STATE of CALIFORNIA
COMMISSION ON STATE MANDATES

For CSM Use Only	
Filing Date:	RECEIVED December 16, 2024 Commission on State Mandates
TC #:	24-TC-04

TEST CLAIM FORM AND TEST CLAIM AMENDMENT FORM (Pursuant to Government Code section 17500 et seq. and Title 2, California Code of Regulations, section 1181.1 et seq.)

Section 1

Proposed Test Claim Title:

Assembly Bill No. 1637: Local Government: Internet Websites and Email Addresses

Section 2

Local Government (Local Agency/School District) Name:

County of Santa Clara

Name and Title of Claimant's Authorized Official pursuant to CCR, tit.2, § 1183.1(a)(1-5):

Margaret Olaiya, Director, Finance Agency

Street Address, City, State, and Zip:

70 West Hedding Street, San Jose, California 95110

Telephone Number: (408) 299-5201

Email Address: margaret.olaiya@fin.sccgov.org

Section 3 – Claimant designates the following person to act as its sole representative in this test claim. All correspondence and communications regarding this claim shall be sent to this representative. Any change in representation must be authorized by the claimant in writing, and e-filed with the Commission on State Mandates. (CCR, tit.2, § 1183.1(b)(1-5).)

Name and Title of Claimant Representative:

Joshua Walden, Deputy County Counsel

Organization: County of Santa Clara Office of the County Counsel

Street Address, City, State, Zip:

70 West Hedding Street, 9th Floor, San Jose, California 95110

Telephone Number: (408) 229-9052

Email Address: joshua.walden@cco.sccgov.org

Section 4 – Identify all code sections (include statutes, chapters, and bill numbers; e.g., Penal Code section 2045, Statutes 2004, Chapter 54 [AB 290]), regulatory sections (include register number and effective date; e.g., California Code of Regulations, title 5, section 60100 (Register 1998, No. 44, effective 10/29/98), and other executive orders (include effective date) that impose the alleged mandate pursuant to Government Code section 17553 and check for amendments to the section or regulations adopted to implement it:

California Government Code sections 50034(a)(1)-(2) & (b), Statutes 2023, Chapter 586 (Assembly Bill 1637)

☑ Test Claim is Timely Filed on [Insert Filing Date] [select either A or B]: 12 / 16 / 2024

☑ A: Which is not later than 12 months (365 days) following [insert effective date] 01 / 01 / 2024, the effective date of the statute(s) or executive order(s) pled; or

☐ B: Which is within 12 months (365 days) of [insert the date costs were *first* incurred to implement the alleged mandate] ___/___/_____, which is the date of first incurring costs as a result of the statute(s) or executive order(s) pled. *This filing includes evidence which would be admissible over an objection in a civil proceeding to support the assertion of fact regarding the date that costs were first incurred.*

(Gov. Code § 17551(c); Cal. Code Regs., tit. 2, §§ 1183.1(c) and 1187.5.)

Section 5 – Written Narrative:

☑ Includes a statement that actual or estimated costs exceed one thousand dollars ($1,000). (Gov. Code § 17564.)

☑ Includes all of the following elements for each statute or executive order alleged **pursuant to Government Code section 17553(b)(1)**:

☑ Identifies all sections of statutes or executive orders and the effective date and register number of regulations alleged to contain a mandate, including a detailed description of the *new* activities and costs that arise from the alleged mandate and the existing activities and costs that are *modified* by the alleged mandate;

☑ Identifies *actual* increased costs incurred by the claimant during the fiscal year for which the claim was filed to implement the alleged mandate;

☑ Identifies *actual or estimated* annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed;

☑ Contains a statewide cost estimate of increased costs that all local agencies or school districts will incur to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed;

Following FY: 2024 - 2025 Total Costs: $90,900,000

☑ Identifies all dedicated funding sources for this program;

State: None

Federal: None

Local agency's general purpose funds: None

Other nonlocal agency funds: None

Fee authority to offset costs: None

☑ Identifies prior mandate determinations made by the Board of Control or the Commission on State Mandates that may be related to the alleged mandate: None

☑ Identifies any legislatively determined mandates that are on, or that may be related to, the same statute or executive order: None

Section 6 – The Written Narrative Shall be Supported with Declarations Under Penalty of Perjury Pursuant to Government Code Section 17553(b)(2) and California Code of Regulations, title 2, section 1187.5, as follows:

☑ Declarations of actual or estimated increased costs that will be incurred by the claimant to implement the alleged mandate.

☑ Declarations identifying all local, state, or federal funds, and fee authority that may be used to offset the increased costs that will be incurred by the claimant to implement the alleged mandate, including direct and indirect costs.

☑ Declarations describing new activities performed to implement specified provisions of the new statute or executive order alleged to impose a reimbursable state-mandated program (specific references shall be made to chapters, articles, sections, or page numbers alleged to impose a reimbursable state-mandated program).

☑ If applicable, declarations describing the period of reimbursement and payments received for full reimbursement of costs for a legislatively determined mandate pursuant to Government Code section 17573, and the authority to file a test claim pursuant to paragraph (1) of subdivision (c) of Government Code section 17574.

☑ The declarations are signed under penalty of perjury, based on the declarant's personal knowledge, information, or belief, by persons who are authorized and competent to do so.

Section 7 – The Written Narrative Shall be Supported with Copies of the Following Documentation Pursuant to Government Code section 17553(b)(3) and California Code of Regulations, title 2, § 1187.5:

☑ The test claim statute that includes the bill number, and/or executive order identified by its effective date and register number (if a regulation), alleged to impose or impact a mandate.
Pages 31 to 34.

☑ Relevant portions of state constitutional provisions, federal statutes, and executive orders that may impact the alleged mandate. Pages N/A to _____.

☑ Administrative decisions and court decisions cited in the narrative. (Published court decisions arising from a state mandate determination by the Board of Control or the Commission are exempt from this requirement.) Pages 35 to 388.

☑ Evidence to support any written representation of fact. *Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.* (*Cal. Code Regs., tit. 2, § 1187.5.*) Pages 18 to 30.

Section 8 – TEST CLAIM CERTIFICATION Pursuant to Government Code section 17553

☑ The test claim form is signed and dated at the end of the document, under penalty of perjury by the eligible claimant, with the declaration that the test claim is true and complete to the best of the declarant's personal knowledge, information, or belief.

Read, sign, and date this section. Test claims that are not signed by authorized claimant officials pursuant to California Code of Regulations, title 2, section 1183.1(a)(1-5) will be returned as incomplete. In addition, please note that this form also serves to designate a claimant representative for the matter (if desired) and for that reason may only be signed by an authorized local government official as defined in section 1183.1(a)(1-5) of the Commission's regulations, and not by the representative.

This test claim alleges the existence of a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this test claim is true and complete to the best of my own personal knowledge, information, or belief. All representations of fact are supported by documentary or testimonial evidence and are submitted in accordance with the Commission's regulations. (Cal. Code Regs., tit.2, §§ 1183.1 and 1187.5.)

Margaret Olaiya

Name of Authorized Local Government Official
pursuant to Cal. Code Regs., tit.2, § 1183.1(a)(1-5)

Director, Finance Agency

Print or Type Title

Margaret Olaiya
Margaret Olaiya (Feb 11, 2025 20:12 PST)

Signature of Authorized Local Government Official
pursuant to Cal. Code Regs., tit.2, § 1183.1(a)(1-5)

Test Claim Form

Final Audit Report 2025-02-12

Created:	2025-01-31
By:	CSM Sign (csmsign@csm.ca.gov)
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Signer joshua.walden@cco.sccgov.org entered name at signing as Joshua Walden
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Form filled by Joshua Walden (joshua.walden@cco.sccgov.org)
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Document e-signed by Margaret Olaiya (margaret.olaiya@fin.sccgov.org)

Signature Date: 2025-02-12 - 4:12:25 AM GMT - Time Source: server

Agreement completed.

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Test Claim Form Sections 4-7 WORKSHEET

Complete Worksheets for Each New Activity and Modified Existing Activity Alleged to Be Mandated by the State, and Include the Completed Worksheets With Your Filing.

Statute, Chapter and Code Section/Executive Order Section, Effective Date, and Register Number:
Government Code §§ 50034(a)(1)-(2), A.B. No. 1637 (Stats. 2023, ch. 586), eff. Jan. 1, 2024

Activity: New activities required to ensure that the County's public-facing internet websites utilize a .gov domain and to redirect public-facing internet websites that are noncompliant with this rule to a .gov domain by no later than January 1, 2029.

Initial FY: 2023-2024 Cost: $ 20,017.00 Following FY: 2024-2025 Cost: $ 24,641.00

Evidence (if required): Declaration of County of Santa Clara Chief Technology Officer Matt Woo

All dedicated funding sources; State: $ 0.00 Federal: $ 0.00

Local agency's general purpose funds: $ 0.00

Other nonlocal agency funds: $ 0.00

Fee authority to offset costs: $ 0.00

Statute, Chapter and Code Section/Executive Order Section, Effective Date, and Register Number:

Activity:

Initial FY: ____-____ Cost: _____ Following FY: _____-_____ Cost:

Evidence (if required):

All dedicated funding sources; State: Federal:

Local agency's general purpose funds:

Other nonlocal agency funds:

Fee authority to offset costs:

Statute, Chapter and Code Section/Executive Order Section, Effective Date, and Register Number:

Activity:

Initial FY: ____-____ Cost: _____ Following FY: _____-_____ Cost:

Evidence (if required):

All dedicated funding sources; State: Federal:

Local agency's general purpose funds:

Other nonlocal agency funds:

Fee authority to offset costs:

COUNTY OF SANTA CLARA TEST CLAIM

STATUTES 2023, CHAPTER 586—ASSEMBLY BILL NO. 1637

Adding Government Code Section 50034, "Local Government Internet Domains"

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COUNTY OF SANTA CLARA TEST CLAIM

STATUTES 2023, CHAPTER 586—ASSEMBLY BILL NO. 1637

Adding Government Code Section 50034, "Local Government Internet Domains"

I. Introduction

The County of Santa Clara ("County") seeks a decision that the State of California ("State") must reimburse the costs of implementing Assembly Bill No. 1637 (Stats. 2023, ch. 586) ("AB 1637"), which mandates that cities and counties ensure that their web pages and email addresses use ".ca.gov" or ".gov" domain names by January 1, 2029. AB 1637, which added Government Code section 50034 ("Section 50034") and became effective on January 1, 2024, creates a new program where there were previously no mandates governing which domains cities and counties must use for websites and email addresses.

Complying with this new program is a complex and costly task for the cities and counties that have long maintained many thousands of web pages and email addresses using domain names other than .ca.gov and .gov. Several decades have passed since the internet became a principal medium through which governments communicate with and make programs available to their residents, ensuring efficiency, access, and transparency. The County has established approximately 79 websites with over 10,000 individual web pages that are routinely relied on by its residents—in November 2024, for example, County webpages received an average of approximately 59,000 views per day. The County also has around 40 public-facing web applications providing access to essential services and 32,690 email addresses. These resources were built on the .org domain. The County must now expend an estimated $918,868 to comply with subsections (a)(1)-(2) and (b) of Section 50034 by reconfiguring its computing systems, taking steps to ensure information security, redesigning and printing documents that cite the outdated websites and email addresses, and educating the public about these changes.

These expenses are exemplary of the mandatory costs that voters intended to require the State to reimburse when they passed Proposition 4 in 1979, amending the California Constitution to add Article XIII B, Section 6 ("Section 6"), which requires the State to compensate local governments for the expenses of carrying out new programs compelled by State law. With this test claim, the County respectfully requests that the Commission on State Mandates find that Sections 50034(a)(1)-(2) and (b) impose reimbursable mandates under Section 6, and that the State must reimburse the costs of compliance that cities and counties in California would otherwise be forced to bear.

II. Background

The County has used the web to communicate with the public about key services, critical news, emergencies, and other important information for several decades. Around 2002, the County began to consolidate its web content and email addresses on the sccgov.org domain, which County departments have used ever since for thousands of web pages and applications and tens of thousands of email accounts.

On October 8, 2023, Governor Newsom approved AB 1637, adding Section 50034, which became effective on January 1, 2024.[1] This statute compels cities and counties in California to use .ca.gov or .gov domain names for public websites and employee email addresses and to migrate websites or email addresses using different domain names to .ca.gov or .gov by January 1, 2029.

Section 50034 provides as follows:

(a) (1) No later than January 1, 2029, a local agency that maintains an internet website for use by the public shall ensure that the internet website utilizes a ".gov" top-level domain or a ".ca.gov" second-level domain.

(2) If a local agency that is subject to paragraph (1) maintains an internet website for use by the public that is noncompliant with paragraph (1) by January 1, 2029, that local agency shall redirect that internet website to a domain name that does comply with paragraph (1).

(b) No later than January 1, 2029, a local agency that maintains public email addresses for its employees shall ensure that each email address provided to its employees utilizes a ".gov" domain name or a ".ca.gov" domain name.

(c) For purposes of this section, "local agency" means a city, county, or city and county.

The County is in the process of bringing its websites, web applications, and email addresses into conformance with the requirements in Sections 50034(a) and (b) by using the new domain santaclaracounty.gov.[2]

III. Legal Standard

Section 6 "requires the state to provide a subvention of funds to compensate local governments for the cost of a new program or higher level of service mandated by the state." *Department of Fin. v. Commission on State Mandates*, 85 Cal. App. 5th 535,

[1] The Commission may consider this test claim because it is timely filed "not later than 12 months following the [statute's] effective date of" January 1, 2024. Gov. Code § 17551(c).

[2] The County interprets subdivisions (a)(1) and (a)(2) of Section 50034 as capable of being implemented only in tandem by the same set of new activities. Namely, the process required to "ensure that [the County's] internet website utilizes a '.gov' top-level domain or a '.ca.gov' second-level domain" under Section 50034(a)(1) involves the same sets of actions as are required to "redirect [the County's] internet website to a domain name that . . . compl[ies] with paragraph (1)" under Section 50034(a)(2). For this reason, all references to Section 50034(a) in the following analysis denote the combined mandate in subdivisions (a)(1) and (a)(2) of the section.

549 (2022). The purpose of Section 6 "was to prevent the state from unfairly shifting the costs of government onto local entities that were ill-equipped to shoulder the task." *County of San Diego v. Commission on State Mandates*, 6 Cal. 5th 196, 207 (2018).

Expenses incurred by a local government in complying with a State statute constitute reimbursable "costs mandated by the state" if: (1) the statute "compels the local agency to act," (2) "the compelled activity requires the agency to provide a new program or higher level of service," and (3) none of the statutory or constitutional exceptions to the State's responsibility to reimburse local governments applies. *Coast Cmty. Coll. Dist. v. Commission on State Mandates*, 13 Cal. 5th 800, 808 (2022) (citation omitted); *see* Gov. Code § 17514 (defining "costs mandated by the state" as, in relevant part, "any increased costs which a local agency . . . is required to incur . . . as a result of a statute . . . which mandates a new program or higher level of service of an existing program within the meaning of [Section 6]").

Under the first prong, a statute "compels the local agency to act" where the State either *legally* compels action by "us[ing] mandatory language that requires or commands a local entity to participate in a program or service," *Coast Cmty. Coll. Dist.*, 13 Cal. 5th at 815 (citation omitted), or *practically* compels action because "an entity . . . face[s] certain and severe penalties or consequences" for noncompliance, *Department of Fin.*, 85 Cal. App. 5th at 558. Under the second prong, a statute creates a new "program" if it involves *either* "(1) programs that carry out the governmental function of providing services to the public, or (2) 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." *San Diego Unified Sch. Dist. v. Commission on State Mandates*, 33 Cal. 4th 859, 874 (2004) (citation omitted). Under the third prong, the State bears the burden of demonstrating the existence of any of the seven conditions in Government Code section 17556 or four conditions in Section 6 that free it from the requirement to reimburse local governments for the costs of carrying out a State-mandated program. *Department of Fin. v. Commission on State Mandates*, 1 Cal. 5th 749, 769 (2016) (holding that the State bears the burden of claiming an exception to the requirement it reimburse mandatory costs); *see also Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 7 Cal. App. 5th 628, 641 (2017) ("An exception to a statute is to be narrowly construed." (citation omitted)).

A local government seeking reimbursement for costs of compliance with a State law may file a test claim with the Commission on State Mandates ("Commission"). *County of San Diego*, 6 Cal. 5th at 202. Following a hearing, the Commission determines "whether the statute that is the subject of the test claim. . . mandates a new program or an increased level of service." *Id.* (citing Gov. Code § 17551). If the Commission concludes that the statute imposes a reimbursable mandate, "it must then 'determine the amount to be subvened to local agencies . . . for reimbursement.'" *Coast Cmty. Coll. Dist.*, 13 Cal. 5th at 809 (quoting Gov. Code § 17557(a)).

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IV. Argument

Sections 50034(a) and (b) will require most cities and counties across California to undertake costly action to migrate their websites and email addresses to new domain names. *See* Sen. Comm. on Governance & Fin., Rep. on AB 1637, 2 (June 28, 2023). In developing AB 1637, the Legislature reported that only "9 of California's 58 counties use a .gov domain (15%), while . . . 24 of the more than 480 California cities use a .gov domain (5%)." *Id.* (citing data from the California State Association of Counties and the League of California Cities). For the 85% of counties and 95% of cities compelled to migrate their websites and email addresses, "[t]ransitioning to a .gov domain isn't quick, easy, or inexpensive," *id.*, and "[c]osts to local agencies . . . [are] likely in the millions of dollars statewide." Assemb. Comm. on Appropriations, Rep. on AB 1637, 1 (May 17, 2023). Indeed, the Senate Committee on Governance and Finance adopted an estimate that cities and counties will incur "upwards of $900k or even several million dollars" to comply with the law, incorporating a range of costs including supporting activities of "IT personnel," "contracting for outside assistance," and making "changes to promotional materials and new business cards." Sen. Comm. on Governance & Fin. Rep. at 3. Yet to date, the State has not allocated any funds to reimburse these costs.

AB 1637 itself provides that "[i]f the Commission on State Mandates determines that this act contains costs mandated by the State, reimbursement for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code." AB 1637 § 4; *see also* Cal. Dep't of Finance, AB 1637 Bill Analysis 1 (June 29, 2023) (concluding that Section 50034 "likely creates a significant state-reimbursable mandate"); Legis. Counsel's Dig., AB 1637 (2023-2024 Reg. Sess.) Stats. 2023 ("By adding to the duties of local officials, [Section 50034] would impose a state-mandated local program."). As detailed below, subsections (a)(1)-(2) and (b) of Section 50034 give rise to reimbursable costs mandated by the State under Section 6 because the statute compels the County to act, the compelled activity requires the County to provide a new program, and the State cannot carry its burden of demonstrating any legal barriers to reimbursement. *See Coast Cmty. Coll. Dist.*, 13 Cal. 5th at 808.

A. Costs of Implementing the New Program Mandated by Sections 50034(a) and (b) Are "Costs Mandated by the State" Warranting Reimbursement Under Section 6

Sections 50034(a) and (b) mandate the County and other local agencies—as defined by subsection (c) of the statute to mean "a city, county, or city and county"—to provide a new program. The County must cover the costs of complying with these mandates from its general fund. The facts provided below, as required under Government Code section 17553(b)(1), demonstrate that these expenditures are reimbursable "costs mandated by the state" under Section 6. *See* Gov. Code § 17514.

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1. Sections 50034(a) and (b) Require the County to Undertake New Activities

The County maintains a public-facing network of approximately 79 websites with over 10,000 individual web pages that disseminate critical information and allow members of the public to communicate with County employees. It also provides around 40 public-facing web applications, or software programs users can access via County web pages to participate in and interact with County services such as scheduling appointments for fingerprinting, paying taxes and bills, filing documents, and viewing regional maps. The County further maintains over 32,690 public email addresses for its employees, contractors, and essential services. For decades, these resources used the domain sccgov.org.

Sections 50034(a) and (b) require the County to undertake new activities to redirect these websites, web applications, and email addresses to the .ca.gov or .gov domains by January 1, 2029, and ensure all public-facing internet and email systems developed after that date use the .ca.gov or .gov domains. *See* Section 50034(a)-(b); Assemb. Comm. on Appropriations Rep. at 3 (noting that a county's migration to .gov required "changing all the websites, web applications, emails, and [employee and contractor] active directory accounts"). These new activities are complex and costly. For entities like the County choosing to comply by using the .gov domain, these activities begin with the filing of an application before the U.S. General Services Administration, which oversees and approves the .gov domain. *See* Cybersecurity and Infrastructure Security Agency, Moving to .gov, https://get.gov/domains/moving (summarizing selected steps in the domain-change process). After approval is granted, cities and counties must engage in a host of further new activities, described below, to carry out the domain change.

a. Under Section 50034(a), the County Must Undertake New Activities to Migrate Its Websites and Web Applications to .gov

Websites. Section 50034(a) mandates that the County transition its approximately 79 websites to the .gov or .ca.gov domain by January 1, 2029. Compliance with this mandate requires the following new activities, among others, to be undertaken by employees and third-party professionals working in areas including change management; network, development operations, testing, and security engineering; user experience design; and business systems analysis. *See* Ex. 1 to the Declaration of Matt Woo ("Woo Decl.").

- Establish teams with expertise to undertake the tasks needed for the domain transition and develop change management processes and oversight.
- Configure the entry-point of the County's web system infrastructure that allows the public to access the County's websites to work with the .gov domain.
- Register the County's new websites in the Domain Name System, the system that translates web addresses (domain names) into the numerical strings (IP

addresses) that allow computers to connect to each other. This ensures that users are directed to the County's websites when using their web browsers to access County services and includes reconfiguring the County's web security layer and cloud software.

- Enable single sign-on—a security process that allows the County's web infrastructure to authenticate valid internal users attempting to log into the system—to accept employees' new .gov email usernames.
- Redesign and replace the logo showing the County's legacy .org address that appears on many County websites.
- Configure the County's cloud computing system with domain name aliases—the likely variants of the new .gov domains that users might enter in browsers when attempting to access County services—to ensure that users are directed to the County's websites even when typing in the legacy .org domains.
- Conduct comprehensive testing of the website system to ensure the functionality of all newly implemented processes.
- Update the County's website analytics and auditing software—the program used to analyze users' interactions with County web pages and check for potential security, accessibility, and other vulnerabilities—to work with the new websites.
- Undertake search engine optimization, the processes that ensure that common internet search engines and web browsers direct users to the new .gov websites.
- Conduct security audits of the websites to locate and shore up potential vulnerabilities before they become publicly accessible. *See* Cybersecurity and Infrastructure Security Agency, Domain Security Best Practices, https://get.gov/domains/security (outlining domain security practices); Sen. Comm. on Governance & Fin. Rep. at 1-2 (noting security requirements for .gov accounts).

Web Applications. Section 50034(a) also requires the County to redirect its web applications to the .gov or .ca.gov domain by January 1, 2029. *See* Assemb. Comm. on Appropriations Rep. at 3 (noting that a county's migration to .gov required "changing all the websites, *web applications*, emails, and [employee and contractor] active directory accounts" (emphasis added)). The County has approximately 40 public-facing web applications, some of which are hosted "on-premises"—that is, within the County's IT infrastructure—while others are hosted remotely on third-party cloud systems. The process of transitioning these web applications to the .gov domain involves the following new activities, among others, to be undertaken by employees and third-party professionals working in areas including change management; development operations, testing, and network engineering; quality assurance; cloud infrastructure; information security operations; and business systems analysis. *See* Woo Decl. Ex. 2.

- Reconfigure web applications hosted on-premises and on the cloud to work with the County's new .gov domain.

- Revise the source code underlying all on-premises and cloud-based web applications to use the new domain and conduct subsequent quality assurance and testing.
- Configure the Domain Name System to direct users attempting to access County services using web browsers to on-premises and cloud-based web applications using the new .gov domain.
- Conduct comprehensive testing of all on-premises and cloud-based applications to ensure they are operable and secure.
- Reconfigure the infrastructure entry-point allowing the public to access the County's web applications to use the new .gov domain.
- Update all email notification services built into the web applications to ensure emails sent automatically to users by the web applications are delivered from addresses using .gov.
- Redesign and replace the logo showing the County's legacy .org address that appears on many County web applications.

b. Under Section 50034(b), the County Must Undertake New Activities to Migrate Its Email Systems to .gov

Section 50034(b) mandates that the County transition all public-facing email accounts it maintains to .gov or .ca.gov by January 1, 2029. The transition of the County's 32,690 email addresses to .gov \ the following new activities, among others, to be undertaken by employees and third-party professionals working in areas including project and change management; solution architecture; infrastructure, network, and security engineering; and system and application administration. *See* Woo Decl. Ex. 3.

- Assemble teams to undertake discovery and assess requirements, risks, and workflows, with consultation of third-party specialists.
- Review workflows, dependencies, and risks in the County's identity management software that stores identifying details about individuals who are provided access to the County's IT systems.
- Add mail exchange records to ensure emails sent to the new email addresses are delivered properly using the County's Domain Name System.
- Update the messaging hygiene infrastructure that scrubs external and internal emails for spam, malware, and other risks to accept the new .gov domain.
- Add the new email domain to the County's software to ensure emails sent from County and external users can be successfully received by County employees.
- Update the Domain Name System to enable it to process County and external emails using the new .gov domain.
- Update the County employee computing authentication system to permit employees to log into County computers and software systems using their new email addresses.

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- Establish system processes to ensure that outgoing emails sent by County employees show the new .gov domain.
- Develop, test, and deploy new systems of identity management to ensure that existing employees' legacy email addresses are replaced with addresses using .gov and future employees are issued addresses using .gov.
- Conduct final testing of the County's IT infrastructure and applications to ensure they properly accept and process new email addresses using the .gov domain.

c. The County Must Undertake New Activities to Inform Its Employees and the Public About Its Web and Email Migration Under Sections 50034(a) and (b)

As part of its implementation of Sections 50034(a) and (b), the County must also communicate the changes it makes to its websites, web applications, and email systems internally among County employees and vendors and to the public, to ensure that users know where to find essential services, how to communicate with County employees, and how to distinguish fraudulent information purporting to originate from the County on other domains. These communications involve new activities warranting reimbursement under Section 6. *See* Moving to .gov (advising entities migrating to .gov to "[d]evelop a communications plan"); Assemb. Comm. on Appropriations Rep. at 3 (noting compliance will include "media campaigns to alert the public to the changes").

New activities required to provide internal communications regarding the domain changes made under Sections 50034(a) and (b) include informing County employees and vendors about the transition to the new email, website, and web application addresses and training employees on how to communicate these changes to the public and access web editing and management services to update and modify content.

New activities required to provide external communications regarding the domain changes made under Sections 50034(a) and (b) include designing and initiating a public relations campaign; replacing references and links to legacy websites, web applications, and email addresses in the County's internet resources; and redesigning and reprinting paper documents containing the legacy addresses, such as election materials, brochures, public signage, billing statements, business cards, and letterhead. *See* Moving to .gov (advising entities migrating to .gov to update "[o]nline and offline branding," including printed documents); Sen. Comm. on Governance & Fin. Rep. at 3 (noting that estimated statewide costs include "changes to promotional materials and new business cards"); Assemb. Comm. on Appropriations Rep. at 3 (similar).

d. The Costs of the New Activities Mandated by Sections 50034(a) and (b) Will Amount to Approximately $918,868

The County estimates that the new activities to comply with the mandates in Sections 50034(a) and (b) will cost approximately $918,868. First, this includes an estimated $44,658 to migrate the County's websites during the 2023-2024 and 2024-2025 fiscal years pursuant to Section 50034(a), accounting for approximately 444 hours

of new activities conducted by employees and third-party professionals. *See* Woo Decl. Ex. 1. Second, it includes an estimated $217,890 to migrate the County's web applications beginning in an upcoming fiscal year pursuant to Section 50034(a), accounting for approximately 2,080 hours of new activities conducted by employees and third-party professionals. *See* Woo Decl. Ex. 2. Third, it includes an estimated $656,320 to migrate the County's email addresses beginning in an upcoming fiscal year pursuant to Section 50034(b), accounting for approximately 2,772 hours of new activities conducted by employees and third-party professionals. *See* Woo Decl. Ex. 3.

2. The County Incurred Approximately $20,017 to Conduct New Activities to Implement Section 50034(a) in the 2023-2024 Fiscal Year

In fiscal year 2023-2024, the County incurred approximately $20,017 to conduct new activities to implement the mandate in Section 50034(a), significantly exceeding the $1,000 minimum threshold above which a local government may bring a test claim. *See* Gov. Code § 17564. This sum was spent to implement the transition of the County's 79 websites from the .org domain to the new santaclaracounty.gov domain. It accounts for around 199 hours of employee and third-party professional labor. *See* Woo Decl. Ex. 1.

3. The County Estimates It Will Incur Approximately $24,641 to Conduct New Activities to Implement Section 50034(a) in the 2024-2025 Fiscal Year

The County estimates it will incur an additional $24,641 to conduct further new activities to implement the transition of the County's websites to the new domain in compliance with Section 50034(a) during the 2024-2025 fiscal year. This accounts for approximately 245 hours of employee and third-party professional labor. *See* Woo Decl. Ex. 1.

4. Statewide Costs of Implementing Sections 50034(a) and (b) in the 2024-2025 Fiscal Year Are Estimated at Approximately $90,900,000

The County estimates that it will cost local agencies an aggregate of approximately $90,900,000 in the 2024-2025 fiscal year to conduct new activities to bring their websites, web applications, and email systems into compliance with the mandates in Sections 50034(a) and (b).

In developing AB 1637, the Senate Committee on Governance and Finance reached a statewide cost estimate for the work of complying with the new rules that assumed a typical cost to a city or county of $900,000. Sen. Comm. on Governance & Fin. Rep. at 3. Although this estimate is slightly lower than the County's anticipated outlay—a difference likely attributable to the County's relatively large population, urban make-up, and high cost of living—the County adopts $900,000 as a reasonable estimate of the average cost of compliance to California's cities and counties.

To reach an estimate of overall statewide costs, the County multiplies this figure by 505, the sum of the estimated 49 counties and 456 cities that the Governance and

Finance Committee anticipated would be required to take actions to comply with the statute. *See id.* at 2 (citing estimates of the California State Association of Counties and League of California Cities). This equation makes a total estimated cost of $454,500,000 to local governments statewide. The County then divides this number by five, assuming that, on average, local governments will expend approximately 20% of their overall anticipated costs during each of the five years between the effective date of January 1, 2024, and the compliance deadline of January 1, 2029. This comes to an estimated $90,900,000 in the 2024-2025 fiscal year.

5. There Are No Dedicated Funding Sources to Offset Costs Under Sections 50034(a) and (b)

There are no dedicated funding sources available from the State, the federal government, or any nonlocal agency to offset the costs of implementing the mandates in Sections 50034(a) and (b). Nor does any fee authority allow the County to recoup these costs from the public. All costs associated with Sections 50034(a) and (b) have been and will be paid from the County's general fund, unless the Commission determines that these costs are reimbursable pursuant to Section 6.

A Senate committee report on AB 1637 suggested that two federal programs, the State and Local Cybersecurity Grant Program (SLCGP) and the Homeland Security Grant Program (HSGP), "could" possibly provide sources of funding for local governments as they transition to the .gov domain. Sen. Comm. on Governance & Fin. Rep. at 4. Even if these resources are available, however, any funding would necessarily fall far short of the estimated statewide cost. *Id.* at 4 (noting that the SLCGP provided only $8 million to California in 2022, 80% of which "will be passed through to local governments," and that HSGP funds amounting to $1.12 billion were distributed nationwide among state, local, tribal, and territorial governments in fiscal year 2023). In any event, both programs require that applications be submitted only by State Administrative Agencies,[3] and to the County's knowledge, the State has not allocated any funds from either program to local governments to support the costs of complying with Sections 50034(a) and (b).

6. There Have Been No Prior Mandate Determinations Related to Sections 50034(a) and (b)

The County is not aware of any prior mandate determination made by the Commission related to Sections 50034(a) and (b).

7. There Have Been No Legislatively Determined Mandates on Sections 50034(a) and (b)

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[3] *See* State and Local Cybersecurity Grant Program, Cybersecurity & Infrastructure Security Agency, https://www.cisa.gov/cybergrants/slcgp; Homeland Security Grant Program (HSGP) Application Process, U.S. Department of Homeland Security, https://www.fema.gov/grants/preparedness/homeland-security/apply.

The County is not aware of any legislatively determined mandate on Sections 50034(a) and (b). AB 1637 provides: "If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code." AB 1637 § 4.

B. The Costs of Compliance with Sections 50034(a) and (b) Are Reimbursable by the State Under the California Supreme Court's Three-Prong Test

Sections 50034(a) and (b) constitute reimbursable State mandates under Section 6 because (1) they compel local governments to act, (2) the compelled activity requires local governments to provide a new program or higher level of service, and (3) the state cannot carry its burden of identifying legal impediments to reimbursement. *See Coast Cmty. Coll. Dist.*, 13 Cal. 5th at 808.

1. Sections 50034(a) and (b) Compel Local Governments to Act

Under Section 6, a statute "constitute[s] a state mandate" where it "establishes conditions under which the state, rather than local officials, has made the decision requiring [local entities] to incur the costs of" providing a new program. *San Diego Unified Sch. Dist.*, 33 Cal. 4th at 880. Section 50034 warrants reimbursement because through its enactment, the State has legally compelled the County to act—that is, Sections 50034(a) and (b) provide local governments no discretion to choose whether to implement its mandates. But even if the Commission were to read Sections 50034(a) and (b) otherwise, reimbursement is still warranted because these subsections at least practically compel action by effectively leaving the County no viable alternative to compliance, as not implementing the statute would entail certain and severe consequences.

a. Sections 50034(a) and (b) Legally Compel Local Governments to Comply

Sections 50034(a) and (b) legally compel action by "us[ing] mandatory language that requires or commands a local entity to participate in a program or service." *Coast Cmty. Coll. Dist.*, 13 Cal. 5th at 815 (citation omitted). Specifically, the statute provides that a local agency "*shall* ensure that [its] internet website utilizes" a .gov or .ca.gov domain, Section 50034(a)(1), "*shall* redirect [a noncompliant] internet website to a [.gov or .ca.gov] domain name," Section 50034(a)(2), and "*shall* ensure that each email address provided to its employees" is similarly compliant, Section 50034(b). (Emphasis added.) This leaves local governments with no discretion to use any other domain after the compliance deadline.

When considering test claims concerning statutes and executive orders requiring that local governments "shall" undertake specified actions, courts and the Commission routinely find that the State has established reimbursable State mandates. For example, a statute requiring that, under certain conditions, a "pupil *shall* be entitled to

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a[n] [expulsion] hearing" legally compelled local governments to conduct such hearings. *San Diego Unified Sch. Dist.*, 33 Cal. 4th at 868 & n.3 (emphasis added). Likewise, executive orders requiring that certain "[p]ersonal protective clothing and equipment . . . *shall* be provided" to firefighters and that employers "*shall* ensure the availability, maintenance, and use of all [such] protective clothing and equipment," 8 C.C.R. § 3401, compelled participation a new program, *Carmel Valley Fire Prot. Dist. v. State of California*, 190 Cal. App. 3d 521, 537-38 (1987); *see also* Commission on State Mandates, Test Claim Decision on *County of L.A. Citizens Redistricting Comm'n*, No. 19-TC-04 at 22-23 (adopted May 28, 2021) (elections-related statute "us[ing] the word 'shall' regarding the requirement for the [local agency] to take steps" left agency "no choice"); Commission on State Mandates, Test Claim Decision on *Peace Officer Training: Mental Health/Crisis Intervention*, No. 17-TC-06 at 21 (adopted May 24, 2019) (provision that "commission *shall* require . . . field training officers . . . to have at least eight hours of [specified] training" legally compelled that program).

Because Sections 50034(a) and (b) legally compel the County to act, Section 6 requires the State to reimburse the costs associated with compliance. *See San Diego Unified Sch. Dist.*, 33 Cal. 4th at 881.

b. Alternatively, Sections 50034(a) and (b) Practically Compel Local Governments to Comply

Even if the Commission finds that Sections 50034(a) and (b) do not *legally* compel local government action, it should nonetheless conclude that these sections *practically* compel action, equally warranting State reimbursement. *See Department of Fin.*, 85 Cal. App. 5th at 558. The State practically compels a program when "an entity or its constituents face certain and severe penalties or consequences for not participating in or complying with an optional state program." *Id.*

At a minimum, Sections 50034(a) and (b) practically compel action because they do not establish any alternatives to compliance. For example, they do not allow local governments to pay a reasonable penalty instead of migrating their web services to .gov or enable them to delay migrating these systems or request an exemption. These sections therefore effectively leave local governments with only two options: (1) to rally the resources to migrate their systems to the new domain, or (2) to stop providing those services to the public altogether. But the latter would involve such "certain and severe . . . consequences" that it is effectively "no alternative at all." *See id.*

Use of the web is widespread among local governments and integral to their functioning. *See, e.g.*, Nondiscrimination on the Basis of Disability, 89 Fed. Reg. 31320, 31325-26 (Apr. 24, 2024) (finding that local governments "regularly use the web to offer services, programs, or activities to the public"). Local governments use the web to disseminate important information and allow citizens to request public records, file essential paperwork, register to vote, and access public hearings. *Id.* This is especially critical for individuals with disabilities and people living far from government buildings or

reliant on public benefits. *Id.* In the County, for example, over 25,000 of its nearly 20 million residents live in rural areas a significant distance from County buildings, rendering them particularly reliant on the County's web resources.[4] Additionally, approximately 95,000 residents live in unincorporated areas not governed by local municipal agencies and are therefore also especially dependent on the County's websites.[5] Moreover, these websites provide all residents a key tool for engaging with elected government, by allowing them to access the agendas of the meetings of the Board of Supervisors, watch streaming and archived videos of these meetings, and participate by video conference to exercise their right to provide public comment.[6]

The importance of websites to the functioning of local governments is reflected in multiple State laws that mandate local agencies to create websites or dictate how they are to be used. For example, the State requires that "every independent special district . . . shall maintain an internet website." Gov. Code § 53087.8. It also requires local governments to post certain at-risk contracts "for public inspection on [their] internet website[s]." Pub. Cont. Code § 20146(e). Similarly, public agencies must post specified notices on their websites under the California Environmental Quality Act. *E.g.*, Pub. Res. Code §§ 21092(b)(3), 21092.3, 21152(c).[7]

The holding in *Department of Finance*, in which the State created new conditions for issuing stormwater drainage system permits to local entities, is instructive. 85 Cal. App. 5th at 558. There, the State issued stormwater drainage permits to local agencies on the condition that the agencies satisfy certain pollution-abatement requirements. *Id.*

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[4] United States Census Bureau, 2020 Decennial Census—Santa Clara County Urban and Rural, https://data.census.gov/table/DECENNIALDHC2020.P2?q=population%20of%20santa%20clara%20county%20by%20rural%20area%20versus%20non-rural.

[5] Local Agency Formation Commission of Santa Clara County, Santa Clara County Cities and Boundaries (Aug. 2019), https://santaclaralafco.org/sites/default/files/SantaClaraLAFCO_Map_August2019_forWeb.pdf (showing that approximately five percent of the 2018 County population of around 1.9 million lived outside city boundaries).

[6] *See* County of Santa Clara, Meetings of the Board of Supervisors and Board Policy Committees, https://board.sccgov.org/meetings-board-supervisors-and-board-policy-committees.

[7] *See also, e.g.*, Gov. Code § 7926.500 ("[E]ach health care district shall maintain an internet website in accordance with subdivision (b) of Section 32139 of the Health and Safety Code."); Health & Safety Code § 32139(b) (requiring hospital district boards to "[e]stablish and maintain an Internet Web site" containing information about budgets, membership, and public meetings); Pub. Cont. Code § 22178 (requiring that for certain high-cost contracts, a local government "shall disclose all offers and counteroffers to the public within 24 hours on its Internet Web site").

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at 551-52. The State argued it should not be required to reimburse the costs of compliance because permittees provided drainage systems voluntarily. *Id.* at 557-58. The court disagreed, holding that permittees were "compelled as a practical matter to obtain a[] permit" because "in urbanized cities and counties . . . , deciding not to provide a stormwater drainage system is no alternative at all." *Id.* at 558. Likewise, here, local governments are left "without discretion" but to comply with Sections 50034(a) and (b) because the alternative to compliance—which would involve no longer providing web services and email accounts—is "so far beyond the realm of practical reality" that it is no real option at all. *Id.* (quoting *City of Sacramento v. State of California*, 50 Cal. 3d 51, 74 (1990)).

2. Sections 50034(a) and (b) Create New Programs for the Purposes of Section 6

The requirements in Sections 50034(a) and (b) that local governments migrate their websites and email systems to the .gov or .ca.gov domain and continue to maintain their web services at that domain are the very kind of mandated activities that warrant reimbursement because they provide new programs for the purposes of Section 6.

a. The Actions Mandated by Sections 50034(a) and (b) Are Programs for the Purposes of Section 6

The actions compelled by Sections 50034(a) and (b) are programs under either prong of the Supreme Court's test because the statute (1) creates "programs that carry out the governmental function of providing services to the public," and (2) "implement[s] a state policy, impose[s] unique requirements on local governments and do[es] not apply generally to all residents and entities in the state." *San Diego Unified Sch. Dist.*, 33 Cal. 4th at 874 (citation omitted). "[O]nly one of these findings is necessary to trigger reimbursement." *Carmel Valley*, 190 Cal. App. 3d at 537.

First, Sections 50034(a) and (b) mandate actions that "carry out a governmental function of providing services to the public," namely, enhancing the security and reliability of government websites, protecting the public from misinformation, and enabling the public's trust in government. Sections 50034(a) and (b) were conceived to ensure that "when Californians look for government information or services, they can know with confidence they are receiving official information." Assemb. Comm. on Privacy & Consumer Protection, Rep. on AB 1637, 4 (Apr. 23, 2023). The Legislature explained that when local governments do not use .gov domain names, users are unable to "verify the authenticity of the website they are visiting," making them vulnerable to fraudulent government websites that "spread misinformation" and "lure . . . users into sharing personal information, making payments, and conducting other compromising activities." *Id.* at 4. Moreover, using .gov "mak[es] it easier for the public to alert [a local] agency about potential security issues with the agency's online services," AB 1637 § 1(c), and assures users that "they are accessing an official

California governmental resource," *id.* § 1(f). The legislature thus found that the new rules "address[] a matter of statewide concern." *Id.* § 3.

Courts have repeatedly found that state laws aimed at providing beneficial and protective public services create programs or higher levels of service under this prong, and accordingly involve reimbursable State mandates. For example, permitting conditions establishing heightened stormwater drainage requirements involved a program because they benefitted the public with increased pollution abatement. *Department of Fin*. 85 Cal. App. 5th at 555-56. Similarly, a law requiring local agencies to contribute costs of educating area pupils with special needs at state schools created a program because "the education of handicapped children is clearly a governmental function providing a service to the public." *Lucia Mar Unified Sch. Dist. v. Honig*, 44 Cal. 3d 830, 835 (1988). And a law requiring that public school districts afford hearings with specified protections to students facing expulsion created a higher level of service for an existing program because "[p]roviding public schooling clearly constitutes a governmental function, and enhancing the safety of those who attend such schools constitutes a service to the public." *San Diego Unified Sch. Dist.*, 33 Cal. 4th at 879. Here, likewise, Sections 50034(a) and (b) create a program subject to Section 6 because providing important information and access to essential services are governmental functions, and ensuring the security and reliability of that information and access is a service to the public.

Second, Sections 50034(a) and (b) "implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." *San Diego Unified Sch. Dist.*, 33 Cal. 4th at 874. As noted above, the legislature found that Section 50034 "addresses a matter of statewide concern." AB 1637 § 3. Moreover, the statute plainly requires action only by "local agenc[ies]," which it defines as "a city, county, or city and county," Section 50034(c), and no other individual or entity. Indeed, the US Department of Homeland Security makes "the '.gov' top-level domain . . . available *solely* to United States-based government organizations and publicly controlled entities." AB 1637 § 1(a) (emphasis added). Because Sections 50034(a) and (b) impose unique requirements on local governments alone, they create a program under this prong. *See, e.g.*, *Lucia Mar*, 44 Cal. 3d at 835 (statute was a program because it "impose[d] requirements on school districts not imposed on all the state's residents"); *San Diego Unified Sch. Dist.*, 33 Cal. 4th at 885 n.20 (statute mandating terms of school district expulsion hearings was a program because it "impose[d] unique requirements on local governments").

b. The Programs Created by Sections 50034(a) and (b) Are New

The programs created in Sections 50034(a) and (b) are new "in comparison with the preexisting scheme [because] they did not exist prior to the enactment of" the statute. *San Diego Unified Sch. Dist.*, 33 Cal. 4th at 878; *see, e.g.*, *Lucia Mar*, 44 Cal. 3d at 835 (statute requiring local agencies to contribute to certain education costs created new program because "at the time [the statute] became effective [agencies]

were not required to contribute to the education of students from their districts"); *Department of Fin.*, 85 Cal. App. 5th at 559-60 (similar). There has never previously been a statutory requirement governing which domain names local agencies in California may use. Accordingly, a legislative committee noted in developing AB 1637 that while "[i]t would have been helpful for internet cybersecurity if government entities had been legally required to take this step decades ago . . . , these requirements were not placed into law." Assemb. Comm. on Privacy & Consumer Protection Rep. at 1.

For the foregoing reasons, the State must reimburse local governments for the costs to local governments triggered by compliance with Sections 50034(a) and (b).

3. No Conditions Exist That Create an Exception to the Requirement That the State Must Reimburse the County for Compliance with Sections 50034(a) and (b)

None of the circumstances enumerated in Government Code section 17556 or Section 6 that create an exception to the State's requirement to reimburse local entities for State-mandated activities exists with respect to the mandates imposed by Sections 50034(a) and (b).

1. The County did not request that the State enact Sections 50034(a) and (b) or grant it the legislative authority to implement the new programs they create. Section 6(a)(1); Gov. Code § 17556(a).

2. Sections 50034(a) and (b) do not define, create, or eliminate a crime or infraction or change the penalty for a crime or infraction or an existing definition of a crime. Section 6(a)(2); Gov. Code § 17556(g).

3. Sections 50034(a) and (b) were not enacted prior to January 1, 1975. Section 6(a)(3).

4. Sections 50034(a) and (b) are not contained in the Ralph M. Brown Act or California Public Records Act. Section 6(a)(4).

5. Sections 50034(a) and (b) do not affirm a mandate declared to be existing law by any court. Gov. Code § 17556(b).

6. Sections 50034(a) and (b) do not impose requirements mandated by federal law or regulation, nor do they result in costs mandated by the federal government. Gov. Code § 17556(c).

7. The County lacks the authority to levy service charges, fees, or assessments to pay for the costs of compliance with Sections 50034(a) and (b). Gov. Code § 17556(d).

8. Sections 50034(a) and (b) do not provide for offsetting savings that result in no net costs to the County or include additional revenue intended to fund the costs of the mandate in an amount sufficient to fund the cost of the mandates. Gov. Code § 17556(e).

9. Sections 50034(a) and (b) do not impose duties that are necessary to implement or are included in a California ballot measure approved by the voters. Gov. Code § 17556(f).

V. Conclusion

For the foregoing reasons, the Commission should find that the State must compensate the County and other local governments for the costs they incur in complying with the State's mandates under Sections 50034(a) and (b).

SECTION 6: DECLARATION

COUNTY OF SANTA CLARA TEST CLAIM

STATUTES 2023, CHAPTER 586—ASSEMBLY BILL NO. 1637

Adding Government Code Section 50034, "Local Government Internet Domains"

DECLARATION OF MATT WOO

1. I, MATT WOO, declare:

2. I have been employed by the County of Santa Clara (the "County") since February 14, 2000, and currently hold the title of Chief Technology Officer. I have occupied this role since June 13, 2022.

3. As Chief Technology Officer, I am responsible for overseeing the County's enterprise technology programs and initiatives. In this role, I oversee the County's actions in carrying out the new programs mandated by Government Code Section 50034 ("Section 50034"), subsections (a)(1)-(2) and (b), described in detail below. I have personal knowledge of the facts set forth in this Declaration and the attached exhibits, as well as the information presented in the adjoining test claim, and if called to testify to the statements made herein, I could and would do so competently.

4. Section 50034 was added by Assembly Bill No. 1637 (Stats. 2023, ch. 586) and became effective on January 1, 2024.

5. Sections 50034(a)(1)-(2) and (b) mandate that all "local agencies" in California provide new programs, and subsection (c) of the statute defines "local agencies" as cities, counties, and cities and counties. The County is therefore a "local agency" subject to Section 50034(c).

6. Under Sections 50034(a)(1)-(2) and (b), the County and other qualifying local agencies that maintain public websites and employee email addresses must ensure that these use ".ca.gov" or ".gov" domain names beginning by January 1, 2029, and must migrate any websites or email addresses using different domain names to .ca.gov or .gov by January 1, 2029.

7. The County has an extensive network of approximately 79 websites with over 10,000 individual web pages that are routinely relied on by its residents—in November 2024, for example, County webpages received an average of approximately 59,000 views per day.

8. The County also has approximately 40 public-facing web applications and 32,690 email addresses for its employees, contractors, and essential services.

9. These websites, web applications, and email addresses were built on the .org domain. Around 2002, the County began to consolidate its web content and email addresses on the sccgov.org domain. Under Sections 50034(a)(1)-(2) and (b), the County must migrate all these systems to the .ca.gov or .gov domains by January 1, 2029.

10. The County has chosen to migrate its web resources to the domain santaclaracounty.gov in complying with Sections 50034(a)(1)-(2) and (b), and is

in the process of bringing its websites, web applications, and email addresses into conformance with the statute.

11. As the County's Chief Technology Officer, I am familiar with the County's new activities arising from Sections 50034(a)(1)-(2) and (b) and the estimated actual and anticipated costs incurred in carrying out these activities.

12. To begin complying with Sections 50034(a)(1)-(2) and (b), the County must undertake the new activity of completing the application process to obtain permission to use the new .gov domain from the U.S. General Services Administration. Once permission is granted, these sections mandate that the County undertake the following new activities.

13. Sections 50034(a)(1) and (2) mandate that the County migrate its County's 79 websites to .gov or .ca.gov by January 1, 2029. Compliance with the mandate in Sections 50034(a)(1) and (2) requires the following new activities, among others, to be undertaken by employees and third-party professionals working in areas including change management; network, development operations, testing, and security engineering; user experience design; and business systems analysis.

    a. Establish teams with expertise to undertake the tasks needed for the domain transition and develop change management processes and oversight.

    b. Configure the entry-point of the County's web system infrastructure that allows the public to access the County's websites to work with the .gov domain.

    c. Register the County's new websites in the Domain Name System, the system that translates web addresses (domain names) into the numerical strings (IP addresses) that allow computers to connect to each other. This ensures that users are directed to the County's websites from their web browsers and includes reconfiguring the County's web security layer and cloud software.

    d. Enable single sign-on—a security process that allows the County's web infrastructure to authenticate valid internal users attempting to log into the system—to accept employees' new .gov email usernames.

    e. Redesign and replace the logo showing the County's legacy .org address that appears on many County websites.

    f. Configure the County's cloud computing systems with domain name aliases—the likely variants of the new .gov domains that users might enter into browsers when attempting to access County services—to ensure that users are directed to the County's websites when typing in the legacy .org domains.

g. Conduct comprehensive testing of the website system to ensure the functionality of all newly implemented processes.

h. Update the County's website analytics and auditing software—the program used to analyze users' interactions with County web pages and check for potential security, accessibility, and other vulnerabilities—to work with the new websites.

i. Undertake search engine optimization, the processes that ensure that common internet search engines and web browsers direct users to the new .gov websites.

j. Conduct security audits of the websites to locate and shore up potential vulnerabilities before they become publicly accessible.

14. Sections 50034(a)(1) and (2) also require the County to redirect its web applications to the .gov or .ca.gov domain by January 1, 2029. The County has approximately 40 public-facing web applications, some of which are hosted "on premises" on the County's cloud infrastructure while others are hosted remotely on third-party cloud systems. Compliance with the mandate in Sections 50034(a)(1) and (2) requires the following new activities, among others, to be taken by employees and third-party professionals working in areas including change management; development operations, testing, and network engineering; quality assurance; cloud infrastructure; information security operations; and business systems analysis.

    a. Reconfigure web applications hosted on-premises and on the cloud to work with the County's new .gov domain.

    b. Revise the source code underlying all on-premises and cloud-based web applications to use the new domain and conduct subsequent quality assurance and testing.

    c. Configure the Domain Name System to direct users attempting to access County services using web browsers to on-premises and cloud-based web applications using the new .gov domain.

    d. Conduct comprehensive testing of all on-premises and cloud-based applications to ensure they are operable and secure.

    e. Reconfigure the infrastructure entry-point allowing the public to access the County's web applications to use the new .gov domain.

    f. Update all email notification services built into the web applications to ensure emails sent automatically to users by the web applications are delivered from addresses using .gov.

g. Redesign and replace the logo showing the County's legacy .org address that appears on many County web applications.

15. Section 50034(b) mandates that the County transition all public-facing email accounts it maintains to .gov or .ca.gov by January 1, 2029. The transition of the County's 32,690 email addresses to .gov requires the following new activities, among others, to be taken by employees and third-party professionals working in areas including project and change management; solution architecture; infrastructure, network, and security engineering; and system and application administration.

    a. Assemble teams to undertake discovery and assess requirements, risks, and workflows, with consultation of third-party specialists.

    b. Review workflows, dependencies, and risks in the County's identity management software that stores identifying details about individuals who are provided access to the County's IT systems.

    c. Add mail exchange records to ensure emails sent to the new email addresses are delivered properly using the County's Domain Name System.

    d. Update the messaging hygiene infrastructure that scrubs external and internal emails for spam, malware, and other risks to accept the new .gov domain.

    e. Add the new email domain to the County's software to ensure emails sent from County and external users can be successfully received by County employees.

    f. Update the Domain Name System to enable it to process County and external emails using the new .gov domain.

    g. Update the County employee computing authentication system to permit employees to log into County computers and software systems using the new .gov addresses.

    h. Establish system processes to ensure that outgoing emails sent by County employees show the new .gov domain.

    i. Develop, test, and deploy new systems of identity management to ensure that existing employees' legacy email addresses are replaced with addresses using .gov and future employees are issued addresses using .gov.

    j. Conduct final testing of the County's IT infrastructure and applications to ensure they properly accept and process new email addresses using the .gov domain.

16. As part of its implementation of Sections 50034(a)(1)-(2) and 50034(b), the County must also communicate the changes it makes to its websites, web applications, and email systems internally among County employees and vendors and to the public, to ensure that users know where to find essential services, how to communicate with County employees, and how to distinguish fraudulent information purporting to originate from the County on other domains. This requires the County to undertake further new activities.

    a. New activities required to provide internal communications regarding the domain changes under Sections 50034(a)(1)-(2) and (b) include informing County employees about the transition to the new email, website, and web application addresses and training employees on how to communicate these changes to the public and access web editing and management services to update and modify content.

    b. New activities required to provide external communications regarding the domain changes under Sections 50034(a)(1)-(2) and (b) include designing and initiating a public relations campaign; replacing references and links to legacy websites, web applications, and email addresses in the County's internet resources; and redesigning and reprinting all paper documents containing the legacy web and email addresses, including election materials, brochures, public signage, billing statements, business cards, and letterhead.

17. The County estimates that the new activities it must undertake to comply with the mandates in Sections 50034(a)(1)-(2) and (b) will cost approximately $918,868.

    a. First, this includes an estimated $44,658 to migrate the County's websites during the 2023-2024 and 2024-2025 fiscal years, pursuant to Sections 50034(a)(1)-(2), accounting for approximately 444 hours of new activities conducted by employees and third-party professionals. *See* Ex. 1.

    b. Second, it includes an estimated $217,890 to migrate the County's web applications beginning in an upcoming fiscal year, pursuant to Sections 50034(a)(1)-(2), accounting for approximately 2,080 hours of new activities conducted by employees and third-party professionals. *See* Ex. 2.

    c. Third, it includes an estimated $656,320 to migrate the County's email addresses beginning in an upcoming fiscal year, pursuant to Section 50034(b), accounting for approximately 2,772 hours of new activities conducted by employees and third-party professionals. *See* Ex. 3.

18. In Fiscal Year 2023-2024, when Sections 50034 became effective, the actual costs arising from the County's implementation of the statute totaled approximately $20,017. These costs are attributable to new activities to migrate the County's websites to the .gov domain under Sections 50034(a)(1)-(2).

19. In Fiscal Year 2024-2025, the year following the effective date of Section 50034, the costs of implementing the activities mandated by the statute are estimated to reach approximately $24,641. These costs are attributable to new activities to migrate the County's websites to the .gov domain under Sections 50034(a)(1)-(2).

20. To the best of my knowledge, the County has received no local, State, or federal funding and does not have a fee authority to offset the increased direct and indirect costs it will incur to implement the programs mandated by Sections 50034(a)(1)-(2) and (b).

21. To the best of my knowledge, there are no legislatively determined mandates on Sections 50034(a)(1)-(2) and (b).

22. The County estimates that it will cost qualifying local agencies across California approximately $90,900,000 in Fiscal Year 2024-2025 to conduct the new activities to bring their websites, web applications, and email systems into compliance with the mandates in Sections 50034(a)(1)-(2) and (b).

    a. For the purposes of this calculation, the County assumes that a reasonable estimate of the approximate average costs of compliance to California's local agencies is $900,000, basing this assumption on the legislative analysis of Section 50034. *See* Sen. Comm. on Governance & Fin., Rep. on AB 1637, 3 (May 18, 2023)

    b. To reach an estimate of overall statewide costs, the County multiplies this average cost by 505, the sum of the 49 counties and around 456 cities that the State legislature estimated would be required to take actions to comply with the statute, and arrives at $454,500,000. *See id.*

    c. The County then divides this number by five, assuming that, on average, local agencies will expend approximately 20% of their overall anticipated costs during each of the five years between the effective date of January 1, 2024, and the compliance deadline of January 1, 2029.

23. I declare under penalty of perjury that the foregoing is true and correct to the best of my personal knowledge, information, or belief.

24. Executed on February 10, 2025, at San José, California.

Matt Woo

MATT WOO
Chief Technology Officer

County of Santa Clara

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Exhibit 1: Estimated actual and anticipated costs of new activities to migrate County websites to the .gov domain in compliance with Sections 50034(a)(1) and (2)

Task	Resource Type	Average Hourly Rate	FY 2023-2024 Hours	FY2023-2024 Cost per Task	FY 2024-2025 Hours	FY 2024-2025 Cost per Task	Total Cost
.Gov registry & configure website network infrastructure and entry-point software	Network Engineer	$102	15.9984	$1,631.84	19.6944	$2,008.83	$3,640.67
Domain Name System change to .gov	Development Operations (“DevOps”) Engineer	$110	5.6661	$623.27	6.9751	$767.26	$1,390.53
Single Sign-On implementation	Network & DevOps Engineers	$106	31.9968	$3,391.66	39.3888	$4,175.21	$7,566.87
County URL logo replacement and test	User Experience (UX) Designer	$85	31.9968	$2,719.73	39.3888	$3,348.05	$6,067.78
Implement domain name alias configuration	DevOps Engineer	$110	7.9992	$879.91	9.8472	$1,083.19	$1,963.10
Domain Name System routing configuration	Network Engineer	$102	7.3326	$747.93	9.0266	$920.71	$1,668.64
Testing	Test Engineer	$103	15.9984	$1,647.84	19.6944	$2,028.52	$3,676.36
Configure website auditing and analytics software crawler	Associate UX Designer	$77	8.9991	$692.93	11.0781	$853.01	$1,545.94

Task	Resource Type	Average Hourly Rate	FY 2023-2024 Hours	FY2023-2024 Cost per Task	FY 2024-2025 Hours	FY 2024-2025 Cost per Task	Total Cost
Design and implement internal and external communications about change to .gov	Senior Business Systems Analyst (BSA) / Communications and Public Affairs Team	$109	31.9968	$3,487.65	39.3888	$4,293.38	$7,781.03
Change management coordination	Senior BSA	$109	7.3326	$799.25	9.0266	$983.90	$1,783.15
Search engine optimization update	BSA	$91	19.6647	$1,789.49	24.2077	$2,202.90	$3,992.39
Security scan	Security engineer	$112	14.3319	$1,605.17	17.6429	$1,976.00	$3,581.18
TOTAL			**199.3134**	**$20,016.66**	**245.3594**	**$24,640.98**	**$44,657.64**

Exhibit 2: Estimated anticipated costs of new activities to migrate County web applications to the .gov domain in compliance with Sections 50034(a)(1) and (2)

Task	Resource Type	Average Hourly Rate	Upcoming FY Hours	Total Cost
Reconfigure on-premises applications to .gov	Development Operations ("DevOps") Engineer	$108	80	$8,640
Revise source code for on-premises applications	Development Team	$100	250	$25,000
Domain Name System zone configuration for on-premises applications	DevOps Engineer	$108	100	$10,800
Test on-premises applications after change	Quality Assurance (QA) Team / Test Engineer	$100	120	$12,000
Reconfigure cloud-hosted applications to .gov	Cloud / DevOps / Information Security Teams	$108	600	$64,800
Revise source code for on-premises applications	Development Team	$100	150	$15,000
Domain Name System zone configuration for cloud-hosted applications	Cloud / DevOps / Information Security Teams	$108	100	$10,800
Test cloud-hosted applications after change	QA Team / Business Systems Analyst / Customer	$100	80	$8,000
Change management coordination	DevOps Engineer	$108	50	$5,400

Task	Resource Type	Average Hourly Rate	Upcoming FY Hours	Total Cost
Configure network routing, entry-point software, and internal active directory	Network Engineer	$102	200	$20,400
County URL logo replacement and test	Development Team	$100	100	$10,000
Design and implement internal and external communications about change to .gov	Business Systems Analyst / Communications and Public Affairs Team	$109	50	$5,450
Change email addresses from which applications communicate with users to .gov	DevOps Engineer	$108	200	$21,600
TOTAL			**2080**	**$217,890**

Exhibit 3: Estimated anticipated costs of new activities to migrate County email systems to the .gov domain in compliance with Section 50034(b)

Task	Resource Type	Average Hourly Rate	Upcoming FY Hours	Total Cost
Project Management	Project Manager	$230	400	$92,000
Discovery, requirements gathering	Solution Architects	$274	120	$32,880
Discovery, requirements gathering	Infrastructure Engineers	$240	120	$28,800
Identify business rules for email ID collision	Solution Architects	$274	120	$32,880
Consultation with information security, legal, and other departments	Solution Architects	$274	120	$32,880
Assessment and configuration consulting	Third-Party Professional Services	$200	160	$32,000
Discovery, requirements gathering, configuration validation	Infrastructure Engineers	$240	160	$38,400
Identity Management system workflows review	Infrastructure Engineers	$240	80	$19,200
Configure records in external Domain Name System	Network Engineers	$240	32	$7,680
Update external and internal email hygiene infrastructure to accept new email domain	Security Engineer	$240	32	$7,680
Add new email domain as accepted domain in on-premises and third-party software	Infrastructure Engineers	$240	32	$7,680
Update Domain Name System records to allow for import of new .gov emails	Network Engineers	$240	32	$7,680
Add Domain Name System records for .gov email domain	Network Engineers	$240	32	$7,680
Configure .gov email domain in active directory for internal user login authentication	Infrastructure Engineers	$240	32	$7,680

Task	Resource Type	Average Hourly Rate	Upcoming FY Hours	Total Cost
Invoke email address policy to stamp outgoing emails with users' primary .gov addresses	Infrastructure Engineers	$240	80	$19,200
Identification management workflows development	Infrastructure Engineers	$240	160	$38,400
Identification management workflows development testing	System Administrators	$240	120	$28,800
Identification management workflows deployment	Infrastructure Engineers	$240	120	$28,800
Identification management workflows deployment testing	System Administrators	$240	80	$19,200
Rename email addresses where necessitated by name collision after migration to .gov	Infrastructure Engineers	$240	380	$91,200
Testing	Infrastructure Engineers	$240	120	$28,800
Testing	Applications Administrators	$240	120	$28,800
Redesign/printing of public written materials citing legacy email addresses	Various job titles	$150	120	$18,000
TOTAL			**2,772**	**$656,320**

SECTION 7: SUPPORTING DOCUMENTS

COUNTY OF SANTA CLARA TEST CLAIM

STATUTES 2023, CHAPTER 586—ASSEMBLY BILL NO. 1637

Adding Government Code Section 50034, "Local Government Internet Domains"

Assembly Bill No. 1637

CHAPTER 586

An act to add Section 50034 to the Government Code, relating to local government.

[Approved by Governor October 8, 2023. Filed with Secretary of State October 8, 2023.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1637, Irwin. Local government: internet websites and email addresses.

(1) The California Constitution authorizes cities and counties to make and enforce within their limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws and further authorizes cities organized under a charter to make and enforce all ordinances and regulations in respect to municipal affairs, which supersede inconsistent general laws.

The California Public Records Act requires a local agency to make public records available for inspection and allows a local agency to comply by posting the record on its internet website and directing a member of the public to the internet website, as specified.

This bill, no later than January 1, 2029, would require a local agency, as defined, that maintains an internet website for use by the public to ensure that the internet website utilizes a ".gov" top-level domain or a ".ca.gov" second-level domain and would require a local agency that maintains an internet website that is noncompliant with that requirement to redirect that internet website to a domain name that does utilize a ".gov" or ".ca.gov" domain. This bill, no later than January 1, 2029, would also require a local agency that maintains public email addresses to ensure that each email address provided to its employees utilizes a ".gov" domain name or a ".ca.gov" domain name. By adding to the duties of local officials, the bill would impose a state-mandated local program.

(2) The bill would include findings that changes proposed by this bill address a matter of statewide concern rather than a municipal affair and, therefore, apply to all cities, including charter cities.

(3) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

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

SECTION 1. The Legislature finds and declares all of the following:

(a) The Cybersecurity and Infrastructure Security Agency (CISA), within the Department of Homeland Security, sponsors the ".gov" top-level domain and makes it available solely to United States-based government organizations and publicly controlled entities, including California's local agencies.

(b) California's local agencies qualify for a ".gov" domain without paying any fee.

(c) Using ".gov" increases security by enforcing multifactor authentication on all accounts in the ".gov" registrar, requiring browsers to only use a Hypertext Transfer Protocol Secure (HTTPS) connection with ".gov" domains, and enabling the addition of a security contact, making it easier for the public to alert the agency about potential security issues with the agency's online services.

(d) The Government Operations Agency oversees the ".ca.gov" domain name program, and the Department of Technology manages the registration, change, and renewal process for ".ca.gov" domains. Agencies are not required to pay any fee for a ".ca.gov" domain.

(e) To administer the ".ca.gov" second-level domain, the Department of Technology has established policies and protocols consistent with federal policy, including, but not limited to, the federal Interagency Committee on Government Information's Recommended Policies and Guidelines for Federal Public Websites and the federal .gov Registrar administered by CISA.

(f) Users of websites or other internet services with a ".ca.gov" domain can be assured they are accessing an official California governmental resource.

SEC. 2. Section 50034 is added to the Government Code, to read:

50034. (a) (1) No later than January 1, 2029, a local agency that maintains an internet website for use by the public shall ensure that the internet website utilizes a ".gov" top-level domain or a ".ca.gov" second-level domain.

(2) If a local agency that is subject to paragraph (1) maintains an internet website for use by the public that is noncompliant with paragraph (1) by January 1, 2029, that local agency shall redirect that internet website to a domain name that does comply with paragraph (1).

(b) No later than January 1, 2029, a local agency that maintains public email addresses for its employees shall ensure that each email address provided to its employees utilizes a ".gov" domain name or a ".ca.gov" domain name.

(c) For purposes of this section, "local agency" means a city, county, or city and county.

SEC. 3. The Legislature finds and declares that Section 2 of this act adding Section 50034 to the Government Code addresses a matter of statewide concern and is not a municipal affair as that term is used in Section

5 of Article XI of the California Constitution. Therefore, Section 1 of this act adding Section 50034 to the Government Code applies to all cities, including charter cities.

SEC. 4. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

O

West's Annotated California Codes
Government Code (Refs & Annos)
Title 5. Local Agencies (Refs & Annos)
Division 1. Cities and Counties (Refs & Annos)
Part 1. Powers and Duties Common to Cities and Counties (Refs & Annos)
Chapter 1. General (Refs & Annos)
Article 2. Powers and Duties of Legislative Bodies (Refs & Annos)

West's Ann.Cal.Gov.Code § 50034

§ 50034. Local government; internet websites and email addresses

Effective: January 1, 2024
Currentness

(a)(1) No later than January 1, 2029, a local agency that maintains an internet website for use by the public shall ensure that the internet website utilizes a ".gov" top-level domain or a ".ca.gov" second-level domain.

(2) If a local agency that is subject to paragraph (1) maintains an internet website for use by the public that is noncompliant with paragraph (1) by January 1, 2029, that local agency shall redirect that internet website to a domain name that does comply with paragraph (1).

(b) No later than January 1, 2029, a local agency that maintains public email addresses for its employees shall ensure that each email address provided to its employees utilizes a ".gov" domain name or a ".ca.gov" domain name.

(c) For purposes of this section, "local agency" means a city, county, or city and county.

Credits
(Added by Stats.2023, c. 586 (A.B.1637), § 2, eff. Jan. 1, 2024.)

West's Ann. Cal. Gov. Code § 50034, CA GOVT § 50034
Current with urgency legislation through Ch. 1002 of 2024 Reg.Sess. Some statute sections may be more current, see credits for details.

End of Document

190 Cal.App.3d 521, 234 Cal.Rptr. 795

CARMEL VALLEY FIRE PROTECTION DISTRICT et al., Plaintiffs and Respondents,
v.
THE STATE OF CALIFORNIA et al., Defendants and Appellants.
RINCON DEL DIABLO MUNICIPAL WATER DISTRICT et al., Plaintiffs and Respondents,
v.
THE STATE OF CALIFORNIA et al., Defendants and Appellants.
COUNTY OF LOS ANGELES, Plaintiff and Respondent,
v.
THE STATE OF CALIFORNIA et al., Defendants and Appellants.

No. B006078., No. B011941., No. B011942.
Court of Appeal, Second District, Division 5, California.
Feb 19, 1987.

SUMMARY

The trial court, in separate proceedings brought by three counties against the state for reimbursement of funds expended by the counties in complying with a state order to provide protective clothing and equipment for county fire fighters, issued writs of mandate compelling the state to reimburse the counties. Previously, the counties had filed test claims with the State Board of Control for reimbursement of similar expenses. The board determined that there was a state mandate and the counties should be reimbursed. The state did not seek judicial review of the board's decision. Thereafter, a local government claims bill, Sen. Bill No. 1261 (Stats. 1981, ch. 1090, p. 4191) was introduced to provide appropriations to pay some of the counties' claims for the state-mandated costs. After various amendments, the legislation was enacted into law without the appropriations. The counties then sought reimbursement by filing petitions for writs of mandate and complaints for declaratory relief. (Superior Court of Los Angeles County, No. C437471, Norman L. Epstein, Judge; No. C514623 and No. C515319, Jack T. Ryburn, Judge.) ***522**

In a consolidated appeal, the Court of Appeal affirmed with certain modifications. It held that, by failing to seek judicial review of the board's decision, the state had waived its right to contest the board's finding that the counties' expenditures were state mandated. Similarly, it held that the state was collaterally estopped from attacking the board's findings. It also held that the executive orders requiring the expenditures constituted the type of "program" that is subject to the constitutional imperative of subvention under Cal. Const., art. XIII B, § 6. The court also held that the trial courts had not ordered an appropriation in violation of the separation of powers doctrine, and that the trial courts correctly determined that certain legislative disclaimers, findings, and budget control language did not exonerate the state from its constitutionally and statutorily imposed obligation to reimburse the counties' state-mandated costs. Further, the court held that the trial courts properly authorized the counties to satisfy their claims by offsetting fines and forfeitures due to the state, and that the counties were entitled to interest. (Opinion by Eagleson, J., with Ashby, Acting P. J., and Hastings, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b)
Estoppel and Waiver § 23--Waiver--Trial and Appeal--Failure to Seek Judicial Review of Administrative Decision--Waiver of Right to Contest Findings.
In a proceeding by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with a state order to provide protective clothing and equipment to county fire fighters, the state waived its right to contest findings made by the State Board of Control in a previous proceeding. The board found that the costs were state-mandated and that the county was entitled to reimbursement. The state failed to seek judicial review of the board's decision, and the statute of limitations applicable to such review had passed. Moreover, the state, through its agents, had acquiesced in the board's findings by seeking an appropriation to satisfy the validated claims, which, however, was rebuffed by the Legislature.

(2)
Estoppel and Waiver § 19--Waiver--Requisites.
Waiver occurs where there is an existing right; actual or constructive knowledge of its existence; and either an actual intention to relinquish it, or conduct so inconsistent with an intent to enforce the right as to induce a reasonable ***523** belief that it has been waived. A right that is waived is lost

forever. The doctrine of waiver applies to rights and privileges afforded by statute.

[See **Cal.Jur.3d,** Estoppel and Waiver § 21; **Am.Jur.2d,** Estoppel and Waiver § 154.]

(3a, 3b, 3c, 3d)
Judgments § 81--Res Judicata--Collateral Estoppel--County's Action for Reimbursement of State-mandated Costs--Findings of State Board of Control.
In a proceeding brought by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with a state order to provide protective clothing and equipment to county fire fighters, the state was collaterally estopped from attacking the findings made, in a previous proceeding, by the State Board of Control that the costs were state-mandated and that the county was entitled to reimbursement. The issues were fully litigated before the board. Similarly, although the state was not a party to the board hearings, it was in privity with those state agencies which did participate. Moreover, a determination of conclusiveness would not work an injustice.

(4)
Judgments § 81--Res Judicata--Collateral Estoppel--Elements.
In order for the doctrine of collateral estoppel to apply, the issues in the two proceedings must be the same, the prior proceeding must have resulted in a final judgment on the merits, and the parties or their privies must be involved.

(5)
Judgments § 84--Res Judicata--Collateral Estoppel--Identity of Parties--Privity--Governmental Agents.
The agents of the same government are in privity with each other for purposes of collateral estoppel, since they represent not their own rights but the right of the government.

(6)
Judgments § 96--Res Judicata--Collateral Estoppel--Matters Concluded-- Questions of Law.
A prior judgment on a question of law decided by a court is conclusive in a subsequent action between the same parties where both causes involved arose out of the same subject matter or transaction, and where holding the judgment to be conclusive will not result in an injustice.

(7)
State of California § 11--Fiscal Matters--Reimbursement to County for State-mandated Costs--New Programs.
A "new program," for purposes of determining whether the program is subject to the constitutional imperative of subvention under Cal. Const., art. XIII B, § 6, is one which carries out the governmental function of providing services ***524** 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.

(8)
State of California § 7--Actions--Reimbursement of County Funds for State-mandated Costs--New Programs.
In an action brought by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with state executive orders to provide protective clothing and equipment to county fire fighters, the trial court properly determined that the executive orders constituted the type of "new program" that was subject to the constitutional imperative of subvention under Cal. Const., art. XIII B, § 6. Fire protection is a peculiarly governmental function. Also, the executive orders manifest a state policy to provide updated equipment to all fire fighters, impose unique requirements on local governments, and do not apply generally to all residents and entities in the state, but only to those involved in fire fighting.

(9)
Constitutional Law § 37--Doctrine of Separation of Powers--Violations of Doctrine--Judicial Order of Appropriation.
In a proceeding brought by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with a state order to provide protective clothing and equipment to county fire fighters, the trial court's judgment granting the writ was not in violation of the separation of powers doctrine. The court order did not directly compel the Legislature to appropriate funds or to pay funds not yet appropriated, but merely affected an existing appropriation.

(10)
Constitutional Law § 40--Distribution of Governmental Powers--Between Branches of Government--Judicial Power and Its Limits--Order Directing Treasurer to Pay on Already Appropriated Funds.

Once funds have been appropriated by legislative action, a court transgresses no constitutional principle when it orders the State Controller or other similar official to make appropriate expenditures from such funds. Thus, a judgment which ordered the State Controller to draw warrants and directed the State Treasurer to pay on already-appropriated funds permissibly compelled performance of a ministerial duty.

(11)
State of California § 12--Fiscal Matters--Appropriations--Reimbursement to County for State-mandated Costs.
Appropriations affected by a court order need not specifically refer to the particular expenditure in question in order to be available. Thus, in a proceeding brought by a county for a writ of mandate to compel reimbursement ***525** by the state for funds expended in complying with a state order to provide protective clothing and equipment to county fire fighters, the funds appropriated for the Department of Industrial Relations for the prevention of industrial injuries and deaths of state workers were available for reimbursement, despite the fact that the funds were not specifically appropriated for reimbursement. The funds were generally related to the nature of costs incurred by the county.

(12a, 12b)
Fires and Fire Districts § 2--Statutes and Ordinances--County Compliance With State Executive Order to Provide Protective Equipment--Federal Mandate.
A county's purchase of protective clothing and equipment for its fire fighters was not the result of a federally mandated program so as to relieve the state of its obligation (Cal. Const., art. XIII B, § 6) to reimburse the county for the cost of the purchases. The county had made the purchase in compliance with a state executive order. The federal government does not have jurisdiction over local fire departments and there are no applicable federal standards for local government structural fire fighting clothing and equipment. Hence, the county's obedience to the state executive orders was not federally mandated.

(13)
Statutes § 20--Construction--Judicial Function--Legislative Declarations.
The interpretation of statutory language is purely a judicial function. Legislative declarations are not binding on the courts and are particularly suspect when they are the product of an attempt to avoid financial responsibility.

(14a, 14b)
Statutes § 10--Title and Subject Matter--Single Subject Rule.
In a proceeding brought by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with a state order to provide protective clothing and equipment to county fire fighters (Cal. Admin. Code, tit. 8, §§ 3401-3409), the trial court properly invalidated, as violating the single subject rule, the budget control language of Stats. 1981, ch. 1090, § 3. The express purpose of ch. 1090 was to increase funds available for reimbursing certain claims. The budget control language, on the other hand, purported to make the reimbursement provisions of Rev. & Tax. Code, § 2207, and former Rev. & Tax. Code, § 2231, unavailable to the county. Because the budget control language did not reasonably relate to the bill's stated purpose, it was invalid.

(15)
Statutes § 10--Title and Subject Matter--Single Subject Rule.
The single subject rule essentially requires that a statute have only one subject matter and that the subject be clearly expressed in a statute's ***526** title. The rule's primary purpose is to prevent “logrolling” in the enactment of laws, which occurs where a provision unrelated to a bill's main subject matter and title is included in it with the hope that the provision will remain unnoticed and unchallenged. By invalidating these unrelated clauses, the single subject rule prevents the passage of laws which might otherwise not have passed had the legislative mind been directed to them. However, in order to minimize judicial interference in the Legislature's activities, the single subject rule is to be construed liberally. A provision violates the rule only if it does not promote the main purpose of the act or does not have a necessary and natural connection with that purpose.

(16)
Statutes § 5--Operation and Effect--Retroactivity--Reimbursement to County for State-mandated Costs.
The budget control language of Stats. 1981, ch. 1090, § 3, which purported to make the reimbursement provisions of Rev. & Tax. Code, § 2207 and former Rev. & Tax. Code, § 2231, unavailable to a county seeking reimbursement (Cal. Const., art. XIII B, § 6) for expenditures made in purchasing state-required protective clothing and equipment for county fire fighters (Cal. Admin. Code, tit. 8, §§ 3401-3409), was

invalid as a retroactive disclaimer of the county's right to reimbursement for debts incurred in prior years.

(17)
State of California § 13--Fiscal Matters--Limitations on Disposal-- Reimbursement to Counties for State-mandated Costs.
The budget control language of § 28.40 of the 1981 Budget Act and § 26.00 of the 1983 and 1984 Budget Acts did not exonerate the state from its constitutional and statutory obligations to reimburse a county for the expenses incurred in complying with a state mandate to purchase protective clothing and equipment for county fire fighters. The language was invalid in that it violated the single subject rule, attempted to amend existing statutory law, and was unrelated to the Budget Acts' main purpose of appropriating funds to support the annual budget.

(18)
Constitutional Law § 4--Legislative Power to Create Workers' Compensation System--Effect on County's Right to Reimbursement.
Cal. Const., art. XIV, § 4, which vests the Legislature with unlimited plenary power to create and enforce a complete workers' compensation system, does not affect a county's right to state reimbursement for costs incurred in complying with state-mandated safety orders.

(19)
Constitutional Law § 7--Mandatory, Directory, and Self-executing Provisions--Subvention Provisions--County Reimbursement for State-mandated Costs.
The subvention provisions of Cal. Const., art. XIII B, § 6, operate so as to require the state to reimburse counties for ***527** state-mandated costs incurred between January 1, 1975, and June 30, 1980. The amendment, which became effective on July 1, 1980, provided that the Legislature "may, but need not," provide reimbursement for mandates enacted before January 1, 1975. Nevertheless, the Legislature must reimburse mandates passed after that date, even though the state did not have to begin reimbursement until the effective date of the amendment.

(20)
Mandamus and Prohibition § 5--Mandamus--Conditions Affecting Issuance--Exhaustion of Administrative Remedies--County Reimbursement for State-mandated Costs.
A county's right of action in traditional mandamus to compel reimbursement for state-mandated costs did not accrue until the county had exhausted its administrative remedies. The exhaustion of remedies occurred when it became unmistakably clear that the legislative process was complete and that the state had breached its duty to reimburse the county.

(21)
Mandamus and Prohibition § 13--Mandamus--Conditions Affecting Issuance--Existence and Adequacy of Other Remedy.
A party seeking relief by mandamus is not required to exhaust a remedy that was not in existence at the time the action was filed.

(22a, 22b)
State of California § 7--Actions--Reimbursement to County for State-mandated Costs--County's Right to Offset Fines and Forfeitures Due to State.
In a proceeding by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with a state order to provide protective clothing and equipment for county fire fighters, the trial court did not err in authorizing the county to satisfy its claims by offsetting fines and forfeitures due to the state. The order did not impinge upon the Legislature's exclusive power to appropriate funds or control budget matters.

(23)
Equity § 5--Scope and Types of Relief--Offset.
The right to offset is a long-established principle of equity. Either party to a transaction involving mutual debits and credits can strike or balance, holding himself owing or entitled only to the net difference. Although this doctrine exists independent of statute, its governing principle has been partially codified in Code Civ. Proc., § 431.70 (limited to cross-demands for money).

(24)
State of California § 7--Actions--Reimbursement to County for State-mandated Costs--State's Use of Statutory Offset Authority.
In a proceeding brought by a county for a writ of mandate to compel reimbursement by the state for funds expended

in complying with a state ***528** order to provide protective clothing and equipment to county fire fighters, the trial court did not err in enjoining the exercise of the state's statutory offset authority (Gov. Code, § 12419.5) until the county was fully reimbursed. In view of the state's manifest reluctance to reimburse, and its otherwise unencumbered statutory right of offset, the trial court was well within its authority to prevent this method of frustrating the county's collection efforts from occurring.

(25)
State of California § 7--Actions--Reimbursement to County for State-mandated Costs--State's Right to Revert or Dissipate Undistributed Appropriations.
In a proceeding brought by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with a state order to provide protective clothing and equipment to county fire fighters, the trial court properly enjoined, and was not precluded by Gov. Code, § 16304.1, from enjoining, the state from directly or indirectly reverting the reimbursement award sum from the general fund line item accounts, and from otherwise dissipating that sum in a manner that would make it unavailable to satisfy the court's judgment in favor of the county.

(26)
Parties § 2--Indispensable Parties--County Auditor Controller--County Action to Collect Reimbursement From State.
In an action brought by a county for a writ of mandate to compel reimbursement by the state for funds expended in complying with a state order to provide protective clothing and equipment to county fire fighters, the county auditor-controller was not an indispensable party whose absence would result in a loss of the trial court's jurisdiction. The auditor-controller was an officer of the county and was subject to the direction and control of the county board of supervisors. He was indirectly represented in the proceedings because his principal, the county, was the party litigant. Additionally, he claimed no personal interest in the action and his pro forma absence in no way impeded complete relief

(27)
Parties § 2--Indispensable Parties--Fines and Forfeitures--County Action to Collect Reimbursement From State.
In an action brought by a county for a writ of mandate to compel reimbursement by the state for costs expended in complying with a state order to provide protective clothing and equipment to county fire fighters, the funds created by the collected fines and forfeitures which the county was allowed to offset to satisfy its claims against the state were not "indispensable parties" to the litigation. The action was not an in rem proceeding, and the ownership of a particular stake was not in dispute. Complete relief could be afforded without including the specified funds as a party.

(28)
Interest § 4--Interest on Judgments--County Action for Reimbursement of State-mandated Costs--State Reliance on Invalid Statute.
An ***529** invalid statute voluntarily enacted and promulgated by the state is not a defense to its obligation to pay interest on damages under Civ. Code, § 3287, subd. (a). Thus, in an action brought by a county for writ of mandate to compel reimbursement by the state for funds expended in complying with a state order to provide protective clothing and equipment to county fire fighters, the state could not avoid its obligation to pay interest on the funds by relying on invalid budget control language which purported to restrict payment on reimbursement claims.

(29)
Appellate Review § 127--Review--Scope and Extent--Interpretation of Statutes.
An appellate court is not limited by the interpretation of statutes given by the trial court.

(30)
Appellate Review § 162--Determination of Disposition of Cause-- Modification--Action Against State--Appropriation.
In an action against the state, an appellate court is empowered to add a directive that the trial court order be modified to include charging orders against funds appropriated by subsequent budget acts.

COUNSEL
John K. Van de Kamp, Attorney General, N. Eugene Hill, Assistant Attorney General, Marilyn K. Mayer and Carol Hunter, Deputy Attorneys General, for Defendants and Appellants.
De Witt Clinton, County Counsel, Amanda F. Susskind, Deputy County Counsel, Ross & Scott, William D. Ross and Diana P. Scott, for Plaintiffs and Respondents.

EAGLESON, J.

These consolidated appeals arise from three separate trial court proceedings concerning the heretofore unsuccessful efforts of various local agencies to secure reimbursement of state-mandated costs.

Case No. 2d Civ. B006078 (Carmel Valley et al. case) was the first matter decided by the trial court. The memorandum of decision in that case was judicially noticed by the trial court which heard the consolidated matters in 2d Civ. B011941 (Rincon et al. case) and 2d Civ. B011942 (County of Los Angeles case). Issues common to all three cases will be discussed together ***530** under the County of Los Angeles appeal, while issues unique to the other two appeals will be considered separately.

We identify the parties to the various proceedings in footnote 1. [1] For literary convenience, however, we will refer to all appellants as the State and all respondents as the County unless otherwise indicated.

1 *2d Civ. B006078*: The petitioners below and respondents on appeal are Carmel Valley Fire Protection District, City of Anaheim, Aptos Fire Protection District, Citrus Heights Fire Protection District, Fair Haven Fire Protection District, City of Glendale, City of San Luis Obispo, County of Santa Barbara and Ventura County Fire Protection District.
The respondents below and appellants here are State of California, Kenneth Cory and Jesse Marvin Unruh.
2d Civ. B011941: The petitioners below and respondents on appeal are Rincon Del Diablo Municipal Water District, Twenty-Nine Palms Water District, Alpine Fire Protection District, Bonita-Sunnyside Fire Protection District, Encinitas Fire Protection District, Fallbrook Fire Protection District, City of San Luis Obispo, Montgomery Fire Protection District, San Marcos Fire Protection District, Spring Valley Fire Protection District, Vista Fire Protection District and City of Coronado.
Respondents below and appellants here are State of California, State Department of Finance, State Department of Industrial Relations, State Board of Control, Kenneth Cory, State Controller, Jesse Marvin Unruh, State Treasurer, and Mark H. Bloodgood, Auditor-Controller, County of Los Angeles.
2d Civ. B011942: The County of Los Angeles is the petitioner below and respondent on appeal. Respondents below and appellants here are State of California, State Department of Finance, State Department of Industrial Relations, Kenneth Cory, and Jesse Marvin Unruh.
All respondents on appeal are conceded to be "local agencies," as defined in Revenue and Taxation Code section 2211.

Appeal In Case No. 2 Civil B011942

(County of Los Angeles Case)

Facts and Procedural History

County employs fire fighters for whom it purchased protective clothing and equipment, as required by title 8, California Administrative Code, sections 3401-3409, enacted in 1978 (executive orders). County argues that it is entitled to State reimbursement for these expenditures because they constitute a state-mandated "new program" or "higher level of service." County relies on Revenue and Taxation Code section 2207 [2] and former ***531** section 2231, [3] and California Constitution, article XIII B, section 6 [4] to support its claim.

2 The pertinent parts of Revenue and Taxation Code section 2207 provide: " 'Costs mandated by the state' means any incureased costs which a local agency is required to incur as a result of the following" [¶] (a) Any law enacted after January 1, 1973, which mandates a new program or a n incureased level of service of an existing program: [¶] (b) Any executive order issued after January 1, 1973, which mandates a new program; [¶] (c) Any executive order isued after January 1, 1973, which (i) implements or interprets a state statute and (ii), by such implementation or interpretation, increases program levels above the levels required prior to January 1, 1973 ..."

3 The pertinent parts of former Revenue and Taxation Code section 2231, subdivision (a) provide: "The state shall reimburse each local agency for all 'costs mandated by the state', as defined in Section 2207." This section was repealed (Stats. 1986, ch. 879, § 23), and replaced by Government Code section 17561. We will refer to the earlier code section.

4 The pertinent parts of section 6, article XIII B of the California Constitution, enacted by initiative measure, provide: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] ... [¶¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." This constitutional amendment became effective July 1, 1980.

County filed a test claim with the State Board of Control (Board) for these costs incurred during fiscal years 1978-1979 and 1979-1980. [5] After hearings were held on the matter, the Board determined on November 20, 1979, that there was a state mandate and that County should be reimbursed. State did not seek judicial review of this quasi-judicial decision of the Board.

5 County filed its test claim pursuant to former Revenue and Taxation Code section 2218, which was repealed by Statutes 1986, chapter 879, section 19.
Additionally, the Board is no longer in existence. The Commission on State Mandates has succeeded to these functions. (Gov. Code, §§ 17525, 17630.)

Thereafter, a local government claims bill, Senate Bill Number 1261 (Stats. 1981, ch. 1090, p. 4191) (S.B. 1261) was introduced to provide appropriations to pay some of County's claims for these state-mandated costs. This bill was amended by the Legislature to delete all appropriations for the payment of these claims. Other claims of County not provided for in S.B. 1261 were contained in another local government claims bill, Assembly Bill Number 171 (Stats. 1982, ch. 28, p. 51) (A.B. 171). The appropriations in this bill were deleted by the Governor. Both pieces of legislation, sans appropriations, were enacted into law. [6]

6 The final legislation did include appropriations for other local agencies on other types of approved claims.

On September 21, 1984, following these legislative rebuffs, County sought reimbursement by filing a petition for writ of mandate (Code Civ. Proc., § 1085) and complaint for declaratory relief. After appropriate responses were filed and a hearing was held, the court executed a judgment on February 6, 1985, granting a peremptory writ of mandate. A writ of mandate was issued and other findings and orders made. It is from this judgment of ***532** February 6, 1985, that State appeals. The relevant portions of the judgment are set forth verbatim below. [7] ***533**

7 "1. The Court adjudges and declares that funds appropriated by the Legislature for the State Department of Industrial Relations for the Prevention of Industrial Injuries and Deaths of California Workers within the Department's General Fund may properly be and should be spent for the reimbursement of state-mandated costs incurred by Petitioner as established in this action.
"2. A peremptory writ of mandamus shall issue under the seal of this Court, commanding Respondent State of California, through its Department of Finance, to give notification in writing as specified in Section 26.00 of the Budget Act of 1984 (Chapter 258, Statutes of 1984) of the necessity to encumber funds in conformity [with]this order and, unless the Legislature approves a bill that would enact a general law, within 30 days of said notification that would obviate the necessity of such payment, Respondent Kenn[e]th Cory, the State Controller of the State of California, or his successors in office, if any, shall draw warrants on funds appropriated for the State Department of Industrial Relations for the 1984-85 Budget Year in account numbers 8350-001-001, 8350-001-452, 8350-001-453, and 8350-001-890 as implemented in Chapter 258 Statutes of 1984, sufficient to satisfy the claims of Petitioner, plus interest, as set forth in the motion and accompanying writ of mandamus. Said writ shall also issue against Jessie [*sic*] Marvin Unruh, the State Treasurer of the State of California, and his successors in office, if any, commanding him to make payment on the warrants drawn by Respondent Kenneth Cory.
"3. Pending the final disposition of this proceeding, or the payment of the applicable reimbursement claims and interest as set forth herein, Respondents, and each of of [*sic*] them, their successors in office, agents, servants and employees and all persons acting in concert [or] participation with

them, are hereby enjoined and restrained from directly or indirectly expending from the 1984-85 General Fund Budget of the State Department of Industrial Relations as is more particularly described in paragraph number 2 hereinabove, any sums greater than that which would leave in said budget at the conclusion of the 1984-85 fiscal year an amount less than the reimbursement amounts on the aggregate amount of $307,685 in this case, together with interest at the legal rate through payment of said reimbursement amounts. Said amounts are hereinafter referred to collectively as the 'reimbursement award sum'.

"4. Pending the final disposition of this proceeding or the payment of the reimbursement award sum at issue herein, Respondents, and each of them, their successors in office, agents, servants and employees, and all persons acting in concert or participation with them, are hereby enjoined and restrained from directly or indirectly reverting the reimbursement award sum from the General Fund line-item accounts of the Department of Industrial Relations to the General Funds of the State of California and from otherwise dissipating the reimbursement award sum in a manner that would make it unavailable to satisfy this Court's judgment.

"5. In addition to the foregoing relief, Petitioner is entitled to offset amounts sufficient to satisfy the claims of Petitioner, plus interest, against funds held by Petitioner as fines and forfeitures which are collected by the local Courts, transferred to the Petitioner and remitted to Respondents on a monthly basis. Those fines and forfeitures are levied, and their distribution provided, as set forth in Penal Code Sections 1463.02, 1463.03, 14[6] 3.5[a], and 1464; Government Code Sections 13967, 26822.3 and 72056, Fish and Game Code Section 13100; Health and Safety Code Section 11502 and Vehicle Code Sections 1660.7, 42004, and 41103.5.

"6. The Court adjudges and declares that the State has a continuing obligation to reimburse Petitioner for costs incurred in fiscal years subsequent to its claim for expenditures in the 1978-79 and 1979-80 fiscal years as set forth in the petition and the accompanying motion for the issuance of a writ of mandate.

"7. The Court adjudges and declares that deletion of funding and prohibition against accepting claims for expenditures incurred as a result of the state-mandated program of Title 8, California Administrative Code Sections 3401 through 3409 as contained in Section 3 of Chapter 109[0], Statutes of 1981 were invalid and unconstitutional.

"8. The Court adjudges and declares that the expenditures incurred by Petitioner as a result of the state-mandated program of Title 8, California Administrative Code Sections 3401 through 3409 were not the result of any federally mandated program.

"9. A peremptory writ of mandamus shall issue under the seal of this Court commanding Respondent State Board of Control, or its successor-in-interest, to hear and approve the claims of Petitioner for costs incurred in complying with the state-mandated program of Title 8, California Administrative Code Sections 3401 through 3409 subsequent to fiscal year 1979-80.

. . . . ."

"11. The Court adju[d]ges and declares that the State Respondents are prohibited from offsetting, or attempting to implement an offset against moneys due and owing Petitioner until Petitioner is completely reimbursed for all of its costs in complying with the state mandate of Title 8, California Administrative Code Sections 3401 through 3409."

Contentions

State advances two basic contentions. It first asserts that the costs incurred by County are not state mandated because they are not the result of a "new program," and do not provide a "higher level of service." Either or both of these requirements are the sine qua non of reimbursement. Second, assuming a "new program" or "higher level of service" exists, portions of the trial court order aimed at assisting the reimbursement process were made in excess of the court's jurisdiction.

These contentions are without merit. We modify and affirm all three judgments.

Discussion

I

Issue of State Mandate

The threshold question is whether County's expenditures are state mandated. The right to reimbursement is triggered when the local agency incurs "costs mandated by the state" in either complying with a "new program" or providing "an increased level of service of an existing program." [8] State advances many theories as to why the Board erred in concluding that these expenditures are state-mandated costs. One of these arguments is whether the executive orders are a "new program" as that phrase has been recently defined by our Supreme Court in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46 [233 Cal.Rptr. 38, 729 P.2d 202]. ***534**

8 This language is taken from Revenue and Taxation Code section 2207 and former section 2231. Article XIII B, section 6 refers to "higher" level of service rather than "increased" level of service. We perceive the intent of the two provisions to be identical. The parties also use these words interchangeably.

As we shall explain, State has waived its right to challenge the Board's findings and is also collaterally estopped from doing so. Additionally, although State is not similarly precluded from raising issues presented by the *State of California* case, we conclude that the executive orders are a "new program" within the meaning of article XIII B, section 6.

A. *Waiver*

(1a)We initially conclude that State has waived its right to contest the Board's findings. (2)Waiver occurs where there is an existing right; actual or constructive knowledge of its existence; and either an actual intention to relinquish it, or conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that it has has been waived. (*Medico-Dental etc. Co. v. Horton & Converse* (1942) 21 Cal.2d 411, 432 [132 P.2d 457]; *Loughan v. Harger-Haldeman* (1960) 184 Cal.App.2d 495, 502-503 [7 Cal.Rptr. 581].) A right that is waived is lost forever. (*L.A. City Sch. Dist. v. Landier Inv. Co*. (1960) 177 Cal.App.2d 744, 752 [2 Cal.Rptr. 662].) The doctrine of waiver applies to rights and privileges afforded by statute. (*People v. Murphy* (1962) 207 Cal.App.2d 885, 888 [24 Cal.Rptr. 803].)

(1b)State now contends to be an aggrieved party and seeks to dispute the Board's findings. However it failed to seek judicial review of that November 20, 1979 decision (Code Civ. Proc., § 1094.5) as authorized by former Revenue and Taxation Code section 2253.5. The three-year statute of limitations applicable to such review has long since passed. (*Green v. Obledo* (1981) 29 Cal.3d 126, 141, fn. 10 [172 Cal.Rptr. 206, 624 P.2d 256]; Code Civ. Proc., § 338, subd. 1.)

In addition, State, through its agents, acquiesced in the Board's findings by seeking an appropriation to satisfy the validated claims. (Former Rev. & Tax. Code, § 2255, subd. (a).) On September 30, 1981, S.B. 1261 became law. On February 12, 1982, A.B. 171 was enacted. Appropriations had been stripped from each bill. State did not then seek review of the Board determinations even though time remained before the three-year statutory period expired. This inaction is clearly inconsistent with any intent to contest the validity of the Board's decision and results in a waiver.

B. *Administrative Collateral Estoppel*

(3a)We next conclude that State is collaterally estopped from attacking the Board's findings. (4)Traditionally, collateral estoppel has been applied to bar relitigation of an issue decided in a prior court proceeding. In order for the doctrine to apply, the issues in the two proceedings must ***535** be the same, the prior proceeding must have resulted in a final judgment on the merits, and the same parties or their privies must be involved. (*People v. Sims* (1982) 32 Cal.3d 468, 484 [186 Cal.Rptr. 77, 651 P.2d 321].)

The doctrine was extended in *Sims* to apply to a final adjudication of an administrative agency of statutory creation so as to preclude relitigation of the same issues in a subsequent criminal case. Our Supreme Court held that collateral estoppel applies to such prior adjudications where three requirements are met: (1) the administrative agency acted in a judicial capacity; (2) it resolved disputed issues properly before it; and (3) all parties were provided with the opportunity to fully and fairly litigate their claims. (*Id.* at p. 479.) All of the elements of administrative collateral estoppel are present here.

(3b)The Board was created by the state Legislature to exercise quasi-judicial powers in adjudging the validity of claims against the State. (*County of Sacramento v. Loeb* (1984) 160 Cal.App.3d 446, 452 [206 Cal.Rptr. 626].) At the time of the hearings, the Board proceedings were the sole administrative remedy available to local agencies seeking reimbursement for state-mandated costs. (Former Rev. & Tax. Code, § 2250.) Board examiners had the power to administer oaths, examine witnesses, issue subpoenas, and receive evidence. (Gov. Code, § 13911.) The hearings were adversarial in nature and allowed for the presentation of evidence by the claimant,

the Department of Finance, and any other affected agency. (Former Rev. & Tax. Code, § 2252.)

The record indicates that the state mandate issues in this case were fully litigated before the Board. A representative of the state Division of Occupational Safety and Health and the Department of Industrial Relations testified as to why County's costs were not state mandated. Representatives of the various claimant fire districts in turn offered testimony contradicting that view. The proceedings culminated in a verbatim transcript and a written statement of the basis for the Board's decision.

State complains, however, that some of the traditional elements of the collateral estoppel doctrine are missing. In particular, State argues that it was not a party to the Board hearings and was not in privity with those state agencies which did participate.

(5)"[T]he courts have held that the agents of the same government are in privity with each other, since they represent not their own rights but the right of the government. [Fn. omitted.]" (*Lerner v. Los Angeles City Board of Education* (1963) 59 Cal.2d 382, 398 [29 Cal.Rptr. 657, 380 P.2d 97].) As we stated in our introduction of the parties in this case, the party ***536** known as "State" is merely a shorthand reference to the various state agencies and officials named as defendants below. Each of these defendants is an agent of the State of California and had a mutual interest in the Board proceedings. They are thus in privity with those state agencies which did participate below (e.g., Occupational Safety and Health Division).

It is also clear that even though the question of whether a cost is state mandated is one of law (*City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 781 [200 Cal.Rptr. 642]), subsequent litigation on that issue is foreclosed here. (6)A prior judgment on a question of law decided by a court is conclusive in a subsequent action between the same parties where both causes involved arose out of the same subject matter or transaction, and where holding the judgment to be conclusive will not result in an injustice. (*City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 230 [123 Cal.Rptr. 1, 537 P.2d 1250]; *Beverly Hills Nat. Bank v. Glynn* (1971) 16 Cal.App.3d 274, 286-287 [93 Cal.Rptr. 907]; Rest.2d Judgments, § 28, p. 273.) [9]

9 As it happened, the entire Board determination involved a question of law since the dollar amount of the claimed reimbursement was not disputed.

(3d)Here, the basic issues of state mandate and the amount of reimbursement arose out of County's required compliance with the executive orders. In either forum—Board or court—the claims and the evidentiary and legal determination of their validity would be considered in similar fashion.

Furthermore, a determination of conclusiveness would not work an injustice. As we have noted, the Board was statutorily created to consider the validity of the various claims now being litigated. Processing of reimbursement claims in this manner was the only administrative remedy available to County. If we were to grant State's request and review the Board's determination de novo, we would, in any event, adhere to the well-settled principle of affording "great weight" to "the contemporaneous administrative construction of the enactment by those charged with its enforcement ...." (*Coca-Cola Co. v. State Bd. of Equalization* (1945) 25 Cal.2d 918, 921 [156 P.2d 1].)

There is no policy reason to limit the application of the collateral estoppel doctrine to successive court proceedings. In *City and County of San Francisco v. Ang* (1979) 97 Cal.App.3d 673, 679 [159 Cal.Rptr. 56], the doctrine was applied to bar relitigation in a subsequent civil proceeding of a zoning issue previously decided by a city board of permit appeals. We similarly hold that the questions of law decided by the Board are binding in all of the subsequent civil proceedings presented here. State therefore is collaterally ***537** estopped to raise the issues of state mandate and amount of reimbursement in this appeal.

C. *Executive Orders—A "New Program" Under Article XIII B, Section 6*

(7)The recent decision by our Supreme Court in *County of Los Angeles v. State of California*, *supra.*, 43 Cal.3d at p. 49 presents a new issue not previously considered by the Board or the trial court. That question is whether the executive orders constitute the type of "program" that is subject to the constitutional imperative of subvention under article XIII B, section 6. [10] We conclude that they are.

10 State is not precluded from raising this new issue on appeal. Questions of law decided by an administrative agency invoke the collateral

> estoppel doctrine only when a determination of conclusiveness will not work an injustice. Likewise, the doctrine of waiver is inapplicable if a litigant has no actual or constructive knowledge of his rights. Since the *State of California* rule had not been announced at the time of the Board or trial court proceedings herein, the doctrines of waiver and collateral estoppel are inapplicable to State on this particular issue. Both parties have been afforded additional time to brief the matter.

In *State of California*, the Court concluded that the term "program" has two alternative meanings: "programs that carry out the governmental function of providing services 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." (*Id.* at p. 56, italics added.) Although only one of these findings is necessary to trigger reimbursement, both are present here.

(8)First, fire protection is a peculiarly governmental function. (*County of Sacramento v. Superior Court* (1972) 8 Cal.3d 479, 481 [105 Cal.Rptr. 374, 503 P.2d 1382].) "Police and fire protection are two of the most essential and basic functions of local government." (*Verreos v. City and County of San Francisco* (1976) 63 Cal.App.3d 86, 107 [133 Cal.Rptr. 649].) This classification is not weakened by State's assertion that there are private sector fire fighters who are also subject to the executive orders. Our record on this point is incomplete because the issue was not presented below. Nonetheless, we have no difficulty in concluding as a matter of judicial notice that the overwhelming number of fire fighters discharge a classical governmental function. [11] ***538**

11 County suggests that to the extent private fire brigades exist, they are customarily part-time individuals who perform the function on a part-time basis. As such, they are excluded by the balance of the definitional term in title 8, California Administrative Code section 3402, which provides, in pertinent part: "... The term [fire fighter] does not apply to emergency pick-up labor or other persons who may perform first-aid fire extinguishment as collateral to their regular duties."

The second, and alternative, prong of the *State of California* definition is also satisfied. The executive orders manifest a state policy to provide updated equipment to all fire fighters. Indeed, compliance with the executive orders is compulsory. The requirements imposed on local governments are also unique because fire fighting is overwhelmingly engaged in by local agencies. Finally, the orders do not apply generally to all residents and entities in the State but only to those involved in fire fighting.

These facts are distinguishable from those presented in *State of California*. There, the court held that a state-mandated increase in workers' compensation benefits did not require state subvention because the costs incurred by local agencies were only an incidental impact of laws that applied generally to all state residents and entities (i.e., to all workers and all governmental and nongovernmental employers). Governmental employers in that setting were indistinguishable from private employers who were obligated through insurance or direct payment to pay the statutory increases.

State of California only defined the scope of the word "program" as used in California Constitution, article XIII B, section 6. We apply the same interpretation to former Revenue and Taxation Code section 2231 even though the statute was enacted much earlier. The pertinent language in the statute is identical to that found in the constitutional provision and no reason has been advanced to suggest that it should be construed differently. In any event, a different interpretation must fall before a constitutional provision of similar import. (*County of Los Angeles v. Payne* (1937) 8 Cal.2d 563, 574 [66 P.2d 658].)

II

Issue of Whether Court Orders Exceeded Its Jurisdiction

A. *The Court Has Not Ordered an Appropriation in Violation of the Separation of Powers Doctrine*

(9)State begins its general attack on the judgment by citing the longstanding principle that a court order which directly compels the Legislature to appropriate funds or to pay funds not yet appropriated violates the separation of powers doctrine. (Cal. Const., art. III, § 3; art. XVI, § 7; *Mandel v. Myers* (1981) 29 Cal.3d 531, 540 [174 Cal.Rptr. 841, 629 P.2d 935].) [12] State ***539** observes (and correctly so) that the relevant constitutional (art. XIII B, § 6) and statutory (Rev. & Tax. Code, § 2207 & former § 2231) provisions are not appropriations measures. (See *City of Sacramento v. California State Legislature* (1986) 187 Cal.App.3d 393, 398 [231 Cal.Rptr. 686].) Since State otherwise discerns no manifest legislative intent to appropriate funds to pay

County's claims (*City & County of S. F. v. Kuchel* (1948) 32 Cal.2d 364, 366 [196 P.2d 545]), it concludes that the judgment unconstitutionally compels performance of a legislative act.

12 Article III, section 3 of the California Constitution provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."
Article XVI, section 7 of the California Constitution provides: "Money may be drawn from the Treasury only through an appropriation made by law and upon a Controller's duly drawn warrant."

State further argues that the judiciary's ability to reach an existing agency-support appropriation (State Department of Industrial Relations) (fn. 7, ¶ 1, *ante*) has been approved in only two contexts. First, the court can order payment from an existing appropriation, the expenditure of which has been legislatively prohibited by an unconstitutional or unlawful restriction. (*Committee to Defend Reproductive Rights v. Cory* (1982) 132 Cal.App.3d 852, 856 [183 Cal.Rptr. 475].) Second, once an adjudication has finally determined the rights of the parties, the court may compel satisfaction of the judgment from a current unexpended, unencumbered appropriation which administrative agencies routinely have used for the purpose in question. (*Mandel v. Myers*, *supra.*, 29 Cal.3d at p. 544.) State insists that these facts are not present here.

County rejoins that a writ of traditional mandate (Code Civ. Proc., § 1085) is the correct method of compelling State to perform a clear and present ministerial legal obligation. (*County of Sacramento v. Loeb*, *supra.*, 160 Cal.App.3d at pp. 451-452.) The ministerial obligation here is contained in California Constitution, article XIII B, section 6 and in Revenue and Taxation Code section 2207 and former section 2231. These provisions require State to reimburse local agencies for state-mandated costs.

We reject State's general characterization of the judgment by noting that it only affects an existing appropriation. It declares (fn. 7, ¶ 1, *ante*) that only funds already "*appropriated* by the Legislature for the State Department of Industrial Relations for the Prevention of Industrial Injuries and Deaths of California Workers within the Department's General Fund" shall be spent for reimbursement of County's state-mandated costs. (Italics added.) There is absolutely no language purporting to require the Legislature to enact appropriations or perform any other act that might violate separation of powers principles. (10)By simply ordering the State Controller to draw warrants and directing the State Treasurer to pay on already appropriated funds (fn. 7, ¶ 2, *ante*), the judgment permissibly compels performance of a ministerial duty: "[O]nce funds have already been appropriated by legislative action, a court transgresses no constitutional principle when it orders the State Controller or other similar official to make appropriate expenditures ***540** from such funds. [Citations.]" (*Mandel v. Myers*, *supra.*, 29 Cal.3d at p. 540.)

As we will discuss in further detail below, the subject funds (fn. 7, ¶ 1, *ante*) were saddled with an unconstitutional restriction (fn. 7, ¶ 7, *ante*). However, *Mandel* establishes that such a restriction does not necessarily infect the entire appropriation. There, the Legislature had improperly prohibited the use of budget funds to pay a court-ordered and administratively approved attorney's fees award. The court reasoned that as long as appropriated funds were "reasonably available for the expenditures in question, the separation of powers doctrine poses no barrier to a judicial order directing the payment of such funds." (*Id.* at p. 542.) The court went on to find that money in a general "operating expenses and equipment" fund was, by both the Budget Act's terms and prior administrative practice, reasonably available to pay the attorney's fees award.

Contrary to State's argument, *Mandel* does not require that past administrative practice support a judgment for reimbursement from an otherwise available appropriation. Although there was evidence of a prior administrative practice of paying counsel fees from funds in the "operating expenses and equipment" budget, this fact was not the main predicate of the court's holding. Rather, the decisive factor was that the budget item in question functioned as a "catchall" appropriation in which funds were still reasonably available to satisfy the State's adjudicated debt. (*Id.* at pp. 543-544.)

Another illustration of this principle is found in *Serrano v. Priest* (1982) 131 Cal.App.3d 188 [182 Cal.Rptr. 387]. Plaintiffs in that case secured a judgment against the State of California for $800,000 in attorney's fees. The judgment was not paid, and subsequent proceedings were brought against State to satisfy the judgment. The trial court directed the State Controller to pay the $800,000 award, plus interest, from funds appropriated by the Legislature for "operating

expenses and equipment" of the Department of Education, Superintendent of Public Instruction and State Board of Education. (*Id.* at p. 192.) This court affirmed that order even though there was no evidence that the agencies involved had ever paid court-ordered attorney's fees from that portion of the budget. Relying on *Mandel*, we concluded that funds were reasonably available from appropriations enacted in the Budget Act in effect at the time of the court's order, as well as from similar appropriations in subsequent budget acts.

(11)State also incorrectly asserts that the appropriations affected by the court's order must specifically refer to the particular expenditure in question in order to be available. This notion was summarily dismissed in *Mandel v. Myers*, *supra.*, 29 Cal.3d at pp. 543-544. Likewise, in *Committee to Defend* ***541** *Reproductive Rights v. Cory*, *supra.*, 132 Cal.App.3d at pp. 857-858, the court decreed that payments for Medi-Cal abortions could properly be ordered from monies appropriated for other Medi-Cal services, even though this use had been specifically prohibited by the Legislature.

Applying these various principles here, we note that the judgment (fn. 7, ¶ 2, *ante*) identified funds in account numbers 8350-001-001, 8350-001-452, 8350-001-453 and 8350-001-890 as being available for reimbursement. Within these 1984-1985 account appropriations for the Department of Industrial Relations were monies for Program 40, the Prevention of Industrial Injuries and Deaths of California Workers. The evidence clearly showed that the remaining balances on hand would cover the cost of reimbursement. Since it is conceded that the fire fighting protective clothing and equipment in this case was purchased to prevent deaths and injuries to fire fighters, these funds, although not specifically appropriated for the reimbursement in question, were generally related to the nature of costs incurred by County and are therefore reasonably available for reimbursement.

B. *Legislative Disclaimers, Findings and Budget Control Language Are No Defense to Reimbursement*

As a general defense against the order to reimburse, State insists that the Legislature has itself concluded that the claimed costs are not reimbursable. This determination took the combined form of disclaimers, findings and budget control language. State interprets this self-serving legislation, as well as the legislative and gubernatorial deletions, as forever sweeping away State's obligation to reimburse the state-mandated costs at issue. Consequently, any order that ignores these restrictions on payment would amount to a court-ordered appropriation. As we shall conclude, these efforts are merely transparent attempts to do indirectly that which cannot lawfully be done directly.

The seminal legislation that gave rise to the 1978 executive orders was enacted by Statutes 1973, chapter 993, and is labeled the California Occupational Safety and Health Act (Cal/OSHA). It is modeled after federal law and is designed to assure safe working conditions for all California workers. A legislative disclaimer appearing in section 106 of that bill reads: "No appropriation is made by this act ... for the reimbursement of any local agency for any costs that may be incurred by it in carrying on any program or performing any service required to be carried on ...." The stated reason for this decision not to appropriate was that the cost of implementing the act was "minimal on a statewide basis in relation to the effect on local tax rates." (Stats. 1973, ch. 993, § 106, p. 1954.) ***542**

Again, in 1974, the Legislature stated: "Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to this section, nor shall there be an appropriation made by this act, because the Legislature finds that this act and any executive regulations or safety orders issued pursuant thereto merely implement federal law and regulations." (Stats. 1974, ch. 1284, § 106, p. 2787.) This statute amended section 106 of Statutes 1973, chapter 993, and was a post facto change in the stated legislative rationale for not providing reimbursement.

Presumably because of the large number of reimbursement claims being filed, the Legislature subsequently used budget control language to confirm that compliance with the executive orders should not trigger reimbursement. Some of this legislation was effective September 30, 1981, as part of a local agency and school district reimbursement bill. The control language provided that "[t]he Board of Control shall not accept, or submit to the Legislature, any more claims pursuant to ... Sections 3401 to 3409, inclusive, of Title 8 of the California Administrative Code." (Stats. 1981, ch. 1090, § 3, p. 4193.) [13]

13 When Governor Brown deleted the appropriations from A.B. 171, he stated that he was relying on the pronouncements in Statutes 1974, chapter 1284 and Statutes 1981, chapter 1090.

Further control language was inserted in the 1981, 1983 and 1984 Budget Acts. (Stats. 1981, ch. 99, § 28.40, p. 606;

Stats. 1983, ch. 324, § 26.00, p. 1504; Stats. 1984, ch. 258, § 26.00.) This language prohibits encumbering appropriations to reimburse costs incurred under the executive orders, except under certain limited circumstances.

(12a)State first challenges the trial court's finding that expenditures mandated by the executive orders were not the result of a federally mandated program (fn. 7, ¶ 8, *ante*), despite the legislative finding in Statutes 1974, chapter 1284, section 106. We agree with the court's decision that there was no federal mandate.

The significance of this no-federal-mandate finding is revealed by examining past changes in the statutory definition of state-mandated costs. As thoroughly discussed in *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182, 196-197 [203 Cal.Rptr. 258] disapproved on other grounds in *County of Los Angeles v. State of California*, *supra.*, 43 Cal.3d at p. 58, fn. 10, the concept of federally mandated costs has provided local agencies with a financial escape valve ever since passage of the "Property Tax Relief Act of 1972." (Stats. 1972, ch. 1406, § 1, p. 2931.) That act limited local governments' power to levy property taxes, while requiring that they be reimbursed by the State for providing compulsory increased levels of service or ***543** new programs. However, under Revenue and Taxation Code section 2271, "costs mandated by the federal government" were not subject to reimbursement and local governments were permitted to levy taxes in addition to the maximum property tax rate to pay such costs.

On November 6, 1979, the limitation on local government's ability to raise property taxes, and the duty of the State to reimburse for state-mandated costs, became a part of the California Constitution through the initiative process. Article XIII B, section 6, enacted at that time, directs state subvention similar in nature to that required by the preexisting provisions of Revenue and Taxation Code section 2207 and former section 2231. As a defense against this duty to reimburse local agencies, the Legislature began to insert disclaimers in bills which mandated costs on local agencies. It also amended Revenue and Taxation Code section 2206 to expand the definition of nonreimbursable "costs mandated by the federal government" to include the following: "costs resulting from enactment of a state law or regulation where failure to enact such law or regulation to meet specific federal program or service requirements would result in substantial monetary penalties or loss of funds to public or private persons in the state."

In applying this definition here, State offers nothing more than the bare legislative finding contained in Statutes 1974, chapter 1284, section 106. State contends that a federally mandated cost cannot, by definition, be a state-mandated cost. Therefore, if the cost is federally mandated, local agency reimbursement is not required. (13)**(See fn. 14.)** Although State's argument is correct in the abstract, neither the facts nor federal law supports the underlying assumption that there is a federal mandate. [14]

14 We address this subject only because the trial court found that the costs were not federally mandated. Actually, State cannot raise this issue on appeal because of the waiver and administrative collateral estoppel doctrines. We note, however, where there is a quasi-judicial finding that a cost is state mandated, there is an implied finding that the cost is not federally mandated; the two concepts are mutually exclusive.
Moreover, our task is aided by the fact that interpretation of statutory language is purely a judicial function. Legislative declarations are not binding on the courts and are particularly suspect when they are the product of an attempt to avoid financial responsibility. (*City of Sacramento v. State of California*, *supra.*, 156 Cal.App.3d at pp. 196-197.)

(12b)Both the Board and the court had in evidence a letter from a responsible official of the federal Occupational Safety and Health Administration (OSHA). The letter emphasizes the independence of state and federal OSHA standards: "OSHA does not have jurisdiction over the fire departments of any political subdivision of a state whether the state has elected to have its own state plan under the OSHA act or not .... [¶] More specifically, in 1978, the State of California promulgated standards applicable to fire departments in California. Therefore, California standards, rather than ***544** federal OSHA standards, are applicable to fire departments in that state ...." This theme is also reflected in a section of OSHA which expressly disclaims jurisdiction over local agencies such as County. (29 U.S.C. § 652(5).) Accordingly, as a matter of law, there are no federal standards for local government structural fire fighting clothing and equipment.

In short, while the Legislature's enactment of Cal/OSHA to comply with federal OSHA standards is commendable, it certainly was not compelled. Consequently, County's

obedience to the 1978 executive orders is not federally mandated.

(14a)The trial court also properly invalidated the budget control language in Statutes 1981, chapter 1090, section 3 (fn. 7, ¶ 7, *ante*) because it violated the single subject rule. [15] This legislative restriction purported to make the reimbursement provisions of Revenue and Taxation Code section 2207 and former section 2231 unavailable to County.

15 Article IV, section 9 of the California Constitution reads: "A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void. A statute may not be amended by reference to its title. A section of a statute may not be amended unless the section is re-enacted as amended."

(15)The single subject rule essentially requires that a statute have only one subject matter and that the subject be clearly expressed in the statute's title. The rule's primary purpose is to prevent "log-rolling" in the enactment of laws. This disfavored practice occurs where a provision unrelated to a bill's main subject matter and title is included in it with the hope that the provision will remain unnoticed and unchallenged. By invalidating these unrelated clauses, the single subject rule prevents the passage of laws which otherwise might not have passed had the legislative mind been directed to them. (*Planned Parenthood Affiliates v. Swoap* (1985) 173 Cal.App.3d 1187, 1196 [219 Cal.Rptr. 664].) However, in order to minimize judicial interference in the Legislature's activities, the single subject rule is to be construed liberally. A provision violates the rule only if it does not promote the main purpose of the act or does not have a necessary and natural connection with that purpose. (*Metropolitan Water Dist. v. Marquardt* (1963) 59 Cal.2d 159, 172-173 [28 Cal.Rptr. 724, 379 P.2d 28].)

(14b)The stated purpose of chapter 1090 is to increase funds available for reimbursing certain claims. It describes itself as an "act making an appropriation to pay claims of local agencies and school districts for additional reimbursement for specified state-mandated local costs, awarded by the State Board of Control, and declaring the urgency thereof, to take effect immediately." (Stats. 1981, ch. 1090, p. 4191.) There is nothing in this introduction ***545** alerting the reader to the fact that the bill prohibits the Board from entertaining claims pursuant to the Cal/OSHA executive orders. The control language does not modify or repeal these orders, nor does it abrogate the necessity for County's continuing compliance therewith. It simply places County's claims reimbursement process in limbo.

This special appropriations bill is similar in kind to appropriations in an annual budget act. Observations that have been made in connection with the enactment of a budget bill are appropriate here. "[T]he annual budget bill is particularly susceptible to abuse of [the single subject] rule. 'History tells us that the general appropriation bill presents a special temptation for the attachment of riders. It is a necessary and often popular bill which is certain of passage. If a rider can be attached to it, the rider can be adopted on the merits of the general appropriation bill without having to depend on its own merits for adoption.' [Citation.]" (*Planned Parenthood Affiliates v. Swoap*, *supra.*, 173 Cal.App.3d at p. 1198.) Therefore, the annual budget bill must only concern the subject of appropriations to support the annual budget and may not constitutionally be used to substantively amend or change existing statutory law. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 394 [211 Cal.Rptr. 758, 696 P.2d 150].) We see no reason to apply a less stringent standard to a special appropriations bill. Because the language in chapter 1090 prohibiting the Board from processing claims does not reasonably relate to the bill's stated purpose, it is invalid.

(16)The budget control language in chapter 1090 is also invalid as a retroactive disclaimer of County's right to reimbursement for debts incurred in prior years. This legislative technique was condemned in *County of Sacramento v. Loeb*, *supra.*, 160 Cal.App.3d at p. 446. There, the Legislature had enacted a Government Code section which prohibited using appropriations for any purpose which had been denied by any formal action of the Legislature. The State attempted to use this code section to uphold a special appropriations bill which had deleted County's Board-approved claims for costs which were incurred prior to the enactment of the code section. The court held that the code section did not apply retroactively to defeat County's claims: "A retroactive statute is one which relates back to a previous transaction and gives that transaction a legal effect different from that which it had under the law when it occurred ... 'Absent some clear policy requiring the contrary, statutes modifying liability in civil cases are not to be construed retroactively.'" (*Id.* at p. 459, quoting *Robinson v. Pediatric Affiliates Medical Group, Inc.* (1979) 98 Cal.App.3d 907, 912 [159 Cal.Rptr. 791].) Similarly, the control language in

chapter 1090 does not apply retroactively to County's prior, Board-approved claims. ***546**

(17)Finally, the control language in section 28.40 of the 1981 Budget Act and section 26.00 [16] of the 1983 and 1984 Budget Acts does not work to defeat County's claims. (Stats. 1981, ch. 99, § 28.40, p. 606; Stats. 1983, ch. 324, § 26.00, p. 1504; Stats. 1984, ch. 258, § 26.00.) This section is comprised of both substantive and procedural provisions. We are concerned primarily with those portions that purport to exonerate State from its constitutionally and statutorily imposed obligation to reimburse County's state-mandated costs.

16 Each of these sections contains the following language: "No funds appropriated by this act shall be encumbered for the purpose of funding any increased state costs or local governmental costs, or both such costs, arising from the issuance of an executive order as defined in section 2209 of the Revenue and Taxation Code or subject to the provisions of section 2231 of the Revenue and Taxation Code, unless (a) such funds to be encumbered are appropriated for such purpose, or (b) notification in writing of the necessity of the encumbrance of funds available to the state agency, department, board, bureau, office, or commission is given by the Department of Finance, at least 30 days before such encumbrance is made, to the chairperson of the committee in each house which considers appropriations and the Chairperson of the Joint Legislative Budget Committee, or such lesser time as the chairperson of the committee, or his or her designee, determines."

The writ of mandate directed compliance with the procedural provisions of these sections and is not a point of dispute on appeal. Subsection (a) affords the Legislature one last opportunity to appropriate funds which are to be encumbered for the purpose of paying state-mandated costs, an invitation repeatedly rejected. Subsection (b) directs that the Department of Finance notify the chairpersons of the appropriate committees in each house and chairperson of the Joint Legislative Budget Committee of the need to encumber funds. Presumably, the objective of this procedure is to give the Legislature another opportunity to amend or repeal substantive legislation requiring local agencies to incur state-mandated costs. Again, the Legislature declined to act. Legislative action pursuant to subsection (b) could arguably ameliorate the plight of local agencies prospectively, but would be of no practical assistance to a local agency creditor seeking reimbursement for costs already incurred.

The first portion of each section, however, imposes a budgetary restriction on encumbering appropriated funds to reimburse for state-mandated costs arising out of compliance with the executive orders, absent a specific appropriation pursuant to subparagraph (b). For the reasons stated above, this substantive language is invalid under the single subject rule. It attempts to amend existing statutory law and is unrelated to the Budget Acts' main purpose of appropriating funds to support the annual budget. (*Association for Retarded Citizens v. Department of Developmental Services*, *supra.*, 38 Cal.3d at p. 394.) Now unfettered by invalid restrictions, the appropriations involved in this case are reasonably available for reimbursement. ***547**

C. *The Legislature's Plenary Power to Regulate Worker Safety Does Not Affect the Right to Reimbursement*

(18)State contends that article XIV, section 4 of the California Constitution vests the Legislature with unlimited plenary power to create and enforce a complete workers' compensation system. It postulates that the Legislature may determine that the interest in worker safety and health is furthered by requiring local agencies to bear the costs of safety devices. This non sequitur is advanced without citation of authority.

Article XIV, section 4 concerns the power to enact workers' compensation statutes and regulations. It does not focus on the issue of reimbursement for state-mandated costs, which is covered by Revenue and Taxation Code section 2207 and former section 2231, and article XIII B, section 6. Since these latter provisions do not effect a pro tanto repeal of the Legislature's plenary power over workers' compensation law (see *County of Los Angeles v. State of California*, *supra.*, 43 Cal.3d 46), they do not conflict with article XIV, section 4.

Moreover, even though the reimbursement issue has come before the Legislature repeatedly since 1972, no law has been enacted to exempt compliance with workers' compensation executive orders from the mandatory reimbursement provisions of Revenue and Taxation Code section 2207 and former section 2231. Likewise, article XIII B, section 6 does not provide an exception to the obligation to reimburse local agencies for compliance with these safety orders.

D. *Pre-1980 Claims Are Reimbursable Under Article XIII B, Section 6, Effective July 1, 1980*

(19)State further argues that to the extent County's claims for fiscal years 1978-1979 and 1979-1980 are predicated on the subvention provisions of article XIII B, section 6, they fall within a "window period" of nonreimbursement. This assertion emanates from section 6, subdivision (c), which states that the Legislature "[m]ay, but need not," provide reimbursement for mandates enacted before January 1, 1975. State reasons that because the constitutional amendment did not become effective until July 1, 1980, claims for costs incurred between January 1, 1975 and June 30, 1980, need not be reimbursed.

This notion was rejected in *City of Sacramento v. State of California*, *supra.*, 156 Cal.App.3d at p. 182 on behalf of local agencies seeking reimbursement of unemployment insurance costs mandated by a 1978 statute. Basing its decision on well-settled principles of constitutional interpretation ***548** and upon a prior published opinion of the Attorney General, the court interpreted section 6, subdivision (c) as follows: "[T]he Legislature *may* reimburse mandates enacted prior to January 1, 1975, and *must* reimburse mandates passed after that date, but does not have to begin such reimbursement until the effective date of article XIII B (July 1, 1980)." (*Id.* at p. 191, italics in original.) In other words, the amendment operates on "window period" mandates even though the reimbursement process may not actually commence until later.

We agree with this reasoning and find costs incurred by County under the 1978 executive orders subject to reimbursement under the Constitution.

E. *Claims Under Revenue and Taxation Code Section 2207 and Former Section 2231 Are Not Time-barred*

(20)State collaterally asserts that to the extent County bases its claims on Revenue and Taxation Code section 2207 and former section 2231, they are barred by Code of Civil Procedure sections 335 and 338, subdivision 1. This omnibus challenge to the order directing payment has no merit.

Code of Civil Procedure section 335 is a general introductory section to the statute of limitations for all matters except recovery of real property. Code of Civil Procedure section 338, subdivision 1 requires "[a]n action upon a liability created by statute" to be commenced within three years.

A claimant does not exhaust its administrative remedies and cannot come under the court's jurisdiction until the legislative process is complete. (*County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 77 [222 Cal.Rptr. 750].) Here, County pursued its remedy before the Board and prevailed. Thereafter, as required by law, appropriate legislation was introduced. Both the Board hearings and the subsequent efforts to secure legislative appropriations were part of the legislative process. (Former Rev. & Tax. Code, § 2255, subd. (a).) It was not until the legislation was enacted sans appropriations on September 30, 1981 (S.B. 1261) and February 12, 1982 (A.B. 171) that it became unmistakably clear that this process had ended and State had breached its duty to reimburse. At these respective moments of breach, County's right of action in traditional mandamus accrued. County's petition was filed on September 21, 1984, within the three-year statutory period. [17] (*Lerner v. Los Angeles City Board of Education*, *supra.*, 59 Cal.2d at p. 398.) ***549**

17 Technically, Statute has waived the statute of limitations defense because it was not raised in its answer. (*Ventura County Employees' Retirement Association v. Pope* (1978) 87 Cal.App.3d 938, 956 [151 Cal.Rptr. 695].)

F. *Government Code Section 17612's Remedy for Unfunded Mandates Does Not Supplant the Court's Order*

State continues its general attack on the order directing payment by arguing that the Legislature has "defined" the remedy available to a local agency if a mandate is unfunded. That remedy is found in Government Code section 17612, subdivision (b) and reads: "If the Legislature deletes from a local government claims bill funding for a mandate, the local agency ... *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." (Italics added.) (See also former Rev. & Tax. Code, § 2255, subd. (c), eff. Oct. 1, 1982.)

State hints that this procedure is the only remedy available to a local agency if funding is not provided. At oral argument, State admitted that this declaration of enforceability and injunction against enforcement would be prospective only. This remedy would provide no relief to local agencies which have complied with the executive orders.

We conclude that Government Code section 17612, subdivision (b) is inapplicable here because it did not become operative until January 1, 1985. It was not in place when the

Board rendered its decision on November 20, 1979; when funding was deleted from S.B. 1261 (Sept. 30, 1981) and A.B. 171 (Feb. 12, 1982); or when this litigation commenced on September 21, 1984. (21)A party is not required to exhaust a remedy that was not in existence at the time the action was filed. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 912, fn. 9 [141 Cal.Rptr. 133, 569 P.2d 727].) To abide by this post facto legislation now would condone legislative interference in a specific controversy already assigned to the judicial branch for resolution. (*Serrano v. Priest*, *supra.*, 131 Cal.App.3d at p. 201.)

Also, this remedy is purely a discretionary course of action. By using the permissive word "may," the Legislature did not intend to override article XIII B, section 6 and Revenue and Taxation Code section 2207 and former section 2231. These constitutional and statutory imprimaturs each impose upon the State an obligation to reimburse for state-mandated costs. Once that determination is finally made, the State is under a clear and present ministerial duty to reimburse. In the absence of compliance, traditional mandamus lies. (Code Civ. Proc., § 1085.) [18] ***550**

18 We leave undecided the question of whether this type of legislation could ever be held to override California Constitution, article XIII B, section 6. The Constitution of the State is supreme. Any statute in conflict therewith is invalid. (*County of Los Angeles v. Payne*, *supra.*, 8 Cal.2d at p. 574.) Similarly, former Revenue and Taxation Code section 2255, subdivision (c) cannot abrogate the constitutional directive to reimburse.

G. *The Court's Order Properly Allows County the Right of Offset*

(22a)As the first in a series of objections to portions of the judgment which assist in the reimbursement process, State argues that the court has improperly authorized County to satisfy its claims by offsetting fines and forfeitures due to State. (Fn. 7, ¶ 5, *ante.*) The fines and forfeitures are those found in Penal Code sections 1463.02, 1463.03, 1463.5a and 1464; Government Code sections 13967, 26822.3 and 72056; Fish and Game Code section 13100; Health and Safety Code section 11502; and Vehicle Code sections 1660.7, 42004 and 41103.5. [19]

19 At oral argument, County conceded that the order authorizing offset of Fish and Game Code section 13100 fines and forfeitures is inappropriate. These collected funds must be spent exclusively for protection, conservation, propagation or preservation of fish, game, mollusks, or crustaceans, and for administration and enforcement of laws relating thereto, or for any such purpose. (Cal. Const., art. XVI, § 9; 20 Ops. Cal. Atty. Gen. 110 (1952).)

Broadly speaking, these statutes require County to periodically transfer all or part of the fines and forfeitures collected by it for specified law violations to the State Treasury. They are to be held there "to the credit" of various state agencies, or for payment into specific funds. State contends that since these statutes require mandatory, regular transfers and do not expressly permit diversion for other purposes, the court had no power to allow County to offset. State cites no authority for this contention.

(23)The right to offset is a long-established principle of equity. Either party to a transaction involving mutual debits and credits can strike a balance, holding himself owing or entitled only to the net difference. (*Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 362 [113 Cal.Rptr. 449, 521 P.2d 441, 65 A.L.R.3d 1266].) Although this doctrine exists independent of statute, its governing principle has been partially codified (Code Civ. Proc., § 431.70) (limited to cross-demands for money).

The doctrine has been applied in favor of a local agency against the State. In *County of Sacramento v. Lackner* (1979) 97 Cal.App.3d 576[159 Cal.Rptr.1], for example, the court of appeal upheld a trial court's decision to grant a writ of mandate that ordered funds awarded the County under a favorable judgment to be offset against its current liabilities to the State under the Medi-Cal program. The court stated that such an order does not interfere with the "Legislature's control over the 'submission, approval and enforcement of budgets....'" (*Id.* at p. 592, quoting Cal. Const., art. IV, § 12, subd. (e).)

(22b)The order herein likewise does not impinge upon the Legislature's exclusive power to appropriate funds or control budget matters. The identified ***551** fines and forfeitures are collected by the County for statutory law violations. Some of these funds remain with the County, while others are transferred to the State. State's portions are uncertain as to amount and date of transfer. State does not come into actual possession of these funds until they are transferred. State's holding of these funds "to the credit" of a particular agency, or for payment to a specific fund, does not commence until their

receipt. Until that time, they are unencumbered, unrestricted and subject to offset.

H. *State's Use of its Statutory Offset Authority Was Properly Enjoined*

(24)State further contends that the trial court exceeded its jurisdiction by enjoining the exercise of State's statutory offset authority until County is fully reimbursed. (Fn. 7, ¶ 11, *ante*.) [20] This order complemented that portion of the order discussed, *infra.*, which allowed County to temporarily offset fines and forfeitures as an aid in the reimbursement process.

20 Government Code section 12419.5 provides: "The Controller may, in his discretion, offset any amount due a state agency from a person or entity, against any amount owing such person or entity by any state agency. The Controller may deduct from the claim, and draw his warrants for the amounts offset in favor of the respective state agencies to which due, and, for any balance, in favor of the claimant.... The amount due any person or entity from the state or any agency thereof is the net amount otherwise owing such person or entity after any offset as in this section provided." (See also *Tyler v. State of California* (1982) 134 Cal.App.3d 973, 975-976 [185 Cal.Rptr. 49].)

State correctly observes that it has not unlawfully used its offset authority during the course of this dispute. However, State has not needed to do so because it has adopted other means of avoiding payment on County's claims. In view of State's manifest reluctance to reimburse, and its otherwise unencumbered statutory right of offset, the trial court was well within its authority to prevent this method of frustrating County's collection efforts from occurring. (See *County of Los Angeles v. State of California* (1984) 153 Cal.App.3d 568 [200 Cal.Rptr. 394].)

I. *The Injunction Against Reversion or Dissipation of Undisbursed Appropriations Is Proper*

(25)State continues that the order (fn. 7, ¶ 4, *ante*) enjoining it from directly or indirectly reverting the reimbursement award sum from the general fund line item accounts, and from otherwise dissipating that sum in a manner that would make it unavailable to satisfy this court's judgment, violates Government Code section 16304.1. [21] This section reverts undisbursed ***552** balances in any appropriation to the fund from which the appropriation was made. No authority is cited for State's proposition. To the contrary, *County of Sacramento v. Loeb*, *supra.*, 160 Cal.App.3d at pp. 456-457 expressly confirms this type of ancillary remedy as a legitimate exercise of the court's authority to assist in collecting on an adjudicated debt, the payment of which has been delayed all too long.

21 Government Code section 16304.1 provides: "Disbursements in liquidation of encumbrances may be made before or during the two years following the last day an appropriation is available for encumbrance.... Whenever, during [such two-year period], the Director of Finance determines that the project for which the appropriation was made is completed and that a portion of the appropriation is not necessary for disbursements, such portion shall, upon order of the Director of Finance, revert to and become a part of the fund from which the appropriation was made. Upon the expiration of two years...following the last day of the period of its availability, the undisbursed balance in any appropriation shall revert to and become a part of the fund from which the appropriation was made...."

That portion of the order restraining reversion is particularly innocuous because it only affects undisbursed balances in an appropriation. At the time of reversion, it is crystal clear that these remaining funds are unneeded for the primary purpose for which appropriated; otherwise, they would not exist. Moreover, that portion of the order restraining dissipation of the reimbursement award sum in a manner that would make it unavailable to satisfy a court's judgment is similarly a proper exercise of the court's authority. By not reimbursing County for the state-mandated costs, State would be contravening its constitutional and statutory obligations to subvent. To the extent it is not reimbursed, County would be compelled, contrary to law, to bear the cost of complying with a state-imposed obligation.

J. *The Auditor Controller and the Specified Funds Are Not Indispensable Parties*

(26, 27)State next contends that the Auditor Controller of Los Angeles County and the "specified" fines and forfeitures County was allowed to offset are indispensable parties. Failure to join them in the action or to serve them with process purportedly renders the trial court's order void as in excess of its jurisdiction. [22] State cites only the general statutory

definition of an indispensable party (Code Civ. Proc., § 389) to support this assertion.

22 Code of Civil Procedure section 389, subdivision (a) provides: "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party."

The Auditor Controller is an officer of the County and is subject to the ***553** direction and control of the County board of supervisors. (Gov. Code, § 24000, subds. (d), (e), 26880; L.A. County Code, § 2.10.010.) He is indirectly represented in these proceedings because his principal, the County, is the party litigant. Additionally, he claims no personal interest in the fines and forfeitures and his pro forma absence in no way impedes complete relief.

The funds created by the collected fines and forfeitures also are not indispensable parties. This is not an in rem proceeding, and the ownership of a particular stake is not in dispute. Rather, this is an action to compel a ministerial obligation imposed by law. Complete relief may be afforded without including the specified funds as a party.

K. *County is Entitled to Interest*

(28)State insists that an award of interest to County unfairly penalizes State for not paying claims which it was prohibited by law from paying under Statutes 1981, chapter 1090, section 3. This argument is unavailing.

Civil Code section 3287, subdivision (a) allows interest to any person "entitled to recover damages certain, or capable of being made certain by calculation...." Interest begins on the day that the right to recover vests in the claimant. By its own terms, this section applies to any judgment debtor, "including the state...or any political subdivision of the state."

The judgment orders interest at the legal rate from September 30, 1981, for reimbursement funds originally contained in S.B. 1261, and from February 12, 1982, for the funds originally contained in A.B. 171. These are the respective dates that the bills were enacted without appropriations. As we concluded earlier, County's cause of action did not arise and its right to recover did not vest until this legislative process was complete. County offers no authority to suggest that any other vesting date is appropriate.

Furthermore, State cannot avoid its obligation to pay interest by relying on the invalid budget control language in Statutes 1981, chapter 1090, section 3. "An invalid statute voluntarily enacted and promulgated by the state is not a defense to its obligation to pay interest under Civil Code section 3287, subdivision (a)." (*Olson v. Cory* (1983) 35 Cal.3d 390, 404 [197 Cal.Rptr. 843, 673 P.2d 720].)

Appeal in Case No. 2 Civil B011941

(Rincon et al. Case)

The procedural history and legal issues raised in the *Rincon et al*. appeal are essentially similar to those discussed in the County of Los Angeles matter. ***554**

County, although not a party to this underlying trial court proceeding, filed a test claim with the Board. All parties agree that County represented the interests of the named respondents here.

The Board action resulted in a finding of state-mandated costs. It further found that Rincon et al. were entitled to reimbursement in the amount of $39,432. After the Legislature and the Governor, respectively, deleted the funding from the two appropriations bills, S.B. 1261 and A.B. 171, Rincon et al. filed a petition for writ of mandate and declaratory relief. This action was consolidated for hearing in the trial court with the action in B011942 (County of Los Angeles matter). The within judgment was also signed, filed and entered on February 6, 1985. The reimbursement order was directed against the 1984-1985 budget appropriations. State appeals from that judgment.

The court here included a judicial determination that the Board, or its successors, hear and approve the claims of certain other respondents for costs incurred in connection with the state-mandated program. (Fn. 7, ¶ 9, *ante*.) This special directive was necessary because the claims of these respondents (petitioners below) have not yet been

determined.[23] Since we have ruled that State is barred by the doctrines of waiver and administrative collateral estoppel from raising the state mandate issue, the validity of these claims becomes a question of law susceptible to but one conclusion, and mandamus properly lies. (*County of Sacramento v. Loeb*, *supra.*, 160 Cal.App.3d at p. 453.) This portion of the order also underscores, for the Board's edification, the determination that the statutory restriction on the Board authority to proceed is invalid.[24]

23 Responding to the budget control language directing it to refuse to process these claims, the Board declined to hear these matters.

24 Because certain claims have not yet been processed, we assume that the issue of the amount of reimbursement may still be at large. Our record is not clear on this point.

Once again, our determinations and conclusions in the County of Los Angeles matter are equally applicable here.

Appeal in Case No. 2 Civil B006078

(Carmel Valley et al.)

Again, the procedural history and legal issues raised in this appeal are essentially similar to those discussed in the County of Los Angeles matter.

County filed a test claim with the Board. All parties agree that the County represented the interests of the named respondents here. ***555**

On December 17, 1980, the Board found that a state mandate existed and that specific amounts of reimbursement were due several respondents totalling $159,663.80. Following the refusal of the Legislature to appropriate funds for reimbursement, Carmel Valley et al. filed a petition for writ of mandate and declaratory relief on January 3, 1983. Judgment was entered on May 23, 1984. The reimbursement order was directed against 1983-1984 budget appropriations.

The judgment differs from the other two because it does not decree a specific reimbursement amount. The trial court determined that even though the Board had approved the claims, the State was not precluded from contesting that determination. The court's reasons were that the State, in its answer, had denied that the money claimed was actually spent, and that Board approval had not been implemented by subsequent legislation. The court concluded that the reimbursement process, of which the Board action was an intrinsic part, was "aborted."

We disagree with this portion of the court's analysis. The moment S.B. 1261 and A.B. 171 were enacted into law without appropriations, Carmel Valley et al. had exhausted their administrative remedies and were entitled to seek a writ of mandate. At the time of trial, State was barred by the doctrines of waiver and administrative collateral estoppel from contesting the state mandate issue or the amount of reimbursement. The trial court therefore should have rendered a judgment for the amount of reimbursement. Having failed to do so, this fact-finding responsibility falls upon this court. Although we ordinarily are not equipped to handle this function, the writ of mandate in this case identifies the amount of the approved claims as $159,663.80. We accordingly will amend the judgment to reflect that amount.

The trial court also predicated its judgment for Carmel Valley et al. solely on the basis of Revenue and Taxation Code section 2207 and former section 2231. In doing so, the court did not have the benefit of the decision in *City of Sacramento v. State of California*, *supra.*, 156 Cal.App.3d at p. 182.[25] That case held that mandates passed after January 1, 1975, must be reimbursed pursuant to article XIII B, section 6 of the California Constitution, but that reimbursement need not commence until July 1, 1980. In light of this rule, we conclude that the trial court's decision ordering reimbursement is also supported by article XIII B, section 6. ***556**

25 The decision in *City of Sacramento*, *supra.*, was filed just one day before the trial court signed the written order in this case. The Revenue and Taxation Code sections on which the court relied were operational before the costs claimed in this case were incurred.

State raises another point specific to this particular appeal. In its answer to the writ petition, State admitted that the local agency expenditures were state mandated. Consequently, the issue was not contested at the trial court level. However, State vigorously contends here that it is not bound by its trial court admissions because the state mandate issue is purely a question of law.

(29)State is correct in contending that an appellate court is not limited by the interpretation of statutes given by the trial court. (*City of Merced v. State of California*, *supra.*, 153

Cal.App.3d at p. 781.) However, State's victory on this point is Pyrrhic. Regardless of how the issue is characterized, State is precluded from contesting the Board findings on appeal because of the independent application of the doctrines of waiver and administrative collateral estoppel. These doctrines would also have applied at the trial court level if State's answer had raised the issue of state mandate in the first instance.

We also reject State's argument, advanced for the first time on appeal, that the executive orders of 1978 initially implement legislation enacted prior to January 1, 1975, and that state reimbursement is therefore discretionary. (Cal. Const., art. XIII B, § 6, subd. (c).) Again, State is barred by the doctrines of waiver and administrative collateral estoppel from arguing that costs incurred under the executive orders are not subject to reimbursement.

State continues that the *Carmel Valley* judgment against the Department of Industrial Relations is erroneous. Since the department was never made a party in the suit, nor served with process, the resulting judgment reflects a denial of due process and is in excess of the court's jurisdiction. (See Code Civ. Proc., § 389; fn. 22, *ante*.)

This assertion is but a variant of the same argument advanced in the County of Los Angeles case, *supra.*, which we rejected as meritless. The department is part of the State of California. (Lab. Code, § 50.) State extensively argued the department's position and even offered into evidence a declaration from the chief of fiscal accounting of the department. As stated earlier, agents of the same government are in privity with each other. (*People v. Sims*, *supra.*, 32 Cal.3d at p. 487.)

Ross v. Superior Court, *supra.*, 19 Cal.3d at p. 899 demonstrates how, through the notion of privity, a government agent can be held in contempt for knowingly violating a court order issued against another agent of the same government. There, a court in an earlier proceeding had decided that defendant Department of Health and Welfare must pay unlawfully withheld welfare benefits to qualified recipients. The County Board of Supervisors, ***557** who were not parties to this action, knew about the court's order but refused to comply. The Supreme Court affirmed a trial court decision holding the Board in contempt for violating the order directing payment. The court reasoned that, as an agent of the Department of Health and Welfare, the Board did not collectively or individually need to be named as a party in order to be bound by a court order of which they had actual knowledge.

The determinations and conclusions in the County of Los Angeles case are likewise applicable here.

Modification of Judgments in All Three Appeals

The trial court judgments ordering reimbursement from specific account appropriations were entered many months ago. We will affirm these judgments and thereby validate the trial courts' determination that funds already appropriated for the State Department of Industrial Relations were reasonably available for payment at the time of the courts' orders.

Due to the passage of time, we requested State at oral argument to confirm whether the appropriations designated in the respective judgments are still available for encumbrance. State's counsel responded by rearguing that the weight of the evidence did not support the trial courts' findings that specific funds were reasonably available for reimbursement. Counsel further hinted that the funds may not actually be available.

We hope that counsel for the State is mistaken. But in order to emphasize our strong and unequivocal determination that the local agency petitioners be promptly reimbursed, we will take judicial notice of the enactment of the 1985-1986 Budget Act (Stats. 1985, ch. 111) and the 1986-1987 Budget Act (Stats. 1986, ch. 186). (*Serrano v. Priest*, *supra.*, 131 Cal.App.3d at p. 197.) Both acts appropriate money for the State Department of Industrial Relations and fund the identical account numbers referred to in the trial courts' judgments. They are:

Account Numbers	1985-1986 Budget Act	1986-1987 Budget Act
8350-001-001	$94,673,000	$106,153,000
8350-001-452	2,295,000	2,514,000
8350-001-453	2,859,000	2,935,000
8350-001-890	16,753,000	17,864,000

(30)An appellate court is empowered to add a directive that the trial court order be modified to include charging orders against funds appropriated by subsequent budget acts. (*Serrano v. Priest*, *supra.*, 131 Cal.App.3d at pp. 198, 201.) We do so here with respect to all three judgments. ***558**

Disposition

2d Civ. B011942 (*County of Los Angeles Case*)

The judgment is modified as follows:

(1) The following sentence is added to paragraph 2: "If the hereinabove described funds are not available for reimbursement, the warrants shall be drawn against funds in the same account numbers enacted in the 1985-86 and 1986-87 Budget Acts."

(2) The words "Fish and Game Code Section 13100" are deleted from paragraph 5.

(3) The peremptory writ of mandate is modified to command the Controller to draw warrants, if necessary, against the same account numbers identified in the judgment as appropriated by the 1985-1986 and 1986-1987 Budget Acts.

As modified, the judgment is affirmed. Respondents to recover costs on appeal.

***2d Civ. B011941* (*Rincon et al. Case*)**

The judgment is modified as follows:

(1) The following sentence is added to paragraph 2: "If the hereinabove described funds are not available for reimbursement, the warrants shall be drawn against funds in the same account numbers enacted in the 1985-86 and 1986-87 Budget Acts."

(2) The peremptory writ of mandate is modified to command the Controller to draw warrants, if necessary, against the same account numbers identified in the judgment as appropriated by the 1985-1986 and 1986-1987 Budget Acts.

As modified, the judgment is affirmed. Respondents to recover costs on appeal.

***2d Civ. B006078* (*Carmel Valley et al. Case*)**

The judgment is modified as follows: ***559**

(1) The following sentences are added to paragraph 2: "The reimbursement amounts total $159,663.80. If the hereinabove described funds are not available for reimbursement, the warrants shall be drawn against funds in the same account numbers enacted in the 1985-86 and 1986-87 Budget Acts."

(2) The peremptory writ of mandate is modified to command the Controller to draw warrants, if necessary, against the same account numbers identified in the judgment as appropriated by the 1985-1986 and 1986-1987 Budget Acts.

As modified, the judgment is affirmed. Respondents to recover costs on appeal.

Ashby, Acting P. J., and Hastings, J., concurred.

A petition for a rehearing was denied March 17, 1987, and appellant's petition for review by the Supreme Court was denied May 14, 1987. Eagleson, J., did not participate therein. ***560**

50 Cal.3d 51, 785 P.2d 522, 266 Cal.Rptr. 139
Supreme Court of California

CITY OF SACRAMENTO et al., Plaintiffs and Appellants,
v.
THE STATE OF CALIFORNIA et al., Defendants and Respondents

No. S006188.
Jan 29, 1990.

SUMMARY

A city and a county filed claims with the State Board of Control seeking subvention of the costs imposed on them by Stats. 1978, ch. 2, which extended mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations. The board denied the claims, ruling that Stats. 1978, ch. 2, did not enact a state-mandated program for which reimbursement was required under Cal. Const., art. XIII B. On mandamus the trial court overruled the board and found the cost reimbursable, and the Court of Appeal affirmed. On remand, the board determined the amounts due on the claims originally submitted; however, the Legislature failed to appropriate the necessary funds for disbursement. The city then commenced a class action against the state on behalf of all local governments in the state. The complaint sought injunctive and declaratory relief barring enforcement of Stats. 1978, ch. 2, in the absence of state subvention; a writ of mandate directing that past, current, and/or future subvention funds be appropriated and disbursed, and/or that the Employment Development Department pay local agencies' past, current, and future unemployment insurance contributions from its own budget; and damages for past failures to reimburse. The trial court granted summary judgment for the state. (Superior Court of Sacramento County, No. 331607, Darrel W. Lewis, Judge.) The Court of Appeal, Third Dist., No. C002265, reversed.

The Supreme Court reversed the judgment of the Court of Appeal. The court held that the trial court did not err in granting summary judgment for the state on the ground that the local costs of providing unemployment insurance coverage were not subject to subvention under Cal. Const., art. XIII B, or parallel statutes (Rev. & Tax. Code, former §§ 2207, 2231, subd. (a); Gov. Code, §§ 17514, 17561, subd. (a)). The state had not compelled provision of new or increased "service to the public" at the local level, nor had it imposed a state policy "uniquely" on local governments. However, the court held, Stats. 1978, ch. 2, implemented a federal "mandate" within the meaning of Cal. Const., art. XIII B, and prior statutes restraining local ***52** taxation; thus, subject to superseding constitutional ceilings on taxation by state and local governments, an agency governed by Stats. 1978, ch. 2, may tax and spend as necessary to meet the expenses required to comply with that legislation. (Opinion by Eagleson, J., with Lucas, C. J., Mosk, Broussard, Panelli and Kennard, JJ., concurring. Separate concurring and dissenting opinion by Kaufman, J., concurring in the judgment.)

HEADNOTES

Classified to California Digest of Official Reports

(1)
Property Taxes § 7.5--Constitutional Provisions; Statutes and Ordinances--Real Property Tax Limitation--Exemptions for Federally Mandated Costs.
To the extent that a "federally mandated" cost is exempt from prior statutory limits on local taxation, Cal. Const., art. XIII A, restricting the assessment and taxing powers of state and local governments, eliminates the exemption insofar as it would allow levies in excess of the constitutional ceiling.

(2)
State of California § 7--Actions--Reimbursement to Local Governments for Unemployment Insurance Costs--Exhaustion of Remedies.
A class action by a city on behalf of all local governments in the state, against the state, in which it was alleged that Stats. 1978, ch. 2 (extending mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations), mandated a new program or higher level of service on local agencies for which reimbursement by the state of local compliance costs was required under Cal. Const., art. XIII B, was not barred by any failure of plaintiffs to exhaust their remedies. The city and a county had filed timely claims for reimbursement of expenses incurred, to comply with Stats. 1978, ch. 2. When the State Board of Control initially denied the claims, the city and the county pursued judicial remedies, culminating in a Court of Appeal opinion concluding that reimbursement was required. The board then upheld the claims. Insofar as the Legislature thereafter declined to appropriate the necessary funds for

disbursement, the city and the county were authorized to bring an enforcement action.

(3a, 3b)
State of California § 7--Actions--Reimbursement to Local Governments for Unemployment Insurance Costs--Remedies Available.
Cal. Const., art. XIII, § 32, precluding any suit to enjoin or impede collection of a tax, did not bar a class action brought by a city ***53** on behalf of all local governments in the state, against the state, in which it was alleged that Stats. 1978, ch. 2 (extending mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations), mandated a new program or higher level of service on local agencies for which reimbursement by the state of local compliance costs was required under Cal. Const., art. XIII B. The state contended that the only remedy open to the city was to pay its unemployment "taxes" and then seek a "refund" under the "exclusive" procedures set forth in the Unemployment Insurance Code. However, the city was not challenging, directly or indirectly, the validity or application of the unemployment insurance law as such, or the propriety of any "tax" assessed thereunder; rather, it claimed that all its costs of affording unemployment compensation to its employees were subject to a statutory and constitutional subvention that the state refused to make. For the same reasons, the city's claim for reimbursement for past expenses was not barred.

(4)
Constitutional Law § 40--Distribution of Governmental Powers--Between Branches of Government--Judicial Power.
Under the separation of powers doctrine, the Legislature cannot be compelled to appropriate or authorize the disbursement of specific funds.

[See **Am.Jur.2d,** Constitutional Law, § 316.]

(5a, 5b, 5c)
Judgments § 81--Res Judicata--Collateral Estoppel-- Public-interest Exception--Reimbursement to Local Governments for Unemployment Insurance Costs.
In a class action by a city on behalf of all local governments in the state, against the state, in which it was alleged that Stats. 1978, ch. 2 (extending mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations), mandated a new program or higher level of service on local agencies for which reimbursement by the state of local compliance costs was required under Cal. Const., art. XIII B, the state was not collaterally estopped from litigating the reimbursement issue. The city and a county had previously brought an action against the state, culminating in a Court of Appeal opinion concluding that reimbursement was required. The Legislature then declined to appropriate the necessary funds for disbursement. Even if the formal prerequisites for collateral estoppel were present, the public-interest exception to that doctrine governed, since strict application of the doctrine would foreclose any reexamination of the earlier holding, and the consequences of any error transcended those that would apply to mere private parties. ***54**

(6)
Judgments § 81--Res Judicata--Collateral Estoppel--Questions of Law.
Generally, collateral estoppel bars a party to a prior action, or one in privity with him, from relitigating issues finally decided against him in the earlier action. However, when the issue is a question of law rather than of fact, the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed.

(7)
State of California § 7--Actions--Reimbursement to Local Governments for Unemployment Insurance Costs--Summary Judgment--Effect of Failure of Moving Party to Challenge Prior Summary Adjudication of Issues.
In a class action by a city, on behalf of all local governments in the state, against the state, in which it was alleged that Stats. 1978, ch. 2 (extending mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations), mandated a new program or higher level of service on local agencies for which reimbursement by the state of local compliance costs was required under Cal. Const., art. XIII B, the trial court did not lack the power to grant summary judgment for the state on the authority of a newly decided California Supreme Court case. The trial court had previously granted the city's motion for summary adjudication of issues, and the state had failed to seek timely mandamus review of that prior, contrary order. However, failure to challenge a summary adjudication order by the discretionary avenue of writ review cannot foreclose a party from asserting subsequent changes in law that render such a pretrial order incorrect.

(8)
Judgments § 68--Res Judicata--Identity of Parties--Class Action--Where Prior Action Involved Individual Claims.
In a class action by a city on behalf of all local governments in the state, against the state, in which it was alleged that Stats. 1978, ch. 2 (extending mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations), mandated a new program or higher level of service on local agencies for which reimbursement by the state of local compliance costs was required under Cal. Const., art. XIII B, res judicata did not preclude examination of an earlier Court of Appeal opinion, in an action by the city and a county, concluding that reimbursement was required. The issues presented in the current action were not limited to the validity of any finally adjudicated individual claims; rather, they encompassed the question of the state's subvention obligations in general under Stats. 1978, ch. 2.

(9a, 9b)
State of California § 11--Fiscal Matters--Reimbursement to Local Governments--State-mandated Programs--Unemployment Insurance ***55** Costs.
In a class action by a city on behalf of all local governments in the state, against the state, in which it was alleged that Stats. 1978, ch. 2 (extending mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations), mandated a new program or higher level of service on local agencies for which reimbursement by the state was required under Cal. Const., art. XIII B, the trial court did not err in granting summary judgment for the state on the ground that the local costs of providing such coverage were not subject to subvention under Cal. Const., art. XIII B, or parallel statutes (Rev. & Tax. Code, former §§ 2207, 2231, subd. (a); Gov. Code, §§ 17514, 17561, subd. (a)). The state had not compelled provision of new or increased "service to the public" at the local level, nor had it imposed a state policy "uniquely" on local governments. The phrase, "To force programs on local governments," in the voters' pamphlet relating to Cal. Const., art. XIII B, § 6, confirmed that the intent underlying that section was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities.

[See **Cal.Jur.3d,** State of California, § 78.]

(10)
State of California § 11--Fiscal Matters--Reimbursement to Local Governments--State-mandated Programs.
The concepts of reimbursable state-mandated costs in Cal. Const., art. XIII B, requiring that the state reimburse local governments for the costs of state-mandated new programs or higher levels of service, and Rev. & Tax. Code, former §§ 2207, 2231, are identical.

(11a, 11b, 11c)
State of California § 11--Fiscal Matters-- Reimbursement to Local Governments--Federally Mandated Programs--Unemployment Insurance Costs.
Stats. 1978, ch. 2, extending mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations, implemented a federal "mandate" within the meaning of Cal. Const., art. XIII B, and prior statutes restricting local taxation; thus, subject to superseding constitutional ceilings on taxation by state and local governments, an agency governed by Stats. 1978, ch. 2, may tax and spend as necessary to meet the expenses required to comply with that legislation. In enacting Stats. 1978, ch. 2, the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses; the alternatives were so far beyond the realm of practical reality that they left the state "without discretion" to depart from federal ***56** standards. (Disapproving, insofar as it is inconsistent with this analysis, the decision in *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 [203 Cal.Rptr. 258].)

(12)
Constitutional Law § 11--Construction of Constitutions--Liberality and Flexibility.
Constitutional enactments must receive a liberal, practical commonsense construction that will meet changed conditions and the growing needs of the people. While a constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words, the literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers.

(13)
State of California § 11--Fiscal Matters--Reimbursement to Local Governments--Federally Mandated Programs.
In determining whether a program is federally mandated, to exempt its cost from a local government's statutory

taxation limit (Rev. & Tax. Code, § 2271), and to exclude any appropriation required to comply with the mandate from the constitutional spending limit of the affected entity (Cal. Const., art. XIII B, § 9, subd. (b)), the result will depend on the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal. The courts and the Commission on State Mandates must respect the governing principle of Cal. Const., art. XIII B, § 9, subd. (b): neither state nor local agencies may escape their spending limits when their participation in federal programs is truly voluntary.

COUNSEL

James P. Jackson, City Attorney, and William P. Carnazzo, Deputy City Attorney, for Plaintiffs and Appellants.

John K. Van de Kamp, Attorney General, N. Eugene Hill, Assistant Attorney General, Paul H. Dobson, Richard M. Frank, Floyd D. Shimomura and Carol Hunter, Deputy Attorneys General, for Defendants and Respondents.

De Witt W. Clinton, County Counsel (Los Angeles), Amanda F. Susskind, Deputy County Counsel, Kitt Berman, Ross & Scott and William D. Ross as Amici Curiae on behalf of Defendants and Respondents. ***57**

EAGLESON, J.

In response to changes in federal law, chapter 2 of the Statutes of 1978 (hereafter chapter 2/78) extended mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations. Here we consider whether, in chapter 2/78, the state "mandate[d] a new program or higher level of service" on the local agencies, and must therefore reimburse local compliance costs under article XIII B of the California Constitution and related statutes.

We conclude that the state is *not* required to reimburse the chapter 2/78 expenses of local governments. The obligations imposed by chapter 2/78 fail to meet the "program" and "service" standards for mandatory subvention we recently set forth in *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46 [233 Cal.Rptr. 38, 729 P.2d 202] (hereafter *County of Los Angeles*). Chapter 2/78 imposes no "unique" obligation on local governments, nor does it require them to provide new or increased governmental services to the public. The Court of Appeal decision, finding the expenses reimbursable, must therefore be reversed.

However, our holding does not leave local agencies powerless to counter the fiscal pressures created by chapter 2/78. Though provisions of the Revenue and Taxation Code limit local property tax levies, and article XIII B itself places spending limits on both state and local governments, "costs mandated by the federal government" are expressly excluded from these ceilings. Chapter 2/78 imposes such "federally mandated" costs, because it was adopted by the state under federal coercion tantamount to compulsion. Hence, subject to overriding limitations on taxation rates (see, e.g., Cal. Const., art. XIII A), both state and local governments may levy and spend for their chapter 2/78 coverage obligations without reduction of the fiscal limits applicable to other needs and services.

I. Facts.

In 1972, and again in 1973, the Legislature enacted comprehensive schemes for local property tax relief. Though frequently amended thereafter, these statutes retained three principal features. First, they placed a limit on the local property tax rate. Second, they required the *state* to reimburse local governments for their costs resulting from state laws "which mandate ... new program[s] or ... increased level[s] of service" at the local level. Finally, they allowed local governments to exceed their property taxation limits to fund certain other nondiscretionary expenses, including "costs mandated by the federal government." (Stats. 1972, ch. 1406, § 14.7, pp. ***58** 2961-2967; Stats. 1973, ch. 358, § 3, pp. 783-790; Rev. & Tax. Code, §§ 2206, 2260 et seq., 2271; former §§ 2164.3, 2165, 2167, 2169, 2207, 2231; Gov. Code, § 17500 et seq.)

Since adoption of the Social Security Act in 1935, federal law has provided powerful incentives to enactment of unemployment insurance protection by the individual states. In current form, the Federal Unemployment Tax Act (hereafter FUTA) (26 U.S.C. § 3301 et seq.) assesses an annual tax upon the gross wages paid by covered private employers nationwide. The tax rate, which has varied over the years, stands at 6.2 percent for calendar year 1990. (26 U.S.C. §§ 3301(1), 3306.) However, employers in a state with a federally "certified" unemployment insurance program may credit their contributions to the state system against up to 90 percent of the federal tax (currently computed at 6 percent for this purpose). (*Id.*, §§ 3302-3304.) A "certified" state program

also qualifies for federal administrative funds. (42 U.S.C. §§ 501-503.)

California enacted its unemployment insurance system "on the eve of the adoption of the Social Security Act" in 1935 (*Steward Machine Co.* v. *Davis* (1937) 301 U.S. 548, 587-588 [81 L.Ed. 1279, 1291-1292, 57 S.Ct. 883, 109 A.L.R. 1293]; see Stats. 1935, ch. 352, § 1 et seq., p. 1226 et seq.) and has sought to maintain federal compliance ever since. Every other state has also adopted an unemployment insurance plan in response to the federal stimulus.

In 1976, Congress enacted Public Law number 94-566 (hereafter Public Law 94-566). Insofar as pertinent here, Public Law 94-566 amended FUTA to require for the first time that a "certified" state plan include coverage of the employees of public agencies. (Pub.L. No. 94-566 (Oct. 20, 1976) § 115(a), 90 Stat. 2670; 26 U.S.C. §§ 3304(a)(6)(A), 3309(a); see 26 U.S.C. § 3306(c)(7).) States which did not alter their unemployment compensation laws accordingly faced loss of the federal tax credit and administrative subsidy.

The Legislature thereafter adopted chapter 2/78 to conform California's system to Public Law 94-566. Among other things, chapter 2/78 effectively requires the state and all local governments, beginning January 1, 1978, to participate in the state unemployment insurance system on behalf of their employees. (Stats. 1978, ch. 2, §§ 12, 24, 31, 36.5, 58-61, pp. 12-14, 16, 18, 24-27; Unemp. Ins. Code, §§ 135, subd. (a), 605, 634.5, 802-804.)

In November 1979, the voters adopted Proposition 4, adding article XIII B to the state Constitution. (1) **(See fn. 1.)** Article XIII B—the so-called "Gann limit"—restricts the amounts state and local governments may ***59** appropriate and spend each year from the "proceeds of taxes." (§§ 1, 3, 8, subds. (a)-(c).) [1] In language similar to that of earlier statutes, article XIII B also requires state reimbursement of resulting local costs whenever, after January 1, 1975, "the Legislature or any state agency mandates a new program or higher level of service on any local government, ..." (§ 6.) Such mandatory state subventions are excluded from the local agency's spending limit, but included within the state's. (§ 8, subds. (a), (b).) Finally, article XIII B excludes from either the state or local spending limit any "[a]ppropriations required for purposes of complying with mandates of the courts *or the federal government* which, *without discretion*, require an expenditure for additional services or which *unavoidably* make the providing of existing services more costly." (§ 9, subd. (b) [hereafter section 9(b)], italics added.)

1 Article XIII B is to be distinguished from article XIII A, which was adopted as Proposition 13 at the June 1978 election. Article XIII A imposes a direct constitutional limit on state and local power to *adopt and levy taxes*. Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend for public purposes. Moreover, to the extent "federally mandated" costs are exempt from prior *statutory* limits on local *taxation* (see *ante*, at pp. 57-58), article XIII A eliminates the exemption insofar as it would allow levies in excess of the constitutional ceiling.
All further section references are to article XIII B of the California Constitution, unless otherwise indicated.

The City of Sacramento (City) and the County of Los Angeles (County) filed claims with the State Board of Control (Board) (see Rev. & Tax. Code, former § 2250 et seq.; see now Gov. Code, § 17550 et seq.) seeking state subvention of the costs imposed on them by chapter 2/78 during 1978 and portions of 1979. The Board denied the claims, ruling that chapter 2/78 was an enactment required by federal law and thus was not a reimbursable state mandate. On mandamus (Code Civ. Proc., § 1094.5; Rev. & Tax. Code, former § 2253.5; see now Gov. Code, § 17559), the Sacramento Superior Court overruled the Board and found the costs reimbursable. The court ordered the Board to determine the amounts of the City's and the County's individual claims, and also to adopt "parameters and guidelines" to be applied in determining "these ... and other claims" arising under chapter 2/78. (Rev. & Tax. Code, former § 2253.2; see now Gov. Code, §§ 17555, 17557.) [2]

2 The claims for reimbursement were originally premised entirely on Revenue and Taxation Code section 2201 et seq. While the City's and the County's mandamus petitions were pending in superior court, article XIII B was adopted. The City and the County amended their petitions to include article XIII B as an additional basis for relief, and the case proceeded accordingly.

In *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 [203 Cal.Rptr. 258] (hereafter *Sacramento I*), the Court of Appeal affirmed. Among other things, the court concluded (pp. 194-199) that chapter 2/78 ***60** imposed

state-mandated costs reimbursable under section 6 of article XIII B, since the potential loss of federal funds and tax credits did not render Public Law 94-566 so coercive as to constitute a "[*mandate*] ... of the *federal* government" under section 9(b). (Italics added.) We denied hearing.

On remand, the Board determined the amounts due on the claims originally submitted by the City and the County. As required by the judgment, the Board also adopted "parameters and guidelines" for reimbursement of chapter 2/78 costs to all affected local agencies. However, during the 1984 session of the Legislature, no bills were introduced for reimbursement of pre-1984 costs, and bills to fund costs in and after 1984 failed passage.

From and after the decision in *Sacramento I*, the City paid "under protest" its quarterly billings from the Employment Development Department (EDD) for unemployment compensation. Each payment included a claim for refund of unemployment taxes pursuant to Unemployment Insurance Code section 1176 et seq. EDD responded to the refund claims by referring the City to its statutory subvention remedies.

Accordingly, in July 1985, the City began returning its quarterly billings unpaid. It thereupon commenced the instant class action in Sacramento Superior Court on behalf of all local governments in the state. Named as defendants were the State of California, the Governor, EDD, the state Controller and Treasurer, and the Legislature. The complaint sought (1) injunctive and declaratory relief barring enforcement of chapter 2/78 in the absence of state subvention; (2) a writ of mandate directing that past, current, and future subvention funds be appropriated and disbursed, and/or that EDD pay local agencies' past, current, and future unemployment-insurance contributions from its own budget; and (3) damages for past failures to reimburse.

Shortly after this suit was filed, the Legislature appropriated some chapter 2/78 funds for fiscal year 1984-1985 (Stats. 1985, ch. 1217, §§ 12, 17, subd. (b), pp. 4148, 4150), and it subsequently authorized limited funds in the 1986 Budget Act (Stats. 1986, ch. 186, § 2.00, p. 1006). On defendants' demurrer, the trial court later dismissed plaintiffs' claims for reimbursement for these post-1984 periods. [3] Thereafter, the trial court certified the suit as a class action and granted plaintiffs' motion for summary adjudication of issues based on *Sacramento I.* ***61**

3 The trial court also sustained the Legislature's demurrer without leave to amend and dismissed the Legislature as a party defendant. The Court of Appeal affirmed the dismissal in a separate proceeding. (See *City of Sacramento v. California State Legislature* (1986) 187 Cal.App.3d 393 [231 Cal.Rptr. 686].)

While the case remained pending at the trial level, we decided *County of Los Angeles*. There we held that article XIII B, and earlier subvention statutes, requires state reimbursement *only* when the state compels local governments to provide new or upgraded "programs that carry out the governmental function of providing *services to the public*, or ..., to implement a state policy, [the state] impose[s] *unique* requirements on local governments [that] do not apply generally to all residents and entities in the state." (43 Cal.3d at p. 56, italics added.)

Defendants in this case thereupon moved for summary judgment, urging that extension of unemployment insurance coverage to public employees satisfied neither reimbursement standard set forth in *County of Los Angeles*. The trial court agreed and awarded summary judgment.

The Court of Appeal reversed on two independent grounds. First, the court ruled that defendants were collaterally estopped by *Sacramento I* to relitigate the reimbursability of chapter 2/78 costs. Second, the court found that chapter 2/78 imposed "unique requirements" on local governments, within the meaning of *County of Los Angeles*, since the legislation was aimed solely at local agencies and subjected them to obligations from which they were previously exempt.

II. Jurisdiction; Plaintiffs' Exhaustion of Remedies.

(2) After we granted review, we asked the parties and amici curiae [4] to brief whether the current suit is jurisdictionally barred by any failure of plaintiffs to exhaust their remedies (see *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 291-295 [109 P.2d 942, 132 A.L.R. 715]), or for any other reason. If so, the summary judgment for defendants against all plaintiffs was proper notwithstanding the merits of the subvention claim. In that event, the judgment of the Court of Appeal must be reversed without consideration of the substantive issues raised by the appeal.

4 Amicus curiae briefs were filed on behalf of plaintiffs by (1) the League of California Cities, the Association of California Water Agencies, and the

Fire District Association of California, and (2) the County of Los Angeles and the County Supervisors Association of California.

However, we find no failure to exhaust which would bar us from reaching the merits. Defendants concede plaintiffs exhausted all administrative remedies provided by the statutes governing subvention of state-mandated costs. The concession appears correct, at least as to the City and the County. These two agencies filed timely claims for reimbursement of expenses incurred to comply with chapter 2/78. When the Board initially denied the claims, the City and the County pursued judicial remedies culminating in ***62** *Sacramento I*. By direction of the judgment in *Sacramento I*, the Board ultimately upheld the City's and County's 1979 claims, determined their amount, and adopted "parameters and guidelines" for statewide reimbursement that were later included in the Board's government-claims report to the Legislature. (Rev. & Tax. Code, former §§ 2253.2, 2255, subd. (a).)

These procedures exhausted the City's and the County's administrative and judicial avenues, short of this suit, to obtain redress on the claims adjudicated in *Sacramento I*. Insofar as the Legislature thereafter declined to appropriate the necessary funds for disbursement by the Controller, the City and the County were authorized to bring an enforcement action. (Rev. & Tax. Code, former § 2255, subd. (c); Gov. Code, § 17612, subd. (b); *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 72 [222 Cal.Rptr. 750]; see *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 548-549 [234 Cal.Rptr. 795].) [5]

(3a) Defendants urge, however, that plaintiffs essentially are seeking resolution of a "tax" question—the validity *vel non* of their unemployment tax contributions—but have failed to satisfy the special procedures applicable to such cases. Defendants insist that because article XIII, section 32, of the California Constitution broadly precludes any suit to enjoin or impede collection of a tax (e.g., *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 838-841 [258 Cal.Rptr. 161, 771 P.2d 1247]; *Western Oil & Gas Assn. v. State Bd. of Equalization* (1987) 44 Cal.3d 208, 213 [242 Cal.Rptr. 334, 745 P.2d 1360]; *Pacific Gas & Electric Co. v. State Bd. of Equalization* (1980) 27 Cal.3d 277, 279-284 [165 Cal.Rptr. 122, 611 P.2d 463]), plaintiffs' claims for declaratory and injunctive relief are barred.

The only remedy constitutionally open to plaintiffs, defendants assert, is to pay their unemployment "taxes" and then seek a "refund" under the "exclusive" procedures set forth in the Unemployment Insurance Code. (Unemp. Ins. Code, §§ 1176 et seq., 1241, subd. (a).) Insofar as plaintiffs' complaint *does* seek reimbursement for past contributions, defendants suggest, plaintiffs have not correctly pursued the Unemployment Insurance Code procedures.

We question, but do not decide, whether a *public entity's* contributions to the state unemployment insurance system can ever constitute a "tax" subject ***63** to article XIII, section 32. Even if so, defendants' claim lacks merit under the circumstances presented here.

"The policy behind [article XIII,] section 32 is to allow revenue collection to continue during [tax] litigation so that essential public services dependent on the funds are not unnecessarily disrupted. [Citation.] ...." (*Pacific Gas & Electric Co., supra*, 27 Cal.3d at p. 283.) The administrative "refund" procedures established by the unemployment insurance law are designed to ensure initial examination of unemployment tax disputes by the agency with specific expertise in that area.

However, plaintiffs attempt no challenge, direct or indirect, to the validity or application of the unemployment insurance law as such, or to the propriety of any "tax" assessed thereunder. Nor have plaintiffs bypassed the agency or procedures established to decide such disputes.

Rather, plaintiffs claim that *all* their costs of affording unemployment compensation to their employees are subject to a statutory and constitutional *subvention* which the state refuses to make. It is incidental that these costs happen to include what might be characterized as a "tax." As the subvention statutes require, plaintiffs City and County have pursued all available remedies before the agency (formerly the Board, now the Commission) created to decide *subvention* issues; that agency has upheld their submitted claims in full, but the necessary appropriations have been withheld.

Under these circumstances, the Legislature has concluded that a local entity should be forced to continue incurring the unfunded costs subject to "refund." Rather, the entity is expressly authorized to bring suit to declare such an unfunded mandate *unenforceable*. (Rev. & Tax. Code, former § 2255, subd. (c); Gov. Code, § 17612, subd. (b).) [6]

6 Indeed, when the City filed protective claims for "refund" with EDD in the wake of *Sacramento*

> *I*, that agency consistently disclaimed authority to decide the subvention issue presented and "suggest[ed]" that the City pursue its remedies before the Commission.

The importance of such a remedy stems from the fundamental legislative prerogative to control appropriations. (4) Under the separation of powers doctrine, the Legislature cannot be compelled to appropriate or authorize the disbursement of specific funds. (*Mandel* v. *Myers* (1981) 29 Cal.3d 531, 540 [174 Cal.Rptr. 841, 629 P.2d 935].) Since the Legislature will have demonstrated its refusal to fund a particular mandate by the time a mandamus action is filed, the literal "tax refund" process urged by defendants may often be meaningless.

(3b) Insofar as plaintiffs also seek reimbursement for past expenses, similar considerations dictate that the governing statutes are those created ***64** to resolve subvention problems rather than garden-variety disputes over the unemployment insurance tax.[7] We find nothing in the language, history, or purpose of article XIII, section 32, or of the unemployment insurance law, which bars the instant complaint. We therefore have jurisdiction to decide whether chapter 2/78 constitutes a reimbursable mandate.

7 As we note above, courts are powerless to compel appropriations *per se*. However, that fact does not render a prayer for reimbursement of *past* costs wholly meaningless. California courts have previously recognized judicial power to fashion other appropriate reimbursement remedies. (See, e.g., *Carmel Valley Fire Protection Dist., supra*, 190 Cal.App.3d at pp. 550-552; also cf. *Mandel, supra*, 29 Cal.3d at pp. 535-537, 539-552.) Such power is especially important where subvention is constitutionally compelled.

III. Collateral Estoppel; Res Judicata.

(5a) However, *plaintiffs* claim that because *Sacramento I* "finally" decided whether chapter 2/78 constitutes a reimbursable state mandate, the *state* and its agents are collaterally estopped from relitigating the issue here. The Court of Appeal agreed that the doctrine of collateral estoppel applies. Under the circumstances, we are not persuaded.

(6) Generally, collateral estoppel bars the party to a prior action, or one in privity with him, from relitigating issues finally decided against him in the earlier action. (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 874 [151 Cal.Rptr. 285, 587 P.2d 1098].) "... But when the issue is a question of law rather than of fact, the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed. [Citations.] ...." (*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 902 [160 Cal.Rptr. 124, 603 P.2d 41].)

(5b) Even if the formal prerequisites for collateral estoppel are present here, the public-interest exception governs. Whether chapter 2/78 costs are reimbursable under article XIII B and parallel statutes constitutes a pure question of law. The *state* was the losing party in *Sacramento I*, and also the only entity legally affected by that decision. Thus, strict application of collateral estoppel would foreclose any reexamination of the holding of that case. The state would remain bound, and no other person would have occasion to challenge the precedent.

Yet the consequences of any error transcend those which would apply to mere private parties. If the result of *Sacramento I* is wrong but unimpeachable, taxpayers statewide will suffer unjustly the consequences of the state's continuing obligation to fund the chapter 2/78 costs of local agencies. On the other hand, if the state fails to appropriate the funds to meet this ***65** obligation, and chapter 2/78 therefore cannot be enforced (Rev. & Tax. Code, former § 2255, subd. (c); Gov. Code, § 17612, subd. (b)), the resulting failure to comply with federal law could cost California employers millions.[8] (7) **(See fn. 9.)**, (5c) Under these circumstances, neither stare decisis nor collateral estoppel can permanently foreclose our ability to examine the reimbursability of chapter 2/78 costs.[9]

8 For these reasons, this case is distinguishable from *Slater v. Blackwood* (1975) 15 Cal.3d 791 [126 Cal.Rptr. 225, 543 P.2d 593], cited by the Court of Appeal. *Slater*, a suit between private parties, held only that the "injustice" exception to the rule of collateral estoppel cannot be based *solely* on an intervening change in the law. (P. 796.) Here, as we note, overriding public-interest issues are involved.

9 By the same token, the state has not ignored available remedies or otherwise "waived" its right to argue the issues presented by this appeal. The state immediately raised the applicability of *County of Los Angeles* to this suit once our decision therein became final.

Plaintiffs claim the instant trial court had no power to grant summary judgment for defendants on authority of *County of Los Angeles*. Plaintiffs assert that because defendants failed to seek timely mandamus review of the prior, contrary order granting summary adjudication of issues in *plaintiffs'* favor, the issues decided by the earlier order must be "deemed established." (See Code Civ. Proc., § 437c, subd. (f).) We disagree. Failure to challenge a summary adjudication order by the *discretionary* avenue of writ review cannot foreclose a party from asserting *subsequent* changes in law which render such a pretrial order incorrect.

(8) As below, plaintiffs also argue that reconsideration of *Sacramento I* is precluded by res judicata. They suggest that the prior litigation resolved not only the *legal issues* presented by this appeal, but all *claims* among the current parties as well.

Of course, res judicata and the rule of final judgments bar us from disturbing individual claims or causes of action, on behalf of specific agencies, which have been finally adjudicated and are no longer subject to review. (Code Civ. Proc., § 1908 et seq.; *Slater, supra*, 15 Cal.3d at p. 796; *Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 810 [122 P.2d 892].) However, the issues presented in the current action are not limited to the validity of any such finally adjudicated individual claims. Rather, they encompass the question of defendants' subvention obligations *in general* under chapter 2/78. We therefore conclude that defendants may contend in this lawsuit that chapter 2/78 is not a reimbursable state mandate. [10] We turn to the merits of that issue. ***66**

10 Plaintiffs imply that because the original claims by the City and the County were filed decided as statutory "test claims" (Rev. & Tax. Code, former §§ 2218, 2253.2; see now Gov. Code, §§ 17555, 17557), the "cause of action" adjudicated therein encompasses *all* claims by *all* local agencies for *all* years. However, the obvious purpose of the statutory "test claim" procedure is to resolve the *legal issue whether particular state legislation creates a reimbursable mandate*, not to adjudicate every individual claim for reimbursement which may thereafter accrue. The "test claim" result has *precedential* effect for all subsequent claims, but res judicata effect only for the individual claims which were actually adjudicated.

IV. "New Program" or "Increased Service"?

(9a) As before, defendants urge that by extending unemployment insurance coverage to local government employees, the Legislature did not mandate a "new program" or an "increased" or "higher level of service" on local governments. Thus, they assert, the local costs of providing such coverage are not subject to subvention under article XIII B, section 6, or parallel statutes. (Rev. & Tax. Code, former §§ 2207, 2231, subd. (a); Gov. Code, §§ 17514, 17561, subd. (a).) The trial court granted summary judgment for defendants on this basis. Contrary to the conclusions reached by the Court of Appeal, the trial court's ruling was correct.

Our analysis is controlled by our decision in *County of Los Angeles*. There we determined that a general increase in workers' compensation benefits did not, when applied to local governments, constitute a reimbursable state mandate under article XIII B.

In so holding, we focused on the particular language of article XIII B, section 6, which requires state subvention of a local government's costs of any "new program" or "increased level of service" imposed upon it by the state. We dismissed the notion that, by employing the quoted phrases, the voters intended *all* local costs resulting from compliance with state law to be subject to mandatory reimbursement. Rather, we explained, "[t]he concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public. ..." (43 Cal.3d at p. 56.)

Under these circumstances, we reasoned, the electorate must have intended the undefined terms "new program" and "increased level of service" to carry their "commonly understood meanings ...—programs that carry out the governmental function of providing *services 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." (43 Cal.3d at p. 56, italics added.)

Local governments' costs of complying with a general statewide increase in the level of workers' compensation benefits do not qualify under these standards, we concluded. As we noted, "... [w]orkers' compensation is not a program administered by local agencies to provide service to

the public. (10) **(See fn. 11.)** Although local agencies must provide benefits to ***67** their employees ..., they are indistinguishable in this respect from private employers. ..." (43 Cal.3d at p. 58.) [11]

11 While our discussion centered on the meaning of section 6 of article XIII B, it relied heavily on the legislative history of parallel provisions of the 1972 and 1973 property tax relief statutes. When article XIII B was adopted in November 1979, the Revenue and Taxation Code already required state subvention of local "[c]osts mandated by the state," defined as "any increased costs which a local agency is required to incur as a result of ... [¶] [a]ny law enacted after January 1, 1973, which mandates a *new program* or an *increased level of service* of an existing program." (Rev. & Tax. Code, former §§ 2207 [italics added], 2231, subd. (a).) However, a further statutory definition of "increased level of service" to include any state mandate "which makes necessary expanded or additional costs to a county, city and county, city, or special district" had been repealed in 1975. (*County of Los Angeles*, 43 Cal.3d at p. 55; see Rev. & Tax. Code, former § 2231, subd. (e), repealed by Stats. 1975, ch. 486, § 6, p. 999.) We found the repealer significant to the limited meaning of the statutory term "increased level of service" as later incorporated in article XIII B. (43 Cal.3d at pp. 55-56.) Our implicit conclusion, which we now make explicit, was that the statutory and constitutional concepts of reimbursable state-mandated costs are identical.

(9b) Similar considerations apply here. By requiring local governments to provide unemployment compensation protection to their own employees, the state has not compelled provision of new or increased "service to the public" at the local level. Nor has it imposed a state policy "unique[ly]" on local governments. Most private employers in the state already were required to provide unemployment protection to their employees. Extension of this requirement to local governments, together with the state government and nonprofit corporations, merely makes the local agencies "indistinguishable in this respect from private employers."

Plaintiffs nonetheless suggest there are several bases for reaching a different result here than in *County of Los Angeles*. None of the asserted distinctions has merit.

Plaintiffs first note the proponents' declaration in the voters' pamphlet that the purpose of article XIII B, section 6, was to prevent the state from "forcing" unfunded programs on local agencies. Plaintiffs invoke this pamphlet language for the proposition that any new cost "forced" on local governments by state law is subject to subvention.

The claim is directly contrary to our holding in *County of Los Angeles*. As we explained, "[i]n ... context, the [pamphlet] phrase 'to force *programs* on local governments' confirms that the intent underlying section 6 [of article XIII B] was to require reimbursement to local agencies for the costs involved in carrying out *functions peculiar to government*, not for expenses incurred by local agencies as an *incidental impact* of laws that apply generally to all state residents and entities. ... [¶] The language of section 6 is far too vague to support an inference that ... each time the Legislature ***68** passes a law of general application it must discern the likely effect on local governments and provide an appropriation to pay for any incidental increase in local costs. ..." (43 Cal.3d at pp. 56-57, italics added.) [12]

12 Indeed, our reasoning here was expressly foreshadowed in *County of Los Angeles*. There we observed: "The Court of Appeal reached a different conclusion in [*Sacramento I*], with respect to a newly enacted law requiring that all public employees be covered by unemployment insurance. Approaching the question as ... whether the expense was a 'state mandated cost,' rather than as whether the provision of an employee benefit was a 'program or service' within the meaning of the Constitution, the court concluded that reimbursement was required. To the extent that this decision is inconsistent with our conclusion here, it is disapproved." (43 Cal.3d at p. 58, fn. 10.)

Plaintiffs next urge the Court of Appeal's premise—that chapter 2/78 did impose a "unique" requirement on local agencies within the meaning of *County of Los Angeles*, since it applied only to them, and compelled costs to which they were not previously subject. Plaintiffs cite our recent decision in *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830 [244 Cal.Rptr. 677, 750 P.2d 318]. There we held, inter alia, that by requiring each local school district to contribute part of the expense of educating its handicapped students in state-run schools—a cost previously absorbed entirely by the state—the Legislature created a "*new* program" subject to subvention under article XIII B, section 6. As we observed, "although the

schools for the handicapped have been operated by the state for many years, the program was *new insofar as [the local districts] are concerned* ....” (P. 835, italics added.)

Lucia Mar is inapposite here. The education of handicapped students was clearly a traditional governmental “service to the public,” and it qualified as a “program” on that basis. This function had long been performed by the state, and the only issue was whether the belated shifting of the program's costs to local governments made it “new” for subvention purposes. A negative answer to that question would have undermined a central purpose of article XIII B, section 6—to prevent the state's transfer of the *cost of government* from *itself* to the local level.

Here, the issue is whether costs *unrelated* to the provision of public services are *nonetheless* reimbursable costs of government, because they are imposed on local governments “unique[ly],” and not merely as an incident of compliance with general laws. State and local governments, and non-profit corporations, had previously enjoyed a special *exemption* from requirements imposed on most other employers in the state and nation. Chapter 2/78 merely eliminated the exemption and made these previously exempted entities subject to the general rule. By doing so, it may have imposed a requirement “new” to local agencies, but that requirement was not “unique.” ***69**

The distinction proposed by plaintiffs would have an anomalous result. The state could avoid subvention under *County of Los Angeles* standards by imposing new obligations on the public and private sectors *at the same time*. However, if it chose to proceed by stages, extending such obligations first to private entities, and only later to local governments, it would have to pay. This was not the intent of our recent decision.

Next, plaintiffs complain that the new costs imposed on local governments by chapter 2/78 are too great to be deemed “incidental” within the meaning of *County of Los Angeles*. However, our decision did not use the word “incidental” to mean merely “insignificant in amount.” Rather, we declared that the state need not reimburse local governments for expenses *incidentally imposed* upon them by laws of general application. In *County of Los Angeles*, we assumed that the expenses imposed *in common* on the private and public sectors by such a general law—as by the across-the-board increase in workers' compensation benefits there at issue—might be substantial. Notwithstanding this possibility, we found the voters did not intend to require a state subsidy of the public sector in such cases. (43 Cal.3d at pp. 56-58.)

Finally, plaintiffs and their amici curiae urge us to overrule *County of Los Angeles*. They insist that our “program” and “unique requirement” limitations conflict with the language and purpose of article XIII B. First, they note that *nonreimbursable* state-mandated costs are expressly listed in subdivisions (a) through (c) of article XIII B, section 6. [13] Under the maxim *inclusio unius est exclusio alterius*, they reason, further exceptions may not be implied. Second, they assert, our limiting construction allows the state to “force” many costly but unfunded requirements on local governments, which the latter must absorb without relief from their own article XIII B spending limits. This, they aver, cannot have been the voters' intent.

13 Article XIII B, section 6, provides that the state shall provide a subvention of funds to reimburse a local agency for costs incurred by the agency “[w]henever the [state] mandates [on the agency] a new program or higher level of service ..., except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (a) Legislative mandates requested by the local agency affected; [¶] (b) Legislation defining a new crime or changing an existing definition of a crime; or [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.”

These arguments misapprehend both the language of article XIII B, section 6, and our *County of Los Angeles* holding. Our reasoning in that case is not inconsistent with subdivisions (a) through (c) of section 6. Those paragraphs simply exclude certain state-imposed costs *even if they would otherwise be reimbursable under the “new program” or “increased service”* ***70** *standards*. Subdivisions (a) through (c) do not purport to define what constitutes a “new program” or “increased level of service.”

Moreover, the “program” and “service” standards developed in *County of Los Angeles* create no undue risk that the state will impose expensive unfunded obligations against local agencies' article XIII B spending limits. On the contrary, our standards require reimbursement whenever the state freely chooses to impose on local agencies *any* peculiarly

"governmental" cost which they were not previously required to absorb.

On the other hand, as we explained in *County of Los Angeles*, extension of the subvention requirements to costs "incidentally" imposed on local governments would require the Legislature to assess the fiscal effect on local agencies of each law of general application. Moreover, it would subject much general legislation to the supermajority vote required to pass a companion local-government revenue bill. Each such necessary appropriation would, in turn, cut into the *state's* article XIII B spending limit. (§ 8, subd. (a).) We concluded that nothing in the language, history, or apparent purpose of article XIII B suggested such far-reaching limitations on legitimate state power. (43 Cal.3d at pp. 56-58.)

We remain persuaded by this reasoning.[14] We decline to overrule *County of Los Angeles*. Under the teaching of that case, we hold that chapter 2/78 imposes no local costs which must be reimbursed pursuant to article XIII B, section 6, and parallel statutes.

14 Nor do we agree that subvention depends on whether the "benefit" of a state-imposed local requirement falls principally at the state or local level. Attempts to apply such a "benefit" test to the myriad of individual cases could easily produce debates bordering on the metaphysical. Nothing in the language or history of article XIII B, or prior subvention statutes, suggests an intent to force such debates upon the Legislature each time it considers legislation affecting local governments.

V. "Federal" Mandate?

(11a) This case proceeded through the Court of Appeal solely on the issue whether chapter 2/78 constitutes a reimbursable "state mandate," as defined in *County of Los Angeles*. After we granted review, and in the public interest, we also decided to reexamine a related holding contained in *Sacramento I*—that chapter 2/78 does not qualify as a "federal" mandate.

Proper application of the "federal mandate" concept has important implications beyond subvention. A "cost mandated by the federal government" is exempt from a local government's statutory taxation limit. (Rev. & Tax. Code, § 2271.) Moreover, an appropriation required to comply with a ***71** federal mandate is excluded from the constitutional spending limit of any affected entity, state or local (Cal. Const., art. XIII B, § 9 (b)). Accordingly, we requested supplemental briefs on this question.[15]

15 For the reasons expressed in part III, *ante*, our consideration of this issue is not foreclosed by principles of collateral estoppel.

After due consideration, we reject *Sacramento I's* premise. We conclude that chapter 2/78 does impose "costs mandated by the federal government," as described in article XIII B and parallel statutes.[16]

16 In *Sacramento I*, both the parties and the Court of Appeal assumed that if a cost was "federally mandated," it was therefore *not* a "state mandated" cost subject to subvention. In other words, it was assumed, an expense could not be both "state mandated" and "federally mandated," even if imposed by the state under federal compulsion. It was in this context that *Sacramento I* addressed the "federal mandate" issue. (See also *Carmel Valley Fire Protection Dist., supra*, 190 Cal.App.3d at p. 543.) We here express no view on the question whether "federal" and "state" mandates are mutually exclusive for purposes of state subvention, but leave that issue for another day. We decide only that, insofar as an expense is "federally mandated," as described in the state Constitution and statutes, it is exempt from the pertinent taxation and spending limits.

Article XIII B, section 9(b), defines federally mandated appropriations as those "required for purposes of complying with mandates of ... the federal government which, *without discretion*, require an expenditure for additional services or which *unavoidably make the providing of existing services more costly*." (Italics added.)

As in *Sacramento I*, plaintiffs argue that the words "without discretion" and "unavoidably" require clear *legal* compulsion not present in Public Law 94-566. Defendants respond, as before, that the consequences of California's failure to comply with the federal "carrot and stick" scheme were so substantial that the state had no realistic "discretion" to refuse.[17] In *Sacramento I*, the Court of Appeal adopted plaintiffs' narrow view. On reflection, we disagree.

17 Ironically, the local agencies here argue *against* a "federal mandate," with the state in opposition

to that view. An anti-"federal mandate" position seems directly contrary to the local agencies' interests, since its acceptance would mean the agencies are not eligible for exemptions from their pertinent taxing and spending limits. However, all parties appear still bound by the premise of *Sacramento I* that if a cost is "federally mandated," it is ineligible for state subvention. As noted above (see fn. 16, *ante*), we do not decide that issue here.

Though section 9(b) seems plain on its face, we find a latent ambiguity in context. At the time article XIII B was adopted, United States Supreme Court decisions construing the Tenth Amendment *severely limited* federal power to dictate policy or programs to the sovereign states or their subdivisions.[18] Indeed, by its early ruling that federal unemployment insurance ***72** laws did not violate state sovereignty insofar as they merely employed a "carrot and stick" to induce state compliance (*Steward Machine Co.* v. *Davis, supra*, 301 U.S. 548, 585-593 [81 L.Ed. 1279, 1290-1294]), the high court helped set the stage for two generations of pervasive federal regulation by this indirect means.[19]

18 The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

19 The traditional categorical-aid provisions of the Social Security Act (e.g., 42 U.S.C. §§ 301 et seq. [old-age assistance], 601 et seq. [aid to needy families with dependent children], 1201 et seq. [aid to the blind], 1351 et seq. [aid to the permanently and totally disabled]), and statutes concerned with occupational safety and health (e.g., 29 U.S.C. § 651 et seq.), highways and mass transit (e.g., 23 U.S.C. § 101 et seq.), education (e.g., 20 U.S.C. § 241a et seq.), and air and water pollution (e.g., 33 U.S.C. §§ 1251 et seq., 1311 et seq.; 42 U.S.C. § 7401 et seq.) are but a few examples of federal laws imposing greater or lesser degrees of inducement to state and local compliance with federal policies and programs.

Just three years before article XIII B was adopted, the court struck down, on Tenth Amendment grounds, Congress's effort to extend the minimum-wage and maximum-hour requirements of the Fair Labor Standards Act directly to local government employees. (*National League of Cities v. Usery* (1976) 426 U.S. 833 [49 L.Ed.2d 245, 96 S.Ct. 2465].) Overruling earlier authority (see *Maryland* v. *Wirtz* (1968) 392 U.S. 183 [20 L.Ed.2d 1020, 88 S.Ct. 2017]), the court held in *Usery, supra*, that constitutional principles of federalism prohibit Congress from using its otherwise "plenary" commerce power against the "States as States," so as to interfere with the essential "attributes of [state government] sovereignty." (426 U.S. at pp. 840-855 [49 L.Ed.2d at pp. 250-260].) Accordingly, said the court, Congress could not "force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. ..." (*Id.*, at p. 855 [49 L.Ed.2d at p. 259].)

Usery dealt with federal efforts to regulate sovereign units of government as employers. However, the court's rationale obviously applied with equal or greater force to direct federal regulation of state and local governments *as governments*. Under *Usery's* reasoning, it seems manifest that Congress's direct power to require or prohibit substantive governmental policies or programs by state or local agencies was greatly curtailed. Such power would interfere impermissibly with "integral governmental functions" and essential "attributes of [state] sovereignty.[20] ***73**

20 *Hodel v. Virginia Surface Mining & Recl. Assn.* (1981) 452 U.S. 264 [69 L.Ed.2d 1, 101 S.Ct. 2352] later implicitly confirmed this premise. There, Virginia mine operators challenged a federal surface-mining regulatory scheme on grounds it displaced state authority and sovereignty. The federal law imposed minimum federal standards, to be enforced by federal or state officials at the state's choice, and allowed states to take over regulation by imposing equal or higher standards of their own. (30 U.S.C. §§ 1201 et seq., 1251-1254.) The court upheld the program, noting it regulated private persons, not the "States as States. " Moreover, said the court, since states were not ordered to adopt their own surface-mining standards, "there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program. [Citations.] .... " (452 U.S. at pp. 286-288 [69 L.Ed.2d at pp. 22-24].)

After article XIII B's adoption, both the result and the reasoning of *Usery* were overruled in *Garcia v. San Antonio*

Metro. Transit Auth. (1985) 469 U.S. 528 [83 L.Ed.2d 1016, 105 S.Ct. 1005]. In *Garcia*, a five-justice majority concluded that the political structure of the federal system, rather than rigid categories of inviolable state "sovereignty," constitutes state and local governments' primary protection against Congress's overreaching efforts to regulate them. (Pp. 547-555 [83 L.Ed.2d at pp. 1031-1037].)

However, this later development does not alter two crucial facts extant when article XIII B was enacted. First, the power of the federal government to impose its direct regulatory will on state and local agencies was *then* sharply in doubt. Second, in conformity with this principle, the vast bulk of cost-producing federal influence on government at the state and local levels was by inducement or incentive rather than direct compulsion.[21] That remains so to this day.

Thus, if article XIII B's reference to "federal mandates" were limited to strict legal compulsion by the federal government, it would have been largely superfluous.[22] (12) It is well settled that "constitutional ... enactments must receive a liberal, practical common-sense construction which will meet changed conditions and the growing needs of the people. [Citations.] ...." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245 [149 Cal.Rptr. 239, 583 P.2d 1281].) While "[a] constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words[,] [citation] [, t]he literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers. [Citations.]" (*Ibid.*)

22 For this reason, federal cases cited by plaintiffs and their amici curiae for the proposition that Public Law 94-566 is not "coercive " (e.g., *County of Los Angeles, Cal. v. Marshall* (D.C. Cir. 1980) 631 F.2d 767 [203 App.D.C. 185]; *State, etc.* v. *Marshall* (1st. Cir. 1980) 616 F.2d 240) are inapposite. Those decisions applied *Tenth Amendment* principles to determine whether Public Law 94-566 was constitutionally valid. Had Public Law 94-566 been struck down on this ground, it would *not* have resulted in local costs to which the "federal mandate" provisions of article XIII B might extend. Thus, applying the Tenth Amendment cases to determine whether a cost is "federally mandated " for purposes of article XIII B presents a problem in circular reasoning.

(11b) As the drafters and adopters of article XIII B must have understood, certain regulatory standards imposed by the federal government ***74** under "cooperative federalism" schemes are coercive on the states and localities in every practical sense. The instant facts amply illustrate the point. Joint federal-state operation of a system of unemployment compensation has been a fundamental aspect of our political fabric since the Great Depression. California had afforded federally "certified" unemployment insurance protection to its workers for over 40 years by the time Public Law 94-566, chapter 2/78, and article XIII B were adopted. Every other state also operated such a system. If California failed to conform its plan to new federal requirements as they arose, its businesses faced a new and serious penalty —full, double unemployment taxation by both state and federal governments. Besides constituting an intolerable expense against the state's economy on its face, this double taxation would place California employers at a serious competitive disadvantage against their counterparts in states which remained in federal compliance.

Plaintiffs and their amici curiae suggest California could have chosen to terminate its own unemployment insurance system, thus leaving the state's employers faced only with the federal tax. However, we cannot imagine the drafters and adopters of article XIII B intended to force the state to such draconian ends.

Here, the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses. The alternatives were so far beyond the realm of practical reality that they left the state "without discretion" to depart from federal standards. We therefore conclude that the state acted in response to a federal "mandate" for purposes of article XIII B.[23] ***75**

23 The dissent cites two older cases for the premise that in antidebt and antispending measures, the exception recognized for "mandatory" costs and expenditures has traditionally been limited to obligations imposed by law. Neither cited decision is dispositive or persuasive here.
County of Los Angeles v. Byram (1951) 36 Cal.2d 694 [227 P.2d 4], and the cases therein cited, concern the constitutional provision (Cal. Const., former art. XI, § 18, see now art. XVI, § 18 (hereafter section 18)) which prohibits local governments, absent voter approval, from incurring debts or liabilities which exceed in any

year the income or revenue provided for such year. Section 18 is *absolute on its face* and, unlike article XIII B, it contains *no express exception* for mandatory expenses. Though sometimes founded on contorted linguistic analyses (see, e.g., *City of Long Beach* v. *Lisenby* (1919) 180 Cal. 52, 56 [179 P. 198]), the *implied* exceptions to section 18, as recognized in *Byram* and other cases, arise from a rule of necessity and despite the absolute constitutional language. Such implied exceptions must, of course, be narrowly confined.

On the other hand, *County of Los Angeles v. Payne* (1937) 8 Cal.2d 563 [66 P.2d 658], also cited by the dissent, construed former Political Code section 3714, which limited a local government's annual expenditures to its previously adopted budget. Section 3714 *did* contain an express exception for "mandatory expenses *required by law*." (Italics added.) *Payne's* adherence to the explicit terms of the statutory exception is hardly remarkable.

In contrast with the measure considered in *Byram*, article XIII B and the Revenue and Taxation Code *do* expressly exempt "federally mandated " expenses from the pertinent taxation and appropriations limits. Unlike the measure construed in *Payne*, neither article XIII B nor the Revenue and Taxation Code expressly limit their exemptions to obligations " required by law." Article XIII B uses the broader terms "unavoidably " and "without discretion," suggesting recognition by the drafters and voters that forces beyond strict legal compulsion may produce expenses that are realistically involuntary. The Revenue and Taxation Code explicitly includes coercive federal "carrot and stick" requirements within the federally "mandated" costs exempt from statutory property tax limits. (Rev. & Tax. Code, § 2206.)

Unlike the *Sacramento I* court, we deem significant the Legislature's persistent agreement with our construction. In 1980, after the adoption of article XIII B, it amended the statutory definition of "costs mandated by the federal government" to provide that these include "costs resulting from enactment of a state law or regulation where failure to enact such law or regulation to meet specific federal program or service requirements would result in *substantial monetary penalties* or *loss of funds* to *public or private persons* in the state. ..." (Rev. & Tax. Code, § 2206, italics added; Stats. 1980, ch. 1256, § 3, p. 4247.)

In *Sacramento I*, the Court of Appeal declined to apply this statutory amendment "retroactively" to article XIII B. (156 Cal.App.3d at pp. 197-198.) The Legislature immediately responded. In 1984 statutes enacted for the express purpose of "implement[ing]" article XIII B (see Gov. Code, § 17500), the Legislature reiterated its 1980 definition. (*Id.*, § 17513; Stats. 1984, ch. 1459, § 1, p. 5114.) [24]

24 Plaintiffs suggest that by reenacting this language in the wake of *Sacramento I*, the Legislature "acquiesced" in the Court of Appeal's narrow definition of "costs mandated by the federal government." We are not persuaded. *Sacramento I* did not *construe* the statutory language; it simply found a postdated statute *irrelevant* to the proper interpretation of article XIII B. By later readopting its expanded definition in statutes designed to "implement" article XIII B, the Legislature expressed its disagreement with *Sacramento I*, not its acquiescence. Contrary to the implications of *Sacramento I*, legislative efforts to resolve ambiguities in constitutional language are entitled to serious judicial consideration. (See authorities cited *ante*.)

Plaintiffs contend that these statutory pronouncements deserve little interpretive weight since, among other things, they are "internally inconsistent." Plaintiffs stress the proviso in Revenue and Taxation Code, section 2206, and in Government Code, section 17513, that the phrase "' [c]osts mandated by the federal government' does *not* include costs which are specifically reimbursed or funded by the federal or state government or programs or services which may be implemented at the *option* of the state, local agency, or school district." (Italics added.)

We see no fatal inconsistencies. The first clause of the proviso merely confirms, as article XIII B itself specifies, that program funds voluntarily provided by another unit of government may not be excluded from the ***76** spending limits of recipient local agencies. (Compare art. XIII B, §§ 8, subd. (b), 9(b).) The second clause isolates a concern which we share—that state or local governments might otherwise claim "federally mandated costs " even where participation in a federal program, or compliance with federal " standards," is a matter of true choice. (Cf., e.g., *Carmel Valley Fire Protection Dist., supra*, 190 Cal.App.3d at pp. 542-544.) [25]

25 In the *Carmel Valley* case, the state claimed, among other things, that local costs of purchasing protective clothing and equipment for firefighters, as required by regulations under the California Occupational Safety and Health Act, constituted a nonreimbursable "federal mandate " because the California standards merely "implemented" federal law. However, the evidence was contrary; a letter from the federal Occupational Safety and Health Administration disclaimed federal jurisdiction over California's political subdivisions and stated that state and federal standards were independent. (190 Cal.App.3d at pp. 543-544.) Examination of the pertinent statutory scheme reinforces the view that compliance with federal standards in this area is "optional" with the state. Other than loss of limited federal administrative funds (29 U.S.C. § 672(g)), the only sanction for California's decision not to maintain a federally approved occupational safety and health system is that federal standards, administered by federal personnel, will then prevail within the state. (*Id.*, § 667(b)-(h).)

Given the variety of cooperative federal-state-local programs, we here attempt no final test for "mandatory" versus "optional" compliance with federal law. (13) A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal. Always, the courts and the Commission must respect the governing principle of article XIII B, section 9(b): neither state nor local agencies may escape their spending limits when their participation in federal programs is truly voluntary.

(11c) For reasons expressed above, we are satisfied under these standards that chapter 2/78 did implement a federal "mandate" within the meaning of article XIII B and prior statutes restricting local taxation. Hence, subject to superseding constitutional ceilings on taxation by state and local governments, an agency governed by chapter 2/78 may tax and spend as necessary to meet the expenses required to comply with that legislation. To the extent *Sacramento I* is inconsistent with our analysis, that decision is disapproved.

VI. Conclusion.

We have concluded that chapter 2/78 is a "federal mandate" which exempts affected state and local agencies from pertinent limits on their power to tax, appropriate, and spend. However, local governments' expenses ***77** of complying with chapter 2/78 are not subject to compulsory state subvention, because chapter 2/78 imposed no new or increased "program or service," and no "unique" requirement, on local agencies. The contrary judgment of the Court of Appeal is reversed.

Lucas, C. J., Mosk, J., Broussard, J., Panelli, J., and Kennard, J., concurred.

KAUFMAN, J.,

Concurring and Dissenting.

I concur in the judgment. Given this court's decision in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46 [233 Cal.Rptr. 38, 729 P.2d 202], I am compelled to agree that the obligation imposed on local governments by the 1978 state unemployment insurance legislation is not a "new program or higher level of service" within the meaning of article XIII B, section 6, of the California Constitution, and that for this reason the state is not constitutionally obligated to provide a subvention of funds to reimburse the unemployment insurance costs of local governments. I respectfully dissent, however, from the additional conclusion, stated in part V of the majority opinion, that these unemployment insurance costs are "mandates of ... the federal government" and therefore exempt from the state and local government appropriation limits of article XIII B and from property taxation limits imposed by statute. In reaching this additional conclusion the majority decides an issue not raised by the parties and completely outside the scope of this action. As so often happens when a court reaches beyond the confines of the case before it to render a gratuitous advisory opinion, the majority decides the issue incorrectly.

All too frequently in recent years (see, e.g., *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 345, fn. 1 [256 Cal.Rptr. 543, 769 P.2d 399]) this court, in its misguided zeal to provide enlightenment, has reached out to decide an issue not tendered by the parties. The majority's failure to exercise proper judicial restraint in the instant case is another example of this trend and one I find particularly disturbing since it violates a fundamental and venerable tenet of judicial practice—i.e., "A court will

not decide a constitutional question unless such construction is absolutely necessary." (*Estate of Johnson* (1903) 139 Cal. 532, 534 [73 P. 424]; accord, *People* v. *Williams* (1976) 16 Cal.3d 663, 667 [128 Cal.Rptr. 888, 547 P.2d 1000]; *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 65 [195 P.2d 1].) The federal mandate issue which the majority here decides, because it turns on the proper construction of article XIII B, section 9, of our state Constitution, is a constitutional issue. Using this case to resolve that issue is, to my mind, indefensible.

To see just how far the majority has wandered from the issues essential to the proper resolution of this case, one need only point out that this action ***78** was not brought to settle a dispute about taxation or appropriation limits, nor has this court been informed that any such dispute exists. Rather, this action was brought to enforce the holding in *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 [203 Cal.Rptr. 258] (*Sacramento I*), that the state is constitutionally obligated to reimburse the unemployment insurance costs of local governments. The governmental entities litigating this proceeding have not sought a judicial determination of the 1978 unemployment insurance legislation's effect on their statutory or constitutional taxing or spending limits, nor have they raised any issue regarding whether unemployment insurance costs are federally mandated for any purpose. The federal mandate issue was first injected into the case by this court when we requested additional briefing on the questions whether the unemployment insurance costs of local governments are federally mandated under article XIII B, section 9, of the state Constitution and, if so, whether this conclusion necessarily exempts the state from any obligation it might otherwise have to reimburse local governments for these costs.

The majority's federal mandate discussion does not even provide an alternative ground for the holding denying reimbursement of local governments' unemployment insurance costs, for the majority purports to decide whether unemployment insurance costs are federally mandated without deciding whether resolution of this issue has any bearing on entitlement to reimbursement (see maj. opn., *ante*, p. 71, fn. 16). The majority's only justification for deciding whether unemployment insurance costs are federally mandated is that the issue has " important implications" inasmuch as federally mandated costs are "exempt from a local government's statutory taxation limit (Rev. & Tax. Code, § 2271) " and "from the constitutional spending limit of any affected entity, state or local (Cal. Const., art. XIII B, § 9(b))." (Maj. opn., *ante*, pp. 70-71.) But the present case is an inappropriate vehicle for deciding these weighty issues since neither the state nor the local entities have any reason to contest the other's exemptions from spending or taxation limits. In other words, the parties now before us are not adverse on these issues and so have not defined and argued opposing points of view with the vigor and thoroughness essential to proper judicial resolution of complex legal questions, particularly those of constitutional magnitude. Those who might have argued in favor of including unemployment insurance costs in the taxing and spending limits—for example, the proponents of the initiative measure by which article XIII B was enacted—are not represented in this proceeding.

Were the issue properly presented in this case, I would conclude that the unemployment insurance costs are not federally mandated. The text of a constitution "should be construed in accordance with the natural and ordinary meaning of its words." (***79** *Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization* (1978) 22 Cal.3d 208, 245 [149 Cal.Rptr. 239, 583 P.2d 1281].) The language at issue here excludes from the definition of " appropriations subject to limitation" those appropriations " required for purposes of complying with *mandates* of the courts or the federal government which, *without discretion, require* an expenditure for additional services or which *unavoidably* make the providing of existing services more costly. " (Cal. Const., art. XIII B, § 9, subd. (b), italics added.)

The meaning of this language is clear; to look beyond the text for some other meaning is both unnecessary and improper under accepted rules of constitutional interpretation. (See *State Board of Education* v. *Levit* (1959) 52 Cal.2d 441, 462 [343 P.2d 8]; *People v. Knowles* (1950) 35 Cal.2d 175, 182-183 [217 P.2d 1].) A "mandate" is "an order, command [or] charge." (*Xth Olympiad Com. v. American Olym. Assn.* (1935) 2 Cal.2d 600, 604 [42 P.2d 1023]; see also, *Morris* v. *County of Marin* (1977) 18 Cal.3d 901, 908 [136 Cal.Rptr. 251, 559 P.2d 606] ["mandatory duty" is "an obligatory duty which a governmental entity is required to perform"]; *Bridgman v. American Book Co.* (1958) 12 Misc.2d 63, 66 [173 N.Y.S.2d 502, 506] ["mandate" is "a command, order or direction ... which a person is bound to obey"].) The mandates to which the constitutional provision at issue refers are those "of the courts or the federal government." The coercive force of court mandates is, of course, the force of law. That "mandates of ... the federal government" are similarly

limited to those obligations imposed by force of federal law is shown not only by the term "mandate" itself but also by the terms "without discretion " and " unavoidably," which plainly exclude any form of inducement using political or economic pressure rather than legal compulsion.

Laws limiting governmental appropriations and indebtedness have traditionally exempted two categories of expenditures: those required to meet emergencies and those required to satisfy duties or mandates imposed by law. (See, e.g., *County of Los Angeles v. Byram* (1951) 36 Cal.2d 694, 698-700 [227 P.2d 4]; *County of Los Angeles* v. *Payne* (1937) 8 Cal.2d 563, 569-575 [66 P.2d 658]; *State* v. *City Council of City of Helena* (1939) 108 Mont. 347 [90 P.2d 514, 516]; *Raynor v. King County* (1940) 2 Wn.2d 199 [97 P.2d 696, 707].) The latter category has been interpreted as including only those obligations compelled by force of law, as opposed to economic or political necessity or expedience. (See *County of Los Angeles v. Byram, supra*, at pp. 698-700; *County of Los Angeles* v. *Payne, supra*, at pp. 573-574.) Article XIII B of the California Constitution follows the pattern of other similar laws; it provides exemptions for emergency appropriations in section 3, subdivision (c), and for legal duties or "mandates" in section 9, subdivision (b). I see no basis for concluding that the term "mandate," which in the context of government debt and appropriation limitations has traditionally ***80** meant a duty imposed by force of law, has suddenly acquired a novel and more expansive meaning in section 9. On the contrary, the drafters of section 9 appear to have taken pains to avoid any such interpretation.

As stated in *Sacramento I*, "The concept of federal mandates ... is defined in section 9 of article XIII B. Subdivision (b) of that section excludes from a governmental entity's appropriation limit '[a]ppropriations required for purposes of complying with mandates of ... the federal government which, *without discretion, require* an expenditure' by the governmental entity. (Italics added.) As contemplated by article XIII B, section 9, a federal mandate is one pursuant to which the federal government imposes a cost upon a governmental entity, and the entity has *no discretion* to refuse the cost. Chapter 2 [the 1978 unemployment insurance legislation] was not a federal mandate within this constitutional definition, as the State had the discretion to participate or not in the federal unemployment insurance system. " (*Sacramento I, supra*, 156 Cal.App.3d 182, 197, italics in original.) Giving the constitutional language its usual and ordinary meaning, I agree with the Court of Appeal that federal law "mandates" an expenditure only if the expenditure is legally compelled, and not if the federal law merely provides economic or political inducements, no matter how powerful or coercive. Since it is undisputed that the state was under no legal compulsion to enact the 1978 unemployment insurance legislation, the burdens of that legislation are not " mandates of ... the federal government."

In support of its contrary conclusion, the majority reasons as follows: (1) when article XIII B of the California Constitution was drafted and enacted, the Tenth Amendment to the United States Constitution had been construed to prohibit Congress from imposing costs on state and local governments; (2) as a result, virtually all federal laws imposing costs on state and local governments did so through "carrot and stick" incentive programs rather than by direct legal compulsion; and (3) the exemption for "mandates of ... the federal government" must be construed to encompass at least some of these incentive programs because otherwise it would be almost entirely superfluous. I find each of these points highly questionable, if not demonstratively unsound.

First, the Tenth Amendment has never been interpreted as entirely prohibiting the federal government from imposing costs on state and local government. Rather, *National League of Cities v. Usery* (1976) 426 U.S. 833 [49 L.Ed.2d 245, 96 S.Ct. 2465] defined an exception to the broad sweep of Congress's commerce clause authority. Under this exception, "traditional governmental functions" of state and local governments were protected from direct and intrusive federal regulation. (426 U.S. at p. 852 [49 L.Ed.2d at pp. 257-258].) As explained in *Garcia v. San Antonio Metro. Transit* ***81** *Auth.* (1985) 469 U.S. 528, 538-547 [83 L.Ed.2d 1016, 1025-1032, 105 S.Ct. 1005], the result was an inconsistent patchwork of decisions upholding or striking laws depending on whether the regulated activities were perceived by the court as being traditionally associated with state or local government or constituting " attributes of state sovereignty." Thus, a significant number of laws imposing costs on state and local governments survived Tenth Amendment scrutiny even before the decision in *Garcia v. San Antonio Metro. Transit Auth., supra*. (See, e.g., *EEOC v. Wyoming* (1983) 460 U.S. 226 [75 L.Ed.2d 18, 103 S.Ct. 1054] [holding state and local government employee retirement policies subject to federal age discrimination regulations]; see generally, Skover, *"Phoenix Rising" and Federalism Analysis* (1986) 13 Hastings Const.L.Q. 271, 286-288.) More importantly, however, I see no reason to assume that the drafters of article XIII B intended that the federal mandate exemption would have broad application, encompassing a large number of

federal programs. Rather, construing the exemption narrowly seems entirely consistent with the probable intent of those who drafted the provision.

The test proposed by the majority for identifying those incentive programs which qualify as "mandates of ... the federal government" will require an extensive factual inquiry into the practical consequences of noncompliance with the federal law. It will be burdensome to apply and its outcome will be difficult to predict. Besides being wholly unnecessary to resolution of this case, and violating the probable intent of the voters who enacted article XIII B of the California Constitution, [1] the majority's discussion of the federal mandate issue is certain to generate more difficulties than it resolves. ***82**

1 Those voters no doubt will be upset to learn that their tax dollars will be dissipated in litigation to determine such metaphysical questions as whether a decision to participate in a federal program was "truly voluntary."

Footnotes

FN5 In 1986, the Legislature repealed sections 2250-2255 of the Revenue and Taxation Code. (Stats. 1986, ch. 879, §§ 37-48, p. 3047.) The Board's functions have been transferred to the Commission on State Mandates (Commission), but the procedures for administrative and judicial determination of subvention disputes remain functionally similar. (Gov. Code, §§ 17500 et seq., 17600 et seq.)

FN21 The United States Constitution includes specific limitations on the subject-matter jurisdiction of state and local governments (art. I, § 10), imposes certain direct obligations and restrictions on the "States as States" (e.g., art. I, § 2, cls. 1, 4; art. I, § 3, cls. 1, 2; art II, § 1, cl. 2; art. IV, §§ 1, 2, cls. 1, 2; Amends. XIV, XV), and grants Congress power to prevent denial of certain constitutional rights by the states (Amends. XIII, XIV, XV). Obviously, however, these provisions account for only a minute portion of the costs incurred by state and local governments as a result of federal programs and regulations.

13 Cal.5th 800
Supreme Court of California.

COAST COMMUNITY COLLEGE DISTRICT et al., Plaintiffs and Appellants,
v.
COMMISSION ON STATE MANDATES, Defendant and Respondent;
Department of Finance, Real Party in Interest and Respondent.

S262663
|
August 15, 2022

Synopsis

Background: Community college districts petitioned for writ of mandate challenging decision of Commission on State Mandates that funding entitlement regulations did not impose a state mandate under state constitutional provision requiring the State to reimburse local governments for state-mandated new programs or higher level of service. The Superior Court, Sacramento County, No. 34-2014-80001842CUWMGDS, Christopher E. Krueger, J., denied petition and entered judgment. Districts appealed. The Court of Appeal, 47 Cal.App.5th 415, 261 Cal.Rptr.3d 26, reversed in part. Commissioner petitioned for review.

[Holding:] The Supreme Court, Groban, J., held that funding entitlement regulations did not impose a state mandate under a legal compulsion theory.

Judgment of Court of Appeal reversed and remanded.

Liu, J., filed concurring opinion.

Procedural Posture(s): Petition for Discretionary Review; On Appeal; Petition for Writ of Mandate.

West Headnotes (16)

[1] **States** Jurisdiction and venue

Commission on State Mandates is a quasi-judicial body that has the sole and exclusive authority to adjudicate whether a state mandate exists. Cal. Gov't Code § 17551.

[2] **States** State Expenses and Charges; Statutory Liabilities

Purpose of the state's constitutional obligation to reimburse a local government whenever the legislature or any state agency mandates a new program or higher level of service on any local government 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. Cal. Const. art. XIII B, § 6.

1 Case that cites this headnote

[3] **Education** Powers, duties, and liabilities

The only limitation placed on the authority of a board of trustees of a community college district under the permissive education code is that the board may not act in any manner that is inconsistent with any law. Cal. Educ. Code § 70902(a)(1).

[4] **States** Weight and sufficiency

A court reviews a decision of Commission on State Mandates to determine whether it is supported by substantial evidence.

[5] **Mandamus** Scope and extent in general

Ordinarily, when the scope of review in the trial court on a petitioned for writ of mandate is whether the administrative decision is supported by substantial evidence, the scope of review on appeal is the same; however, an appellate court independently reviews conclusions as to the meaning and effect of constitutional and statutory provisions.

2 Cases that cite this headnote

[6] **Trial** Construction of writings

Question whether statute or executive order imposes a mandate is a question of law.

[7] **Mandamus** Scope and extent in general

Question of whether funding entitlement regulations governing community colleges districts imposed a state mandate, for purposes of constitutionally reimbursable state-mandated new programs or higher level of service, was a question of law warranting independent review by the Supreme Court based on the entire record, on appeal from denial of petition for writ of mandate. Cal. Const. art. XIII B, § 6; Cal. Educ. Code § 70901(b)(6); Cal. Code Regs. tit. 5, § 51102.

More cases on this issue

[8] **States** State Expenses and Charges; Statutory Liabilities

"Legal compulsion," as a theory of a state mandate on a local entity for purposes of constitutionally reimbursable state-mandated new programs or higher level of service, occurs when a statute or executive action uses mandatory language that requires or commands a local entity to participate in a program or service. Cal. Const. art. XIII B, § 6.

1 Case that cites this headnote

[9] **States** State Expenses and Charges; Statutory Liabilities

"Legal compulsion," as a theory of a state mandate on a local entity for purposes of constitutionally reimbursable state-mandated new programs or higher level of service, is present when the local entity has a mandatory, legally enforceable duty to obey. Cal. Const. art. XIII B, § 6.

1 Case that cites this headnote

[10] **States** State Expenses and Charges; Statutory Liabilities

The "legal compulsion" standard, as a theory of a state mandate on a local entity for purposes of constitutionally reimbursable state-mandated new programs or higher level of service, is similar to the showing necessary to obtain a traditional writ of mandate. Cal. Const. art. XIII B, § 6.

[11] **Mandamus** Ministerial acts in general

A petitioner seeking a traditional writ of mandate must establish that the administrative agency or its officer has a clear, present, and usually ministerial duty to act.

1 Case that cites this headnote

[12] **Mandamus** Matters of discretion

Mandate will not issue if the duty to act on the part of the administrative agency or its officers is mixed with discretionary power.

2 Cases that cite this headnote

[13] **States** State Expenses and Charges; Statutory Liabilities

Generally, a local entity's voluntary or discretionary decision to undertake an activity cannot be said to be legally compelled, as a theory of a state mandate on a local entity for purposes of constitutionally reimbursable state-mandated new programs or higher level of service, even if that decision results in certain mandatory actions. Cal. Const. art. XIII B, § 6.

[14] **States** State Expenses and Charges; Statutory Liabilities

"Practical compulsion," as a theory of a state mandate on a local entity for purposes of constitutionally reimbursable state-mandated new programs or higher level of service, arises when a statutory scheme does not command a local entity to engage in conduct, but rather induces compliance through the imposition of severe consequences that leave the local entity no reasonable alternative but to comply. Cal. Const. art. XIII B, § 6.

[15] **States** State Expenses and Charges; Statutory Liabilities

Regulations specifying various conditions that community college districts were required to satisfy to avoid the possibility of having state aid reduced or withheld did not legally compel districts to comply, and thus regulations did not impose a state mandate under a legal compulsion theory for purposes of a local government's constitutional right to reimbursement for a state-mandated new program or higher level of service; fact that the standards set forth in regulations, including matriculation, hiring of faculty, and selecting curriculum, related to districts' core functions did not in itself establish that districts had a mandatory legal obligation to adopt those standards, and California Community Colleges Chancellor had discretion to pursue remedial measures for any noncompliance. Cal. Const. art. XIII B, § 6; Cal. Educ. Code § 70901(b)(6); Cal. Code Regs. tit. 5, § 51102.

[16] **States** State Expenses and Charges; Statutory Liabilities

Proper focus for inquiry into legal compulsion, as a theory of a state mandate on a local entity for purposes of constitutionally reimbursable state-mandated new programs or higher level of service, is upon the nature of claimants' participation in the underlying programs themselves. Cal. Const. art. XIII B, § 6.

****856** *****69** Third Appellate District, C080349, Sacramento County Superior Court, 34-2014-80001842CUWMGDS, Christopher E. Krueger, Judge

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Opinion

Opinion of the Court by Groban, J.

****857** ***805** Article XIII B, section 6 of the California Constitution requires the state to reimburse local governments "[w]henever the Legislature ***806** or any state agency mandates a new program or higher level of service ...." (Cal. Const., art. XIII B, § 6, subd. (a).) In this case, several community college districts, including Coast Community College District, North Orange County Community College District, San Mateo County Community College District, Santa Monica Community College District, and State Center Community College District (districts), seek reimbursement for regulations that specify various conditions the districts must satisfy to avoid the possibility of having their state aid withheld. The conditions describe standards governing several core areas of community college administration, including matriculation requirements, hiring procedures, and curriculum selection.

[1] The districts filed a claim with the Commission on State Mandates (the Commission), " ' "a quasi-judicial body [that] has the sole and exclusive authority to adjudicate whether a state mandate exists" ' " (*California School Boards Assn. v. State of California* (2009) 171 Cal.App.4th 1183, 1200 [90 Cal. Rptr. 3d 501]; see Gov. Code, § 17551), arguing that reimbursement was required under California Constitution, article XIII B, section 6 because:

(1) the regulations imposed a legal duty to satisfy the conditions described therein (legal compulsion); or (2) the regulations otherwise ***70 compelled compliance as a practical matter (practical compulsion). (See *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 741 [134 Cal. Rptr. 2d 237, 68 P.3d 1203] (*Kern*) ["reimbursable state mandate arises" when entity is compelled to comply; distinguishing legal and practical compulsion]; *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1365–1366, 89 Cal.Rptr.3d 93 (*Department of Finance*) [reimbursement not required "if a local government participates 'voluntarily,' i.e., without legal compulsion or compulsion as a practical matter, in a program with a rule requiring increased costs"].)

The Commission rejected the claims, concluding that the districts had failed to show they were legally compelled to comply with the regulations because there was no provision creating a mandatory duty that they do so; instead, noncompliance merely raised the possibility that some portion of their state funding would be withheld. The Commission further concluded that the districts had failed to establish they were compelled to comply as a practical matter, explaining that no evidence had been submitted demonstrating the districts were unable to function without state funding or that they otherwise lacked any true choice but to comply with the conditions.

In subsequent mandate proceedings, the trial court affirmed the Commission's findings with respect to both legal and practical compulsion. The Court of Appeal reversed, concluding that the districts were legally compelled to comply with the regulations because those regulations "apply to the underlying core functions of the community colleges, functions compelled by state law." The court also rejected the Commission's finding that legal compulsion was inapplicable because noncompliance merely placed the districts at risk of having some portion of their state aid withheld. According to the court, state *807 laws that required the funding of community colleges and other evidence in the record demonstrated the districts rely on state aid to function, leaving them no choice but to comply with the regulations. Having found the districts had a legal duty to comply with the regulations, the court declined to review the trial court's conclusion that the districts had failed to show practical compulsion.

We reverse. Contrary to the Court of Appeal's interpretation, the fact that the standards set forth in the regulations relate to the districts' core functions (matriculation, hiring of faculty and selecting curriculum, etc.) does not in itself establish that the districts have a mandatory legal obligation to adopt those standards. (See *Kern, supra*, 30 Cal.4th at p. 741, 134 Cal.Rptr.2d 237, 68 P.3d 1203.) The regulations make clear that if a district fails to comply, the California Community Colleges Chancellor has discretion to pursue any number of remedial measures that range from taking no action to "withhold[ing] or reduc[ing] all or part of the district's state aid." (Cal. Code Regs., tit. 5, § 51102, subd. (b)(5).) Thus, the districts are not legally obligated to adopt the standards described in the regulations, but rather face the risk of potentially severe financial consequences **858 if they chose not to do so. Because the regulations induce rather than obligate compliance, legal compulsion is inapplicable. (See *Kern, supra,* 30 Cal.4th at p. 742, 134 Cal.Rptr.2d 237, 68 P.3d 1203 [legal compulsion applicable when a local entity "has a legal obligation" to comply].)

Moreover, while the Court of Appeal appears to have reasoned that the districts have no true choice to comply with the regulations insofar as they depend on state ***71 aid to function, those arguments sound in *practical*, rather than *legal*, compulsion. (See generally *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 74, 266 Cal.Rptr. 139, 785 P.2d 522 (*City of Sacramento*) [finding practical compulsion where "[t]he alternatives were so far beyond the realm of practical reality that they left the state 'without discretion' to depart from federal standards"].) Because the Court of Appeal chose not to address whether the districts established practical compulsion, we will remand the matter to allow the court to evaluate that issue in the first instance.

I. BACKGROUND

A. Summary of Applicable Statutes

1. Proposition 4 and implementing legislation

"Article XIII A (adopted by the voters in 1978 as Proposition 13), limits the *taxing* authority of state and local government. Article XIII B *808 (adopted by the voters in 1979 as Proposition 4) limits the *spending* authority of state and local government." (*Kern, supra*, 30 Cal.4th at p. 735, 134 Cal.Rptr.2d 237, 68 P.3d 1203.)

[2] Section 6 of California Constitution, article XIII B provides: "Whenever the Legislature or any state agency

mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service." The purpose of section 6 "is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose." (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81, 61 Cal.Rptr.2d 134, 931 P.2d 312 (*County of San Diego*).)

In 1984, the Legislature adopted statutory procedures for determining whether a statute or executive action (which includes executive orders and regulations) imposes state-mandated costs on a local agency. (See Gov. Code, § 17500 et seq.) That legislation provides a two-step procedure. First, a local agency seeking reimbursement must file a "test claim" with the Commission, a quasi-judicial body established to "hear and decide" such matters. (*Id.*, § 17551, subds. (a)–(b).) The test claim process allows the claimant and other interested parties to present written evidence and testimony at a public hearing. (*Id.*, § 17553, subd. (a)(1)); see Cal. Code Regs., tit. 2, § 1183.1, subd. (b) [authorizing multiple claimants "to file a test claim as a joint effort" and providing that "[o]ther similarly situated affected agencies may participate in the process"].) Based on that evidence, the Commission must decide whether the challenged statute or executive order mandates a new program or increased level of service.

In making that determination, the Commission is required to address a series of questions. First, it must decide whether the legal provision for which subvention is sought compels the local agency to act or merely invites voluntary action. If the provision compels action, the Commission must next decide whether the compelled activity requires the agency to provide "a new program or higher level of service." (Cal. Const., art. XIII B, § 6.) Finally, if the Commission finds a statute or executive action mandates a new program or higher level of service, it must consider if any of the enumerated exceptions to reimbursement ***72** apply.[1] This case involves **859** only the first of those inquiries: whether the regulations at issue compel community college districts to act or, alternatively, merely invite voluntary action.

1 Those exceptions include, among other things: (1) when the state has imposed the new program or service to comply with a federal mandate; (2) when the state has provided the local agency offsetting savings that are commensurate with costs of the new program or service; or (3) when the local agency is authorized to fund the new program or service by imposing fees or assessments. (See Gov. Code, § 17556.)

809 If the Commission ultimately determines there is a reimbursable mandate, it must then "determine the amount to be subvened to local agencies and school districts for reimbursement. In so doing it shall adopt parameters and guidelines for reimbursement of any claims relating to the statute or executive order." (Gov. Code, § 17557, subd. (a); see *County of San Diego*, *supra*, 15 Cal.4th at p. 81, 61 Cal.Rptr.2d 134, 931 P.2d 312.)

2. Statutes and regulations governing community colleges

[3] California community colleges offer two-year degree programs and other forms of instruction. There are currently 73 community college districts that collectively operate 116 community colleges. Each community college district is run by a board of trustees (district board) (see Ed. Code, § 70902, subd. (a)(1)) that is responsible for "establish[ing], maintain[ing], operat[ing], and govern[ing] [the community colleges it oversees] in accordance with law." (*Ibid.*) Under what is commonly referred to "as the 'permissive code' concept" (*Service Employees Internat. Union v. Board of Trustees* (1996) 47 Cal.App.4th 1661, 1666, 55 Cal.Rptr.2d 484), district boards are permitted to "initiate and carry on any program, activity, or may otherwise act in any manner that is not in conflict with ... any law and that is not in conflict with the purposes for which community college districts are established." (Ed. Code, § 70902, subd. (a)(1).) Thus, the "only limitation placed on a [district] board's authority under the permissive code is that the board may not act in any manner" that is inconsistent with any law. (*Service Employees Internat. Union,* at p. 1666, 55 Cal.Rptr.2d 484.)

The Legislature has, however, cabined the authority of district boards in some ways. Education Code section 66010.4, subdivision (a), for example, sets forth the general mission and functions of the community colleges, requiring that they: "offer academic and vocational instruction ... through, but not beyond, the second year of college" (*id.*, subd. (a)(1)); offer courses to provide "remedial instruction for those in need of it" (*id.*, subd. (a)(2)(A)); "instruct[ ] in English as a second language" (*ibid.*); and offer "adult noncredit instruction" (*ibid.*).

The Legislature has assigned general oversight authority of the districts to the Board of Governors of the California Community Colleges (the Board of Governors or Board), which enacts regulations and reviews major decisions of community college districts, such as the creation of new colleges. (See Ed. Code, § 70901, subd. (b).) The Board of Governors is headed by the California Community Colleges Chancellor, who is responsible for carrying out and enforcing the Board's regulations and overseeing the annual apportionment of state funds.

***810** In 1988, the Legislature passed new statutory directives requiring the Board of Governors to establish two categories of regulations. (See Stats. 1988, ch. 973, § 8, p. 7357, adding Ed. Code, § 70901.) First, the Board was required to adopt regulations *****73** establishing "minimum standards as required by law" for various aspects of community college operations. (Ed. Code, § 70901, subd. (b)(1).) Those regulations (hereafter operating standards regulations) set out mandatory "minimum standards" related to (among other things) "graduation requirements," "the employment of academic and administrative staff," student discipline, and curriculum. (*Ibid.*; see also Cal. Code Regs., tit. 5, §§ 53000–59606.)[2]

2 Except where otherwise noted, all further references to "Regulation" or "Regulations" are to title 5 of the California Code of Regulations.

The Legislature also directed the Board of Governors to adopt separate regulations that "[e]stablish minimum conditions entitling districts to receive state aid for support of community colleges" and to adopt procedures to "periodic[ally] review" whether each district has met those minimum conditions. (Ed. Code, § 70901, subd. (b)(6)(A); see Cal. Code Regs., tit. 5, § 51000.) Pursuant to those provisions, the Board passed 19 regulations (see Cal. Code Regs., tit. 5, §§ 51002–51027; ****860** hereafter funding entitlement regulations), many of which overlap with (and in some cases directly incorporate) requirements set forth in the operating standards regulations.[3]

3 Regulation 51002, subd. (a), for example, directs the districts to "adopt regulations consistent with the standards of scholarship contained in articles 2 through 5 (commencing with section 55020) of subchapter 1 of chapter 6" of the Regulations, which refers to the operating standards regulations that govern scholarship. Similarly, Regulation 51004, subd. (a) directs the districts to "adopt regulations consistent with regulations contained in articles 6 and 7 (commencing with section 55060) of subchapter 1 of chapter 6," which refers to the operating standards regulations that govern the issuance of degrees and certificates. As discussed in more detail below (see *post*, at p. 813), the Court of Appeal's decision found that numerous other provisions in the funding entitlement regulations overlap with requirements in the operating standards regulations.

Unlike the operating standards regulations, the districts are not expressly required to comply with the funding entitlement regulations. Instead, the Education Code and its implementing regulations provide that noncompliance authorizes the chancellor to initiate a process that may result in withholding or reduction of state funding. (See Ed. Code, § 70901, subd. (b)(6); Regs., §§ 51000, 51102.) If the chancellor determines a district is out of compliance with some or all of the funding entitlement regulations, she must provide the district notice identifying the noncompliance issues and request a response. (See Regs., § 51102, subd. (a).) Once the district responds (or time has lapsed to do so), the chancellor "shall pursue one or more ... courses of action" that include (among other things) accepting the district's response, requiring the district to adhere to a remedial plan or "withhold[ing] or reduc[ing] all or part of the ***811** district's state aid." (Regs., § 51102, subd. (b).) The regulations further require that the remedy the chancellor selects "shall be related to the extent and gravity of noncompliance." (*Id.*, subd. (c).)

B. Procedural History

1. The Commission's resolution of the test claims

In June 2003, the Los Rios, Santa Monica, and West Kern community college districts filed test claims seeking reimbursement for costs associated with 27 sections of the Education Code and approximately 140 related regulations. The test claims included (among other provisions) the operating standards regulations and the funding entitlement regulations. After *****74** nearly a decade of review, the Commission issued a 164-page statement of decision that authorized reimbursement for over 90 of the alleged mandates, many of which related to the operating standards regulations implemented pursuant to Education Code section 70901, subdivision (b)(1). The Commission later adopted

parameters and guidelines for the reimbursement of those mandates.

However, the Commission rejected all claims related to the funding entitlement regulations, concluding that the districts had failed to establish those regulations compelled them to take any action. The Commission reasoned that unlike the operating standards regulations, compliance with the funding entitlement regulations was not legally mandated, but instead operated to remove the possibility that the Board of Governors might withhold some portion of the noncomplying district's state aid. The Commission further explained that the regulations provided the chancellor and the Board of Governors discretion to choose what "actions to take" in response to a district's noncompliance, meaning that a district might still retain all its aid even if it chose not to comply. The Commission noted that the districts' evidence showed only one case in which the chancellor had ever recommended that the Board of Governors withhold funding from a district, which occurred after the San Mateo County Community College District had failed to comply with an equal opportunity hiring regulation when choosing its new superintendent. The Board, however, ultimately rejected the chancellor's recommendation to withhold funding and chose instead to increase monitoring over the district. The Commission concluded the case demonstrated that while "there is ... a possible loss of funding, [there is no] ... evidence of the certainty of this loss."

2. The trial court's ruling

The districts filed a writ petition seeking reversal of the Commission's finding that the ****861** funding entitlement regulations did not qualify as a mandate. ***812** Although the Department of Finance (the Department) joined the Commission in opposing the petition, the Department chose not to seek review of the portion of the Commission's decision finding that over 90 statutes and regulations (including most of the operating standards regulations) qualified as reimbursable mandates.

The trial court affirmed the Commission's decision and adopted most of its reasoning. The court concluded that the districts "are not legally compelled to comply with the minimum conditions. Instead, ... [they] only have to comply with the minimum conditions if they want to become entitled to receive state aid." (Italics omitted.) The court also rejected the districts' assertion that even if not legally compelled to comply, they were nonetheless practically compelled to do so "because they cannot operate without state funding and thus have no meaningful choice but to comply with the minimum conditions." The court explained that it could not evaluate that assertion because the districts had "cite[d] no evidence in their briefs about how much community colleges receive from state aid, how much they receive from property taxes, and how much they receive from other funding sources. ... With no evidence on this issue, ... [the districts] fail to prove the key point (i.e., that they cannot operate without state funds)." (Italics omitted.)

The trial court further concluded that even if there were sufficient evidence to support a finding that the districts relied on state funds to operate, the districts had failed to show that noncompliance was reasonably likely to result in the withholding of state funds. The court reasoned that *****75** while the funding entitlement regulations authorized the chancellor "to withhold state aid if a district fails to comply," the districts had not proved that "loss of state aid is ... reasonably certain to occur" or that the amounts withheld would necessarily be "severe." Like the Commission, the trial court cited evidence regarding the disciplinary action the Board of Governors had taken against San Mateo County Community College District for failing to comply with funding entitlement regulations related to equal opportunity hiring. The trial court noted that the Board's meeting minutes showed it had rejected the chancellor's recommendation to withhold $500,000 in state aid because "of the worry that doing so would negatively impact students." In the court's view, these actions showed that it was "unlikely that a district would actually lose any state aid if it failed to comply with the minimum conditions."

3. The Court of Appeal's partial reversal

The Court of Appeal reversed in part, concluding that the districts had shown they were legally compelled to comply with the funding entitlement regulations because those regulations related to the community college ***813** districts' core functions: "[T]he [funding entitlement regulations] apply to the underlying core functions of the community colleges, functions compelled by state law. ... California community colleges are required to provide specified academic, vocational, and remedial instruction, along with support services. (Ed. Code, § 66010.4.) The [funding entitlement regulations] direct the community college districts to take specific steps in fulfilling those legally-

compelled core mission functions, including requirements pertaining to scholarship, degrees, courses, campuses, counseling, and curriculum."

The court further concluded that while the Commission had found "the [funding entitlement regulations] are not legally compelled because the community colleges are free to decline state aid," that conclusion was "inconsistent with the statutory scheme and the appellate record." The court explained that the California Constitution requires "a specific minimum level of state General Fund revenues be guaranteed and applied for the support of community college districts" and further requires that the state provide districts sufficient funding "to permit them to carry out their mission." Without citing a specific source, the court noted that "in the most recent year for which the appellate record in this case provides information, more than half of California community college funding came from the state General Fund. In that same year, other funding sources, including federal funds, local funds, and student fees, provided significantly less ****862** support. Like public school districts in general, community college districts are dependent on state aid." (Italics omitted.) Because the court found that the districts were legally compelled to comply with the funding entitlement regulations, it declined to address the trial court's alternative finding that the districts had failed to demonstrate they "faced practical compulsion based on severe and certain penalties."

The Court of Appeal went on to rule, however, that the districts were not entitled to reimbursement for many of the funding entitlement regulations because the programs or services described within those regulations were duplicative of requirements imposed under the operating standards regulations, which the Commission had previously found to be reimbursable. In total, the Court of Appeal found that only six of the 19 funding entitlement regulations involved programs or services that did not overlap with operating *****76** standards regulations or other statutory requirements the Commission had already found to be reimbursable. For those six regulations, the court remanded the matter back to the Commission to evaluate whether they imposed a new program or higher level of service within the meaning of the mandate law.

***814** The Commission and the Department (collectively respondents) filed petitions for review challenging the Court of Appeal's conclusion that the districts were legally compelled to comply with the funding entitlement regulations. [4]

[4] The Commission has also requested review of a separate portion of the Court of Appeal's decision that directs the Commission to make further findings regarding the districts' entitlement to reimbursement for various sections of the Education Code that are unrelated to the regulations discussed above. The Commission asserts it lacks fundamental jurisdiction to address those sections of the Education Code because: (1) the districts' test claims do not expressly reference those statutes; and (2) some of those statutes were the subject of a prior test claim. The Department, which has not joined in this argument, is of the view that while a claimant might be procedurally barred from seeking reimbursement for statutes that were not listed in a test claim or were the subject of a prior test claim, those circumstances do not result in a jurisdictional bar.
Although the Commission's arguments regarding this secondary issue fall within the scope of our order granting review, we decline to address them. (Cal. Rules of Court, rule 8.516(b)(3) ["The court need not decide every issue the parties raise or the court specifies"].)

II. DISCUSSION

A. Standard of Review

[4] [5] [6] [7] "Courts review a decision of the Commission to determine whether it is supported by substantial evidence. [Citation.] Ordinarily, when the scope of review in the trial court is whether the administrative decision is supported by substantial evidence, the scope of review on appeal is the same. [Citation.] However, the appellate court independently reviews conclusions as to the meaning and effect of constitutional and statutory provisions. [Citation.] The question whether a statute or executive order imposes a mandate is a question of law. [Citation.] Thus, we review the entire record before the Commission ... and independently determine whether it supports the Commission's conclusion that the conditions here were not ... mandates." (*Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 762, 207 Cal.Rptr.3d 44, 378 P.3d 356.)

B. Analysis

Respondents argue the Court of Appeal erred in finding the districts were legally compelled to comply with the funding

entitlement regulations. They further contend that although the Court of Appeal did not reach the issue, we should additionally find that the districts failed to establish they were practically compelled to comply with those regulations.

*815 *1. Distinction between legal compulsion and practical compulsion*

[8] **[9]** **[10]** **[11]** **[12]** When evaluating whether a statute or executive action compels compliance for purposes of subvention claims, we have identified two distinct theories of mandate: legal compulsion and practical compulsion. Legal compulsion occurs when a statute or executive action uses mandatory language that " 'require[s]' or 'command[s]' " a local entity to participate in a program or service. **863 (*Kern*, *supra*, 30 Cal.4th at p. 741, 134 Cal.Rptr.2d 237, 68 P.3d 1203; see *Long Beach Unified Sch. Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174, 275 Cal.Rptr. 449 [construing the term "mandates" in ***77 art. XIII B, § 6 to mean " 'orders' or 'commands' "].) Stated differently, legal compulsion is present when the local entity has a mandatory, legally enforceable duty to obey. This standard is similar to the showing necessary to obtain a traditional writ of mandate, which requires the petitioning party to establish the respondent has "a clear, present, and usually ministerial duty to act. ... Mandate will not issue if the duty is ... mixed with discretionary power." (*Los Angeles County Prof. Peace Officers' Assn. v. County of Los Angeles* (2004) 115 Cal.App.4th 866, 869, 9 Cal.Rptr.3d 615.)

[13] Thus, as a general matter, a local entity's voluntary or discretionary decision to undertake an activity cannot be said to be legally compelled, even if that decision results in certain mandatory actions. In *Kern*, *supra*, 30 Cal.4th 727, 134 Cal.Rptr.2d 237, 68 P.3d 1203, for example, we held that school districts were not entitled to reimbursement for costs associated with a law that imposed new requirements related to the administration of certain voluntary, state-funded educational programs. Under the original statutes governing these voluntary educational programs, "participating school districts [we]re granted state or federal funds to operate the program, and [we]re required to establish ... advisory committees [to] ... administer the program." (*Id.* at p. 732, 134 Cal.Rptr.2d 237, 68 P.3d 1203.) The new law required participating districts to make those advisory committee meetings open to the public and provide the public notice of the meetings and postmeeting agendas.

In rejecting the districts' reimbursement claim for those new open meeting requirements, we explained that because the "notice and agenda provisions [were merely] mandatory elements of [voluntary] programs" (*Kern, supra*, 30 Cal.4th at p. 731, 134 Cal.Rptr.2d 237, 68 P.3d 1203), the districts were not legally compelled to comply with those provisions. (See *id.* at p. 742, 134 Cal.Rptr.2d 237, 68 P.3d 1203 ["activities undertaken at the option or discretion of a local government entity ... do not trigger a state mandate and hence do not require reimbursement of funds — even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice"]; but see *816 *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887, 16 Cal.Rptr.3d 466, 94 P.3d 589 [declining to adopt a bright-line rule precluding reimbursement "whenever an entity makes an initial discretionary decision that in turn triggers mandated costs"].)

[14] *Kern* also discussed the concept of "practical compulsion," a theory of mandate that arises when a statutory scheme does not command a local entity to engage in conduct, but rather induces compliance through the imposition of severe consequences that leave the local entity no reasonable alternative but to comply. (See *Kern, supra*, 30 Cal.4th at pp. 748–752, 134 Cal.Rptr.2d 237, 68 P.3d 1203.) Relying on our decision in *City of Sacramento, supra,* 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522, the claimants in *Kern* argued that we should construe section's 6's mandate provision (see Cal. Const., art. XIII B, § 6) to encompass both legal and practical compulsion. *City of Sacramento* addressed a different provision in article XIII B — section 9 — which lists various categories of appropriations that are excluded from the spending limitations article XIII B otherwise places on state and local governments. One of those exceptions excludes "[a]ppropriations required to comply with mandates of ... the federal government." (Cal. Const., art. XIII B, § 9, subd. (b).) As summarized in *Kern*, our decision in *City of Sacramento* examined whether section 9 's federal mandate exclusion applied to a ***78 federal law that provided substantial tax incentives for states to extend their unemployment insurance programs to cover public employees. To retain these significant tax advantages, our Legislature passed a statute requiring that government entities (including local entities) include their employees within the state unemployment program. The question we had to decide was whether the federal law constituted **864 a "federal mandate," which would mean that local governments could exclude the costs of complying with the new state statute

from their constitutional spending limits. (*Kern*, at p. 749, 134 Cal.Rptr.2d 237, 68 P.3d 1203.)

Although we found the federal law did not *legally* compel states to extend unemployment insurance coverage to all public employees, we nevertheless concluded that "because the financial consequences to the state and its residents of failing to participate in the federal plan were so onerous and punitive — we characterized the consequences as amounting to 'certain and severe federal penalties' including 'double ... taxation' and other 'draconian' measures [citation] — as a practical matter, for purposes of article XIII B, section 9, the state was mandated to participate in the federal plan to extend unemployment insurance coverage." (*Kern*, *supra*, 30 Cal.4th at p. 749, 134 Cal.Rptr.2d 237, 68 P.3d 1203 [summarizing *City of Sacramento*]; see *City of Sacramento, supra*, 50 Cal.3d at p. 76, 266 Cal.Rptr. 139, 785 P.2d 522 [practical compulsion determination "must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal"].)

***817** The claimants in *Kern*, *supra*, 30 Cal.4th 727, 134 Cal.Rptr.2d 237, 68 P.3d 1203, argued that for purposes of consistency we should likewise construe the state mandate provision in California Constitution, article XIII B, section 6 to encompass both legal and practical compulsion. (See *Kern*, at p. 750, 134 Cal.Rptr.2d 237, 68 P.3d 1203 ["claimants argue, the word 'mandate,' used in two separate sections of article XIII B, should not be given two different meanings"].) The Department, however, contended we should interpret section 6 's mandate provision more "narrowly ... to include only programs in which local entities are legally compelled to participate." (*Kern*, at p. 751.)

We declined to resolve that issue, explaining that even if we were to assume "that our construction of the term 'federal mandate' ... applies equally in the context of article XIII B, section 6" (*Kern, supra*, 30 Cal.4th at p. 751, 134 Cal.Rptr.2d 237, 68 P.3d 1203), the claimants had failed to identify any " 'certain and severe ... penalties' " or other " 'draconian' consequences" that "reasonably could constitute ... a 'de facto' reimbursable mandate." (*Id*. at p. 754, 134 Cal.Rptr.2d 237, 68 P.3d 1203.) Rather, the record demonstrated that the new laws merely required each school district to decide whether to continue participating in the voluntary school programs, "even though the school district also must incur program-related costs associated with the notice and agenda requirements .... Presumably, a school district will continue to participate only if it determines that ..., on balance, the funded program, even with strings attached, is deemed beneficial." (*Id.* at p. 753, 134 Cal.Rptr.2d 237, 68 P.3d 1203, italics omitted.) [5]

5 While *Kern's* general discussion of the distinction between legal and practical compulsion is helpful for evaluating the parties' arguments in this case, the specific nature of the mandate claim at issue in *Kern* is factually somewhat distinct from the districts' claims here. As discussed above, participation in the underlying school programs that triggered the challenged costs in *Kern* was completely voluntary. (*Kern, supra*, 30 Cal.4th at p. 744, 134 Cal.Rptr.2d 237, 68 P.3d 1203.) Thus, nonparticipation in the underlying programs would have left the claimant school districts in the same position they would have been in otherwise, i.e., with no additional costs. By contrast, as discussed in more detail below, the districts here allege that choosing not to comply with the funding entitlement regulations results in unavoidable severe consequences, namely placing their state aid in jeopardy.

*****79** *2. The districts have failed to show legal compulsion*

[15] We first address the Court of Appeal's conclusion that the districts were legally compelled to comply with the funding entitlement regulations. Education Code section 70901, subdivision (b)(6)(A) directs the Board of Governors to "[e]stablish minimum conditions entitling districts to receive state aid for support of community colleges" and to periodically review whether districts are in compliance with those conditions. (See *ante*, at p. 810.) ****865** The implementing regulations, in turn, set forth the applicable funding entitlement requirements and describe how the chancellor is to proceed in the event of noncompliance. The regulations direct that after ***818** soliciting a response from a noncompliant district, the chancellor may pursue a variety of remedies that range from accepting the district's response to an inquiry to withholding some or all of the district's state aid. (See Regs., § 51102, subd. (b).)

We are not persuaded that this enforcement scheme legally compels the districts to comply with funding entitlement regulations. As summarized above, Education Code section 70901, subdivision (b) required the Board of Governors to adopt two distinct sets of regulations: the operating standards regulations that the Commission previously found to impose mandates (see Ed. Code, § 70901, subd. (b)(1)) and the funding entitlement regulations at issue in this case (see Ed. Code, § 70901, subd. (b)(6)). (See *ante*, 297 Cal.Rptr.3d at pp. 72–73, 514 P.3d at pp. 859–860.) Unlike the mandatory language governing the operating standards regulations, which directs the Board to "[e]stablish minimum standards *as required by law*" (Ed. Code, § 70901, subd. (b)(1), italics added) and which requires that districts *shall* establish policies consistent with those standards (see Ed. Code, § 70902, subd. (b) ["board of each community college district shall" establish policies and procedures that are consistent with the operating standards]), Education Code section 70901, subdivision (b)(6) and its implementing regulations contain no language "command[ing]" (*Kern*, *supra*, 30 Cal.4th at p. 741, 134 Cal.Rptr.2d 237, 68 P.3d 1203) that the districts comply with the funding entitlement regulations. Instead, those provisions make clear that districts that fail to comply *may* be subject to certain consequences, the most severe of which is withholding of state funds. (See Ed. Code, § 70901, subd. (b)(6)(A) [directing board to establish minimum conditions "entitling districts to receive state aid"]; Regs., § 51102, subd. (b) [describing actions Board may take in response to noncompliance, including withholding of state aid].)

While the districts argue that the threat of such a penalty effectively forces community colleges to comply with the regulations (an issue discussed in more detail below), there is nothing in the statute or regulations that creates a mandatory legal obligation that they do so, which is the ***80 appropriate test for legal compulsion. If a community college district is willing to risk the possibility of losing some or all its state aid, there does not appear to be any mechanism (or at least none the parties have identified) that would allow the chancellor or any other state entity to compel compliance as a matter of law. [6]

6 At oral argument, counsel for the districts argued that several of the funding entitlement regulations include the word "shall," which is generally indicative of a mandatory duty. (See Regs., §§ 51002 [district "*shall* [¶] ... adopt regulations consistent with the standards of scholarship contained in articles 2 through 5 (commencing with section 55020)" (italics added)], 51004 [district "*shall* [¶] ... adopt regulations consistent with regulations contained in articles 6 and 7 (commencing with section 55060)" (italics added)], 51006 [district "*shall* adopt" a policy making courses open to any enrolled students (italics added)].) Those regulations, however, must be read in the context of — and in conjunction with — Education Code section 70901, subdivision (b)(6) and Regulation 51002, which explain the *consequences* of failing to comply with regulations, i.e., the chancellor and Board of Governors are given discretionary authority to withhold state aid. (See *ante*, at p. 810.) Regardless of whether those consequences are sufficient to support a claim of *practical* compulsion (an issue we do not reach here [see *post* at pp. 821–822]), the risk that funding might be withheld does not create a mandatory legal duty to comply with the regulations, which is the applicable test for legal compulsion. (Cf., *Kern, supra,* 30 Cal.4th at p. 745, 134 Cal.Rptr.2d 237, 68 P.3d 1203 [regulation directing that school districts "shall" establish certain policies did not create a legal duty where other provisions made clear compliance was only necessary if the school districts chose to participate in a voluntary program].)

***819** The Court of Appeal reached a different conclusion, finding that the districts were legally compelled to comply with the regulations because the funding entitlement regulations "apply to the underlying core functions of the community colleges, functions compelled by state law." In support, the court cited to Education Code section 66010.4, which describes the "missions and functions" **866 of community colleges, including (among other things) "academic and vocational instruction ... through but not beyond the second year of college." (Ed. Code, § 66010.4, subd. (a)(1).) In the appellate court's view, the funding entitlement regulations "direct the community college districts to take specific steps in fulfilling those legally compelled core mission functions, including requirements pertaining to scholarship, degrees, courses, campuses, counseling, and curriculum."

[16] We do not dispute that many of the funding entitlement regulations are "in connection with" or relate to the "core functions" that community colleges are required to perform. We are not persuaded, however, that such a

relationship is sufficient to establish legal compulsion. As we have previously explained, "[T]he proper focus under a legal compulsion inquiry is upon the nature of claimants' participation in the underlying programs themselves." (*Kern, supra*, 30 Cal.4th at p. 743, 134 Cal.Rptr.2d 237, 68 P.3d 1203.) Applying that standard here, the proper inquiry is whether the language of the funding entitlement provisions legally obligates the districts to comply with the conditions described therein, not whether those conditions relate to the core functions of the districts. Section 70901, subdivision (b)(6) provides that compliance with the minimum conditions "*entitl[es]* districts to receive state aid" (italics added), while Regulation 51102, subdivision (b) describes the remedial actions the chancellor may impose in the event of noncompliance, up to and including withholding of state aid. (See Regs., § 51102, subd. (b)(5).) Because these provisions do not create an enforceable obligation to comply ***81 with the funding entitlement conditions, but rather describe conditions the districts must satisfy to avoid the possibility of having their state aid reduced or withheld, the enactments are not "mandates" under a legal compulsion theory.

*820 The Court of Appeal also disagreed with the Commission's conclusion that compliance with the funding entitlement regulations is not "legally compelled" because "community colleges are free to decline state aid." In rejecting this argument, the court noted that various statutes and constitutional provisions require the state to provide the community college system sufficient funding to carry out its mission. Without citing a specific source, the court further explained that in the most recent year for which information was available "more than half of California community college funding came from the state General Fund. ... [while] other funding sources ... provided significantly less support. (Italics omitted.) Like public school districts in general, community college districts are dependent on state aid."

While the Court of Appeal may be correct that some (if not most) community college districts are heavily reliant on state aid — and thus have no true alternative but to act in a manner that secures their funding — those arguments sound in *practical* compulsion, rather than legal compulsion. [7] (See generally *Kern, supra*, 30 Cal.4th at pp. 731, 751, 134 Cal.Rptr.2d 237, 68 P.3d 1203 [practical compulsion occurs when the local entity has " 'no true option or choice' "]; *City of Sacramento*, *supra*, 50 Cal.3d at p. 74, 266 Cal.Rptr. 139, 785 P.2d 522 [finding practical compulsion where the consequences of noncompliance "were so far beyond the realm of practical reality that they left the state 'without discretion' to depart from federal standards"].)

7 The administrative record includes a letter the chancellor submitted to the Commission in 2008 acknowledging that three (and in some prior years four) community college districts did not receive any general apportionment funding because they derived sufficient revenue from other sources (primarily property tax allocations from their respective counties) to meet their funding needs. This evidence suggests that some districts may rely on state funding more heavily than others.

The Court of Appeal's reasoning is consistent with the primary argument the districts have raised throughout these proceedings, which also sounds in practical compulsion. In the trial court, for example, the districts argued that "the most serious error in the [Commission's] decision is the conclusion that the 'minimum conditions' of receiving state aid are not mandates because the Colleges may choose not to receive state funding. That conclusion is erroneous because the Colleges **867 truly have no meaningful choice [but to comply]." In support, they cited *City of Sacramento, supra*, 50 Cal.3d 51, a case that turned on practical compulsion. (See *ante*, at pp. 816–817.) The districts' briefing in the Court of Appeal contains essentially identical language, asserting that because noncompliance with the funding entitlement regulations could result in the "drastic loss" of funding necessary "to provide educational services, ... the [c]olleges have no true choice but to comply." Those same arguments remain central in the districts' briefing before this court, where they again contend that "[t]he most serious error in the ... Commission decision is ... the conclusion that the minimum conditions of *821 receiving State aid are not mandates because the [districts] may somehow choose not to receive state funding. This conclusion is erroneous because the [districts] have no true choice. ... [¶] ... Put simply, the [districts] contend ***82 community colleges cannot function without state aid." [8] Like the Court of Appeal, the districts' focus on the consequences of noncompliance, and the purported absence of any true choice, sounds in practical rather than legal compulsion. That the financial situation of some (or most) districts may leave them with no reasonable alternative but to comply with the funding entitlement regulations does not transform this case into one involving legal compulsion.

[8] The districts' answers to respondents' petitions for review likewise focused on the consequences of noncompliance, arguing that they had not "voluntarily" complied with the funding entitlement regulations, but rather were "required to do so at risk of drastic fiscal loss of funds" and had no "true choice" but to comply given their reliance on state aid.

In sum, while many of the directives in the funding entitlement regulations relate to the districts' core educational functions, that is insufficient to show legal compulsion. Rather, to establish legal compulsion, the claimants had to show they had a mandatory duty to comply with the regulations. The districts have pointed to no such provision. Instead, they have asserted that because they rely on state aid to carry out their core functions, they have no true choice but to comply. For the reasons discussed above, we conclude that argument should be evaluated under the lens of practical, rather than legal, compulsion.

3. On remand, the Court of Appeal should consider practical compulsion

The districts also argue that regardless of whether legal compulsion applies in this case, the record makes clear they were compelled to comply with the funding entitlement regulations as a practical matter. (See *Kern, supra*, 30 Cal. 4th at p. 731, 134 Cal.Rptr.2d 237, 68 P.3d 1203 ["we do not foreclose the possibility that a reimbursable state mandate might be found in circumstances short of legal compulsion"]; *id.* at p. 736, 134 Cal.Rptr.2d 237, 68 P.3d 1203 [leaving open question "whether ... there are some circumstances in which a state mandate may be found in the absence of legal compulsion"]; *id.* at p. 744, 134 Cal.Rptr.2d 237, 68 P.3d 1203; see also *Department of Finance*, *supra*, 170 Cal.App.4th at pp. 1365–1366, 89 Cal.Rptr.3d 93 ["if a local government participates 'voluntarily,' i.e., without legal compulsion or compulsion as a practical matter, in a program with a rule requiring increased costs, there is no requirement of state reimbursement"].)

The Department, however, contends (as it did in *Kern*) that we should narrowly interpret article XIII B, section 6 to require reimbursement only when a local government has been legally compelled to ***822** provide a new program or higher level of service. (See *Kern, supra*, 30 Cal.4th at p. 736, 134 Cal.Rptr.2d 237, 68 P.3d 1203 ["the Department ... asserts that article XIII B, section 6, reflects an intent on the part of the drafters and the electorate to limit reimbursement to costs that are forced upon local governments as a matter of legal compulsion"].) Alternatively, respondents collectively argue that even if practical compulsion is a valid theory of mandate (or is assumed to be so), claimants in this case have failed to introduce any evidence establishing that noncompliance with the applicable regulations is "reasonably certain to [result in] ' "severe," ' ' "draconian" ' consequences." (Quoting ****868** *Kern,* at pp. 750–751, 134 Cal.Rptr.2d 237, 68 P.3d 1203; see *id.* at p. 751, 134 Cal.Rptr.2d 237, 68 P.3d 1203 [finding it "unnecessary to resolve whether" practical compulsion is a valid theory *****83** of mandate where claimants had failed to demonstrate noncompliance would result in severe penalties].) More specifically, respondents contend the districts have failed to show either that noncompliance is likely to result in withholding of a significant amount of state aid,[9] or that the risk of such withholding leaves them with no true alternative but to comply.

[9] As noted above, there appears to be substantial overlap between the directives described in the operating standards regulations (which the Commission has already found to qualify as mandates) and those set forth in the funding entitlement regulations. (See *ante*, at pp. 810, fn. 3, 813–814.) Thus, while the record before us is not clear on the point, the districts may already be compliant with (and reimbursed for) many or most of the activities described in the funding entitlement regulations. Given that the funding entitlement regulations direct that any remedy the chancellor chooses to impose must relate to the "extent and gravity of noncompliance" (Regs., § 51102, subd. (c)), the fact that districts may already be compliant with (and compensated for) many of the conditions described in the funding entitlement regulations could be relevant to determining the appropriate remedy, including the size and scope of any withholding.

Because the Court of Appeal found the districts were compelled to comply with the funding entitlement regulations as a matter of legal compulsion, it chose not to address any of the parties' arguments regarding practical compulsion (also referred to as "nonlegal compulsion" [*Kern, supra*, 30 Cal.4th. at p. 754, 134 Cal.Rptr.2d 237, 68 P.3d 1203]). Having now rejected the Court of Appeal's conclusion regarding legal compulsion, we find it "appropriate to remand

for the [court] to resolve ... in the first instance" whether the districts may be entitled to reimbursement under a theory of nonlegal compulsion. (*Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1149, 95 Cal.Rptr.2d 701, 998 P.2d 403 ["It is appropriate to remand for the Court of Appeal to resolve ... in the first instance" issues that the court chose "not [to] reach because of its holdings"]; see *People v. Goolsby* (2015) 62 Cal.4th 360, 368, 196 Cal.Rptr.3d 726, 363 P.3d 623 [reversing finding that Pen. Code, § 654 barred retrying defendant for a lesser offense and remanding with directions that appellate court "decide ... in the first instance" the unresolved question of whether retrial was barred under double jeopardy principles]; see ***823** *Central Coast Forest Assn. v. Fish & Game Com.* (2017) 2 Cal.5th 594, 606, 214 Cal.Rptr.3d 265, 389 P.3d 840; *In re Manuel G.* (1997) 16 Cal.4th 805, 820, 66 Cal.Rptr.2d 701, 941 P.2d 880.) [10]

10 The concurrence agrees that the Court of Appeal erred in finding the statutes and regulations the parties have relied on throughout this litigation (namely Ed. Code, § 70901, subd. (b)(6) and Regs., § 51102) legally compel the districts to comply with the funding entitlement regulations. Rather than remand the matter to address only practical compulsion, however, the concurrence would remand with directions that the appellate court also consider whether a different section of the Education Code, section 70902, might be interpreted to legally compel the districts to comply with the challenged regulations. The success or failure of such an argument, the concurrence explains, would appear to turn on whether there may be another "enforcement mechanism" apart from the provisions in Regulation 51102 that could be used to compel the districts to comply with the funding entitlement regulations. (See conc. opn. of Liu, J., *post*, at pp. 824–826.) The concurrence identifies no such alternative mechanism, but hypothesizes that because one might exist, we should provide the parties an opportunity to explore the issue further.

As the concurrence expressly acknowledges, no party has ever presented such a theory at any point during this litigation, which has now been ongoing for almost two decades. (See conc. opn. of Liu, J., *post*, at p. 826.) From the start of the proceedings, the districts' reimbursement claim has focused on Education Code section 70901 and its implementing regulations. That is not particularly surprising given that section 70901 is the statute that describes (and distinguishes) the operating standards regulations and the funding entitlement regulations. In any event, as a court of review, our role is to evaluate the arguments the parties have presented, not "construct [alternative] theor[ies that might be] supportive" of their claims. (*People v. Stanley* (1995) 10 Cal.4th 764, 793, 42 Cal.Rptr.2d 543, 897 P.2d 481; see also *In re Harris* (2021) 71 Cal.App.5th 1085, 1100, 287 Cal.Rptr.3d 46 ["it is not our role to make arguments for petitioner or to consider arguments not raised or ... addressed below" (fn. omitted)]; cf. *Jibilian v. Franchise Tax Bd.* (2006) 136 Cal.App.4th 862, 866, fn. 3 [39 Cal. Rptr. 3d 123] ["it is not our role to construct theories or arguments that would undermine the judgment"].) Accordingly, we decline to direct the Court of Appeal to consider undeveloped legal theories that neither party has advocated for.

****869 ***84 III. DISPOSITION**

The Court of Appeal's judgment is reversed and the matter is remanded for further proceedings consistent with this opinion.

CANTIL-SAKAUYE, C. J., CORRIGAN, J., KRUGER, J., JENKINS, J., and GUERRERO, J., concurred.

Concurring Opinion by Justice Liu

The Court of Appeal in this case concluded that community college districts are legally compelled to comply with the regulations setting forth the "minimum conditions entitling districts to receive state aid" (Ed. Code, § 70901, subd. (b)(6)(A)) based on its view that the regulations "direct the community college districts to take specific steps in fulfilling th[eir] legally-compelled core mission functions." I agree with today's opinion that the Court of Appeal's reasoning and conclusion are incorrect, and I therefore concur in the judgment of reversal. However, given the way the ***824** parties argued this case, I do not think we have enough information to conclude that the minimum conditions are not legally compelled. I would remand for further consideration of this issue in light of the relevant statutory and regulatory provisions.

I.

This case concerns the legal obligations of California's community college districts. Two sets of potential obligations are at issue: "minimum standards" and "minimum conditions." (Ed. Code, § 70901, subd. (b)(1), (b)(6).) These two sets of regulations describe a variety of requirements related to community colleges' operations and academic offerings, and they overlap substantially.

It is uncontested that the community college districts are legally obligated to comply with the minimum *standards*, making costs incurred in compliance with those regulations subject to reimbursement under provisions added to the California Constitution by Proposition 13, adopted by voters in 1978. (See *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 743 [134 Cal. Rptr. 2d 237, 68 P.3d 1203] [costs that are "legally compelled ... constitute reimbursable state mandates"].) The court below determined that the districts are legally compelled to comply with the minimum *conditions* regulations as well. We are asked to review that decision.

The Education Code tells us where to look to understand the legal obligations of community college districts. Section 70900 of the Education Code says that "local districts shall carry out the functions specified ***85** in Section 70902." (Ed. Code, § 70900.) Section 70902 of the Education Code (section 70902) then sets forth in detail the obligations of community college districts. Certain provisions of that section specifically instruct districts to comply with at least some of the minimum standards. For instance, subdivision (b) states that "each community college district shall [¶] ... [¶] [e]stablish academic standards, probation and dismissal and readmission policies, and graduation requirements not inconsistent with the minimum standards" and shall "[e]mploy and assign all personnel not inconsistent with the minimum standards." (Ed. Code, § 70902, subd. (b), (b)(3), (b)(4).)

Section 70902 does not specifically mention the minimum conditions. But several provisions of section 70902 appear to create broad legal requirements for community college districts that might include compliance with those regulations. For example, subdivision (a)(2) says districts "shall establish rules and regulations not inconsistent with the regulations of the board of governors," the state's supervisory entity that issues both the minimum standards and minimum conditions regulations. (§ 70902, subd. (a)(2); see also Ed. Code, § 70901, subd. (b)(1), (6) [requiring board of ***825** governors to establish minimum standards and minimum conditions].) Section 70902 also requires districts to initiate and operate their ****870** programs in ways that are "not in conflict with or inconsistent with, or preempted by, any law and that [are] not in conflict with the purposes for which community college districts are established." (Ed. Code, § 70902, subd. (a)(1).) These provisions could be read to require community colleges to comply with some or all of the specific requirements of the minimum conditions regulations.

Because this statutory language is not free of ambiguity, we look to applicable regulations to discern what consequences may flow from noncompliance with the minimum conditions in order to decide whether they are legally compelled. Sections 51100 and 51102 of title 5 of the California Code of Regulations govern the investigation and enforcement of the minimum conditions. When a district is found to be in noncompliance with the minimum conditions, section 51102 describes several penalties that may be imposed, which include withholding or reduction of state funding. (Cal. Code Regs., tit. 5, § 51102, subd. (b).) But section 51100 further instructs that "[t]he enforcement procedures and remedies set forth in this subchapter are in addition to any and all other enforcement mechanisms and remedies provided by law for violation of the provisions of this chapter" (i.e., the minimum conditions). (Cal. Code Regs., tit. 5, § 51100, subd. (d).)

California Code of Regulations, title 5, section 51100 does not say what other enforcement mechanisms and remedies are available for violations of the minimum conditions. And we have received no briefing or argument about what legal obligations related to the minimum conditions may be imposed by section 70902 or what enforcement mechanisms besides withholding of funds are contemplated by section 51100. Without further information about the meaning of those provisions, I do not see how we can determine whether compliance with the minimum conditions is legally compelled.

II.

Today's opinion focuses instead on the language of section 70901 of the Education Code, the part of the code that describes the obligations of the state board of governors. (See Ed. Code, § 70900 ["The board of governors shall carry out the functions specified in Section 70901, [and]

local districts shall carry out the functions specified ***86 in Section 70902 ...."].) The court reasons that because subdivision (b)(6) of section 70901 "and its implementing regulations contain no language 'command[ing]' [citation] that the districts comply with the [minimum conditions] regulations," compliance with the minimum conditions is not compelled by statute. (Maj. opn., *ante*, at p. 818.)

*826 But, as noted, Education Code section 70901 does not set forth the legal duties of community college districts; it addresses the duties of the state board of governors. The statute that describes the legal responsibilities of community college districts is section 70902, which today's opinion does not consider in its assessment of the minimum conditions.

Further, the court explains the procedure under California Code of Regulations, title 5, section 51102 by which state funding may potentially be withheld from districts for noncompliance with the minimum conditions. It then declares that this is "the most severe" consequence for noncompliance. (Maj. opn., *ante*, at p. 818.) If that were true, I would agree that the consequences for noncompliance with the minimum conditions are insufficient to impose a legal mandate. But we do not know whether withholding of funds is "the most severe" consequence districts may face. The court does not discuss title 5, section 51100, subdivision (d)—the regulation that makes that consequence nonexclusive—nor do we have any information about what other consequences are authorized by the regulations.

The parties have not supplied briefing or argument on the language in section 70902 that may obligate districts to follow the minimum conditions or the provision of California Code of Regulations, title 5, section 51100 that makes withholding of funds a nonexclusive remedy for noncompliance. They have focused instead on the language of Education Code section 70901, as the court does. But we must consider all relevant provisions before reaching a conclusion as to whether compliance with the minimum conditions is legally compelled. Indeed, the fact that neither the parties nor the courts below have **871 discussed section 70902 or section 51100 is exactly why I would not go as far as the court does today. (Cf. maj. opn., *ante*, at p. 823, fn. 10.) I would hold only that the Court of Appeal's analysis was incorrect and remand for that court to consider in the first instance any other theories of legal or practical compulsion, including any mandate that may be imposed by section 70902 or section 51100. Without due consideration of those provisions, I would not hold, as today's opinion does, that community college districts are not legally compelled to comply with the minimum conditions.

I concur only in the judgment of reversal.

All Citations

13 Cal.5th 800, 514 P.3d 854, 297 Cal.Rptr.3d 67, 406 Ed. Law Rep. 958, 22 Cal. Daily Op. Serv. 8609, 2022 Daily Journal D.A.R. 8695

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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM Elections Code Sections 21530, 21531, 21532, 21533, 21534, and 21535 as added by Statutes 2016, Chapter 781 (SB 958) Filed on June 26, 2020 County of Los Angeles, Claimant	Case No.: 19-TC-04 *County of Los Angeles Citizens Redistricting Commission* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted May 28, 2021*) (*Served June 8, 2021*)

TEST CLAIM

The Commission on State Mandates adopted the attached Decision on May 28, 2021.

Heather Halsey, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM Elections Code Sections 21530, 21531, 21532, 21533, 21534, and 21535 as added by Statutes 2016, Chapter 781 (SB 958) Filed on June 26, 2020 County of Los Angeles, Claimant	Case No.: 19-TC-04 *County of Los Angeles Citizens Redistricting Commission* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted May 28, 2021*) (*Served June 8, 2021*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on May 28, 2021. Fernando Lemus appeared as the representative of and Lucia Gonzalez appeared as a witness for the County of Los Angeles (claimant). Chris Hill appeared on behalf of the Department of Finance (Finance).

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

The Commission adopted the Proposed Decision to partially approve the Test Claim by a vote of 6-0, as follows:

Member	**Vote**
Lee Adams, County Supervisor	Yes
Jeannie Lee, Representative of the Director of the Office of Planning and Research	Yes
Gayle Miller, Representative of the Director of the Department of Finance, Chairperson	Yes
Sarah Olsen, Public Member	Yes
Spencer Walker, Representative of the State Treasurer	Yes
Jacqueline Wong-Hernandez, Representative of the State Controller, Vice-Chairperson	Yes

Summary of the Findings

This Test Claim, which was timely filed by the County of Los Angeles (claimant), addresses Statutes 2016, Chapter 781, which added Elections Code sections 21530 through 21535 to require the claimant to create, staff, and fund the independent County of Los Angeles Citizens Redistricting Committee (CRC) to adjust the boundary lines of the supervisorial districts in the County of Los Angeles in the year following the year of the decennial federal census.

Under prior law, the claimant's board of supervisors were required to perform the supervisorial redistricting.[1] Before adjusting the boundaries, the board was required to hold at least one public hearing on the proposed district lines prior to the public hearing at which the board votes to approve or deny the proposal.[2]

The Commission finds that the following activities required by Elections Code sections 21532 and 21534, as added by the test claim statute, mandate a new program or higher level of service on the claimant:

- The county shall create a CRC in each year ending in the number zero.[3]
- The elections official shall review the applications, select 60 applicants, publish the list of the 60 applicants, and create a subpool for each supervisorial district.[4]
- The Auditor-Controller randomly draws eight commissioners.[5]
- The board shall take all steps necessary to ensure a complete and accurate computerized database is available for redistricting and to provide access to the public.[6]

In addition, based on Elections Code section 21534(c)(8), which requires the claimant to provide reasonable funding and staffing to the CRC, the following activities required by Elections Code sections 21532 and 21534 to be performed by the CRC mandate a new program or higher level of service on the claimant:

- The eight commissioners shall appoint six applicants to the CRC.[7]
- Conduct at least seven public hearings before drafting a map.[8]

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[1] Elections Code section 21500 as added by Statutes 1994, chapter 920 and amended by Statutes 2015, chapter 732, section 36; Elections Code sections 21501-21506 as added by Statutes 1994, chapter 920; and Elections Code section 21507 as added by Statutes 2014, chapter 873.

[2] Elections Code section 21507 as added by Statutes 2014, chapter 873.

[3] Elections Code section 21532(a).

[4] Elections Code section 21532(e)-(g).

[5] Elections Code section 21532(g).

[6] Elections Code section 21534(c)(7).

[7] Elections Code section 21532(h).

[8] Elections Code section 21534(c)(2).

- Post the draft map for public comment on the County website and conduct one public hearing on the draft map.[9]
- Comply with the Ralph M. Brown Act.[10]
- Make available to the public a calendar of all public hearings.[11]
- Arrange for the live translation of a hearing in an applicable language upon timely request.[12]
- Encourage county residents to participate in the redistricting.[13]
- Issue a report that explains the basis on which the CRC made its decisions.[14]

However, Elections Code sections 21530, 21533, and 21535 do not impose any state-mandated requirements on the claimant, but rather generally define terms and limit the hiring of consultants by the CRC to help with the adjustment of district boundaries. Although the claimant is required by Elections Code section 21534(c)(8) to provide reasonable funding to the CRC, which may include paying for a consultant hired by the CRC, the courts have made it clear that "[n]othing in article XIII B prohibits the shifting of costs between local governmental entities."[15]

Moreover, the requirements imposed by Elections Code sections 21531 and 21534(a), (c)(9), and (d)(1)-(3) to adjust supervisorial boundary lines, adopt a redistricting plan every ten years; and to comply with the Public Records Act are not new and do not impose a new program or higher level of service on the claimant.[16]

The Commission also finds that all of the new state-mandated activities impose costs mandated by the state pursuant to Government Code section 17514, *except* for the activities required by Elections Code section 21534(c)(1) and (c)(4)(B) to comply with the Ralph M. Brown Act for the public hearings conducted by the CRC. These activities are expressly exempted from the reimbursement requirement by article XIII B, section 6(a)(4). Article XIII B, section 6(a)(4) states that "the Legislature may, but need not, provide a subvention of funds for the following

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[9] Elections Code section 21534(c)(3)(A)-(B).

[10] Elections Code sections 21534(c)(1); 21534(c)(4)(B).

[11] Elections Code section 21534(c)(4)(A).

[12] Elections Code section 21534(c)(5).

[13] Elections Code section 21534(c)(6).

[14] Elections Code section 21534(d)(4).

[15] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1815.

[16] California Constitution, article I, sections 3(b) and 7; California Constitution, article II, section 2.5; California Constitution, article XIII B, section 6(a); Elections Code sections 14025-14032 as added by Statutes 2002, chapter 129; Elections Code section 21500 as added by Statutes 1994, chapter 920 and amended by Statutes 2015, chapter 732, section 36; Elections Code section 21507 as added by Statutes 2014, chapter 873; Government Code section 6252 as last amended by Statutes 2015, chapter 537; and *Reynolds v. Sims* (1964) 377 U.S. 533, 566.

mandates: . . . Legislative mandates contained in statutes within the scope of paragraph (7) of subdivision (b) of Section 3 of Article I." Article I, section 3(b) of the California Constitution requires local agencies to comply with the Ralph M. Brown Act, beginning with Government Code section 54950. The Brown Act applies to all local agencies and "any other local body created by state statute," and therefore applies to the CRC.[17] Accordingly, the activities required by Elections Code section 21534(c)(1) and (c)(4)(B) to comply with the Ralph M. Brown Act do not impose costs mandated by the state pursuant to article XIII B, section 6(a)(4) of the California Constitution.

In conclusion, the Commission partially approves this Test Claim and finds that Elections Code sections 21532 and 21534 as added by the test claim statute impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for the following activities:

- The county shall create a CRC no later than December 31, 2020, and in each year ending in the number zero thereafter.[18]
- The elections official shall review the applications and eliminate applicants who do not meet the specified qualifications, select 60 of the most qualified applicants, publish the list of qualified applicants for 30 days, and create a subpool for each of the five existing supervisorial districts of the board.[19]
- At a regularly scheduled meeting of the board, the Auditor-Controller conducts a random drawing to select one commissioner from each of the five subpools, then another random drawing from all of the remaining applicants to select three additional commissioners.[20]
- The board shall take all steps necessary to ensure a complete and accurate computerized database is available for redistricting, and that procedures are in place to provide to the public ready access to redistricting data and computer software equivalent to what is available to the CRC.[21]

In addition, based on Elections Code section 21534(c)(8), which requires the claimant to provide reasonable funding and staffing to the CRC, the following activities mandated by Elections Code sections 21532 and 21534 impose a reimbursable state mandated program within the meaning of article XIII B, section 6 of the California Constitution on the claimant:

- The eight selected commissioners shall review the remaining names in the subpools of applicants and shall appoint six additional applicants to the CRC.[22]

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[17] Government Code section 54952(a).

[18] Elections Code section 21532(a).

[19] Elections Code section 21532(e)-(g).

[20] Elections Code section 21532(g).

[21] Elections Code section 21534(c)(7).

[22] Elections Code section 21532(h).

- Conduct at least seven public hearings before drafting a map, to take place over a period of no fewer than 30 days, with at least one public hearing held in each supervisorial district.[23]
- Post the draft map for public comment on the website of the County of Los Angeles and conduct one public hearing on the draft map (in addition to the one hearing required under prior law, which is not reimbursable).[24]
- Establish and make available to the public a calendar of all public hearings.[25]
- Arrange for the live translation of a hearing in an applicable language (defined as "a language for which the number of residents of the County of Los Angeles who are members of a language minority is greater than or equal to 3 percent of the total voting age residents of the county") if a request for translation is made at least 24 hours before the hearing.[26]
- Take steps to encourage county residents to participate in the redistricting public review process.[27]
- Issue a report that explains the basis on which the CRC made its decisions in achieving compliance with the redistricting criteria required to comply with the Voting Rights Act.[28]

All other code sections added by the test claim statute and activities alleged to be mandated in the Test Claim are denied.

COMMISSION FINDINGS

I. Chronology

01/01/2017 The effective date of the test claim statute.[29]

06/26/2020 The claimant filed the Test Claim.[30]

12/28/2020 The Department of Finance (Finance) filed comments on the Test Claim.[31]

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[23] Elections Code section 21534(c)(2).

[24] Elections Code section 21534(c)(3)(A)-(B).

[25] Elections Code section 21534(c)(4)(A).

[26] Elections Code section 21534(c)(5).

[27] Elections Code section 21534(c)(6).

[28] Elections Code section 21534(d)(4).

[29] Statutes 2016, chapter 781.

[30] Exhibit A, Test Claim, filed June 26, 2020, page 1.

[31] Exhibit B, Finance's Comments on the Test Claim, filed December 28, 2020, page 1.

02/26/2021 The claimant filed late rebuttal comments.[32]

03/15/2021 Commission staff issued the Draft Proposed Decision.[33]

04/05/2021 The claimant filed comments on the Draft Proposed Decision.[34]

II. Background

A. A History of Redistricting in California

1. The Creation of the California Citizens Redistricting Commission to Adjust District Lines for the State Assembly, Senate, and Board of Equalization, and for Congress.

Redistricting is the apportionment of legislative representation based on population.[35] The right to vote, guaranteed by the Fourteenth and Fifteenth Amendments of the United States Constitution, requires equal legislative representation through periodic redistricting.[36] Each state has the discretion to choose a specific methodology to use for redistricting,[37] however, the Fourteenth Amendment restricts the use of race as the predominant criterion in drawing district lines.[38]

The Voting Rights Act of 1965 was enacted by Congress to further protect the right to vote.[39] The Act prohibits states and their political subdivisions from using voting qualifications, prerequisites to voting, standards, practices, or procedures that result in the denial or abridgment of a citizen's right to vote on account of race, color, or membership in a "language minority group."[40] After the Supreme Court held that this provision prohibited only intentional discrimination,[41] Congress amended the Act to forbid any act having a disparate impact on minority voting strength. "Thus, after the 1982 amendment, the Voting Rights Act can be violated by both intentional discrimination in the drawing of district lines and facially neutral apportionment schemes that have the effect of diluting minority votes."[42]

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[32] Exhibit C, Claimant's Late Rebuttal Comments, filed February 26, 2021.

[33] Exhibit D, Draft Proposed Decision, issued March 15, 2021.

[34] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed April 5, 2021.

[35] United States Constitution, article I, sections 2 and 4.

[36] *Reynolds v. Sims* (1964) 377 U.S. 533 [state legislative districts]; *Kirkpatrick v. Preisler* (1969) 394 U.S. 526 [congressional districts].

[37] *Reynolds v. Sims* (1964) 377 U.S. 533, 583.

[38] *Shaw v. Reno* (1993) 509 U.S. 630.

[39] 52 U.S. Codes section 10101 et seq. formerly 42 U.S. Codes section 1971.

[40] 52 U.S. Codes sections 10101(a), 10103(f)(2).

[41] *City of Mobile v. Bolden* (1980) 446 U.S. 55.

[42] *Garza v. County of Los Angeles* (9th Cir. 1990) 918 F.2d 763, 766.

California enacted its own Voting Rights Act[43] in 2002 which implements the equal protection[44] and the right to vote[45] guarantees in the California Constitution by proscribing "the dilution or the abridgment of the rights of voters who are members of a protected class."[46]

California required the Legislature to adjust district lines for the Assembly, Senate, and Board of Equalization in the year following the federal census.[47] This process was fraught with partisan issues and gerrymandering for decades, however, solutions were slow in coming.[48] In the 1980s alone, California voters defeated four redistricting reform initiatives.[49] Finally, on November 4, 2008, California voters approved Proposition 11, the Voters FIRST Act, which amended Article XXI of the California Constitution taking the authority for the creation of district lines away from the Legislature and instead created the California Citizens Redistricting Commission to establish district lines for the Assembly, Senate, and Board of Equalization.[50] The 14 Commission members, chosen randomly by the State Auditor, are made up of five Democrats, five Republicans, and four members who are registered with neither of those political parties.[51] This entirely independent commission redistricting system was the first in the nation.[52] In 2010, the voters approved Proposition 20, the Voters FIRST Act for Congress, which further amended Article XXI giving the California Citizens Redistricting Commission the authority to establish district lines for U.S. congressional districts.[53]

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[43] Statutes 2002, chapter 129 codified at Elections Code sections 14025-14032.

[44] California Constitution, article I, section 7.

[45] California Constitution, article II, section 2.5.

[46] Elections Code sections 14027 and 14031.

[47] California Constitution, article XXI.

[48] Exhibit F, Quinn, *Carving Up California: A History of Redistricting, 1951-1984* (Ph.D. diss.), Rose Institute of State and Local Government, Claremont McKenna College, https://s10294.pcdn.co/wp-content/uploads/2014/02/Carving-Up-California.pdf (accessed on December 22, 2020).

[49] Exhibit F, Heslop, *Governing California in the 21st Century - Redistricting Reform in California*, pages 1-5, http://roseinstitute.org/wp-content/uploads/2014/02/Redistricting-Reform-in-CA.pdf (accessed on December 24, 2020).

[50] Government Code sections 8251-8253.6.

[51] *Vandermost v. Bowen* (2012) 53 Cal.4th 421, 442-448.

[52] Exhibit F, Rose Institute of State and Local Government, *Redistricting in America, A State-by-State Analysis*, pages 44-46, https://s10294.pcdn.co/wp-content/uploads/2016/05/Redistricting-in-America-for-Print.pdf (accessed on December 24, 2020).

[53] Government Code sections 8251-8253.6.

2. Supervisorial Redistricting for the County of Los Angeles Under Prior Law.

Under the California Constitution, charter counties are not free to establish their own redistricting process.[54] As the County of Los Angeles is a charter county, it was obligated to follow the existing statutes regarding redistricting. Similar to the initial state system, supervisorial redistricting is performed by the legislative body of each county, the board of supervisors.[55]

In 2016, at the time that the test claim legislation was being considered, the process began after each decennial federal census. A county board of supervisors was required to adjust its supervisorial boundaries in compliance with the Voting Rights Act of 1965 so that the districts were nearly equal in population. The board was required to use the census data as a basis for the adjustment. The board had the option to consider the factors of topography; geography; cohesiveness, contiguity, integrity, and compactness of territory; and communities of interest.[56] The board also had the option to appoint an advisory committee of residents to study changing the boundaries. This committee would report its findings on the need for change of boundaries and the recommended changes to the board. These recommendations were advisory only.[57] Before adjusting the boundaries, the board was required to hold at least one public hearing on the proposed district lines prior to the public hearing at which the board votes to approve or deny the proposal.[58] If the board failed to complete the redistricting before the first day of November, a supervisorial redistricting commission, consisting of the county district attorney, the county assessor, and an elected county elections official, an elected county superintendent of schools, or the sheriff, was assembled to complete the redistricting.[59] Once established, the new district boundaries would take effect at the next election.[60] Between federal censuses, the board could redistrict based on a county census or use population estimates by the State Department of Finance, the county planning department, or county planning commission.[61] However, any person could bring suit claiming that the estimates did not reflect the current population more accurately than the most recent census data and seek declaratory relief from a court.[62]

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[54] California Constitution, article XI, section 4(a).

[55] Elections Code section 21500 as added by Statutes 1994, chapter 920 and amended by Statutes 2015, chapter 732, section 36; Elections Code sections 21501-21506 as added by Statutes 1994, chapter 920; and Elections Code section 21507 as added by Statutes 2014, chapter 873.

[56] Elections Code section 21500 as added by Statutes 1994, chapter 920 and amended by Statutes 2015, chapter 732, section 36.

[57] Elections Code section 21505 as added by Statutes 1994, chapter 920.

[58] Elections Code section 21507 as added by Statutes 2014, chapter 873.

[59] Elections Code sections 21501 and 21502 as added by Statutes 1994, chapter 920.

[60] Elections Code section 21506 as added by Statutes 1994, chapter 920.

[61] Elections Code section 21503 as added by Statutes 1994, chapter 920.

[62] Elections Code section 21504 as added by Statutes 1994, chapter 920.

The claimant has had a history of racial discrimination in its supervisorial redistricting process.[63] In 1988, Hispanic groups in Los Angeles County, joined by the United States of America, filed a voting rights action seeking a redrawing of the districts for the Los Angeles County Board of Supervisors.[64] They alleged that the existing boundaries, which had been drawn after the 1980 census, were intentionally gerrymandered boundaries that diluted Hispanic voting strength. They sought redistricting in order to create a district with a Hispanic majority for the 1990 Board of Supervisors election.[65] The federal district court found "that the Board [of Supervisors] had engaged in intentional discrimination in redistrictings that it undertook in 1959, 1965 and 1971" and "the 1981 redistricting was calculated at least in part to keep the effects of those prior discriminatory reapportionments in place, as well as to prevent Hispanics from attaining a majority in any district in the future."[66] The district court determined that the county's district boundaries violated the federal Voting Rights Act of 1965.[67] The Ninth Circuit Court of Appeal affirmed the lower court's decision and further found that the county had violated both the Voting Rights Act of 1965 and the equal protection guarantee of the 14th Amendment when drawing supervisorial districts.[68] The U.S. Supreme Court did not take up the county's appeal.[69] The parties settled the matter by entering into a stipulation requiring the county to submit future redistricting plans to the U.S. Department of Justice for review. The stipulation terminated on December 31, 2002.[70] As a result of the court's decision, a special election for supervisor was held in 1991 for the newly redrawn First Supervisorial District.[71] The 2010 redistricting plan, the first not to require review under the stipulation, was not challenged in court.[72]

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[63] *Garza v. County of Los Angeles* (9th Cir. 1990) 918 F.2d 763, 765-766.

[64] *Garza v. County of Los Angeles* (9th Cir. 1990) 918 F.2d 763, 765.

[65] *Garza v. County of Los Angeles* (9th Cir. 1990) 918 F.2d 763, 765-766.

[66] *Garza v. County of Los Angeles* (9th Cir. 1990) 918 F.2d 763, 767.

[67] *Garza v. County of Los Angeles* (Cal. 1990) 756 F.Supp. 1298, 1303-1304.

[68] *Garza v. County of Los Angeles* (9th Cir. 1990) 918 F.2d 763, 771.

[69] *County of Los Angeles v. Garza* (1991) 498 U.S. 1028.

[70] *County of Los Angeles v. State of California* (Jan. 14, 2020, B290091) [nonpub. opn.], page 6.

[71] Exhibit F, Farrell, *Vote Marks New Era for 1st District: County Board: For the Plaintiffs Who Sued Over Bias Against Latinos, the Balloting is the Real Victory*, L.A. Times (Feb. 20, 1991), https://www.latimes.com/archives/la-xpm-1991-02-20-me-1513-story.html (accessed on March 9, 2021).

[72] *County of Los Angeles v. State of California* (Jan. 14, 2020, B290091) [nonpub. opn.], pages 6-10.

B. The Test Claim Statute, Statute 2016, Chapter 781, Added Sections 21530 through 21535 to the Elections Code to Establish an Independent Citizens Redistricting Commission for the County of Los Angeles.

The test claim statute was characterized by the author as "a good government proposal for the citizens of Los Angeles County" which would "align the Los Angeles County Board of Supervisors' redistricting policy with the statewide movement toward independent redistricting."[73] Legislative history of the statute noted that the state of California has a redistricting commission as does the County of San Diego through legislation requested by the county.[74] Without such statutory authority, counties are powerless to create commissions on their own.[75] The legislative history concluded that the successful establishment of an independent redistricting commission in San Diego County, the second most populous county in California, boded well for the success of an independent commission in Los Angeles County, the state's most populous county and "one of the most geographically and ethnically diverse counties in the state."[76]

The test claim statute provides that the CRC will adjust the boundary lines of the supervisorial districts in the County of Los Angeles in the year following the year of the decennial federal census.[77] The 14-member CRC must be created no later than December 31, 2020, and in each year ending in the number zero thereafter.[78] The process for the selection of members is designed to produce a CRC that is independent from the influence of the board and is reasonably representative of the county's diversity.[79] The members' political party preferences must be as proportional as possible to the total number of voters who are registered with each political party in the county. At least one member must reside in each of the five existing supervisorial districts.[80] Members are required to meet all of the following qualifications:

- Be a resident of the county,
- Be a voter who has been continuously registered in the county who has not changed their political party affiliation for five or more years,
- Have voted in at least one of the last three statewide elections,

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[73] Exhibit F, Senate Rules Committee, Office of the Senate Floor Analyses, Third Reading of Senate Bill 958 (2015-2016 Reg. Sess.), August 30, 2016, page 5.

[74] Exhibit F, Senate Rules Committee, Office of the Senate Floor Analyses, Third Reading of Senate Bill 958 (2015-2016 Reg. Sess.), August 30, 2016, page 5.

[75] California Constitution, article XI, section 4.

[76] Exhibit F, Senate Rules Committee, Office of the Senate Floor Analyses, Third Reading of Senate Bill 958 (2015-2016 Reg. Sess.) August 30, 2016, pages 5 and 8.

[77] Elections Code section 21531.

[78] Elections Code section 21532(a) and (c).

[79] Elections Code section 21532(b).

[80] Elections Code section 21532(c).

- Within the last 10 years, neither the applicant nor an immediate family member, has been appointed to, elected to, or have been a candidate for office; served as an employee of, or paid consultant for, an elected representative, candidate, or political party; or been a registered state or local lobbyist,
- Possess experience that demonstrates relevant analytical skills and an ability to comprehend and apply legal requirements,
- Possess experience that demonstrates an ability to be impartial, and
- Possess experience that demonstrates an appreciation for the diverse demographics and geography of the county.[81]

Those individuals who meet the qualifications may submit an application to the county elections official who is required to review the applications and eliminate applicants who do not meet the qualifications.[82] During the selection process, the official is barred from communicating with a member of the board, or an agent for a member of the board, about any matter related to the nomination process or applicants. The official selects 60 of the most qualified applicants and makes public a list of their names for at least 30 days.[83] During this time, the official may eliminate any of the previously selected applicants if the official becomes aware that the applicant does not meet the qualifications.[84] After the 30 days, the official creates a subpool for each of the five existing supervisorial districts.[85] At a regularly scheduled meeting of the board, the Auditor-Controller of the county randomly draws to select one commissioner from each of the five subpools and then, randomly draws from all of the remaining applicants, without respect to subpools, to select three additional commissioners.[86] The eight selected commissioners review the remaining applicants and appoint six commissioners based on relevant experience, analytical skills, ability to be impartial, political party preference, and to ensure that the CRC reflects the county's diversity.[87]

The commissioners' terms expire upon the appointment of the first member of the succeeding CRC.[88] Nine commissioners are a quorum.[89] Each commissioner is a designated employee for purposes of conflicts of interest and is required to apply these statutes impartially to reinforce public confidence in the integrity of the process.[90] The CRC cannot retain a consultant — a

[81] Elections Code section 21532(d).

[82] Elections Code section 21532(e).

[83] Elections Code section 21532(f)(1).

[84] Elections Code section 21532(f)(2).

[85] Elections Code section 21532(g)(1).

[86] Elections Code section 21532(g)(2).

[87] Elections Code section 21532(h).

[88] Elections Code section 21533(b).

[89] Elections Code section 21533(c).

[90] Elections Code section 21533(a) and (e).

person retained, paid or unpaid, to advise the CRC or a commissioner regarding any aspect of the redistricting process — who would not be qualified as an applicant.[91] After appointment, a commissioner is ineligible to hold elective public office for five years and ineligible to hold appointive office, to serve as paid staff or paid consultant to, the Board of Equalization, the Congress, the Legislature, or any legislator, or to register as a lobbyist in the state for three years.[92]

The CRC shall use the following criteria, in the order of priority, in its mapping process:

(1) Districts shall comply with the United States Constitution and each district shall have a reasonably equal population with the other districts, except where deviation is required to comply with the federal Voting Rights Act of 1965[93] or allowable by law.

(2) Districts shall comply with the federal Voting Rights Act of 1965.

(3) Districts shall be geographically contiguous.

(4) The geographic integrity of any city, local neighborhood, or local community of interest shall be respected in a manner that minimizes its division to the extent possible. A community of interest is defined as a contiguous population that shares common social and economic interests that should be included within a single district for effective and fair representation, but does not include political parties or candidates.

(5) To the extent practicable, districts shall be drawn to encourage geographical compactness.[94]

The CRC shall not consider the place of residence of any incumbent or political candidate in the creation of a map; nor shall districts be drawn to favor or discriminate against an incumbent, political candidate, or political party.[95]

The CRC is required to comply with the Ralph M. Brown Act.[96] The CRC must establish a calendar of all public hearings and make it available to the public. The hearings are to be scheduled at various times and days of the week to accommodate a variety of work schedules and to reach as large an audience as possible. The CRC shall post the hearing agenda at least seven days before the hearing dates.[97] The CRC shall arrange for the live translation of a hearing if a request for translation is made at least 24 hours before the hearing.[98] This applies to any language for which the number of county residents who are members of a language minority is

[91] Elections Code section 21533(d).

[92] Elections Code section 21535.

[93] United States Code, title 52, section 10101 et seq.

[94] Elections Code section 21534(a).

[95] Elections Code section 21534(b).

[96] Elections Code section 21534(c)(1).

[97] Elections Code section 21534(c)(4).

[98] Elections Code section 21534(c)(5).

greater than or equal to three percent of the total voting age residents of the county.[99] Before drawing a draft map, the CRC shall conduct at least seven public hearings, over no fewer than 30 days, with at least one public hearing held in each supervisorial district.[100] After drawing a draft map, the CRC shall post the map for public comment on the county website,[101] include the map with the posted agenda,[102] and conduct at least two public hearings over no fewer than 30 days before adoption of the final plan and map.[103]

The CRC shall take steps to encourage residents to participate in the redistricting public review process. These steps may include:

- Providing information through media, social media, and public service announcements.
- Coordinating with community organizations.
- Posting information on the county website explaining the redistricting process, including a notice of each public hearing and the procedures for testifying during a hearing or submitting written testimony directly to the CRC.[104]

The board of supervisors shall take all steps necessary to ensure that a complete and accurate computerized database is available for redistricting and that procedures are in place to provide the public with ready access to redistricting data and computer software equivalent to what is available to the CRC.[105] The board shall provide reasonable funding and staffing for the CRC.[106] All records of the CRC relating to redistricting are public records.[107]

The CRC is required to adopt a redistricting plan adjusting the boundaries of the supervisorial districts and file the plan with the county elections official before August 15 of the year after the census.[108] The plan shall be effective 30 days after filing and shall be subject to referendum in the same manner as ordinances.[109] The CRC shall issue, with the final map, a report that explains the basis on which the CRC made its decisions.[110]

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[99] Elections Code section 21534(c)(5)(B).

[100] Elections Code section 21534(c)(2).

[101] Elections Code section 21534 (c)(3)(A).

[102] Elections Code section 21534 (c)(4)(B).

[103] Elections Code section 21534(c)(3).

[104] Elections Code section 21534(c)(6).

[105] Elections Code section 21534(c)(7).

[106] Elections Code section 21534(c)(8).

[107] Elections Code section 21534(c)(9).

[108] Elections Code section 21534(d)(1).

[109] Elections Code section 21534(d)(2)-(3).

[110] Elections Code section 21534(d)(4).

III. Positions of the Parties

A. County of Los Angeles

The claimant alleges that the test claim statute results in state-mandated reimbursable costs incurred by two departments: the Registrar-Recorder/County Clerk (RR/CC) and the Commission Services Division of the Executive Office of the Board. Specifically, the claimant alleges that the following activities are imposed on the RR/CC:

- To educate and inform the public, through digital, print, radio, social, and earned media outreach on the importance of the Commission and how the public can apply and become a commission member[111]
- To create an application process, receive and review applications, and select the 60 most-qualified applicants.[112] The county Auditor-Controller is required to randomly select eight commissioners from those 60. Those eight commissioner choose the remaining six commissioners.[113]

And, once the CRC is formed, the claimant asserts that the county is mandated to:

- Provide reasonable funding and staffing for the Commission, so that the Commission may fulfill its obligations to redraw supervisorial districts, conduct public hearings, and encourage public participation in the process.[114]
- Take all reasonable steps to ensure that a complete and accurate computerized database is available for redistricting, and that procedures are in place to provide the public with ready access to redistricting data and computer software equivalent to what is available to the Commission.[115]

Additionally, the claimant alleges that "Elections Code section 21533, enables the County to retain a consultant in order to advise the newly formed Commission on issues related to redistricting, provided that the consultant meets all of the qualification requirements of the Commission members."[116]

The claimant alleges costs were first incurred on July 1, 2019.[117] The claimant incurred $35,533.18 for the RR/CC staff meeting to create the application process and $1,268.91 to design

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[111] Exhibit A, Test Claim, filed June 26, 2020, page 20.

[112] Exhibit A, Test Claim, filed June 26, 2020, pages 9-10.

[113] Exhibit A, Test Claim, filed June 26, 2020, page 10.

[114] Exhibit A, Test Claim, filed June 26, 2020, page 13.

[115] Exhibit A, Test Claim, filed June 26, 2020, page 10.

[116] Exhibit A, Test Claim, filed June 26, 2020, page 20.

[117] Exhibit A, Test Claim, filed June 26, 2020, page 28 (Declaration of Albert Navas, Departmental Finance Manager, Registrar-Recorder/County Clerk).

and develop the application process, create internal working documents, and design and set up a website for the CRC.[118]

The claimant projects costs of $100,000 for the RR/CC to review and track applications, answer phone calls, send emails, and direct the application process pursuant to Elections Code sections 21532(f)(1)(2) and 21532(e); $250,000 to run a media campaign "to promote the application process and educate the public on the redistricting process" pursuant to Elections Code section 21532(b); $5,000 to staff redistricting workshops pursuant to Elections Code sections 21532(a)-(e); and $50,000 for County Counsel advice and miscellaneous expenses.[119]

The claimant also projects costs to the Commission Services Division of $184,000 to find and reserve CRC meeting locations, schedule meetings, and prepare agendas, minutes, and supporting documents pursuant to Elections Code section 21534(c)(8); $439,000 for a computerized database for CRC and public use pursuant to Elections Code section 21534(c)(7); and $250,000 to launch and engage in a media campaign to encourage residents to participate in the redistricting public review process pursuant to Elections Code section 21534(c)(6).[120]

The claimant projects additional costs of $4,620 to secure public address systems, audio equipment, translation services, and assisted-hearing devices at public hearings pursuant to Elections Code section 21534(c); and $250,000 to "procure a consultant to guide the CRC and ensure it meets timelines for final map submission" pursuant to Elections Code section 21534(d)(1)(2).[121] The claimant projects a total of $1,127,620 in costs for FY 2020-21.[122]

In its rebuttal to Finance's comments, the claimant reasserts that the test claim statute mandates compliance with a new program.[123] The claimant also argues that the two cases relied upon by Finance are not applicable to defeat the Test Claim. Both *City of Anaheim v. State of California*[124] and *San Diego Unified School District v. Commission on State Mandates*[125] involve

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[118] Exhibit A, Test Claim, filed June 26, 2020, pages 28-30 (Declaration of Albert Navas, Departmental Finance Manager, Registrar-Recorder/County Clerk).

[119] Exhibit A, Test Claim, filed June 26, 2020, pages 20-21 and pages 28-30 (Declaration of Albert Navas, Departmental Finance Manager, Registrar-Recorder/County Clerk).

[120] Exhibit A, Test Claim, filed June 26, 2020, page 21 and pages 32-34 (Declaration of Twila Kerr, Chief of the Commission Services Division at the Executive Office of the Board of Supervisors).

[121] Exhibit A, Test Claim, filed June 26, 2020, page 21 and pages 32-34 (Declaration of Twila Kerr, Chief of the Commission Services Division at the Executive Office of the Board of Supervisors).

[122] Exhibit A, Test Claim, filed June 26, 2020, pages 32-34 (Declaration of Twila Kerr, Chief of the Commission Services Division at the Executive Office of the Board of Supervisors).

[123] Exhibit C, Claimant's Late Rebuttal Comments, filed February 26, 2021, page 2.

[124] *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478.

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

increased costs in an existing program whereas, the test claim statute creates a new program with activities that were not required of the claimant prior to the enactment of the test claim statute.[126]

Finally, although the claimant agrees with the conclusion of the Draft Proposed Decision to approve the Test Claim, the claimant disagrees with the denial of reimbursement for the hiring of consultants. The claimant argues that the hiring of consultants is part of the requirement under Elections Code section 21534(c)(8) for the county to provide reasonable funding for the CRC. The claimant notes that Elections Code section 21533, which places a limit on who can be a consultant, demonstrates that the law "contemplates the engagement of consultants to support the CRC."[127] Further, the claimant points to Elections Code section 21534(a), (b), and (d)(4), which requires the CRC to issue a report that explains the basis for the CRC's decisions to ensure that the mapping process achieves compliance with the designated criteria, which are: the United States Constitution; the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10101 et seq.); geographic contiguity; geographic integrity of cities, neighborhoods, or communities of interest; and geographical compactness without regard to any incumbent, political candidate, or political party. As the claimant explains, "Each of the criteria set forth in (a) and (b) of Elections Code section 21534 requires an understanding of applicable law, legal and geographical concepts and practical applications, and subject matter expertise that compels the engagement of consultants in order to comply with the reporting requirements of Elections Code section 21534(d)(4)."[128] Moreover, the claimant states that the current CRC has already approved a solicitation for one consultant and is considering retaining another to perform the state-mandated activities. Thus the county must provide funding pursuant to Elections Code section 21534(c)(8) for consultants who are essential to the CRC in performing its work, which has been complicated by the delay in acquiring data due to the COVID-19 pandemic. To not provide reimbursement for such funding, places the CRC at of risk not completing its redistricting and will leave the process open to legal challenge.[129]

B. Department of Finance

Finance asserts that the test claim statute is not a reimbursable state mandate as the costs are not the result of a new program or higher level of service, but rather are merely increased costs for redistricting; an activity for which the claimant has always been responsible. Finance requests that reimbursement should be denied under *City of Anaheim v. State of California*,[130] holding increased costs alone do not result in a reimbursable state mandate and *San Diego Unified School*

[126] Exhibit C, Claimant's Late Rebuttal Comments, filed February 26, 2021, pages 2-3.

[127] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed April 5, 2021, page 2.

[128] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed April 5, 2021, page 2.

[129] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed April 5, 2021, pages 2-3.

[130] *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478.

District v. Commission on State Mandates,[131] holding reimbursement is not required if a statute merely implements a change that increases costs.[132]

Finance argues that certain costs alleged by the claimant are not mandated by the test claim statute. The claimant's projected costs of $250,000 for a media campaign by the RR/CC and $250,000 for a media campaign by the board are not required by the text of the test claim statute. Rather, Elections Code section 21534(c)(6)(A)-(C) addresses the steps the claimant may take to inform the public including "(p)roviding information through media, social media, and public service announcements."[133] Also, Elections Code section 21533(d)(1) and (2) sets forth the qualifications for a consultant, but the test claim statute does not require the claimant to retain a consultant and the claimed cost of $250,000 for the consultant should be denied.[134]

IV. Discussion

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

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

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[135] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …."[136]

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

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[137]
2. The mandated activity constitutes a "program" that either:
   a. Carries out the governmental function of providing a service to the public; or

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

[132] Exhibit B, Finance's Comments on the Test Claim, filed December 28, 2020, pages 1-2.

[133] Exhibit B, Finance's Comments on the Test Claim, filed December 28, 2020, page 2.

[134] Exhibit B, Finance's Comments on the Test Claim, filed December 28, 2020, pages 2-3.

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

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

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

b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[138]

3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[139]

4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[140]

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[141] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[142] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[143]

A. The Test Claim Was Timely Filed Pursuant to Government Code Section 17551 and Section 1183.1(c) of the Commission's Regulations Because the Test Claim Was Filed Within Twelve Months of the Claimant First Incurring Costs to Comply with the Test Claim Statute.

Government Code section 17551(c) states: "test claims shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring costs as a result of a statute or executive order, whichever is later." Section 1183.1(c) of the Commission's regulations, effective April 1, 2020, clarifies that

> any test claim or amendment filed with the Commission must be filed not later than 12 months (365 days) following the effective date of a statute or executive

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

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

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

[141] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

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

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

order, or within 12 months (365 days) of first incurring increased costs as a result of a statute or executive order, whichever is later.[144]

The test claim statute became effective on January 1, 2017.[145] The claimant filed a declaration under penalty of perjury from the Finance Manager of the County Clerk's Office stating that the county first incurred costs to comply with the test claim statute on July 1, 2019.[146] The claimant filed this Test Claim on June 26, 2020, within 12 months of first incurring costs to comply with the test claim statute.[147]

Accordingly, this Test Claim was timely filed pursuant to Government Code section 17551.

B. The Test Claim Statute Imposes a Reimbursable State-Mandated Program on the County of Los Angeles.

1. Elections Code Sections 21531, 21532, and 21534, as Added by the Test Claim Statute, Impose State-Mandated Requirements on the County of Los Angeles.

The test claim statute divests the claimant's board of supervisors of the authority to adjust supervisorial district lines and establishes and vests the authority with the CRC. The claimant is required by the test claim statute to create the CRC as follows:

- The CRC shall be created no later than December 31, 2020, and in each year ending in the number zero thereafter.[148]
- The county elections official shall review the applications and eliminate applicants who do not meet the specified qualifications.[149]
- From the pool of qualified applicants, the county elections official shall select 60 of the most qualified applicants, taking into account the requirements described in Elections Code section 21532(c) — that the political party preferences of the CRC members shall be as proportional as possible to the total number of voters who are registered with each political party in the county. The county elections official shall make public the names of the 60 most qualified applicants for at least 30 days.
- Thereafter, the county elections official shall create a subpool for each of the five existing supervisorial districts of the board.[150]

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[144] California Code of Regulations, title 2, section 1183.1(c), Register 2020, No. 4 (eff. April 1, 2020).

[145] Statutes 2016, chapter 781.

[146] Exhibit A, Test Claim, filed June 26, 2020, page 28 (Declaration of Albert Navas, Departmental Finance Manager, Registrar-Recorder/County Clerk).

[147] Exhibit A, Test Claim, filed June 26, 2020, page 1.

[148] Elections Code section 21532(a).

[149] Elections Code section 21532(e).

[150] Elections Code section 21532(f).

- At a regularly scheduled meeting of the board, the Auditor-Controller of the County of Los Angeles shall conduct a random drawing to select one commissioner from each of the five subpools established by the county elections official.
- After completing the random drawing of commissioners from each of the five subpools as set forth above, the Auditor-Controller, at the same meeting of the board, shall conduct a random drawing from all of the remaining applicants, without respect to subpools, to select three additional commissioners.[151]
- The board shall take all steps necessary to ensure that a complete and accurate computerized database is available for redistricting, and that procedures are in place to provide to the public ready access to redistricting data and computer software equivalent to what is available to the CRC members.[152]

In addition, the claimant is required to "provide for reasonable funding and staffing for the commission,"[153] and, thus, the requirements imposed on the CRC must be met at the expense of the claimant. These are as follows:

- The eight selected commissioners shall review the remaining names in the subpools of applicants and shall appoint six additional applicants to the CRC.[154]
- In the year following the year in which the decennial federal census is taken, the CRC shall adjust the boundary lines of the supervisorial districts of the board in accordance with this chapter.[155] The CRC shall establish single-member supervisorial districts for the board pursuant to a mapping process using the following criteria as set forth in the following order of priority:

  > (1) Districts shall comply with the United States Constitution and each district shall have a reasonably equal population with other districts for the board, except where deviation is required to comply with the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10101 et seq.) or allowable by law.
  >
  > (2) Districts shall comply with the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10101 et seq.).
  >
  > (3) Districts shall be geographically contiguous.
  >
  > (4) The geographic integrity of any city, local neighborhood, or local community of interest shall be respected in a manner that minimizes its division to the extent possible without violating the requirements of paragraphs (1) to (3), inclusive. A community of interest is a contiguous population that shares common social and economic interests that should be included within a single district for purposes of

[151] Elections Code section 21532(g).

[152] Elections Code section 21534(c)(7).

[153] Elections Code section 21534(c)(8).

[154] Elections Code section 21532(h).

[155] Elections Code section 21531.

its effective and fair representation. Communities of interest shall not include relationships with political parties, incumbents, or political candidates.

(5) To the extent practicable, and where this does not conflict with paragraphs (1) to (4), inclusive, districts shall be drawn to encourage geographical compactness such that nearby areas of population are not bypassed for more distant areas of population.[156] The CRC shall adopt a redistricting plan adjusting the boundaries of the supervisorial districts and shall file the plan with the county elections official before August 15 of the year following the year in which each decennial federal census is taken.[157]

- Before the CRC draws a map, the CRC shall conduct at least seven public hearings, to take place over a period of no fewer than 30 days, with at least one public hearing held in each supervisorial district.[158]
- After the CRC draws a draft map, the CRC shall do both of the following:
  - Post the map for public comment on the website of the County of Los Angeles.
  - Conduct at least two public hearings to take place over a period of no fewer than 30 days.[159]
- The CRC shall comply with the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code) when conducting these public hearings.[160]
- The CRC shall establish and make available to the public a calendar of all public hearings described in Elections Code section 21534(c)(2) and (3).[161]
- Notwithstanding section 54954.2 of the Government Code — which requires the posting of an agenda 72 hours before a public meeting — the CRC shall post the agenda for the public hearings described in Elections Code section 21534(c)(2) and (3) at least seven days before the hearings. The agenda for a meeting required by Elections Code section 21534(c)(3) shall include a copy of the draft map.[162]
- The CRC shall arrange for the live translation of a hearing held pursuant to this chapter in an applicable language if a request for translation is made at least 24 hours before the hearing. An "applicable language" means a language for which the number of residents

[156] Elections Code section 21534(a).

[157] Elections Code section 21534(d)(1).

[158] Elections Code section 21534(c)(2).

[159] Elections Code section 21534(c)(3).

[160] Elections Code section 21534(c)(1).

[161] Elections Code section 21534(c)(4)(A).

[162] Elections Code section 21534(c)(4)(B).

of the County of Los Angeles who are members of a language minority is greater than or equal to three percent of the total voting age residents of the county.[163]

- The CRC shall take steps to encourage county residents to participate in the redistricting public review process.[164]
- The CRC shall issue a report that explains the basis on which the CRC made its decisions in achieving compliance with the criteria described in Elections Code section 21534(a) and (b).[165] Section 21534(a) is the criteria for the mapping process, listed above. Section 21534(b) states: "The place of residence of any incumbent or political candidate shall not be considered in the creation of a map. Districts shall not be drawn for purposes of favoring or discriminating against an incumbent, political candidate, or political party."

In addition, Elections Code section 21534(c)(9) states that "All records of the commission relating to redistricting, and all data considered by the commission in drawing a draft map or the final map, are public records." Thus, the CRC, at the claimant's expense pursuant to Elections Code section 21534(c)(8), is required to comply with the Public Records Act pursuant to Government Code section 6250 et seq., upon receipt of a public records request for these documents.

These requirements are mandated by the state. The county has no discretion and is forced to comply with these requirements.[166]

Finance argues, however, that certain costs alleged by the claimant to encourage county residents to participate in the redistricting public review process are not mandated by the state. In particular, Finance questions the claimant's projected costs of $250,000 for a media campaign by the Registrar-Recorder/County Clerk and $250,000 for a media campaign by the board, and asserts that these costs are not mandated by the test claim statute.[167] Finance's interpretation of the statute is wrong. The statute states the following:

> The commission shall take steps to encourage county residents to participate in the redistricting public review process. These steps may include:
>
> (A) Providing information through media, social media, and public service announcements.
>
> (B) Coordinating with community organizations.
>
> (C) Posting information on the Internet Web site of the County of Los Angeles that explains the redistricting process and includes a notice of each public

[163] Elections Code section 21534(c)(5).

[164] Elections Code section 21534(c)(6).

[165] Elections Code section 21534(d)(4).

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

[167] Exhibit B, Finance's Comments on the Test Claim, filed December 28, 2020, page 2.

hearing and the procedures for testifying during a hearing or submitting written testimony directly to the commission.[168]

The statute uses the term "may" regarding the types of steps that the CRC can take, but uses the word "shall" regarding the requirement for the CRC to take steps. So, while the CRC has the option of which steps to take, it has no choice but to take steps to encourage participation as mandated by the state.

Accordingly, Elections Code sections 21531, 21532, and 21534 impose state-mandated requirements on the claimant.

2. Elections Code Sections 21530, 21533, and 21535 Do Not Impose Any Requirements or State-Mandated Costs on the Citizens Redistricting Commission or the Claimant and Thus the Costs Incurred to Comply with These Code Sections Are Not Eligible for Reimbursement.

Elections Code sections 21530, 21533, and 21535 impose no requirements on the claimant. Elections Code section 21530 contains only definitions of "Board," Commission," and "Immediate family member."

Elections Code section 21533 sets forth the terms of office, rules for establishing a quorum, designates CRC members as employees for purposes of the conflict of interest code adopted by the County of Los Angeles, and imposes limits on the hiring of consultants by the CRC (by stating that "[t]he commission shall not retain a consultant who would not be qualified as an applicant pursuant to paragraph (4) of subdivision (d) of Section 21532.") The claimant requests reimbursement for the costs incurred for consultants retained by the CRC and argues that having consultants is essential to the CRC completing its work timely, accurately, and in compliance with the requirements of Elections Code section 21534(a), (b), and (d)(4).[169] Elections Code section 21534(a) requires the CRC to establish single-member supervisorial districts every ten years for the board pursuant to a mapping process, which complies with the U.S. Constitution, the federal Voting Rights Act, and other requirements to ensure that the geographic compactness and the integrity of any city be respected. Elections Code section 21534(b) states the following: "The place of residence of any incumbent or political candidate shall not be considered in the creation of a map." Districts shall not be drawn for purposes of favoring or discriminating against an incumbent, political candidate, or political party." And section 21524(d)(4) requires the CRC to "issue a report that explains the basis on which the CRC made its decisions in achieving compliance with the redistricting criteria required to comply with the Voting Rights Act."

Elections Code section 21533, however, does not require the CRC to hire consultants and leaves that decision to the discretion of the CRC. Although the claimant is required by Elections Code section 21534(c)(8) to provide reasonable funding to the CRC, which may include paying for a consultant hired by the CRC to help with the adjustment of district boundaries, the courts have made it clear that "[n]othing in article XIII B prohibits the shifting of costs between local

[168] Elections Code section 21534(c)(6).

[169] Exhibit A, Test Claim, filed June 26, 2020, pages 20-21; Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed April 5, 2021, pages 2-3.

governmental entities."[170] In this respect, the *City of San Jose* case is instructive. *City of San Jose* involved the City's request for reimbursement to comply with Government Code section 29550. Section 29550 states in relevant part: "Notwithstanding any other provision of law, a county may impose a fee upon a city, [or other local entity], for reimbursement of county expenses incurred with respect to the booking or other processing of persons arrested by an employee of that city, ... where the arrested persons are brought to the county jail for booking or detention."[171] The court found that although the city may be required to incur costs it did not formerly incur if the county exercised its authority, the court could not read a mandate into language which is plainly discretionary.[172] The court also found that the financial and administrative responsibility associated with the operation of county jails and detention of prisoners was historically borne entirely by the county and not by the state and, therefore, the shift of costs to the city was from the county and not the state.[173]

Similarly, Elections Code section 21533 and the remaining test claim code sections do not mandate the CRC to hire consultants. If the CRC does hire consultants, it is required to comply with the limitation in Elections Code section 21533 to make sure the consultant would be qualified as a commission member of the CRC ("The commission shall not retain a consultant who would not be qualified as an applicant pursuant to paragraph (4) of subdivision (d) of Section 21532."). And as explained in the next section, the requirements to adopt a redistricting proposal and adjust the supervisorial boundaries in accordance with the law every ten years, even with the help of consultants, are not new. Local agencies have long been required to perform these activities.[174]

Therefore, hiring consultants is not mandated by the state. The claimant, however, may request consultant costs for inclusion in the Parameters and Guidelines. If such a request is supported by substantial evidence in the record showing the activity to hire consultants is "reasonably necessary for the performance *of the state-mandated program,*" in accordance with Government Code section 17557(a), and California Code of Regulations, title 2, sections 1183.7(d) and 1187.5, the activity may be considered and approved.

Elections Code section 21535 provides for a period of ineligibility to hold elected or appointed public offices after their term on the CRC has ended and imposes no requirements on the claimant or the CRC.

Accordingly, Elections Code sections 21530, 21533, and 21535 do not impose any requirements or state-mandated costs on the CRC or the claimant and, thus, any costs incurred to comply with these code sections are not eligible for reimbursement.

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[170] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1815.

[171] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1808.

[172] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1815-1816.

[173] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1812-1813.

[174] Elections Code section 21500 as added by Statutes 1994, chapter 920 and amended by Statutes 2015, chapter 732, section 36; Elections Code section 21507 as added by Statutes 2014, chapter 873.

3. Many State-Mandated Activities Imposed by Elections Code Sections 21532 and 21534 Constitute a New Program or Higher Level of Service. However, the Requirements and Costs Imposed by Elections Code Sections 21531 and 21534(a), (c)(9), and (d)(1)-(3) to Adjust the Supervisorial Boundaries and Adopt a Redistricting Plan Every Ten Years, and Comply with the Public Records Act Are Not New and Do Not Impose a New Program or Higher Level of Service.

For a statute to be subject to subvention, the mandated activity must constitute a "program" that either a) carries out the governmental function of providing a service to the public; or b) imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[175] A mandated activity is new when the statute in question is compared with the legal requirements in effect immediately before the enactment of the statute and the activity increases the level of service provided to the public.[176]

a. Elections Code Sections 21532 and 21534 Impose New Mandated Activities on the Claimant. However, the Requirements Imposed by Elections Code Sections 21531 and 21534(a), (c)(9), and (d)(1)-(3) to Adjust the Supervisorial Boundaries, Adopt a Redistricting Plan, and Comply with the Public Records Act Are Not New.

Under prior law, the claimant's board of supervisors adjusted the district boundary lines every ten years.[177] As a result of the test claim statute, the claimant is now required to create the CRC to perform the supervisorial redistricting. The new mandated activities imposed on the claimant in forming the CRC are as follows:

- The county shall create a CRC no later than December 31, 2020, and in each year ending in the number zero thereafter.[178]
- The elections official shall review the applications and eliminate applicants who do not meet the specified qualifications, select 60 of the most qualified applicants, publish the list of qualified applicants for 30 days, and create a subpool for each of the five existing supervisorial districts of the board.[179]

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[175] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 [reaffirming *County of Los Angeles* (1987) 43 Cal.3d 46, 56]; *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537-538.

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

[177] Elections Code section 21500 as added by Statutes 1994, chapter 920 and amended by Statutes 2015, chapter 732, section 36.

[178] Elections Code section 21532(a).

[179] Elections Code section 21532(e)-(g).

- At a regularly scheduled meeting of the board, the Auditor-Controller conducts a random drawing to select one commissioner from each of the five subpools, then another random drawing from all of the remaining applicants to select three additional commissioners.[180]
- The board shall take all steps necessary to ensure a complete and accurate computerized database is available for redistricting, and that procedures are in place to provide to the public ready access to redistricting data and computer software equivalent to what is available to the CRC.[181]
- The eight selected commissioners shall review the remaining names in the subpools of applicants and shall appoint six additional applicants to the CRC.[182]

These requirements mandated by Elections Code sections 21532 and 21534(c)(7) to create the CRC, to ensure a computerized database is available for redistricting, and to provide the public ready access to the redistricting data and computer software equivalent to what is available to the CRC, were not required by prior law and are newly imposed on the claimant itself and through the CRC since the county board of supervisors is required by Elections Code section 21534(c)(8) to fund and provide staff for the CRC.

However, some of the activities required to adopt a plan and adjust boundary lines of the supervisorial districts every ten years are the same as prior law and are *not* new. The test claim statute requires:

- In the year following the year in which the decennial federal census is taken, the CRC shall adjust the boundary lines of the supervisorial districts of the board in accordance with this chapter.[183]
- The CRC shall establish single-member supervisorial districts for the board pursuant to a mapping process using the following criteria as set forth in the following order of priority:

> (1) Districts shall comply with the United States Constitution and each district shall have a reasonably equal population with other districts for the board, except where deviation is required to comply with the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10101 et seq.) or allowable by law.
>
> (2) Districts shall comply with the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10101 et seq.).
>
> (3) Districts shall be geographically contiguous.
>
> (4) The geographic integrity of any city, local neighborhood, or local community of interest shall be respected in a manner that minimizes its division to the extent possible without violating the requirements of paragraphs (1) to (3), inclusive.

[180] Elections Code section 21532(g).

[181] Elections Code section 21534(c)(7).

[182] Elections Code section 21532(h).

[183] Elections Code section 21531.

(5) To the extent practicable, and where this does not conflict with paragraphs (1) to (4), inclusive, districts shall be drawn to encourage geographical compactness such that nearby areas of population are not bypassed for more distant areas of population.[184]

- The CRC shall adopt a redistricting plan adjusting the boundaries of the supervisorial districts and shall file the plan with the county elections official before August 15 of the year following the year in which each decennial federal census is taken.[185]
- All records of the CRC relating to redistricting, and all data considered by the CRC in drawing a draft map or the final map, are public records and subject to the Public Records Act.[186]

Under prior law, the claimant was also required to adopt a redistricting proposal and adjust the district boundaries every ten years. Prior law required the following:

- Following each decennial federal census, and using that census as a basis, the board shall adjust the boundaries of any or all of the supervisorial districts of the county so that the supervisorial districts shall be as nearly equal in population as may be and shall comply with the applicable provisions of Section 10301 of Title 52 of the United States Code, as amended. In establishing the boundaries of the supervisorial districts the board may give consideration to the following factors: (a) topography, (b) geography, (c) cohesiveness, contiguity, integrity, and compactness of territory, and (d) community of interests of the supervisorial districts.[187]
- Before adjusting the boundaries of a district pursuant to Section 21500, 21503, or 21504, or for any other reason, the board shall hold at least one public hearing on the proposal to adjust the boundaries of the district prior to the public hearing at which the board votes to approve or defeat the proposal.[188]

Both prior law and the test claim statute require adjustment of the boundaries of the supervisorial districts in the year following the federal census. Both set forth criteria that must be met, but the stated criteria are somewhat different. In comparing them, the first requirement under prior law and the test claim statute is equality of population in each district which is required by *Reynolds v. Sims*[189] where the U.S. Supreme Court held that "the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators" and dilution of the vote "impairs basic constitutional rights under the Fourteenth Amendment."[190] The

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[184] Elections Code section 21534(a).

[185] Elections Code section 21534(d).

[186] Elections Code section 21534(c)(9).

[187] Elections Code section 21500 as added by Statutes 1994, chapter 920 and amended by Statutes 2015, chapter 732, section 36.

[188] Elections Code section 21507 as added by Statutes 2014, chapter 873.

[189] *Reynolds v. Sims* (1964) 377 U.S. 533.

[190] *Reynolds v. Sims* (1964) 377 U.S. 533, 566.

second requirement under prior law and the test claim statute is the same for both: compliance with the Voting Rights Act of 1965. The test claim statute includes three requirements — geographically contiguous districts; districting that respects the geographic integrity of cities, local neighborhoods, or local communities of interest; and geographically compact districts — similar to the prior law's considerations of topography, geography, cohesiveness, contiguity, integrity, and compactness of territory, and communities of interest. Each of these, whether requirements or considerations, is a step toward ensuring compliance with the Voting Rights Act of 1965 and away from gerrymandering. Despite the small variance in language, both the prior law and the test claim statute set forth the process of redistricting using the mapping process to ensure compliance with the Voting Rights Act.

Thus, the requirements imposed by Elections Code sections 21531 and 21534(a) and (d)(1)-(3) to adjust the supervisorial boundaries and adopt a redistricting plan are not new.

In addition, the claimant was subject to the Public Records Act under prior law and, thus, the activity and costs to comply with the Public Records Act for the records of the CRC relating to redistricting, and all data considered by the CRC in drawing a draft map or the final map pursuant to Elections Code section 21534(c)(9), are not new. The Public Records Act defines "public records" broadly to include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."[191] Moreover, even if the Public Records Act requirements were found to be new, on June 3, 2014, before the test claim statute was enacted, voters approved Proposition 42, which added paragraph 7 to article I, section 3(b) to the California Constitution to require local agencies "to comply with the California Public Records Act (Chapter 3.5 (commencing with Section 6250)." Proposition 42 also amended section 6(a) of article XIII B of the California Constitution, by adding paragraph 4 to provide "that the Legislature may, but need not, provide a subvention of funds for … legislative mandates contained in statutes within the scope of paragraph (7) of subdivision (b) of section 3 of article I." Thus, the costs would not be eligible for reimbursement in any event.

Nevertheless, the test claim statute mandates the CRC to conduct more hearings before adopting a redistricting plan than were required under prior law, and mandates some additional activities as part of the redistricting process.

Under prior law, the board of supervisors was required to have one public hearing before the hearing in which the board was scheduled to vote and adopt the proposal:

> Before adjusting the boundaries of a district pursuant to Section 21601, 21603, or 21604, or for any other reason, the council shall hold at least one public hearing on the proposal to adjust the boundaries of the district prior to the public hearing at which the council votes to approve or defeat the proposal.[192]

The test claim statute mandates the CRC, at the expense of the claimant, to conduct at least eight more hearings before adopting the final plan and map, and mandates the CRC to perform the following additional activities as part of the redistricting process:

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[191] Government Code section 6252 as last amended by Statutes 2015, chapter 537.

[192] Elections Code section 21507 as added by Statutes 2014, chapter 873.

- Conduct at least seven public hearings before drafting a map, to take place over a period of no fewer than 30 days, with at least one public hearing held in each supervisorial district.[193]
- Post the draft map for public comment on the website of the County of Los Angeles and conduct at least two more public hearings on the draft map (one more than prior law).[194]
- Comply with the Ralph M. Brown Act for these public hearings[195] and yet, notwithstanding the Ralph M. Brown Act, the CRC shall post the agenda for the public hearings at least seven days before the hearing.[196]
- Establish and make available to the public a calendar of all public hearings.[197]
- Arrange for the live translation of a hearing in an applicable language (defined as "a language for which the number of residents of the County of Los Angeles who are members of a language minority is greater than or equal to 3 percent of the total voting age residents of the county") if a request for translation is made at least 24 hours before the hearing.[198]
- Take steps to encourage county residents to participate in the redistricting public review process.[199]
- Issue a report that explains the basis on which the CRC made its decisions in achieving compliance with the redistricting criteria required to comply with the Voting Rights Act.[200]

As indicated above, the hearings conducted by the CRC are subject to the Ralph M. Brown Act. The Ralph M. Brown Act requires local government to ensure that their meetings are noticed and open to the public. The Act requires that an agenda be posted 72 hours prior to the meeting in a location that is freely accessible to members of the public and on the local agency's website, and which includes a brief general description of each item of business to be transacted or discussed.[201]

> At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including

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[193] Elections Code section 21534(c)(2).

[194] Elections Code section 21534(c)(3)(A)-(B).

[195] Elections Code section 21534(c)(1).

[196] Elections Code section 21534(c)(4)(B).

[197] Elections Code section 21534(c)(4)(A).

[198] Elections Code section 21534(c)(5).

[199] Elections Code section 21534(c)(6).

[200] Elections Code section 21534(d)(4).

[201] Government Code section 54954.2.

> items to be discussed in closed session. A brief general description of an item generally need not exceed 20 words. The agenda shall specify the time and location of the regular meeting and shall be posted in a location that is freely accessible to members of the public and on the local agency's Internet Web site, if the local agency has one. If requested, the agenda shall be made available in appropriate alternative formats to persons with a disability, as required by Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof. The agenda shall include information regarding how, to whom, and when a request for disability-related modification or accommodation, including auxiliary aids or services, may be made by a person with a disability who requires a modification or accommodation in order to participate in the public meeting.[202]

The Ralph M. Brown Act applies to "legislative bodies" which includes "[t]he governing body of a local agency or *any other local body created by state* or federal *statute*."[203] Thus, the Ralph M. Brown Act would have applied to the CRC whether or not the test claim statute stated as such. The Ralph M. Brown Act applied to all meetings held by the board of supervisors under prior law, including the public hearings on redistricting. But under prior law, the board of supervisors was only required to have one public hearing before the adoption of the redistricting plan.[204] Although the requirements of the Ralph M. Brown Act are not new on their face, the test claim statute mandates at least eight more hearings than were required under prior law. The Ralph M. Brown Act requirements associated with those additional required hearings are new and are newly imposed on the claimant by the state since the county board of supervisors is required by Elections Code section 21534(c)(8) to fund and provide staff for the CRC.

Similarly, the CRC is required by the test claim statute to arrange for the live translation of a hearing in an applicable language if a request for translation is made at least 24 hours before the hearing. Under existing law, the Dymally-Alatorre Bilingual Services Act places requirements on state and local government to provide services in languages other than English.[205] Specifically, local public agencies, "serving a substantial number of non-English-speaking people" are required to employ "qualified bilingual persons in public contact positions or as interpreters to assist those in such positions."[206] Local public agency is defined to include "a county, . . . or any board, commission or agency thereof, or any other local public agency."[207] Although the CRC is a separate entity from the claimant, it would still fall under the catch-all "any other local public agency" of the Dymally-Alatorre Bilingual Services Act. The Act does not specifically require translation services as set forth in the test claim statute for public hearings. Assuming, however, that the requirement to employ bilingual persons to act as

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[202] Government Code section 54954.2(a)(1).

[203] Government Code section 54952(a). Emphasis added.

[204] Elections Code section 21507 as added by Statutes 2014, chapter 873.

[205] Government Code section 7290 et seq.

[206] Government Code section 7293.

[207] Government Code section 54951.

interpreters indirectly requires translation services at public hearings, the CRC is only required to provide such services to the extent that the CRC serves a "substantial number" of non-English speakers. The Act does not quantify a "substantial number" for local public agencies, but instead leaves the agency to make that determination.[208] The Act does provide that state agencies must provide services in languages other than English when the non-English speakers comprise five per cent or more of the population being served.[209] Even if this were applicable to the CRC, the test claim statute requires "the live translation of a hearing held pursuant to this chapter in an applicable language if a request for translation is made at least 24 hours before the hearing" where "an 'applicable language' means a language for which the number of residents of the County of Los Angeles who are members of a language minority is greater than or equal to 3 percent of the total voting age residents of the county."[210] Although the requirements of the Dymally-Alatorre Bilingual Services Act are not new on their face, the test claim statute requires at least eight more hearings than were required under prior law and as part of those additional hearings, the CRC is required to arrange for the live translation of a hearing in an applicable language if a request for translation is made at least 24 hours before the hearing. These requirements are new and are newly mandated on the claimant since the county board of supervisors is required by Elections Code section 21534(c)(8) to fund and provide staff for the CRC.

Accordingly, Elections Code sections 21532 and 21534, as added by the test claim statute, impose the following new mandated activities on the claimant:

- The county shall create a CRC no later than December 31, 2020, and in each year ending in the number zero thereafter.[211]
- The elections official shall review the applications and eliminate applicants who do not meet the specified qualifications, select 60 of the most qualified applicants, publish the list of qualified applicants for 30 days, and create a subpool for each of the five existing supervisorial districts of the board.[212]
- At a regularly scheduled meeting of the board, the Auditor-Controller conducts a random drawing to select one commissioner from each of the five subpools, then another random drawing from all of the remaining applicants to select three additional commissioners.[213]
- The board shall take all steps necessary to ensure a complete and accurate computerized database is available for redistricting, and that procedures are in place to provide to the

[208] Government Code sections 7293 and 7295.

[209] Government Code section 7596.2.

[210] Government Code section 21534(c)(5).

[211] Elections Code section 21532(a).

[212] Elections Code section 21532(e)-(g).

[213] Elections Code section 21532(g).

public ready access to redistricting data and computer software equivalent to what is available to the CRC.[214]

In addition, based on Elections Code section 21534(c)(8), which requires the claimant to provide reasonable funding and staffing to the CRC, the following activities mandated by Elections Code sections 21532 and 21534 are newly imposed on the claimant:

- The eight selected commissioners shall review the remaining names in the subpools of applicants and shall appoint six additional applicants to the CRC.[215]
- Conduct at least seven public hearings before drafting a map, to take place over a period of no fewer than 30 days, with at least one public hearing held in each supervisorial district.[216]
- Post the draft map for public comment on the website of the County of Los Angeles and conduct one public hearing on the draft map (in addition to the one hearing required under prior law, which is not reimbursable).[217]
- Comply with the Ralph M. Brown Act for these public hearings.[218] This includes posting an agenda seven days prior to the hearing in a location that is freely accessible to members of the public and on the website, and which includes a brief general description of each item of business to be transacted or discussed in accordance with Government Code section 54954.2.
- Establish and make available to the public a calendar of all public hearings.[219]
- Arrange for the live translation of a hearing in an applicable language (defined as "a language for which the number of residents of the County of Los Angeles who are members of a language minority is greater than or equal to three percent of the total voting age residents of the county") if a request for translation is made at least 24 hours before the hearing.[220]
- Take steps to encourage county residents to participate in the redistricting public review process.[221]

[214] Elections Code section 21534(c)(7).

[215] Elections Code section 21532(h).

[216] Elections Code section 21534(c)(2).

[217] Elections Code section 21534(c)(3)(A)-(B).

[218] Elections Code sections 21534(c)(1); 21534(c)(4)(B).

[219] Elections Code section 21534(c)(4)(A).

[220] Elections Code section 21534(c)(5).

[221] Elections Code section 21534(c)(6).

- Issue a report that explains the basis on which the CRC made its decisions in achieving compliance with the redistricting criteria required to comply with the Voting Rights Act.[222]

b. The New Mandated Activities Imposed by Elections Code Sections 21532 and 21534 Are Unique to Government and Provide a Service to the Public and Therefore Impose a New Program or Higher Level of Service.

As set forth above, the test claim statute imposes new activities on the claimant necessary to create, staff, and fund the CRC. For the test claim statute to constitute a new program or higher level of service, it must either a) carry out the governmental function of providing a service to the public; or b) or impose unique requirements on local government that do not apply generally to all residents and entities in the state.[223] The term "program," therefore, has "two alternative meanings," and "only one of these [alternatives] is necessary to trigger reimbursement."[224]

In this case, the test claim statute meets both alternative tests. The test claim statute carries out the government function of redistricting and requires an independent redistricting commission. The purpose of redistricting is protection of the voters' rights under the U.S. Constitution, the California Constitution, and the federal and state Voting Rights Acts. Redistricting by the CRC serves the county residents by ensuring fair representation and that their vote is not diluted to favor any particular group or political party.[225] Further, the test claim statute only applies to the County of Los Angeles, a political subdivision of the State of California. It does not apply to any other residents or entities in the state. Thus, the test claim statute satisfies the requirement of being a new program or higher level of service.

Finance asserts that the test claim statute does not impose a new program or higher level of service, but rather merely increased costs for redistricting, an activity for which the claimant has always been responsible. Finance relies on *City of Anaheim v. State of California*,[226] holding increased costs alone do not result in a reimbursable state mandate and *San Diego Unified School District v. Commission on State Mandates*,[227] holding reimbursement is not required if a statute merely implements a change that increases costs.[228] Finance's reliance on these cases is misplaced.

In *City of Anaheim v. State of California*, the city sought to obtain reimbursement from a change in law that required the Public Employees' Retirement System (PERS) to increase pension

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[222] Elections Code section 21534(d)(4).

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

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

[225] Exhibit F, Senate Rules Committee, Office of the Senate Floor Analyses, Third Reading of Senate Bill 958 (2015-2016 Reg. Sess.), August 30, 2016, page 5.

[226] *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478.

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

[228] Exhibit B, Finance's Comments on the Test Claim, filed December 28, 2020, pages 1-2.

payments to retired public employees. The city claimed that it had to contribute to the fund at a higher rate as a result of PERS' compliance with the new law. The city's case failed because the change in law did not impose any mandated activities upon the city and the city experienced only increased costs in the absence of having to provide a new program or higher level of service.[229] Here, the test claim statute imposes a number of new mandated activities on the claimant as set forth above. There was no requirement in prior law that the claimant create the CRC charged with redistricting.

In *San Diego Unified School District v. Commission on State Mandates*, the school district sought to obtain reimbursement for the increased costs to comply with the requirements for mandatory and discretionary expulsion of students.[230] The court explained "that simply because a state law or order may *increase the costs* borne by local government *in providing services,* this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting 'service to the public' under article XIII B, section 6, and Government Code section 17514."[231] With regard to discretionary expulsions, the court held that the statutes merely implemented federal law and, to the extent that the state added requirements, the costs to comply with them were de minimis and should be considered part of the underlying federal mandate.[232] *San Diego Unified* does not apply here. The test claim statute imposes a new state mandated program on the claimant to establish and fund an independent redistricting commission, which provides a service to the public, as explained above, by ensuring fair representation and that a vote is not diluted to favor any particular group or political party.

Accordingly, the new activities mandated by Elections Code Sections 21532 and 21534 constitute a new program or higher level of service.

4. The Activities Mandated by Elections Code Section 21534(c)(1) and (c)(4)(B) to Comply with the Brown Act Do Not Impose Costs Mandated by the State Pursuant to Article XIII B, Section 6(a)(4) of the California Constitution. The Remaining New Activities Mandated by Elections Code Section 21532 and 21534 Impose Increased Costs Mandated by the State Pursuant to Article XIII B, Section 6, and Government Code Section 17514.

Government Code section 17514 defines "costs mandated by the state" as any increased cost that a local agency or school district incurs as a result of any statute or executive order that mandates a new program or higher level of service. Government Code section 17564(a) further requires that no claim shall be made nor shall any payment be made unless the claim exceeds $1,000.

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[229] *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1482.

[230] *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859, 866.

[231] *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877. Emphasis in the original.

[232] *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859, 889-890.

The claimant claims costs of $35,533.18 "related to planning the CRC's application and selection process" and $1,268.91 for having "designed and developed the CRC application process, created internal working documents, and designed and set up a CRC website."[233]

The application and selection process of the CRC is a requirement mandated on the claimant by the test claim statute. The costs incurred by this requirement far exceed the required $1,000, and are supported by substantial evidence in the record.

Article XIII B, section 6(a)(4) of the California Constitution states, however, that:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds 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:
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> [¶]
>
> (4) Legislative mandates contained in statutes within the scope of paragraph (7) of subdivision (b) of Section 3 of Article I.

And, Article I, section 3(b)(7) provides:

> (7) In order to ensure public access to the meetings of public bodies and the writings of public officials and agencies, as specified in paragraph (1), each local agency is hereby required to comply with the *California Public Records Act* (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) and the *Ralph M. Brown Act* (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code), and with any subsequent statutory enactment amending either act, enacting a successor act, or amending any successor act that contains findings demonstrating that the statutory enactment furthers the purposes of this section.[234]

The Ralph M. Brown Act applies to all local agencies and "any other local body created by state statute," and therefore applies to the CRC.[235] Therefore, costs incurred to comply with the California Public Records Act and the Brown Act are specifically exempted from the subvention requirement by the California Constitution.

Therefore, there are *no* costs mandated by the state pursuant to article XIII B, section 6(a)(4), and reimbursement is not required for the following activities required by Elections Code sections 21534(c)(1); 21534(c)(4)(B):

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[233] Exhibit A, Test Claim, filed June 26, 2020, page 20 and pages 28-30 (Declaration of Albert Navas, Departmental Finance Manager, Registrar-Recorder/County Clerk).

[234] Emphasis added.

[235] Government Code section 54952(a).

- Comply with the Ralph M. Brown Act when conducting the additional public hearings.[236] This includes posting an agenda seven days prior to the hearing in a location that is freely accessible to members of the public and on the website, and which includes a brief general description of each item of business to be transacted or discussed in accordance with Government Code section 54954.2.

Accordingly, the Commission finds that the following new state-mandated activities required by Elections Code sections 21532 and 21534 impose increased costs mandated by the state pursuant to article XIII B, section 6 and Government Code section 17514:

- The county shall create a CRC no later than December 31, 2020, and in each year ending in the number zero thereafter.[237]
- The elections official shall review the applications and eliminate applicants who do not meet the specified qualifications, select 60 of the most qualified applicants, publish the list of qualified applicants for 30 days, and create a subpool for each of the five existing supervisorial districts of the board.[238]
- At a regularly scheduled meeting of the board, the Auditor-Controller conducts a random drawing to select one commissioner from each of the five subpools, then another random drawing from all of the remaining applicants to select three additional commissioners.[239]
- The board shall take all steps necessary to ensure a complete and accurate computerized database is available for redistricting, and that procedures are in place to provide to the public ready access to redistricting data and computer software equivalent to what is available to the CRC.[240]

In addition, based on Elections Code section 21534(c)(8), which requires the claimant to provide reasonable funding and staffing to the CRC, the following activities mandated by Elections Code sections 21532 and 21534 impose increased costs mandated by the state on the claimant:

- The eight selected commissioners shall review the remaining names in the subpools of applicants and shall appoint six additional applicants to the CRC.[241]
- Conduct at least seven public hearings before drafting a map, to take place over a period of no fewer than 30 days, with at least one public hearing held in each supervisorial district.[242]

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[236] Elections Code sections 21534(c)(1); 21534(c)(4)(B).

[237] Elections Code section 21532(a).

[238] Elections Code section 21532(e)-(g).

[239] Elections Code section 21532(g).

[240] Elections Code section 21534(c)(7).

[241] Elections Code section 21532(h).

[242] Elections Code section 21534(c)(2).

- Post the draft map for public comment on the website of the County of Los Angeles[243] and conduct one public hearing on the draft map (in addition to the one hearing required under prior law, which is not reimbursable).[244]
- Establish and make available to the public a calendar of all public hearings.[245]
- Arrange for the live translation of a hearing in an applicable language (defined as "a language for which the number of residents of the County of Los Angeles who are members of a language minority is greater than or equal to 3 percent of the total voting age residents of the county") if a request for translation is made at least 24 hours before the hearing.[246]
- Take steps to encourage county residents to participate in the redistricting public review process.[247]
- Issue a report that explains the basis on which the CRC made its decisions in achieving compliance with the redistricting criteria required to comply with the Voting Rights Act.[248]

V. Conclusion

Based on the foregoing analysis, the Commission partially approves this Test Claim and finds that Elections Code sections 21532 and 21534 as added by the test claim statute impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for the following activities:

- The county shall create a CRC no later than December 31, 2020, and in each year ending in the number zero thereafter.[249]
- The elections official shall review the applications and eliminate applicants who do not meet the specified qualifications, select 60 of the most qualified applicants, publish the list of qualified applicants for 30 days, and create a subpool for each of the five existing supervisorial districts of the board.[250]

[243] Elections Code section 21534(c)(3)(A).

[244] Elections Code section 21534(c)(3)(B).

[245] Elections Code section 21534(c)(4)(A).

[246] Elections Code section 21534(c)(5).

[247] Elections Code section 21534(c)(6).

[248] Elections Code section 21534(d)(4).

[249] Elections Code section 21532(a).

[250] Elections Code section 21532(e)-(g).

- At a regularly scheduled meeting of the board, the Auditor-Controller conducts a random drawing to select one commissioner from each of the five subpools, then another random drawing from all of the remaining applicants to select three additional commissioners.[251]
- The board shall take all steps necessary to ensure a complete and accurate computerized database is available for redistricting, and that procedures are in place to provide to the public ready access to redistricting data and computer software equivalent to what is available to the CRC.[252]

In addition, based on Elections Code section 21534(c)(8), which requires the claimant to provide reasonable funding and staffing to the CRC, the following activities mandated by Elections Code sections 21532 and 21534 impose increased costs mandated by the state on the claimant:

- The eight selected commissioners shall review the remaining names in the subpools of applicants and shall appoint six additional applicants to the CRC.[253]
- Conduct at least seven public hearings before drafting a map, to take place over a period of no fewer than 30 days, with at least one public hearing held in each supervisorial district.[254]
- Post the draft map for public comment on the website of the County of Los Angeles and conduct one public hearing on the draft map (in addition to the one hearing required under prior law, which is not reimbursable).[255]
- Establish and make available to the public a calendar of all public hearings.[256]
- Arrange for the live translation of a hearing in an applicable language (defined as "a language for which the number of residents of the County of Los Angeles who are members of a language minority is greater than or equal to 3 percent of the total voting age residents of the county") if a request for translation is made at least 24 hours before the hearing.[257]
- Take steps to encourage county residents to participate in the redistricting public review process.[258]

[251] Elections Code section 21532(g).

[252] Elections Code section 21534(c)(7).

[253] Elections Code section 21532(h).

[254] Elections Code section 21534(c)(2).

[255] Elections Code section 21534(c)(3)(A)-(B).

[256] Elections Code section 21534(c)(4)(A).

[257] Elections Code section 21534(c)(5).

[258] Elections Code section 21534(c)(6).

- Issue a report that explains the basis on which the CRC made its decisions in achieving compliance with the redistricting criteria required to comply with the Voting Rights Act.[259]

All other code sections added by the test claim statute and activities alleged to be mandated in the Test Claim are denied.

[259] Elections Code section 21534(d)(4).

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.

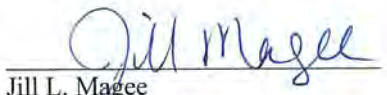
On June 8, 2021, I served the:

- **Decision adopted May 28, 2021**

  County of Los Angeles Citizens Redistricting Commission, 19-TC-04
  Elections Code Sections 21530, 21531, 21532, 21533, 21534, and 21535 as added by Statutes 2016, Chapter 781 (SB 958)
  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 June 8, 2021 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 6/8/21

Claim Number: 19-TC-04

Matter: County of Los Angeles Citizens Redistricting Commission

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.)

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6 Cal.5th 196
Supreme Court of California.

COUNTY OF SAN DIEGO et al., Plaintiffs and Appellants,
v.
COMMISSION ON STATE MANDATES, Defendants and Respondents.

S239907
|
Filed November 19, 2018

Synopsis

Background: Counties filed a petition for writ of administrative mandamus and complaint for declaratory relief challenging Commission on State Mandates decision that costs associated with eight activities required of local governments by the Sexually Violent Predator Act (SVPA) under the Proposition 83, The Sexual Predator Punishment and Control Act: Jessica's Law were not eligible for reimbursement. The Superior Court, San Diego County, No. 37-2014-0005050-CU-WM-CTL, Richard E.L. Strauss, J., denied petition. Counties appealed, and the Court of Appeal reversed and remanded with directions, 7 Cal.App.5th 12, 212 Cal.Rptr.3d 259. The Supreme Court granted review.

Holdings: The Supreme Court, Cuéllar, J., held that:

[1] where a statutory provision was only technically reenacted as part of other changes made by a voter initiative and the Legislature has retained the power to amend the provision through the ordinary legislative process, the provision cannot fairly be considered "expressly included in a ballot measure" within the meaning of statute exempting state from reimbursing local governments for costs incurred in connection with duties included in such a ballot measure; disapproving *Shaw v. People ex rel. Chiang*, 175 Cal.App.4th 577, 96 Cal.Rptr.3d 379;

[2] SVPA provisions technically restated as part enactment of Proposition 83 were not expressly included in a ballot measure approved by the voters within the meaning of statute exempting state from reimbursing local governments for costs; and

[3] Commission was required to consider whether the expanded sexually violent predator definition in Proposition 83 transformed the subject statutes as a whole into a voter-imposed mandate or, alternatively, did so to the extent the expanded definition incrementally imposed new, additional duties on counties.

Affirmed in part and remanded.

Procedural Posture(s): Petition for Discretionary Review; Petition for Writ of Mandate; Complaint for Declaratory Relief.

West Headnotes (18)

[1] **States** State Expenses and Charges; Statutory Liabilities

The state has conditional authority to enlist a local government in carrying out a new program or providing a higher level of service for an existing program. Cal. Const. art. 13 B, § 6; Cal. Gov't Code § 17556.

3 Cases that cite this headnote

[2] **States** Nature, form, and right of action

When the Legislature enacts a statute imposing obligations on a local agency without providing adequate funding to allow the locality to discharge those obligations, the local entity may file a "test claim" with the Commission on State Mandates, which then decides, after a hearing, whether the statute that is the subject of the test claim under review mandates a new program or an increased level of service and, if so, the amount to be reimbursed. Cal. Gov't Code §§ 17521, 17551, 17557.

1 Case that cites this headnote

[3] **Appeal and Error** Governments and Political Subdivisions

The determination as to whether statutes impose a state mandate, and thus require reimbursement, is a question of law reviewed independently. Cal. Const. art. 13 B, § 6.

1 Case that cites this headnote

[4] **States** State Expenses and Charges; Statutory Liabilities

Purpose of constitutional provision requiring the state reimburse local governments for costs incurred when the state enlists their assistance in implementing a state program was to prevent the state from unfairly shifting the costs of government onto local entities that were ill-equipped to shoulder the task. Cal. Const. art. 13 B, § 6.

5 Cases that cite this headnote

[5] **States** State Expenses and Charges; Statutory Liabilities

The state, with certain exceptions, must pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies. Cal. Const. art. 13 B, § 6.

1 Case that cites this headnote

[6] **States** State Expenses and Charges; Statutory Liabilities

The state must reimburse local governments for mandates imposed by the Legislature, but not for mandates imposed by the voters themselves through an initiative. Cal. Const. art. 13 B, § 6; Cal. Gov't Code § 17556(f).

[7] **States** State Expenses and Charges; Statutory Liabilities

Where the Legislature cannot use the ordinary legislative process to amend or alter duties imposed by the voters, it can no longer be reasonably characterized as the source of those duties, and thus is not required to reimburse local governments for costs incurred in connection with those duties. Cal. Const. art. 2, § 10, Cal. Const. art. 13 B, § 6(a); Cal. Gov't Code § 17556(f).

[8] **States** State Expenses and Charges; Statutory Liabilities

Not every single word printed in the body of an initiative falls within the scope of the terms "expressly included in, a ballot measure" in statute exempting state from reimbursing local governments for costs incurred in connection with duties included in such a ballot measure. Cal. Const. art. 13 B, § 6(a); Cal. Gov't Code § 17556(f).

2 Cases that cite this headnote

[9] **Statutes** In general; necessity

When an existing statutory section is amended — even in the tiniest part — the state Constitution requires the entire section to be reenacted as amended. Cal. Const. art. 4, § 9.

10 Cases that cite this headnote

[10] **Statutes** In general; necessity

The rationale for compelling reenactment of an entire statutory section when only a part is being amended is to avoid the enactment of statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect and the risk that the public, from the difficulty of making the necessary examination and comparison, failed to become apprised of the changes made in the laws. Cal. Const. art. 4, § 9.

6 Cases that cite this headnote

[11] **Statutes** Relationship to statute amended; clarification or change of meaning

The portions of the amended section which are copied without change are not to be considered as having been repealed and again re-enacted, but to have been the law all along. Cal. Const. art. 4, § 9; Cal. Gov't Code § 9605.

4 Cases that cite this headnote

[12] **States** State Expenses and Charges; Statutory Liabilities

The purpose of the constitutional ban on unfunded state mandates was to protect the strapped budgets of local governments in the wake of Proposition 13. Cal. Const. art. 13 B, § 6.

[13] **Statutes** Construction and operation of initiated statutes

Purpose of limiting the Legislature's power to amend an initiative statute is to protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent. Cal. Const. art. 2, § 10.

3 Cases that cite this headnote

[14] **Statutes** Power to amend

Statutes Construction and operation of initiated statutes

When technical reenactments of an entire statutory section are required due to the amendment of a portion of it through initiative, yet involve no substantive change in a given statutory provision, the Legislature in most cases retains the power to amend the restated provision through the ordinary legislative process; this conclusion applies unless the provision is integral to accomplishing the electorate's goals in enacting the initiative or other indicia support the conclusion that voters reasonably intended to limit the Legislature's ability to amend that part of the statute. Cal. Const. art. 4, § 9.

19 Cases that cite this headnote

[15] **States** State Expenses and Charges; Statutory Liabilities

Where a statutory provision was only technically reenacted as part of other changes made by a voter initiative and the Legislature has retained the power to amend the provision through the ordinary legislative process, the provision cannot fairly be considered "expressly included in a ballot measure" within the meaning of statute exempting state from reimbursing local governments for costs incurred in connection with duties included in such a ballot measure; disapproving *Shaw v. People ex rel. Chiang*, 175 Cal.App.4th 577, 96 Cal.Rptr.3d 379. Cal. Const. art. 4, § 9; Cal. Const. art. 13 B, § 6(a); Cal. Gov't Code § 17556(f).

14 Cases that cite this headnote

[16] **States** State Expenses and Charges; Statutory Liabilities

Sexually Violent Predators Act (SVPA) provisions technically restated, as required by constitution, as part enactment of Proposition 83, The Sexual Predator Punishment and Control Act: Jessica's Law, were not expressly included in a ballot measure approved by the voters within the meaning of statute exempting state from reimbursing local governments for costs incurred in connection with duties included in such a ballot measure; restated provisions were not integral to accomplishing the initiative's goals, nor was there any basis for believing that it was within the scope of the voters' intended purpose in enacting the initiative to limit the Legislature's capacity to alter or amend the provisions. Cal. Const. art. 4, § 9; Cal. Const. art. 13 B, § 6(a); Cal. Welf. & Inst. Code § 6601 et seq.; Cal. Gov't Code § 17556(f).

10 Cases that cite this headnote

[17] **States** State Expenses and Charges; Statutory Liabilities

Constitutionally-required technical reenactment, as part of Proposition 83, The Sexual Predator Punishment and Control Act: Jessica's Law, of Sexually Violent Predators Act (SVPA) provision stating that "[t]he rights, requirements, and procedures set forth in Section 6603 shall apply to all commitment proceedings" did not make that section "necessary to implement" Proposition 83 within meaning of statute exempting state from reimbursing local governments for costs incurred in connection with duties necessary to implement such a ballot measure; question was not whether the protections in that section were required by due process, but rather was whether the civil commitment program triggering those

procedures was mandated by the state or by the voters. U.S. Const. Amend. 14; Cal. Const. art. 4, § 9; Cal. Const. art. 13 B, § 6(a); Cal. Welf. & Inst. Code §§ 6603, 6604.1; Cal. Gov't Code § 17556(f).

1 Case that cites this headnote

[18] **States** State Expenses and Charges; Statutory Liabilities

Commission on State Mandates considering counties' test claim that they were eligible for reimbursement for costs associated with certain activities required of local governments by the Sexually Violent Predator Act (SVPA) following passage of Proposition 83, The Sexual Predator Punishment and Control Act: Jessica's Law was required to consider whether the expanded sexually violent predator definition in Proposition 83 transformed the subject statutes as a whole into a voter-imposed mandate or, alternatively, did so to the extent the expanded definition incrementally imposed new, additional duties on counties. Cal. Const. art. 4, § 9; Cal. Const. art. 13 B, § 6(a); Cal. Welf. & Inst. Code § 6600 et seq. Cal. Gov't Code § 17556(f).

Witkin Library Reference: 9 Witkin, Summary of Cal. Law (11th ed. 2017) Taxation, § 119 [Requirement.]

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Opinion

Opinion of the Court by CUÉLLAR, J.

*****56** ***200** When convicted sex offenders have a diagnosed mental disorder making it likely they would engage in sexually violent behavior if released, they are subject to civil commitment proceedings under the Sexually Violent Predators Act (SVPA; Welf. & Inst. Code, § 6600 et seq.). County governments are responsible for filing the commitment petition, providing counsel and experts for all hearings on the petition, and housing the individual potentially subject to commitment while the petition is adjudicated. Carrying out these tasks takes more than diligence and organization from counties — it takes money. What we must decide in this case is who pays for the duties the SVPA imposes on county governments.

For the first 15 years of the SVPA's existence, it was the State of California that — according to the Commission on State Mandates (Commission) — had to foot the bill. But in early 2013, the Department of Finance (Department) asked the Commission to reconsider its earlier decision and declare that the SVPA was no longer a state-mandated program. The Department argued that the state's financial responsibility ceased on November 7, 2006, when the voters enacted The Sexual Predator Punishment and Control Act: Jessica's Law (Proposition 83), which "substantively amended and

reenacted various sections of the Welfare and Institutions Code that had served as the basis for the Commission's Statement of Decision." (See Gov. Code, § 17556, subd. (f) [duties that are "expressly included in" or "necessary to implement" a ballot measure do not constitute "costs mandated by the ***201** state"].) The Commission approved the Department's request for redetermination in part and identified six county duties (and part of a seventh) that, ****349** effective July 1, 2011,[1] no longer constituted reimbursable state mandates. (Cal. Com. on State Mandates, Statement of Dec. No. 12-MR-01 (Dec. 6, 2013), pp. 54-55 <https://www.csm.ca.gov/decisions/doc96.pdf> [as of Nov. 15, 2018]; all Internet citations in this opinion are archived by year, docket number, and case name at <http://www.courts.ca.gov/38324.htm>.)

1 Under Government Code section 17557, subdivision (e), a test claim submitted on or before June 30 following a fiscal year establishes "eligibility for reimbursement for that fiscal year."

Soon thereafter, the counties of San Diego, Los Angeles, Orange, Sacramento, and San Bernardino (collectively, the Counties) filed a petition for writ of administrative mandate and a complaint for declaratory relief against the Commission, the State of California, the Department, and John Chiang in his then-official capacity as State Controller (collectively, the State respondents). The San Diego County Superior Court denied the petition and dismissed the complaint. The Court of Appeal reversed, finding that Proposition 83 did not alter in any way the state's obligation to reimburse the Counties for the costs of implementing the SVPA. (*****57** *County of San Diego v. Commission on State Mandates* (2016) 7 Cal.App.5th 12, 18, 212 Cal.Rptr.3d 259 (*County of San Diego*).). We agree that the Commission erred when it treated Proposition 83 as a basis for terminating the state's obligation to reimburse the Counties simply because certain provisions of the SVPA had been restated without substantive change in Proposition 83. But we also remand the matter to the Commission so it can determine, in the first instance, whether and how the initiative's expanded definition of a sexually violent predator (SVP) may affect the state's obligation to reimburse the Counties for implementing the amended statute.

I.

A.

[1] The state has conditional authority to enlist a local government in carrying out a new program or providing a higher level of service for an existing program. Only when the state "reimburse[s] that local government for the costs of the program or increased level of service" may the state impose such a mandate on its local governments. (Cal. Const., art. XIII B, § 6, subd. (a).) No reimbursement is required, though, where "[t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government" (Gov. Code, § 17556, subd. (c)) or where "[t]he statute or executive order imposes duties that are ***202** necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election" (*id*., subd. (f)).

[2] Predictably, local governments often disagree with the state about who is responsible for funding new programs. For the first five years after California Constitution, article XIII B was adopted, such unresolved disputes ended up in court. This arrangement led to unnecessary litigation, burdened the judiciary, delayed reimbursement, and injected uncertainty into budget planning at both the state and local levels. (See *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331, 285 Cal.Rptr. 66, 814 P.2d 1308; Gov. Code, § 17500.) Eventually, the Legislature created the Commission to streamline resolution of these disputes (Gov. Code, §§ 17525, 17551), and adopted procedures for submission and adjudication of reimbursement claims (§ 17500 et seq.). So when the Legislature now enacts a statute imposing obligations on a local agency without providing adequate funding to allow the locality to discharge those obligations, the local entity may file a "test claim" with the Commission. (§ 17521; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 833, 244 Cal.Rptr. 677, 750 P.2d 318.) The Commission then decides, after a hearing, whether the statute that is the subject of the test claim under review (i.e., the test claim statute) mandates a new program or an increased level of service and, if so, the amount to be reimbursed. (§§ 17551, 17557.) Either the local agency or the state may challenge the Commission's decision in court by filing a petition for writ of administrative mandate. (§ 17559, subd. (b).)

In 2010, the Legislature enabled either party to request reconsideration of a prior ****350** Commission decision. Using formal procedures prescribed by statute, an affected state or local agency may ask that the Commission "adopt

a new test claim decision to supersede a previously adopted test claim decision ... upon a showing that the state's liability for that test claim decision ... has been modified based on a subsequent change in law." (Gov. Code, § 17570, subd. (b).) Section 17570, subdivision (a)(2) defines a " '[s]ubsequent change in law' " as a "change in law that requires a finding that an incurred cost is a cost mandated by the state, as defined by Section 17514, or is ***58** not a cost mandated by the state pursuant to Section 17556." Under the Commission's regulations implementing these provisions, the request for a new test claim decision proceeds in two steps. At the first hearing, the Commission decides whether the requesting agency "has made an adequate showing" of "a subsequent change in law ... material to the prior test claim decision." (Cal. Code Regs., tit. 2, § 1190.5, subd. (a)(1).) A showing is "adequate" if the Commission finds the requesting agency "has a substantial possibility of prevailing at the second hearing." (*Ibid.*) At the second hearing, the Commission decides "whether the state's liability ... has been modified based on the subsequent change in law alleged by the requester, thus requiring adoption of a new test claim decision to supersede the previously adopted test claim ***203** decision." (*Id.*, subd. (b)(1).) If so, the Commission "shall adopt a new decision that reflects the modified liability of the state." (*Ibid.*)

B.

The SVPA was enacted by the Legislature in 1995 to enable the involuntary civil commitment of certain persons. The individuals subject to civil commitment under the SVPA are those who, following completion of their prison terms, have a diagnosed mental disorder that makes them likely to engage in sexually violent behavior. (Welf. & Inst. Code, § 6600, subd. (a)(1); see *People v. Roberge* (2003) 29 Cal.4th 979, 984, 129 Cal.Rptr.2d 861, 62 P.3d 97.) Subsequently, the County of Los Angeles filed a test claim seeking reimbursement from the state for the costs of complying with the duties imposed by the SVPA. On June 25, 1998, the Commission adopted a statement of decision approving reimbursement for the following eight specific local government duties (Cal. Com. on State Mandates, Statement of Dec. No. CSM-4509 (June 25, 1998) p. 12 <https://csm.ca.gov/matters/4509/doc1.pdf> [as of Nov. 15, 2018]):

1. Designation by the county board of supervisors of the appropriate district attorney or county counsel who will be responsible for the SVP civil commitment proceedings (Welf. & Inst. Code, § 6601, subd. (i));

2. Initial review of reports and records by the county's designated counsel to determine whether the county concurs with the state's recommendation (Welf. & Inst. Code, § 6601, subd. (i));

3. Preparation and filing of the petition for commitment by the county's designated counsel (Welf. & Inst. Code, § 6601, subd. (i));

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

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

6. Preparation and attendance by the county's designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the SVP (Welf. & Inst. Code, §§ 6605, former subds. (b)-(d), 6608, subds. (a) & (b), former subdivisions (c) & (d));

7. Retention of necessary experts, investigators, and professionals for preparation for trial and subsequent hearings regarding the condition of the SVP (Welf. & Inst. Code, §§ 6603, 6605, former subd. (d)); and

***204** 8. Transportation and housing for each potential SVP at a secured facility while the individual awaits trial on the SVP determination. (Welf. & Inst. Code, § 6602.)

*****59** The Department then began reimbursing counties in a manner consistent with the Commission's decision. For fiscal year 2012-2013, the state reimbursed counties approximately ****351** $20.75 million to cover the cost of implementing the SVP mandate. The Department estimated the mandate costs for fiscal year 2013-2014 to be approximately $21.79 million.

In January 2013, though, the Department sought to terminate these payments by requesting that the Commission adopt a new test claim under Government Code section 17570. In the Department's view, the state mandate ended when the voters enacted Proposition 83 at the November 7, 2006, General Election. The Department argued that each of the state-mandated duties was now either "expressly included in" or

"necessary to implement" Proposition 83, "a ballot measure approved by the voters in a statewide ... election." (Gov. Code, § 17556, subd. (f).)

It is true that Proposition 83 included several of the statutory mandates on which the Commission's 1998 ruling relied. But as the parties concede, these provisions were reprinted in Proposition 83 solely because the California Constitution requires that "[a] section of a statute may not be amended unless the section is re-enacted as amended." (Cal. Const., art. IV, § 9.) Both parties admit Proposition 83 made no changes to many of the provisions the Commission had identified as imposing state-mandated duties on local governments and revised the remainder only in nonsubstantive ways. Nonetheless, on July 26, 2013, the Commission determined that the Department had made a sufficient showing of a " 'subsequent change in law' " within the meaning of Government Code section 17570, subdivision (a)(2) to raise a substantial possibility of prevailing at the second hearing. (Cal. Com. on State Mandates, Statement of Dec. No. 12-MR-01 (July 26, 2013), p. 13 <https://csm.ca.gov/matters/4509/doc55.pdf> [as of Nov. 15, 2018]; see Cal. Code Regs., tit. 2, § 1190.5, subd. (a)(1).) The Commission deemed it "irrelevant ... whether Proposition 83 made any *substantive* changes to the SVP code sections" and instead found it sufficient that the "ballot measure expressly includes some of the same activities as the test claim statutes that were found to impose a reimbursable mandate" in the Commission's 1998 ruling. (Cal. Com. on State Mandates, Statement of Dec. No. 12-MR-01 (July 26, 2013), *supra*, at p. 18, italics added.)

Following the second hearing, the Commission determined that Proposition 83 had transformed six of the eight listed local government duties (and part ***205** of a seventh) from reimbursable state-mandated activities into nonreimbursable voter-mandated activities. Once again, the Commission deemed it "irrelevant ... whether Proposition 83 made any substantive changes at all to the SVP code sections." (Cal. Com. on State Mandates, Statement of Dec. No. 12-MR-01 (Dec. 6, 2013), *supra*, at p. 39.) What proved pivotal for the Commission instead was "that Proposition 83 amended and reenacted wholesale most of the code sections that gave rise to the mandated activities found in the [original] test claim." (*Ibid*.)

Accordingly, local government duties 1, 2, 3, 6, and part of 7, which were "expressly included" in the ballot measure, were no longer reimbursable. (Cal. Com. on State Mandates, Statement of Dec. No. 12-MR-01 (Dec. 6, 2013), *supra*, at pp. 23-25.) The Commission further reasoned that local government duty 5 (the preparation and attendance at trial by the county's designated counsel and appointed counsel for indigents), the remainder of local government duty 7 (the retention of necessary experts for trial), and part of local government *****60** duty 8 (transportation and housing of SVP while awaiting trial) were "required in order to satisfy due process." (*Id*. at p. 34; see *id*. at pp. 36-37.) Because these activities were "necessary to implement" the ballot measure, they likewise were no longer reimbursable. (*Id*. at pp. 36-37.) Only local government duty 4 (preparation and attendance by counsel at a probable cause hearing) and the remainder of local government duty 8 (transportation to and from a state-mandated probable cause hearing) were deemed by the Commission to be reimbursable costs: the statutory provisions underlying these activities were neither reenacted in the ballot measure nor required by due process. (*Id*. at pp. 33, 37, 54-55.) In declaring that local government duties 1, 2, 3, 5, 6, 7, and part of 8 were no longer state mandates, the Commission did not rely on — let alone discuss — the theory that these ****352** duties might be nonreimbursable because they are necessary to implement Proposition 83's expanded definition of an SVP. [2]

2 Proposition 83 expanded the definition of "sexually violent predator" to include those who have a diagnosed mental disorder rendering them likely to engage in sexually violent behavior and have been convicted of a sexually violent offense "against *one* or more victims." (Welf. & Inst. Code, § 6600, subd. (a)(1), italics added.) Prior to Proposition 83, an SVP included only those who had been convicted of a qualifying offense "against *two* or more victims." (Welf. & Inst. Code, § 6600, former subd. (a)(1), italics added; Stats. 2006, ch. 337, § 53, p. 2661.) Prior law also permitted only *one* prior juvenile adjudication of a sexually violent offense to be used as a qualifying conviction (§ 6600, former subd. (g); Stats. 2006, ch. 337, § 53, p. 2661), but Proposition 83 removed that limitation. (§ 6600, subd. (g).)

The Counties responded by filing a petition for a writ of administrative mandate and a complaint for declaratory relief. The writ petition sought an order setting aside the Commission's statements of decision issued on July 26, 2013, and December 6, 2013. The complaint asked for a declaration that ***206** Government Code sections 17556, subdivision (f) and 17570 are unconstitutional and that the

costs incurred by localities in carrying out the SVPA continue to be reimbursable. The trial court denied relief. The court reasoned that Proposition 83 broadened the definition of an SVP and thus "was more than a mere restatement" of existing law. Even if Proposition 83 were construed as a "simple reenactment," though, "the effect of voter-approval cannot be ignored as transforming certain requirements of the Act into voter-approved mandates." The court also rejected the Counties' challenges to the constitutionality of the two statutes.

The Court of Appeal reversed and remanded the matter to the Commission for reconsideration. It found that the statutory duties identified in the Commission's 2013 test claim ruling were neither necessary to implement nor expressly included in Proposition 83 "[b]ecause the duties imposed by the statutes at issue were not affected by Proposition 83." (*County of San Diego*, *supra*, 7 Cal.App.5th at p. 34, 212 Cal.Rptr.3d 259.) The court declined to accord any significance to the ballot measure's expanded definition of an SVP (see fn. 2, *ante*) because the Commission's 1998 decision had previously concluded that the definition set forth in Welfare and Institutions Code section 6600 "was not a basis for any of the duties for which the Counties sought reimbursement." (*County of San Diego*, at p. 36, 212 Cal.Rptr.3d 259.)

We granted the State respondents' petition for review to consider whether Proposition 83, by amending and reenacting provisions of the SVPA, constituted a "subsequent change in law" sufficient to modify the Commission's prior decision, which directed the State of California to ***61** reimburse local governments for the costs of implementing the SVPA. (Gov. Code, § 17570, subd. (b).)

II.

[3] To resolve the question before us, we must consider four distinct legal principles. First, the state must reimburse local governments for the costs of discharging mandates imposed by the Legislature. (Cal. Const., art. XIII B, § 6, subd. (a).) Second, this reimbursement requirement does not apply to those activities that are necessary to implement, or are expressly included in, a ballot measure approved by the voters. (Gov. Code, § 17556, subd. (f).) Third, a statute must be reenacted in full as amended if any part of it is amended. (Cal. Const., art. IV, § 9.) And fourth, the Legislature is prohibited from amending an initiative statute unless the initiative itself permits amendment. (*Id.*, art. II, § 10, subd. (c).) The determination whether the statutes at issue here impose a state mandate — and thus require reimbursement — is a question of law we review independently. (See ***207** *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 762, 207 Cal.Rptr.3d 44, 378 P.3d 356; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109, 61 Cal.Rptr.2d 134, 931 P.2d 312.)

A.

[4] **[5]** We begin with the requirement that the state reimburse local governments for costs incurred when the state enlists their assistance in implementing a state program. (See Cal. Const., art. XIII B, § 6.) The voters ****353** added this requirement to the state Constitution soon after enacting Proposition 13 (Cal. Const., art. XIII A), a measure that "severely restricted the taxing powers of local governments." (*County of Fresno v. State* (1991) 53 Cal.3d 482, 487, 280 Cal.Rptr. 92, 808 P.2d 235.) The purpose of article XIII B, section 6[3] was to prevent the state from unfairly shifting the costs of government onto local entities that were ill-equipped to shoulder the task. (*County of Fresno*, at p. 487, 280 Cal.Rptr. 92, 808 P.2d 235.) As a result, the state now, with certain exceptions, must " 'pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies.' " (*County of San Diego v. State of California*, *supra*, 15 Cal.4th at p. 81, 61 Cal.Rptr.2d 134, 931 P.2d 312.)

3 Article XIII B, section 6, subdivision (a) of the California Constitution provides in relevant part that "[w]henever 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 ...."

[6] **[7]** Government Code section 17556 outlines six circumstances where duties imposed by statute on local governments are not deemed "costs mandated by the state." Among these is the circumstance where "[t]he statute ... imposes duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election." (§ 17556, subd. (f).) In other words, the state must reimburse local governments for mandates imposed by the Legislature, but not for mandates

imposed by the voters themselves through an initiative. (See *California School Boards Assn. v. State of California* (2009) 171 Cal.App.4th 1183, 1207, 90 Cal.Rptr.3d 501.) Where the Legislature cannot use the ordinary legislative process to amend or alter duties imposed by the voters (see Cal. Const., art. II, § 10, subd. (c)), it can no longer be reasonably characterized as the source of those duties.

*****62** **[8]** The question left unresolved by these provisions is what, precisely, qualifies as a mandate imposed by the voters. Government Code section 17556, subdivision (f) exempts from reimbursement only those "duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters." The boundaries of this subdivision depend, then, on the definition of a "ballot measure" in section 17556. Our reading of the ***208** provision's text, the overall statutory structure, and related constitutional provisions persuades us that not every single word printed in the body of an initiative falls within the scope of the statutory terms "expressly included in ... a ballot measure." (§ 17556, subd. (f); see *People v. Chavez* (2018) 4 Cal.5th 771, 779, 231 Cal.Rptr.3d 634, 415 P.3d 707.) Discerning the extent of the state's obligation to reimburse local governments for existing state mandates in the wake of a voter-approved initiative that includes the text of a previously enacted law — and the Legislature's power to amend any of its provisions — takes a more nuanced analysis.

[9] **[10]** Many voter initiatives (such as Proposition 83) amend existing statutory sections. Among these are statutory sections that have already been determined to impose reimbursable duties on local governments. When an existing statutory section is amended — even in the tiniest part — the state Constitution requires the entire section to be reenacted as amended. (Cal. Const., art. IV, § 9; see *Yoshisato v. Superior Court* (1992) 2 Cal.4th 978, 990, 9 Cal.Rptr.2d 102, 831 P.2d 327 (*Yoshisato*) ["The *effect* of this section is that voters considering an initiative ... that seeks to make discrete *amendments* to selected provisions of an existing statute, are forced to reenact the entire statute as amended in order to accomplish the desired amendments"].) The rationale for compelling reenactment of an entire statutory section when only a part is being amended is to avoid " 'the enactment of statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect' " and the risk that " 'the public, from the difficulty of making the necessary examination and comparison, failed to become appr[ ]ised of the changes made in the laws.' " (*Hellman v. Shoulters* (1896) 114 Cal. 136, 152, 45 P. 1057.) Consequently, a substantial part of ****354** almost any statutory initiative will include a restatement of existing provisions with only minor, nonsubstantive changes — or no changes at all.

Proposition 83 is an example. It reenacted verbatim subdivision (i) of Welfare and Institutions Code section 6601, which the Commission's 1998 ruling had identified as the source of local government duties 1, 2, and 3. The initiative made changes to individual subdivisions of Welfare and Institutions Code sections 6605 and 6608, which the Commission's 1998 ruling had identified as the source for local government duties 6 and part of 7. But the minor changes to the procedures governing the filing of a petition for conditional release had no effect on those mandated duties. The ballot measure made only one minor, nonsubstantive change to section 6608, subdivision (a) but otherwise restated the statute verbatim. The voters also reenacted verbatim former subdivisions (c) and (d) of section 6605 and, while amending former subdivision (b), made no changes to the mandated duties. Whatever else Proposition 83 accomplished, it effectively left undisturbed these test claim statutes and the various mandates imposed therein.

***209** The Commission nonetheless found the mere existence of Proposition 83 sufficient to transfer fiscal responsibility for the costs of these duties from the state to *****63** county governments. In the Commission's view, "the extent and degree of substantive amendments" made by a ballot measure are "immaterial" to the source of the mandate. (Cal. Com. on State Mandates, Statement of Dec. No. 12-MR-01 (Dec. 6, 2013), *supra*, at p. 39.) The Commission believed "it is irrelevant to the analysis ... whether Proposition 83 made *any substantive changes at all* to the SVP code sections." (*Ibid*., italics added.) What mattered instead, from its perspective, is that "Proposition 83 amended and reenacted wholesale most of the code sections that gave rise to the mandated activities found in the [1998] test claim." (*Ibid*.) Relying simply on the fact that certain SVPA provisions were restated in Proposition 83, the Commission concluded that local government duties 1, 2, 3, and 6 (as well as part of 7) were "expressly included in" a ballot measure within the meaning of Government Code section 17556, subdivision (f).

We conclude that the Commission's approach is at odds with the constitutional requirement that the state reimburse local governments for the costs of complying with state mandates. (Cf. *Yoshisato*, *supra*, 2 Cal.4th at p. 989, 9 Cal.Rptr.2d 102, 831 P.2d 327 [rejecting an interpretation that "assigns undue import to the technical procedures for amending

statutes"].) If the term "ballot measure" in Government Code section 17556 were defined as automatically including every provision subject to constitutionally compelled restatement in an initiative, it would sweep in vast swaths of the California Code. Neither the Commission nor the other State respondents point to anything indicating that the Legislature intended to terminate reimbursement for existing state mandates simply because the provisions creating the mandate happened to be restated without change in an initiative statute.

[11] According pivotal significance to a mere technical restatement also would prove difficult to reconcile with Government Code section 9605. What this statute provides is that "[w]here a section or part of a statute is amended, it is not to be considered as having been repealed and reenacted in the amended form. The portions which are not altered are to be considered as having been the law from the time when they were enacted; the new provisions are to be considered as having been enacted at the time of the amendment ...." (Gov. Code, § 9605; see *People v. Cooper* (2002) 27 Cal.4th 38, 44, fn. 4, 115 Cal.Rptr.2d 219, 37 P.3d 403 [where voter-approved amendments "did not substantively change the credits provision" in existing law, "there were no reenactments"].) As we have long held, " '[t]he portions of the amended section which are copied without change are not to be considered as having been repealed and again re-enacted, but to have been the law all along.' " (*Vallejo etc. R. R. Co. v. Reed Orchard Co.* (1918) 177 Cal. 249, 255, 170 P. 426.) Statutory provisions that are not actually reenacted and are instead considered to " 'have been the law all along' " ***210** (*ibid.*) cannot fairly be said to be part of a ballot measure **355** within the meaning of Government Code section 17556, subdivision (f).

[12] Nor does the Commission persuasively reconcile a sweeping transfer of financial responsibility whenever a ballot measure happens to restate a provision containing a state mandate with the voters' intended purpose in California Constitution, article IV, section 9. The purpose of the ban on unfunded mandates was to protect the strapped budgets of local governments in the wake of Proposition 13. (See Ballot Pamp., Special Elec. (Nov. 6, 1979) argument in favor of Prop. 4, p. 18 ["this measure WILL NOT allow the state ***64** government to force programs on local governments without the state paying for them"]; cf. *California School Boards Assn. v. State of California*, *supra*, 171 Cal.App.4th at p. 1215, 90 Cal.Rptr.3d 501 [language of former section 17556, subdivision (f) "must be limited" because it "so clearly contravenes the intent of the voters in passing Proposition 4"].) We have no basis to presume such stark fiscal effects would arise from these provisions' compelled restatement, when those provisions are conceded to be bystanders relative to the changes wrought by a voter initiative. (See *County of Sacramento v. Pfund* (1913) 165 Cal. 84, 88, 130 P. 1041 ["to construe a statute amended in certain particulars as having been wholly re-enacted as of the date of the amendment, is to do violence to the code and all canons of construction"].)

By treating those untouched statutory bystanders no differently from materially changed or newly added provisions, the Commission's approach leads to results "that no one would consider reasonable." (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 650, 3 Cal.Rptr.3d 228, 73 P.3d 1205; see *People v. Clark* (1990) 50 Cal.3d 583, 605, 268 Cal.Rptr. 399, 789 P.2d 127.) The Commission's view implies that merely restating a state-mandated duty in a ballot measure to renumber the section, correct punctuation or grammar errors, or substitute gender-neutral language (see, e.g., *Yoshisato*, *supra*, 2 Cal.4th at pp. 983, 985, 9 Cal.Rptr.2d 102, 831 P.2d 327) automatically relieves the state of its obligation to reimburse local governments for performing their assigned role. Ironically, such wholesale reallocation of financial burdens would occur under the Commission's theory even if nothing in the initiative changed any activities the local governments were required to perform. Conversely, if the local government duties listed here happened to appear in a completely separate statute not subject to technical reenactment rather than appearing in the section Proposition 83 amended in other respects, they would have remained state mandates. The mere happenstance that the mandated duties were contained in test claim statutes that were amended in other respects not clearly germane to any of the duties — and thus had to be reenacted in full under the state Constitution — should not in itself diminish their character as state mandates.

***211** So it is telling that the State respondents conspicuously avoid embracing the full scope of the Commission's reasoning. What they argue instead is that the compelled reenactment of the test claim statutes transformed the state mandate into a voter-imposed mandate because the voters *simultaneously* limited the Legislature's ability to revise or repeal the test claim statutes. They point to Proposition 83's amendment clause, which provides in relevant part: "The provisions of this act shall not be amended by the Legislature except by a statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, or by a statute that becomes effective only

when approved by the voters. However, the Legislature may amend the provisions of this act to expand the scope of their application or to increase the punishments or penalties provided herein by a statute passed by a majority vote of each house thereof." (Voter Information Guide, Gen. Elec. (Nov. 7, 2006) text of Prop. 83, § 33, p. 138 (Voter Guide).) In their view, these provisions no longer qualify as legislatively imposed mandates because the Legislature now lacks the power to amend or repeal these test claim statutes using the ordinary legislative process.

[13] We disagree. The strict limitation on amending initiatives generally — and ***65** the relevance of the somewhat liberalized constraints imposed by Proposition 83's amendment **356** clause — derive from the state constitution. Article II, section 10, subdivision (c) of the California Constitution provides that an initiative statute may be amended or repealed only by another voter initiative, "unless the initiative statute permits amendment or repeal without the electors' approval." The evident purpose of limiting the Legislature's power to amend an initiative statute " 'is to "protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent." ' " (*Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577, 597, 96 Cal.Rptr.3d 379 (*Shaw*).) But we have never had occasion to consider precisely "what the people have done" and what qualifies as "undoing" (*ibid.*) when the subject is a statutory provision whose reenactment was constitutionally compelled under article IV, section 9 of the Constitution.

The State respondents' argument depends on one crucial assumption: that because of article II, section 10, subdivision (c) of the state Constitution, none of the technically restated provisions may be amended, except as provided in the initiative's amendment clause. Yet the parties and amici curiae California State Association of Counties and League of California Cities have identified at least *nine* legislative amendments to statutes technically restated in Proposition 83 that — under the view espoused by State respondents — would be in violation of the initiative's amendment clause. (See Voter Guide, *supra*, text of Prop. 83, § 33, p. 138.) These amendments *212 contained provisions that neither expanded the scope of the initiative, increased the punishment, nor garnered a two-thirds vote of each house. (Stats. 2011, ch. 15, § 443 [amending Pen. Code, § 667.5, subd. (a), which was technically restated in § 9 of Prop. 83]; Stats. 2011, ch. 15, § 468 [amending Pen. Code, § 3000, subd. (b), which was technically restated in § 17 of Prop. 83]; Stats. 2011, ch. 15, § 472 [amending Pen. Code, § 3001, subd. (a), which was technically restated in § 19 of Prop. 83]; Stats. 2011, ch. 15, § 473 [amending Pen. Code, § 3003, subd. (a), which was technically restated in § 20 of Prop. 83]; Stats. 2011-2012, 1st Ex. Sess. 2011, ch. 12, § 10 [amending Pen. Code, § 667.5, subd. (b), which was technically restated in § 9 of Prop. 83]; Stats. 2012, ch. 24, § 139 [amending Welf. & Inst. Code, § 6601, which was technically restated in § 26 of Prop. 83]; Stats. 2012, ch. 24, § 143 [amending Welf. & Inst. Code, § 6604, which was technically restated in § 27 of Prop. 83]; Stats. 2012, ch. 24, § 144 [amending Welf. & Inst. Code, § 6605, which was technically restated in § 29 of Prop. 83]; Stats. 2012, ch. 24, § 146 [amending Welf. & Inst. Code, § 6608, which was technically restated in § 30 of Prop. 83].) If the State respondents are correct that *any* amendment to a provision that happens to have been technically restated in a ballot measure must follow the amendment process provided in the initiative, then all of these amendments would be invalid.

The State respondents take a narrow view of the Legislature's power to amend a statutory provision when its reenactment in a ballot measure was compelled by the state Constitution. But they concede only "limited authority" supports this view. Indeed, the lone case cited by the State respondents is *Shaw*, but that case analyzed a legislative amendment aimed at the heart of a voter initiative, not a bystander provision that had been only technically restated. At issue in *Shaw* was Proposition 116, a 1990 voter initiative that in relevant part amended Revenue and Taxation Code section 7102, subdivision (a)(1) to direct ***66** that a portion of sales and use taxes related to motor vehicle fuel (hereafter spillover gas tax revenue) be transferred to the Public Transportation Account (PTA), which was newly designated as " '*a trust fund*' " within the State Transportation Fund. (*Shaw*, *supra*, 175 Cal.App.4th at pp. 588-589, 96 Cal.Rptr.3d 379.). The trust fund was to be used " '*only* for transportation *planning and mass transportation* purposes.' " (*Id.* at p. 589, 96 Cal.Rptr.3d 379.) Proposition 116 also added section 7102, subdivision (d), which allowed the Legislature to amend section 7102 by means of a statute passed with a two-thirds vote of both houses, but only " '*if the statute is consistent with, and furthers the purposes of, this section*.' " (*Shaw*, at p. 590, 96 Cal.Rptr.3d 379.) Notwithstanding these provisions, the Legislature in 2006 and 2007 further amended **357 section 7102, subdivision (a)(1) to qualify the required transfer of spillover gas tax revenue with the words " 'except as modified as follows' " (*Shaw*, at p. 601, 96 Cal.Rptr.3d 379) and added other provisions that "[e]ssentially ... appropriated money

that was otherwise directed to the PTA to various other government sources and ***213** obligations." (*Shaw*, at p. 592, 96 Cal.Rptr.3d 379; see *id*. at p. 602, 96 Cal.Rptr.3d 379.) The new subdivisions added by the Legislature went so far as to order these diversions from the PTA "notwithstanding any other provision of this paragraph or any other provision of law." (§ 7102, subd. (a)(1)(G) & (H).)

As the Court of Appeal readily observed, the Legislature's 2007 amendment was suspect for a specific reason: it sought to undo the very protections the voters had enacted in Proposition 116. (*Shaw*, *supra*, 175 Cal.App.4th at pp. 597-598, 96 Cal.Rptr.3d 379.) Unlike Proposition 83, Proposition 116 had not merely restated a key provision without change. Rather, Proposition 116 had added language to Revenue and Taxation Code section 7102, subdivision (a)(1) designating the PTA as " '*a trust fund*,' " and elsewhere stated that the funds were available " '*only* for transportation, *planning and mass transportation* purposes.' " (*Shaw*, at p. 589, 96 Cal.Rptr.3d 379.) So when the Legislature — a decade and seven years later — sought to undermine the voter-created trust fund by adding new provisions to divert those funds from uses the voters had previously designated, it was not amending a provision that had merely been technically restated by the voters. (*Shaw*, at p. 597, 96 Cal.Rptr.3d 379; see *id*. at p. 601, 96 Cal.Rptr.3d 379 ["The voters' intent to preserve spillover gas tax funding of the PTA would be frustrated if the Legislature could amend section 7102, subdivision (a)(1) to modify the amount of spillover gas tax revenue making it to the PTA."].) Instead, the 2007 amendment sought to alter the voters' careful handiwork, both the text and its intended purpose, and therefore was required to comply with the limitations in the initiative's amendment clause. (*Id*. at pp. 597-598, 96 Cal.Rptr.3d 379.) To grant the Legislature free rein to tinker with spillover gas tax revenue and thereby undermine the PTA's integrity would have defeated a core purpose of Proposition 116 — "to convert the PTA to a trust fund dedicated to supporting transportation planning and mass transportation projects, and to preserve the funding of the PTA for such projects with spillover gas tax revenue according to the formula specified in section 7102, subdivision (a)(1)." (*Shaw*, at p. 601, 96 Cal.Rptr.3d 379.)

By contrast, nothing in Proposition 83 focused on duties local governments were already performing under the SVPA. No provision amended those duties in any substantive way. Nor did any aspect of the initiative's structure or other indicia of its *****67** purpose suggest that the listed duties merited special protection from alteration by the Legislature. According to the Voter Guide, the intended purpose of Proposition 83 was to increase penalties for violent and habitual sex offenders; prohibit registered sex offenders from residing within 2,000 feet of a school or park; require lifetime electronic monitoring of felony registered sex offenders; expand the definition of an SVP; and change the then-existing two-year commitment term for SVPs to an indeterminate commitment. (Voter Guide, *supra*, official title and summary of Prop. 83, p. 42.) Indeed, no indication appears in the text of the initiative, nor in the ballot pamphlet, to suggest voters would have reasonably understood they ***214** were restricting the Legislature from amending or modifying any of the duties set forth in the test claim statutes. Nor is an overbroad construction of article II, section 10 of the California Constitution necessary to safeguard the people's right of initiative. (See *Bartosh v. Board of Osteopathic Examiners* (1947) 82 Cal.App.2d 486, 491-496, 186 P.2d 984.) To the contrary: Imposing such a limitation as a matter of course on provisions that are merely technically restated would unduly burden the people's willingness to amend existing laws by initiative.

[14] **[15]** A more prudent conclusion is to assign somewhat more limited scope to the state constitutional prohibition on legislative amendment of an initiative statute. When technical reenactments are required under article IV, section 9 of the Constitution — yet involve no substantive change in a given statutory provision — the Legislature in ****358** most cases retains the power to amend the restated provision through the ordinary legislative process. This conclusion applies *unless* the provision is integral to accomplishing the electorate's goals in enacting the initiative or other indicia support the conclusion that voters reasonably intended to limit the Legislature's ability to amend that part of the statute. This interpretation of article II of the Constitution is consistent with the people's precious right to exercise the initiative power. (See *Legislature v. Eu* (1991) 54 Cal.3d 492, 501, 286 Cal.Rptr. 283, 816 P.2d 1309.) It also comports with the Legislature's ability to change statutory provisions outside the scope of the existing provisions voters plausibly had a purpose to supplant through an initiative. (See *Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691, 97 Cal.Rptr. 1, 488 P.2d 161.) We therefore hold that where a statutory provision was only technically reenacted as part of other changes made by a voter initiative *and* the Legislature has retained the power to amend the provision through the ordinary legislative process, the provision cannot fairly be considered "expressly included in ... a ballot measure" within

the meaning of Government Code section 17556, subdivision (f). [4]

4 We disapprove *Shaw v. People ex rel. Chiang*, *supra*, 175 Cal.App.4th 577, 96 Cal.Rptr.3d 379, to the extent it is inconsistent with this opinion.

[16] With that in mind, we turn to the statutory provisions identified by the Commission as the source for local government duties 1, 2, 3, 6, and part of 7 — i.e., Welfare and Institutions Code sections 6601, subdivision (i), 6605, former subdivisions (b)-(d), and 6608, subdivisions (a) and (b) and former subdivisions (c) and (d). The State respondents do not dispute that each of these provisions was technically restated in Proposition 83 under constitutional compulsion. They offer no reason — putting aside for the moment the expanded SVP definition — why these restated provisions should be deemed integral to accomplishing the initiative's goals. Nor have they identified any basis for believing that ***68** it was within the scope of the voters' intended *215 purpose in enacting the initiative to limit the Legislature's capacity to alter or amend these provisions. The Commission therefore erred in concluding that those provisions were expressly included in a ballot measure approved by the voters merely because they were restated in the initiative's text.

B.

[17] Similar flaws afflict the Commission's analysis of local government duties 5, 7, and part of 8, which derive from Welfare and Institutions Code sections 6602, 6603, 6604, and 6605, former subdivision (d). The Commission erred when it concluded that these activities were expressly included in the ballot measure simply because Proposition 83 had technically restated the applicable provisions of sections 6604 and 6605. For the reasons stated below, the Commission also erred in concluding that sections 6602 and 6603 were "necessary to implement" Proposition 83.

The Commission's conclusion was based on the theory that Welfare and Institutions Code sections 6602 and 6603 were indispensable to the implementation of *other* provisions that — according to the Commission — were "expressly included" in Proposition 83. But we have determined that those provisions were *not* part of the "ballot measure" for purposes of Government Code section 17556, subdivision (f). And while Proposition 83 technically reenacted a provision of existing law stating that "[t]he rights, requirements, and procedures set forth in Section 6603 shall apply to all commitment proceedings" (Welf. & Inst. Code, § 6604.1, subd. (b)), this did not make Welfare and Institutions Code section 6603 "necessary to implement" the ballot measure, either. The question here is not whether the protections in that section — i.e., trial by jury, appointed counsel, assistance of experts — are required by due process. The critical question is instead whether the SVP civil commitment program, which triggers those procedures, is mandated by the state or by the voters.

We considered an analogous situation in **359 *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 16 Cal.Rptr.3d 466, 94 P.3d 589 (*San Diego Unified*). There, we considered whether the costs associated with mandatory expulsion hearings for students found to be in possession of firearms at school (see Ed. Code, § 48915, former subd. (b); Stats. 1993, ch. 1256, § 2, pp. 7286-7287) were a reimbursable state mandate. The Commission argued that they were not, pointing out that most or all of the costs associated with an expulsion hearing were required by the federal due process clause. (*San Diego Unified*, *supra*, 33 Cal.4th at pp. 879-880, 16 Cal.Rptr.3d 466, 94 P.3d 589; see Gov. Code, § 17556, subd. (c).) We disagreed. Federal law, at the time, did not mandate expulsion for possessing a firearm at school. (*San Diego Unified*, at p. 881, 16 Cal.Rptr.3d 466, 94 P.3d 589.) While federal due process did afford certain protections whenever *216 an expulsion hearing was held, it did not require "that any such expulsion recommendation be made in the first place." (*Ibid.*) Because it was state law — and not due process — that required school districts to undertake an expulsion hearing in the first place, we held that the mandatory expulsion hearing costs were triggered by a state mandate and were fully reimbursable. (*Id.* at pp. 881-882, 16 Cal.Rptr.3d 466, 94 P.3d 589.) Similarly, here, federal law does not require any inmate be civilly committed as an SVP. That mandate comes from state law.

***69** Here again, the State respondents avoid defending the Commission's reasoning. Instead, they rely on the expanded definition of a " '[s]exually violent predator' " in Proposition 83. (Voter Guide, *supra*, text of Prop. 83, § 24, p. 135.) As they point out, the voters broadened the definition of an SVP within the meaning of Welfare and Institutions Code section 6600 in two ways. First, they reduced the required number of victims, so that an offender need only have been "convicted of a sexually violent offense against *one* or more victims," instead of two or more victims. (Voter Guide, *supra*, text of Prop. 83, § 24, p. 135; see Welf. & Inst. Code, §

6600, subd. (a)(1).) Second, the voters eliminated a provision that had capped at one the number of juvenile adjudications that could be considered a prior qualifying conviction. (Voter Guide, *supra*, text of Prop. 83, § 24, p. 136; Welf. & Inst. Code, § 6600, subd. (g).) The State respondents contend that the specified local government duties became necessary to implement the ballot measure, in that the Counties had been under no obligation to perform *any* duties for this class of offenders until the voters by initiative expanded the definition of an SVP.

The Court of Appeal chose to dispose of this argument in a single sentence: "The Commission's 1998 decision ... concluded that Welfare and Institutions Code section 6600 was not a basis for any of the duties for which the Counties sought reimbursement." (*County of San Diego*, *supra*, 7 Cal.App.5th at p. 36, 212 Cal.Rptr.3d 259.) The statement is true, but only to a limited extent. The 1998 decision, which purported to address Welfare and Institutions Code sections 6250 and 6600 through 6608, *did* state that "[t]he Commission denied the remaining provisions of the test claim legislation because they do not impose reimbursable state mandated activities upon local agencies." (Cal. Com. on State Mandates, Statement of Decision No. CSM-4509, *supra*, at p. 12.)

Yet it would be misleading to suggest that Welfare and Institutions Code section 6600 was thereby rendered irrelevant to the duties set forth in the test claim statutes. None of the specified local government duties is triggered until an inmate is identified as someone who may be an SVP. (See §§ 6601, 6603, 6604, 6605, 6608.) Although the SVP definition does not *itself* impose any particular duties on local governments, it is necessarily incorporated into each of the listed activities. Indeed, whether a county has a duty to act (and, if so, ***217** what it must do) depends on the SVP definition. (See Voter Guide, *supra*, analysis of Prop. 83 by Legis. Analyst, p. 44 ["This measure generally makes more sex offenders eligible for an SVP commitment"]; cf. *San Diego Unified*, *supra*, 33 Cal.4th at p. 884, 16 Cal.Rptr.3d 466, 94 P.3d 589 [acknowledging that changes in federal law concerning mandatory expulsion for firearm possession "may lead to a different conclusion" as to whether expulsion hearings remain a state mandate in future years]; Cal. Com. on State Mandates, Statement of Dec. No. 01-TC-18 (May 20, 2011), p. 39 <https://www.csm.ca.gov/decisions/052011sod.pdf> ****360** [as of Nov. 15, 2018] [concluding that changes in federal law concerning mandatory expulsion for firearm possession made the associated hearing costs a federal mandate].) When more people qualify as potential SVPs, a county must review more records. It must file more commitment petitions, and conduct more trials.[5] One can *****70** imagine that if the roles were reversed — i.e., if the Legislature expanded the scope of a voter-created SVP program — the Counties would be claiming that the burdens imposed by the expanded legislative definition constituted a state mandate.

5 The ballot pamphlet said as much: "This measure would also affect state and local costs associated with court and jail operations. For example, the additional SVP commitment petitions resulting from this measure would increase court costs for hearing these civil cases. Also, county jail operating costs would increase to the extent that offenders who have court decisions pending on their SVP cases were held in county jail facilities." (Voter Guide, *supra*, analysis of Prop. 83 by Legis. Analyst, p. 45.)

[18] Unfortunately, the Commission never considered whether the expanded SVP definition in Proposition 83 transformed the test claim statutes as a whole into a voter-imposed mandate or, alternatively, did so to the extent the expanded definition incrementally imposed new, additional duties on the Counties. Its ruling granting the State respondents' request for mandate redetermination instead rested entirely on grounds that we now disapprove. Moreover, the parties admit — and the Court of Appeal found — that the current record is insufficient to establish how, if at all, the expanded SVP definition in Proposition 83 affected the number of referrals to local governments. (See *County of San Diego*, *supra*, 7 Cal.App.5th at p. 36, fn. 14, 212 Cal.Rptr.3d 259; cf. *San Diego Unified*, *supra*, 33 Cal.4th at p. 889, 16 Cal.Rptr.3d 466, 94 P.3d 589 [additional state statutory protections that were "incidental" to federal due process requirements, "producing at most de minimis added cost, should be viewed as part and parcel of the underlying federal mandate, and hence nonreimbursable under Government Code section 17556, subdivision (c)"].) Under the circumstances, we find it prudent to remand the matter to the Commission to enable it to address these arguments in the first instance. (See *Lucia Mar Unified School Dist. v. Honig*, *supra*, 44 Cal.3d at p. 837, 244 Cal.Rptr. 677, 750 P.2d 318; *California School Boards Assn. v. State of California*, *supra*, 171 Cal.App.4th at p. 1217, 90 Cal.Rptr.3d 501.)

***218** III.

Constitutional requirements governing matters such as voter initiatives and the Legislature's financial responsibility to local governments must be read in context. When a ballot initiative is used to amend any part of an existing statutory section, the California Constitution requires that the initiative include the text of the entire statutory section to enable voters to understand the context of the proposed change. (Cal. Const., art. IV, § 9.) But this requirement is a modest means of informing voters about the proposed change by ensuring there is a straightforward before-and-after comparison of the statutory text. Neither by its terms nor by implication does it prevent a future Legislature from making appropriate amendments to the provisions that are merely technically restated in a ballot measure. (See Cal. Const., art. II, § 10, subd. (c).) Likewise, mere technical restatements do not necessarily transform existing state mandates into voter-imposed mandates. (See Gov. Code, § 17556, subd. (f).)

Because the Commission erred in concluding otherwise, we affirm the judgment of the Court of Appeal insofar as it reversed the judgment of the trial court. We remand the matter to the Court of Appeal, so it can direct the trial court to modify its judgment as follows: the trial court shall issue a writ of mandate directing the Commission to set aside the decisions challenged in this action and to reconsider the test claim in a manner consistent with this opinion.

Cantil-Sakauye, C. J., Chin, J., Corrigan, J., Liu, J., Kruger, J., and Meehan, J., * concurred.

* Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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7 Cal.App.5th 628
Court of Appeal, Third District, California.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Petitioner,
v.
ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD, Respondent;
Garfield Beach CVS, LLC et al., Real Parties in Interest.

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Filed 1/17/2017

Synopsis

Background: Department of Alcoholic Beverage Control appealed decision of the Alcoholic Beverage Control Appeals Board, No. AB9434, which reversed suspension of store's off-sale general license for selling alcohol to a minor decoy.

Holdings: The Court of Appeal, Hoch, J., held that:

[1] Alcoholic Beverage Control rule which required that minor decoys "truthfully answer any questions about his or her age," did not require minor decoy to truthfully respond to clerk's statement, after looking at driver's license, that "I would not have guessed it, you must get asked a lot," as rule only required decoys to answer questions, and

[2] rule did not impose affirmative duty on minor decoy to speak up in order to clarify any mistake regarding age articulated by sales clerk.

Annulled; reinstated and remanded.

West Headnotes (15)

[1] **Alcoholic Beverages** Discretion of decisionmaker below

In the absence of a clear abuse of discretion, the courts will uphold the decision of the Department of Alcoholic Beverage Control to suspend a liquor license for violation of the liquor laws. Cal. Const. art. 20, § 22.

[2] **Alcoholic Beverages** Agencies, Boards, Commissions, and Departments

Alcoholic Beverages Powers, duties, and liabilities

Alcoholic Beverages Finality; interlocutory review

The administration of the Alcoholic Beverage Control Act, within the scope of the purposes of that act, is initially vested in the Department of Alcoholic Beverage Control; its decisions, however, are subject to administrative review by the Alcohol Beverage Control Appeals Board, and a final order of the Board is, in turn, subject to judicial review. Cal. Bus. & Prof. Code § 23000 et seq.

1 Case that cites this headnote

[3] **Alcoholic Beverages** Proceedings concerning violations and discipline

Alcoholic Beverages Scope, Standard, and Extent of Review

The scope of review of the decisions of the Department of Alcoholic Beverage Control is the same in the Alcohol Beverage Control Appeals Board and the Court of Appeal. Cal. Bus. & Prof. Code § 23090.2.

1 Case that cites this headnote

[4] **Alcoholic Beverages** Administrative construction of statutes and regulations; judicial deference

Court of Appeal defers to the Department of Alcoholic Beverage Control's interpretation of its own rules, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another. Cal. Bus. & Prof. Code § 23090.2.

2 Cases that cite this headnote

[5] **Alcoholic Beverages** Administrative construction of statutes and regulations; judicial deference

Courts generally will not depart from the Department of Alcoholic Beverage Control's contemporaneous construction of a rule enforced by the Department unless such interpretation is clearly erroneous or unauthorized. Cal. Bus. & Prof. Code § 23090.2.

2 Cases that cite this headnote

[6] **Alcoholic Beverages** Scope, Standard, and Extent of Review

Decisions of the Department of Alcoholic Beverage Control are subject to review only for insufficiency of the evidence, excess of jurisdiction, errors of law, or abuse of discretion. Cal. Bus. & Prof. Code § 23090.2.

2 Cases that cite this headnote

[7] **Alcoholic Beverages** Undercover, decoy, or "sting" operations

Alcoholic Beverage Control rule which required that minor decoys "truthfully answer any questions about his or her age," did not require minor decoy to truthfully respond to clerk's statement, after looking at driver's license, that "I would not have guessed it, you must get asked a lot," as rule only required decoys to answer questions. Cal. Bus. & Prof. Code § 25658(a); Cal. Code Regs. tit. 4, § 141(b)(4).

[8] **Alcoholic Beverages** Undercover, decoy, or "sting" operations

Under Department of Alcoholic Beverage Control rule providing that "a decoy shall answer truthfully any questions about his or her age," minor decoys do not need to respond to statements of any kind, nor do they need to respond truthfully to questions other than those concerning their ages. Cal. Bus. & Prof. Code § 25658(a); Cal. Code Regs. tit. 4, § 141(b)(4).

[9] **Alcoholic Beverages** Undercover, decoy, or "sting" operations

Department of Alcoholic Beverage Control rule providing that "a decoy shall answer truthfully any questions about his or her age" does not require minor decoys to correct mistakes articulated by licensed alcohol sellers; instead, the decoys need to respond truthfully only to questions about their ages. Cal. Bus. & Prof. Code § 25658(a); Cal. Code Regs. tit. 4, § 141(b)(4).

[10] **Alcoholic Beverages** Undercover, decoy, or "sting" operations

Alcoholic Beverage Control rule regarding use of minor decoys, which allowed law enforcement to use decoys "in a fashion that promotes fairness," did not impose affirmative duty on minor decoy to speak up in order to clarify any mistake regarding age articulated by sales clerk who stated, after looking at driver's license, that "I would not have guessed it, you must get asked a lot"; rule implement goal of fairness by imposing five specific requirements, minor decoy did not say anything untrue but rather presented accurate information in the form of his driver license, and minor decoy's silence did not involve any attempt to pressure or encourage the sale of an alcoholic beverage to him. Cal. Bus. & Prof. Code § 25658(a); Cal. Code Regs. tit. 4, § 141.

[11] **Alcoholic Beverages** Decisions Reviewable

Court of Appeal may take judicial notice of decisions of the Alcoholic Beverage Control Appeals Board.

1 Case that cites this headnote

[12] **Alcoholic Beverages** Administrative construction of statutes and regulations; judicial deference

Although not bound by the decisions of the Alcoholic Beverage Control Appeals Board,

Court of Appeal would take judicial notice of their decisions and consider their reasoning for persuasive value when determining whether rule regarding use of minor decoys, which required law enforcement to use minor decoys "in a fashion that promotes fairness," was ambiguous. Cal. Code Regs. tit. 4, § 141(a).

3 Cases that cite this headnote

[13] **Statutes** Exceptions, Limitations, and Conditions

An exception to a statute is to be narrowly construed.

[14] **Statutes** Exceptions, Limitations, and Conditions

When a statute specifies an exception, no others may be added under the guise of judicial construction.

[15] **Alcoholic Beverages** Proceedings concerning violations and discipline

Minor decoy's testimony in proceedings to suspend liquor store's off-sale general license was sufficient to support finding that store clerk's words regarding liquor purchase were a statement, rather than a question about decoy's age to which decoy was required to respond truthfully; decoy's testimony, including that clerk stated "I would not have guessed it, you must get asked a lot," or words to that effect, was clear and credible. Cal. Bus. & Prof. Code § 25658(a); Cal. Code Regs. tit. 4, § 141(b)(4).

****132** ORIGINAL PROCEEDING: Petition for writ of review. Petition granted. Alcoholic Beverage Control Appeals Board No. AB9434.

Attorneys and Law Firms

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Opinion

HOCH, J.

***630** California Constitution, article XX, section 22, prohibits the sale of alcoholic beverages to persons under 21 years of age. (See also Bus. & Prof. Code, § 25658, subd. (a)),[1] [making it a misdemeanor to sell alcohol to a person under 21 years of age]. Here, the Department of Alcoholic Beverage ***631** Control (Department) issued a 15–day suspension of an off-sale general license held by the Garfield Beach CVS LLC Longs Drug Stores California LLC, doing business as CVS Pharmacy Store 9174 (CVS) after an administrative law judge found the store clerk sold alcohol to a minor decoy.[2] The Alcoholic Beverage Control Appeals Board (Appeals Board) reversed the suspension based on California Code of Regulations, title 4, section 141 (Rule 141), which allows a law enforcement agency to use an underage decoy only "in a 'fashion that promotes fairness.' (*Id.*, subd. (a).) In the Appeals Board's view, the suspension was unfair because the minor decoy did not respond about his age when the store clerk looked at his driver license and remarked, "I would never have guessed it, you must get asked a lot." To challenge the reversal of the license suspension, the Department petitioned for a writ of review in this court. (§ 23090.)

1 Undesignated statutory references are to the Business and Professions Code.

2 The license is held by Garfield Beach CVS LLC Longs Drug Stores California LLC, doing business as CVS Pharmacy Store 9174.

The Department contends it correctly interprets Rule 141 to require minor decoys to answer only questions about their ages. Based on the administrative law judge's finding in this case that the store clerk's remark constituted a statement rather than a question, the Department argues its decision was legally correct and supported by substantial evidence. The Appeals Board counters Rule 141 is ambiguous and results "in confusion and manifest unfairness." CVS

argues the Department's interpretation of Rule 141 unfairly allows decoys to remain silent in the face of mistaken statements about age. According to CVS, affirming the license suspension would allow deceptive and misleading silence in the face of a store clerk's explicit mistake about the minor decoy's age.

We conclude Rule 141 is not ambiguous in requiring minor decoys to answer truthfully only questions about their ages. Because substantial evidence supports the administrative law judge's factual finding the decoy in this case was not questioned about his age, we determine as a matter of law that Rule 141 does not provide CVS with a defense to the accusation it sold an alcoholic beverage to an underage buyer. Accordingly, we annul the Appeals Board's decision.

BACKGROUND

The Department's Imposition of a 15–day License Suspension

In October 2013, the Department accused CVS of selling alcohol to an underage person at its Garfield Beach store. An administrative hearing was ***632** held in February 2014, in which the administrative law judge made the following findings of fact:

CVS has held an off-sale general license to sell alcohol since June 2009, with no prior record of discipline by the Department. On June 3, 2013, Joseph Childers was 18 years old and had the appearance and mannerisms of a person under the age of 21. On that date, Childers accompanied ****134** Department agents and law enforcement officers to conduct an alcoholic beverage decoy operation at the Garfield Beach CVS store. Childers entered the store at 2:30 p.m., went to the beer cooler where he selected a 24–ounce bottle of beer, and took the beer to the checkout line. The CVS store clerk scanned the bottle of beer and asked Childers for identification. Childers handed his California driver license to the clerk. The driver license indicated Childers's date of birth and had a red stripe with white letters that stated, "AGE 21 IN 2015." In addition, the driver license had a blue stripe with white letters that stated, "PROVISIONAL UNTIL AGE 18 IN 2012."

The administrative law judge made the following factual findings: "The clerk looked at Childers's [driver license], tried to scan it, and looked at the [license] again. She then stated, 'I would never have guessed it, you must get asked a lot,' or words to that effect. The clerk's remark was framed as a statement not a question. The decoy did not say anything to the clerk in response to her remark. He thought the clerk's statement was 'casual conversation.' The decoy also testified the statement might or might not have been related to his age. Thus, in his mind it was unclear what the clerk meant by her statement. [¶] The clerk sold Childers the 24-ounce bottle of Corona beer. At no time during the transaction did the clerk ask Childers how old he was or his age. Following the sale of the beer, the decoy exited the premises." The administrative law judge found Childers's testimony at the hearing to be clear, concise, and credible. On this basis, the administrative law judge decided there was cause to suspend CVS's off-sale general license for 15 days.

In April 2014, the Department adopted the administrative law judge's proposed decision as its decision in this case. CVS appealed the decision to the Appeals Board.

The Appeals Board's Reversal of License Suspension

In January 2015, the Appeals Board issued its decision. The Appeals Board's decision relied upon its prior decision to conclude Rule 141 required the decoy to respond to the store clerk's statement upon looking at his driver license. The Appeals Board's decision emphasized the following testimony by the decoy at the administrative hearing:

***633** "[Counsel for CVS]: [A]fter the clerk made that statement to you, what did you take that statement to mean?

"A. [Childers]: Casual conversation.

"Q. And [in] that casual conversation did you see it related in any way to your age?

"A. Yes and no.

"Q. When you say 'Yes and no,' what do you mean?

"A. Yes, that maybe *I looked younger*. No, because she *thought I was older* or thought that I do it a lot, you know."

The Appeals Board reasoned that "[w]hen the decoy believes, as here, that a clerk's remarks are ambiguous as to his or her age, the decoy has an obligation to respond verbally and truthfully. That is the plain meaning of rule 141(a)'s language

instructing that minor decoy operations must be conducted in a 'fashion that promotes fairness.' " (Italics omitted.) The Appeals Board further stated that whenever "the decoy him or herself interprets a seller's comments to *in any way* pertain to the decoy's age, the Department should insist that decoy err on the side of responding with clarification." On these grounds, the Appeals Board reversed the Department's decision and rescinded the ****135** suspension of CVS's off-sale general license.

Petition for Writ of Review

In February 2015, the Department filed in this court a petition for writ of review from the decision of the Appeals Board. We issued a writ of review in March 2015. (§ 23090.)

DISCUSSION

I

Standard of Review

[1] **[2]** In addition to prohibiting the sale of alcohol to minors, the California Constitution "vests the Department with broad discretion to revoke or suspend liquor licenses 'for good cause' if continuing the license would be 'contrary to public welfare or morals.' (Cal. Const., art. XX, § 22.) In the ***634** absence of a clear abuse of discretion, the courts will uphold the Department's decision to suspend a license for violation of the liquor laws. (E.g., *Martin v. Alcoholic Bev. etc. Appeals Bd.* (1959) 52 Cal.2d 238, 248–249 [340 P.2d 1].)" (*Provigo Corp. v. Alcoholic Beverage Control Appeals Bd.* (1994) 7 Cal.4th 561, 566, 28 Cal.Rptr.2d 638, 869 P.2d 1163 (*Provigo*).) " 'The administration of the Alcoholic Beverage Control Act, within the scope of the purposes of that act, is initially vested in the department. Its decisions, however, are subject to administrative review by the board and a final order of the board is, in turn, subject to judicial review.' " (*Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd.* (2002) 99 Cal.App.4th 1094, 1099, 121 Cal.Rptr.2d 758, quoting *Walsh v. Kirby* (1974) 13 Cal.3d 95, 102, 118 Cal.Rptr. 1, 529 P.2d 33.)

[3] The scope of review of the Department's decisions is the same in the Appeals Board and this court. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2002) 100 Cal.App.4th 1066, 1071, 123 Cal.Rptr.2d 278 (*Deleuze*).) Section 23090.2 provides that review "shall not extend further than to determine, based on the whole record of the department as certified by the board, whether: [¶] (a) The department has proceeded without or in excess of its jurisdiction. [¶] (b) The department has proceeded in the manner required by law. [¶] (c) The decision of the department is supported by the findings. [¶] (d) The findings in the department's decision are supported by substantial evidence in the light of the whole record. [¶] (e) 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 the department." Section 23090.2 also excludes the power to make findings of fact from the scope of review. (*Ibid.*)

[4] **[5]** **[6]** In conducting our review, " '[w]e defer to the Department's interpretation of its own rules, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another.' (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12 [78 Cal.Rptr.2d 1, 960 P.2d 1031], (*Yamaha Corp.*).) Courts generally will not depart from the Department's contemporaneous construction of a rule enforced by the Department unless such interpretation is clearly erroneous or unauthorized. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2003) 109 Cal.App.4th 1687, 1696 [1 Cal.Rptr.3d 339] ....)" (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 128 Cal.App.4th 1195, 1205, 27 Cal.Rptr.3d 766.) In short, the Department's decisions are ****136** "subject to review only for insufficiency of the evidence, excess of jurisdiction, errors of law, or abuse of discretion." (*Deleuze*, at p. 1072, 123 Cal.Rptr.2d 278.)

***635 II**

Rule 141

The Department contends it correctly rejected CVS's reliance on Rule 141 as providing a defense to its sale of alcohol to the underage decoy in this case. We agree.

A.

The Department's Reliance on Minor Decoys

The Department relies on minor decoy operations as an integral part of its enforcement of the constitutional and statutory prohibitions on sales of alcohol to persons under 21 years of age. (Cal. Const., art. XX, § 22; § 25658, subd. (a).) The California Supreme Court has approved of the practice, noting that "[t]he use of underage decoys to enforce laws against unlawful sales to minors clearly *promotes* rather than hinders" the California constitutional and statutory prohibitions on sales of alcoholic beverages to minors. (*Provigo*, *supra*, 7 Cal.4th at p. 567, 28 Cal.Rptr.2d 638, 869 P.2d 1163.)

The Business and Professions Code provides that "[p]ersons under 21 years of age may be used by peace officers in the enforcement of this section to apprehend licensees, or employees or agents of licensees, or other persons who sell or furnish alcoholic beverages to minors." (§ 25658, subd. (f).) In pertinent part, subdivision (f) of section 25658 further provides: "Guidelines with respect to the use of persons under 21 years of age as decoys shall be adopted and published by the department in accordance with the rulemaking portion of the Administrative Procedure Act ...." To comply with subdivision (f) of section 25658, the Department promulgated Rule 141. (*Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd.* (1998) 67 Cal.App.4th 575, 579, 79 Cal.Rptr.2d 126 (*Acapulco Restaurants*).) In its entirety, Rule 141 states:

"(a) A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

"(b) The following minimum standards shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is alleged that a minor decoy has purchased an alcoholic beverage: [¶] (1) At the time of the operation, the decoy shall be less than 20 years of age; [¶] (2) The decoy ***636** shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense; [¶] (3) A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages; [¶] (4) *A decoy shall answer truthfully any questions about his or her age*; [¶] (5) Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

****137** "(c) Failure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code Section 25658." (Italics added.)

B.

Availability of the Rule 141 Defense

[7] The Appeals Board contends subdivision (b)(4) of Rule 141 required the minor decoy in this case to truthfully respond to the clerk's statement, "I would never have guessed it, you must get asked a lot." Similarly, CVS argues the minor decoy's lack of response violated Rule 141 and provided a defense to the Department's accusation. The Department counters by noting the administrative law judge made the factual finding that the CVS clerk's words to the minor decoy constituted a statement rather than a question. On this basis, the Department argues the defense supplied by Rule 141 does not apply here. Resolving these contentions requires us to construe the meaning of Rule 141.

As this court has previously explained, "Generally, the same rules governing the construction and interpretation of statutes apply to the construction and interpretation of administrative regulations. (*In re Richards* (1993) 16 Cal.App.4th 93, 97–98, 19 Cal.Rptr.2d 797.) Accordingly, ' "we begin with the fundamental rule that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law." ' [Citations.] 'An equally basic rule of statutory construction is, however, that courts are bound to give effect to statutes according to the usual, ordinary import of the language employed in framing them.' [Citations.] Although a court may properly rely on extrinsic aids, it should first turn to the words of the statute to determine the intent of the Legislature. [Citations.] 'If the words of the statute are clear, the court should not add to or alter them to accomplish a ***637** purpose that does not appear on the face of the statute or from its legislative history.' (*California Teachers Assn. v. San Diego*

Community College Dist. (1981) 28 Cal.3d 692, 698 [170 Cal.Rptr. 817, 621 P.2d 856].)" (*Schmidt v. Foundation Health* (1995) 35 Cal.App.4th 1702, 1710–1711, 42 Cal.Rptr.2d 172.) " 'The construction of an administrative regulation and its application to a given set of facts are matters of law.' " (*Ibid.*, quoting *Auchmoody v. 911 Emergency Services* (1989) 214 Cal.App.3d 1510, 1517, 263 Cal.Rptr. 278.)

In enacting the Alcoholic Beverage Control Act (Act) (§ 23000 et seq.), the Legislature declared the Act "involves in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people." (§ 23001.) The Act establishes the Department "to provide a governmental organization which will ensure a strict, honest, impartial, and uniform administration and enforcement of the liquor laws throughout the State." (§ 23049.) To that end, section 23001 declares that "[a]ll provisions of this division shall be liberally construed for the accomplishment of these purposes."

[8] **[9]** Rule 141, subdivision (b)(4) provides that "[a] decoy shall answer truthfully any questions about his or her age." The Rule's guidance is clear and unambiguous. Minor decoys do not need to respond to *statements* of any kind nor do they need to respond truthfully to *questions* other than those concerning their ages. Thus, Rule 141 does not require minor decoys to correct mistakes articulated by licensed alcohol sellers. Instead, the minor decoys need to respond truthfully only to questions about their ages. In short, Rule 141 sets forth clear, unambiguous, and fair guidance for minor decoys to follow during the Department's operations. Consequently, the Department properly construed the ****138** plain language of Rule 141 in determining the minor decoy in this case was not required to respond to the clerk's statement that might have related to the decoy's age.

The Appeals Board disagrees with the Department's plain-meaning interpretation of Rule 141, asserting the Rule is ambiguous and unfair. The Appeals Board argues that "the language of Rule 141[(b)(4)] is ambiguous, and decoys lack the expertise to make a fair decision about whether a clerk's words are a 'question' 'about his or her age.' " The Appeals Board bases its argument on the assertion that "[t]he word 'question' is, especially when uttered vocally as opposed to being written, not free from doubt." In support, the Appeals Board argues the ambiguity of the word "question" is demonstrated by the need for an evidentiary hearing to determine the nature of the store clerk's communication to the minor decoy. We reject the argument.

Courts have long resolved factual issues concerning whether a spoken communication constitutes a question that invited an answer. In ***638** *Rhode Island v. Innis* (1980) 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297, the United States Supreme Court articulated a test for determining when *Miranda* advisements must be given to a suspect that "come[s] into play whenever a person in custody is subjected to either express questioning or its functional equivalent." (*Id.* at pp. 300–301, 100 S.Ct. 1682.) The test under *Rhode Island v. Innis* requires that police officers understand not only whether they are engaging in "express questioning," but also when their words or actions "are reasonably likely to elicit an incriminating response from the suspect." (*Id.* at p. 301, 100 S.Ct. 1682. fn. omitted.) The United States Supreme Court's decision establishes the unproblematic nature of distinguishing between oral communications constituting questions (and even their functional equivalents) and statements not reasonably likely to elicit an incriminating answer. Courts even require law enforcement officers to distinguish between suggestive and nonsuggestive questions. (*People v. Saracoglu* (2007) 152 Cal.App.4th 1584, 1590, 62 Cal.Rptr.3d 418.) Here, the determination required of minor decoys is more clear than the *Rhode Island v. Innis* test or the distinction between suggestive and nonsuggestive questions because subdivision (b)(4) of Rule 141 applies *only* to questions relating to age. "Question" is not an ambiguous term and does not lead to confusion in limiting spoken communications to those involving inquiries that contemplate answers.

[10] We also reject the Appeals Board's contention Rule 141 is ambiguous because "no definition is provided as to what 'fairness' means or how it is to be determined." The lack of a definition of fairness, by itself, does not render Rule 141 ambiguous. (Cf. *Nava v. Mercury Cas. Co.* (2004) 118 Cal.App.4th 803, 805, 13 Cal.Rptr.3d 816 [lack of definition does not render a term ambiguous].) Contrary to the Appeals Board's contention, Rule 141 provides specific guidance regarding how to preserve fairness in minor decoy operations. Subdivision (b) of Rule 141 implements the goal of fairness by imposing five specific requirements for every minor decoy operation. Decoys must be under the age of 20; have the appearance of a person under 21; carry their own actual identification and present that identification upon request; truthfully answer any questions about their ages; and make face-to-face identifications of the persons who sold the alcoholic beverages. (Rule 141, subd. (b)(1)-(5).) Fairness under Rule 141 is assured by a set of five expressly defined

safeguards, all of which must be fulfilled during a minor decoy operation. **139 (*Acapulco Restaurants, supra,* 67 Cal.App.4th at p. 580, 79 Cal.Rptr.2d 126.) Consequently, Rule 141's use of the word "fairness" does not render the rule ambiguous or confusing.

[11] **[12]** In support of the Appeals Board's argument Rule 141 is ambiguous regarding what constitutes fairness, it points to its earlier decisions in *7–Eleven, Inc. & Johal Stores, Inc.* (Oct. 1, 2014) AB–9403 (*7–Eleven*), *Equilon Enterprises, LLC* (July 26, 2002) AB–7845 (*Equilon*), *Lucky Stores, Inc*. (Oct. 13, 1999) AB–7227 (*Lucky*), *Southland Corp. & Dandona* (Apr. *639 16, 1999) AB–7099 (*Southland*), and *Thrifty Payless, Inc*. (Dec. 30, 1998) AB–7050 (*Thrifty*). We may take judicial notice of decisions of the Appeals Board. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (2005) 128 Cal.App.4th 1195, 1208, fn. 5, 27 Cal.Rptr.3d 766; accord *Reimel v. Alcoholic Beverage Control Appeals Bd*. (1967) 254 Cal.App.2d 340, 62 Cal.Rptr. 54.) Thus, although we are not bound by the Appeals Board's decisions, we take judicial notice of the cited decisions and consider their reasoning for persuasive value.

Regarding agency decisions, the California Supreme Court has noted that "[w]here the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth. [Citation.] Considered alone and apart from the context and circumstances that produce them, agency interpretations are not binding or necessarily even authoritative." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7–8, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) Based on our review, we conclude the Appeals Board's cited decisions vary in their persuasiveness and fidelity to Rule 141.

In *7–Eleven*, *supra,* AB–9403, the Appeals Board affirmed the suspension of an off-sale license based on sale to a minor decoy after the store clerk looked at the minor decoy's identification and stated, "oh, you are so young." (*7–Eleven*, at pp. 2, 14.) In affirming the suspension, the Appeals Board concluded the minor decoy was not required to respond because the store clerk did not ask a question or indicate a mistake as to the minor decoy's age. The Appeals Board reasoned that "[t]he wor[d] 'young' is a subjective term, and gives no indication that the clerk has made a miscalculation and as a result believes the decoy to be over 21" years of age. (*Id.* at p. 12.) Under the reasoning of *7–Eleven*, the Appeals Board should have affirmed the license suspension in this case as well. Here, the administrative law judge found the store clerk did not ask a question of the minor decoy. And the store clerk did not clearly demonstrate confusion as to the minor's age in the statement, "I would never have guessed it, you must get asked a lot." The minor decoy testified he thought the statement might mean either that "she thought I was older *or thought that I do it a lot* ...." (Italics added.) Because the store clerk in this case made a statement akin to that in *7–Eleven*, the reasoning employed in *7–Eleven* should have led the Appeals Board to affirm the Department's decision.

We reject the reasoning contained in the remainder of the Appeals Board's earlier decisions because the reasoning in each would require minor decoys to speak up to clarify any mistake about their ages even in the absence of a question. (*Equilon,* supra, AB-7845, at p. 2 [concluding Rule 141 "was *640 violated when the decoy failed to respond to a statement by the clerk which implied that she was 21 years of age or older"], *Lucky*, supra, AB-7227, at p. 4 [same where minor decoy did not respond to mistaken statement, "1978. You are 21"], and *Southland*, supra, AB-7099, at pp. 6, 7 [same where decoy did not respond to statement, "You are 21"]. In each of these decisions, **140 the Appeals Board relied on the notion of fairness to craft a new requirement for Rule 141, namely the obligation of a minor decoy to respond to any indication of mistake regarding age even in the absence of a question. Rule 141, however, expressly requires minor decoys only to answer questions relating to their ages. (Rule 141, subd. (b)(4).) The Appeals Board lacks the power to add a new defense to Rule 141.

The Appeals Board's decision in *Thrifty, supra,* AB–7050 involved a reversal of the Board's decision based on the minor decoy's silent tendering of a driver license rather than answering the clerk's question about her age. (See *Thrifty*, at p. 6 [speculating about the minor decoy's motivation in offering her identification rather than answering about her age].) Unlike this case, *Thrifty* involved an actual question by the clerk about the minor decoy's age and is therefore inapposite in this case where the administrative law judge determined the clerk did not ask any questions. (*Id.* at pp. 5–6.) Consequently, we need not consider whether *Thrifty* was correctly decided in harmony with Rule 141.

Ultimately, we are not persuaded by the Appeals Board's prior decisions that Rule 141 is ambiguous in requiring decoys to answer truthfully only questions relating to their ages.

Next, the Appeals Board argues the principle of fairness upon which Rule 141 is founded imposes an affirmative duty on minor decoys to speak up in order to clarify any mistake regarding age articulated by the vendor. If the Department had wanted to provide license holders with a defense for mistakes about a minor decoy's age or based on a minor decoy's failure to respond to a statement by the clerk, the Department could have done so by including express language to that effect in Rule 141. However, as we explained above, the language of Rule 141 requires minor decoys to respond only to questions about their ages. We reject the Appeals Board's attempt to add a new defense to Rule 141 that is not expressed in the rule. (*Acapulco Restaurants*, *supra*, 67 Cal.App.4th at p. 580, 79 Cal.Rptr.2d 126.)

Acapulco Restaurants involved a minor decoy operation in which the Department did not comply with Rule 141's requirement the minor decoy make a face-to-face identification of the clerk who sold the alcoholic beverage. (Acapulco Restaurants, supra, 67 Cal.App.4th at p. 577, 79 Cal.Rptr.2d 126; see also Rule 141, subd. (b)(5).) Despite the failure to follow this express requirement ***641** of Rule 141, the Department imposed and the Appeals Board affirmed a 15–day license suspension on grounds a law enforcement officer witnessed the entire transaction. (*Acapulco Restaurants,* at p. 577, 79 Cal.Rptr.2d 126.) However, the *Acapulco Restaurants* court reversed, explaining, "[t]o ignore a rule and the defense that arises from law enforcement's failure to comply with that rule is not a matter of 'interpretation.' What the Department has done is to unilaterally decide that rule 141[ ](b)(5) applies in some situations but not others, a decision that exceeds the Department's power. By its refusal to apply rule 141[ ](b)(5) when a police officer is present at the time of the sale, the Department has crossed the line separating the interpretation of a word or phrase on one side to the legislation of a different rule on the other, thereby substituting its judgment for that of the rulemaking authority. It might as well have said that rule 141[ ](b)(5) applies on Mondays but not Thursdays." (*Acapulco Restaurants*, *supra*, 67 Cal.App.4th at p. 580, 79 Cal.Rptr.2d 126.)

[13] **[14]** The result in *Acapulco Restaurants* followed the well-established rule that " '[a]n exception to a statute is to be narrowly construed. (Citation.) When a statute specifies an exception, no others ****141** may be added under the guise of judicial construction. (Citations.)' " (*Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 267 Cal.App.2d 895, 898, 73 Cal.Rptr. 352, quoting *Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control* (1968) 261 Cal.App.2d 181, 189, 67 Cal.Rptr. 734.) Fairness does not require the new exception to be judicially grafted into Rule 141 to provide additional defenses that require a minor decoy to speak up in the absence of a question by the store clerk. As the California Supreme Court has noted, "licensees have a ready means of protecting themselves from liability by simply asking any purchasers who could possibly be minors to produce bona fide evidence of their age and identity." (*Provigo*, *supra*, 7 Cal.4th at p. 570, 28 Cal.Rptr.2d 638, 869 P.2d 1163.)

Likewise, we reject the argument made by CVS that the minor decoy's silence in response the clerk's statement about his youthful appearance was "deceptive and misleading." As this court has previously noted in a case involving a claim a governmental agency engaged in fraudulent concealment, "Courts uniformly distinguish between the misleading half-truth, or partial disclosure, and the case in which defendant says nothing at all. The general rule is that silence alone is not actionable." (*Wiechmann Engineers v. State of California ex rel. Dept. Pub. Wks.* (1973) 31 Cal.App.3d 741, 751, 107 Cal.Rptr. 529.)

Here, the minor decoy did not say anything untrue. To the contrary, the minor decoy presented accurate information in the form of his driver license. Thus, the minor decoy did not engage in deceptive and misleading communication with the clerk. Notably, the California Supreme Court has rejected a claim the use of a "mature-looking" decoy constitutes an unfair practice by ***642** the Department in a case in which a minor decoy "simply bought beer and wine, *without attempting to pressure or encourage the sales in any way*." (*Provigo*, *supra*, 7 Cal.4th at p. 569, 28 Cal.Rptr.2d 638, 869 P.2d 1163, italics added.) The same reason applies here. The minor decoy's silence in this case did not involve any attempt to pressure or encourage the sale of an alcoholic beverage to him. The minor decoy's silence did not render the Department's operation unfair.

CVS's argument its clerk was deceived and misled by the minor decoy in this case is based on the same premise as that advanced by the Appeals Board, namely a minor decoy has a duty to speak up in response to a statement indicating a mistaken calculation of age. However, as we have explained, Rule 141 does not supply a defense based on a minor decoy's failure to respond to statements made by the clerk. Consequently, we conclude the Department properly

rejected CVS's argument the minor decoy's silence rendered the operation unfair under Rule 141.

C.

Substantial Evidence Supports the Department's Decision

[15] As part of its argument Rule 141 is ambiguous, the Appeals Board asserts the minor decoy's testimony during the hearing was equally uncertain. Specifically, the Appeals Board asserts that "[t]he decoy's testimony is as ambiguous as [Rule 141], and certainly does not support the conclusion, reached by the Department, that the clerk's words were '[i]ndisputably a statement' falling outside the Rule." In light of the administrative law judge's factual finding, we disagree.

Viewed in the light most favorable to the Department's decision, we conclude substantial evidence supports the administrative law judge's decision. As the administrative law judge found, the minor decoy's ****142** testimony was clear and credible. The administrative law judge also expressly found the testimony established the store clerk's communication to the minor decoy was a statement and not a question. Under section 23090.2, the Appeals Board lacks power to disregard the Department's factual findings, which includes findings made by the administrative law judge. (*Hasselbach v. Department of Alcoholic Beverage Control* (1959) 167 Cal.App.2d 662, 667, 334 P.2d 1058 ["The statement made in the opinion of the appeals board was not a finding of fact for that board is without power to make findings of fact"].) Accordingly, we reject the Appeals Board's argument the store clerk's statement might have been a question instead of a statement.

***643** DISPOSITION

The decision of the Alcohol Beverage Control Appeals Board is annulled. The decision of the Department of Alcoholic Beverage Control is reinstated and the case is remanded to the Alcohol Beverage Control Appeals Board for further proceedings consistent with this opinion.

We concur:

BLEASE, Acting P.J.

RENNER, J.

All Citations

7 Cal.App.5th 628, 213 Cal.Rptr.3d 130, 17 Cal. Daily Op. Serv. 384, 2017 Daily Journal D.A.R. 402

1 Cal.5th 749
Supreme Court of California.

DEPARTMENT OF FINANCE
et al., Plaintiffs and Respondents,
v.
COMMISSION ON STATE MANDATES, Defendant and Respondent;
County of Los Angeles et al., Real Parties in Interest and Appellants.

S214855
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Filed 8/29/2016
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As Modified on Denial of Rehearing 11/16/2016

Synopsis

Background: Department of Finance, State Water Resources Control Board, and regional water quality control board filed petition for writ of administrative mandamus seeking to overturn decision of Commission on State Mandates that regional board's conditions on permit authorizing local agencies to operate storm drain systems constituted state mandates subject to reimbursement. The Superior Court, Los Angeles County, No. BS130730, Ann I. Jones, J., granted petition. Local agencies appealed. The Court of Appeal, Johnson, J., affirmed. Local agencies petitioned for review. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Corrigan, J., held that:

[1] permit itself did not indicate that permit conditions were federal mandates not subject to reimbursement;

[2] Commission was not required to defer to regional board's conclusion that challenged conditions were federally mandated;

[3] condition requiring local agencies to conduct inspections of certain facilities and construction sites was not a federal mandate; and

[4] condition requiring local agencies to install and maintain trash receptacles was not a federal mandate.

Reversed and remanded.

Opinion, 163 Cal.Rptr.3d 439, superseded.

Cuéllar, J., filed separate concurring and dissenting opinion with which Liu and Kruger, JJ., concurred.

Procedural Posture(s): Petition for Discretionary Review; On Appeal; Review of Administrative Decision.

West Headnotes (14)

[1] Environmental Law Purpose

Federal Clean Water Act (CWA) is a comprehensive water quality statute designed to restore and maintain the chemical, physical, and biological integrity of the nation's water. Federal Water Pollution Control Act § 101, 33 U.S.C.A. § 1251 et seq.

1 Case that cites this headnote

[2] Environmental Law Discharge of pollutants

State permitting system for issuing permits for pollutant discharge from storm sewer system regulates discharges under both state and federal law. Federal Water Pollution Control Act § 101, 33 U.S.C.A. § 1251 et seq.; Cal. Water Code §§ 13370(c), 13372(a), 13374, 13377.

[3] Administrative Law and Procedure Questions of law or fact; matters of law

Administrative Law and Procedure Findings; evidence

Ordinarily, when scope of review in trial court is whether administrative decision is supported by substantial evidence, the scope of review on appeal is the same; however, appellate court independently reviews conclusions as to the meaning and effect of constitutional and statutory provisions.

5 Cases that cite this headnote

[4] **Trial** Construction of writings

Question whether statute or executive order imposes a mandate is a question of law.

2 Cases that cite this headnote

[5] **Municipal Corporations** Power and Duty to Tax in General

States Limitation of Amount of Indebtedness or Expenditure

Taxation Power of legislature in general

Constitutional provision restricting amounts state and local governments may appropriate and spend each year from proceeds of taxes and provision imposing direct constitutional limit on state and local power to adopt and levy taxes work in tandem, together restricting state and local governments' power both to levy and to spend for public purposes. Cal. Const. arts. 13A, 13B.

[6] **Municipal Corporations** Power and Duty to Tax in General

States Limitation of Amount of Indebtedness or Expenditure

States Limitation of Use of Funds or Credit

Taxation Power of legislature in general

Reimbursement provision in constitutional provision providing that, if legislature or state agency required local government to provide new program or higher level of service, local government is entitled to reimbursement from state for associated costs, was included in recognition of the fact that provision restricting amounts state and local governments may appropriate and spend each year from proceeds of taxes and provision imposing direct constitutional limit on state and local power to adopt and levy taxes severely restrict taxing and spending powers of local governments. Cal. Const. arts. 13A, 13B, § 6(a).

5 Cases that cite this headnote

[7] **Municipal Corporations** Power and Duty to Tax in General

States Limitation of Amount of Indebtedness or Expenditure

States Limitation of Use of Funds or Credit

Taxation Power of legislature in general

Purpose of constitutional provision providing that, if legislature or state agency required local government to provide new program or higher level of service, local government is entitled to reimbursement from state for associated costs is to prevent 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 imposed by constitutional articles restricting amounts state and local governments may appropriate and spend each year from proceeds of taxes and imposing direct constitutional limit on state and local power to adopt and levy taxes. Cal. Const. arts. 13A, 13B, § 6(a).

5 Cases that cite this headnote

[8] **Environmental Law** Conditions and limitations

Permit issued by regional water quality board authorizing local agencies to operate storm drain systems, which contained conditions designed to maintain quality of state water and to comply with federal Clean Water Act, did not itself demonstrate what conditions would have been imposed had federal Environmental Protection Agency (EPA) granted permit, and thus permit itself did not indicate that conditions were federal mandates not subject to reimbursement under constitutional provision requiring state to reimburse local agency for costs associated with new program or higher level of service mandated by legislature or state agency; in issuing permit, regional board was implementing both state and federal law and was authorized

to include conditions more exacting than federal law required. Federal Water Pollution Control Act § 101, 33 U.S.C.A. § 1251 et seq.; 40 C.F.R. §§ 122.26(b)(8), 122.26(b)(19); Cal. Const. art. XIII B, § 6(a); Cal. Water Code §§ 13001, 13370(c), 13372(a), 13374, 13377; Cal. Gov't Code §§ 17514, 17556(c).

1 Case that cites this headnote

[9] **Environmental Law** Conditions and limitations

Commission on State Mandates was not required to defer to regional water quality control board's conclusion that challenged conditions contained in permits issued by regional board authorizing local agencies to operate storm drain systems were federally mandated, and thus qualified for exception to constitutional provision requiring state to reimburse local agency for costs associated with new program or higher level of service mandated by legislature or state agency; state had burden to show challenged conditions were mandated by federal law, requiring Commission to defer to regional board would have failed to honor legislature's intent in creating Commission, and policies supporting constitutional provision would have been undermined if Commission were required to defer to regional board on federal mandate question. Federal Water Pollution Control Act § 101, 33 U.S.C.A. § 1251 et seq.; 40 C.F.R. §§ 122.26(b)(8), 122.26(b)(19); Cal. Const. art. XIIIB, § 6(a); Cal. Water Code §§ 13001, 13370(c); Cal. Gov't Code §§ 17514, 17556(c).

3 Cases that cite this headnote

[10] **Environmental Law** Water pollution

In trial court action challenging regional water quality control board's authority to impose specific permit conditions for discharging pollutants from storm sewer system, board's findings regarding what conditions satisfied federal standard are entitled to deference. Federal Water Pollution Control Act §§ 402, 402, 33 U.S.C.A. §§ 1342(a)(1), 1342(a)(2); 40 C.F.R. §§ 122.26(b)(8), 122.26(b)(19); Cal. Water Code §§ 13001, 13263(a), 13370(c).

6 Cases that cite this headnote

[11] **Environmental Law** Water pollution

In trial court action challenging regional water quality control board's authority to impose specific permit conditions for discharging pollutants from storm sewer system, party challenging the board's decision would have the burden of demonstrating its findings were not supported by substantial evidence or that the board otherwise abused its discretion. 40 C.F.R. §§ 122.26(b)(8), 122.26(b)(19); Cal. Water Code §§ 13001, 13263(a), 13370(c).

3 Cases that cite this headnote

[12] **States** State Expenses and Charges; Statutory Liabilities

Typically, the party claiming the applicability of exception to constitutional provision providing that, if legislature or state agency required local government to provide new program or higher level of service, local government is entitled to reimbursement from state for associated costs, bears the burden of demonstrating that exception applies. Cal. Const. art. XIII B, § 6; Cal. Gov't Code § 17556(c).

6 Cases that cite this headnote

[13] **Environmental Law** Conditions and limitations

Condition contained in permit issued by regional water quality board authorizing local agencies to operate storm drain systems, which required local agencies to conduct inspections of certain commercial and industrial facilities and construction sites, was not a federal mandate, but rather was a state mandate subject to reimbursement under constitutional provision providing that, if legislature or state agency required local government to provide new program or higher level of service, local government was entitled to reimbursement from state for associated costs; neither federal

Clean Water Act (CWA) nor Environmental Protection Agency (EPA) regulations required local agencies to inspect facilities or construction sites, state and federal law required regional board to conduct inspections, and regional board exercised its discretion and shifted obligation to conduct inspections to local agencies. Federal Water Pollution Control Act §§ 402, 402, 33 U.S.C.A. §§ 1342(p)(3)(A), 1342(p)(3)(B)(iii); 40 C.F.R. §§ 122.26(b)(8), 122.26(b)(14)(x), 122.26(b)(19), 122.26(d)(2)(iv)(B)(1), 122.26(d)(2)(iv)(C)(1), 122.26(d)(2)(iv)(D)(3); Cal. Const. art. XIII B, § 6(a); Cal. Water Code §§ 13001, 13260, 13263, 13267(c), 13370(c); Cal. Gov't Code §§ 17514, 17556(c).

1 Case that cites this headnote

[14] Environmental Law Conditions and limitations

Condition contained in permit issued by regional water quality board authorizing local agencies to operate storm drain systems, which required local agencies to install and maintain trash receptacles at transit stops, was not a federal mandate, but rather was a state mandate subject to reimbursement under constitutional provision providing that, if legislature or state agency required local government to provide new program or higher level of service, local government was entitled to reimbursement from state for associated costs; while local agencies were required to include a description of practices for operating and maintaining roadways and procedures for reducing impact of discharges from storm sewers in their permit application under federal Clean Water Act (CWA) and Environmental Protection Agency (EPA) regulation, issuing agency had discretion whether to make those practices conditions of the permit, and EPA had issued permits in other cities that did not include trash receptacle condition. Federal Water Pollution Control Act § 101, 33 U.S.C.A. § 1251 et seq.; 40 C.F.R. §§ 122.26(b)(8), 122.26(b)(19), 122.26(d)(2)(iv)(A)(3); Cal. Const. art. XIII B, § 6(a); Cal. Water Code §§ 13001, 13370(c); Cal. Gov't Code §§ 17514, 17556(c).

See 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, § 119.

2 Cases that cite this headnote

****359** *****48** Ct.App. 2/1 B237153, Los Angeles County Super. Ct. No. BS130730

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Opinion

Corrigan, J.

****360** ***754** Under our state Constitution, if the Legislature or a state agency requires a local government to provide a new program or higher level of service, the local government is entitled to reimbursement from the state for the associated costs. (Cal. Const., art. XIII B, § 6, subd. (a).) There are exceptions, however. Under one of them, if the new program or increased service is mandated by a federal law or regulation, reimbursement is not required. (Gov. Code, § 17556, subd. (c).)

The services in question here are provided by local agencies that operate storm drain systems pursuant to a state-issued permit. Conditions in that permit are designed to maintain the quality of California's water, and to comply with the federal Clean Water Act (33 U.S.C. § 1251 et seq.). The Court of Appeal held that certain permit conditions were federally mandated, and thus not reimbursable. We reverse, concluding that no federal law or regulation imposed the conditions nor did the federal regulatory system require the state to impose them. Instead, the permit conditions were imposed as a result of the state's discretionary action.

****361** I. BACKGROUND

The Regional Water Quality Control Board, Los Angeles Region (the Regional Board or the Board) is a state agency. It issued a permit authorizing Los Angeles County,

the Los Angeles County Flood Control District, and 84 cities (collectively, the Operators) to operate storm drainage systems. [1] ***50** Permit ***755** conditions required that the Operators take various steps to reduce the discharge of waste and pollutants into state waters. The conditions included installing and maintaining trash receptacles at transit stops, as well as inspecting certain commercial and industrial facilities and construction sites.

1 The cities involved are the Cities of Agoura Hills, Alhambra, Arcadia, Artesia, Azusa, Baldwin Park, Bell, Bellflower, Bell Gardens, Beverly Hills, Bradbury, Burbank, Calabasas, Carson, Cerritos, Claremont, Commerce, Compton, Covina, Cudahy, Culver City, Diamond Bar, Downey, Duarte, El Monte, El Segundo, Gardena, Glendale, Glendora, Hawaiian Gardens, Hawthorne, Hermosa Beach, Hidden Hills, Huntington Park, Industry, Inglewood, Irwindale, La Cañada Flintridge, La Habra Heights, Lakewood, La Mirada, La Puente, La Verne, Lawndale, Lomita, Los Angeles, Lynwood, Malibu, Manhattan Beach, Maywood, Monrovia, Montebello, Monterey Park, Norwalk, Palos Verdes Estates, Paramount, Pasadena, Pico Rivera, Pomona, Rancho Palos Verdes, Redondo Beach, Rolling Hills, Rolling Hills Estates, Rosemead, San Dimas, San Fernando, San Gabriel, San Marino, Santa Clarita, Santa Fe Springs, Santa Monica, Sierra Madre, Signal Hill, South El Monte, South Gate, South Pasadena, Temple City, Torrance, Vernon, Walnut, West Covina, West Hollywood, Westlake Village, and Whittier.

Some Operators sought reimbursement for the cost of satisfying the conditions. The Commission on State Mandates (the Commission) concluded each required condition was a new program or higher level of service, mandated by the state rather than by federal law. However, it found the Operators were only entitled to state reimbursement for the costs of the trash receptacle condition, because they could levy fees to cover the costs of the required inspections. (See discussion, *post*, at p. 761.) The trial court and the Court of Appeal disagreed, finding that all of the requirements were federally mandated.

We granted review. To resolve this issue, it is necessary to consider both the permitting system and the reimbursement obligation in some detail.

A. The Permitting System

The Operators' municipal storm sewer systems discharge both waste and pollutants. [2] State law controls "waste" discharges. (Wat. Code, § 13265.) Federal law regulates discharges of "pollutant[s]." (33 U.S.C. § 1311(a).) Both state and later-enacted federal law require a permit to operate such systems.

2 The systems at issue here are "municipal separate storm sewer systems," sometimes referred to by the acronym "MS4." (40 C.F.R. § 122.26(b)(19) (2001).) A "municipal separate storm sewer" is a system owned or operated by a public agency with jurisdiction over disposal of waste and designed or used for collecting or conveying storm water. (40 C.F.R. § 122.26(b)(8) (2001).) Unless otherwise indicated, all further citations to the Code of Federal Regulations are to the 2001 version.

California's Porter–Cologne Water Quality Control Act (Porter–Cologne Act or the Act; Wat. Code, § 13000 et seq.) was enacted in 1969. It established the State Water Resources Control Board (State Board), along with nine regional water quality control boards, and gave those agencies "primary responsibility for the coordination and control of water quality." (Wat. Code, § 13001; see *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619, 26 Cal.Rptr.3d 304, 108 P.3d 862 (*City of Burbank*).) The State Board establishes statewide policy. The regional boards formulate and ***756** adopt water quality control plans and issue permits governing the discharge of waste. (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 875, 22 Cal.Rptr.3d 128 (*Building Industry*).)

The Porter–Cologne Act requires any person discharging, or proposing to discharge, waste that could affect the quality of state waters to file a report with the appropriate regional board. (***51** Wat. Code, § 13260, subd. (a)(1).) The regional board then "shall prescribe requirements as to the nature" of the discharge, implementing any applicable water quality control plans. (Wat. Code, § 13263, subd. (a).) The Operators must follow **362** all requirements set by the Regional Board. (Wat. Code, §§ 13264, 13265.)

[1] The federal Clean Water Act (the CWA; 33 U.S.C. § 1251 et seq.) was enacted in 1972, and also established a permitting system. The CWA is a comprehensive water quality statute designed to restore and maintain the chemical, physical, and biological integrity of the nation's waters. (*City of Burbank,*

supra, 35 Cal.4th at p. 620, 26 Cal.Rptr.3d 304, 108 P.3d 862.) The CWA prohibits pollutant discharges unless they comply with: (1) a permit (see 33 U.S.C. §§ 1328, 1342, 1344); (2) established effluent limitations or standards (see 33 U.S.C. §§ 1312, 1317); or (3) established national standards of performance (see 33 U.S.C. § 1316). (See 33 U.S.C. § 1311(a).) The CWA allows any state to adopt and enforce its own water quality standards and limitations, so long as those standards and limitations are not "less stringent" than those in effect under the CWA. (33 U.S.C. § 1370.)

The CWA created the National Pollutant Discharge Elimination System (NPDES), authorizing the Environmental Protection Agency (EPA) to issue a permit for any pollutant discharge that will satisfy all requirements established by the CWA or the EPA Administrator. (33 U.S.C. § 1342(a)(1), (a)(2).) The federal system notwithstanding, a state may administer its own permitting system if authorized by the EPA. [3] If the EPA concludes a state has adequate authority to administer its proposed program, it must grant approval (33 U.S.C. § 1342(b)) and suspend its own issuance of permits (33 U.S.C. § 1342(c)(1)). [4]

3 For a state to acquire permitting authority, the governor must give the EPA a "description of the program [the state] proposes to establish," and the attorney general must affirm that the laws of the state "provide adequate authority to carry out the described program." (33 U.S.C. § 1342(b).)

4 The EPA may withdraw approval of a state's program (33 U.S.C. § 1342(c)(3)), and also retains some supervisory authority: States must inform the EPA of all permit applications received and of any action related to the consideration of a submitted application (33 U.S.C. § 1342(d)(1)).

***757** **[2]** California was the first state authorized to issue its own pollutant discharge permits. (*California ex rel. State Water Resources Control Bd. v. Environmental Pro. Agcy.* (9th Cir. 1975) 511 F.2d 963, 970, fn. 11, revd. on other grounds in *EPA v. State Water Resources Control Board* (1976) 426 U.S. 200 [48 L.Ed.2d 578, 96 S.Ct. 2022].) Shortly after the CWA's enactment, the Legislature amended the Porter–Cologne Act, adding chapter 5.5 (Wat. Code, § 13370 et seq.) to authorize state issuance of permits (Wat. Code, § 13370, subd. (c)). The Legislature explained the amendment was "in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation under state law pursuant to [the Porter–Cologne Act]." (*Ibid*.) The Legislature provided that Chapter 5.5 be "construed to ensure consistency" with the CWA. (Wat. Code, § 13372, subd. (a).) It directed that state and regional boards issue waste discharge requirements "ensur[ing] compliance with all applicable provisions of the [CWA] ... *together with any more stringent effluent standards or limitations* necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance." *****52** (Wat. Code, § 13377, italics added.) To align the state and federal permitting systems, the legislation provided that the term " 'waste discharge requirements' " under the Act was equivalent to the term " 'permits' " under the CWA. (Wat. Code, § 13374.) Accordingly, California's permitting system now regulates discharges under both state and federal law. (*WaterKeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448, 1452, 126 Cal.Rptr.2d 389; accord *Building Industry, supra,* 124 Cal.App.4th at p. 875, 22 Cal.Rptr.3d 128.)

In 1987, Congress amended the CWA to clarify that a permit is required for any discharge from a municipal storm sewer system serving a population of 100,000 or more. (33 U.S.C. § 1342(p)(2)(C), (D).) Under those amendments, a permit may be issued either on a system- or jurisdiction-wide basis, must effectively prohibit non-stormwater discharges into the storm sewers, and must "require controls to reduce the discharge of ****363** pollutants *to the maximum extent practicable*." (33 U.S.C. § 1342(p)(3)(B), italics added.) The phrase "maximum extent practicable" is not further defined. How that phrase is applied, and by whom, are important aspects of this case.

EPA regulations specify the information to be included in a permit application. (See 40 C.F.R. § 122.26(d)(1)(i)-(vi), (d)(2)(i)-(viii).) Among other things, an applicant must set out a proposed management program that includes management practices; control techniques; and system, design, and engineering methods to reduce the discharge of pollutants to the maximum extent practicable. (40 C.F.R. § 122.26(d)(2)(iv).) The permit-issuing agency has discretion to determine which practices, whether or not proposed by the applicant, will be imposed as conditions. (*Ibid*.)

***758** B. The Permit in Question

In 2001, Los Angeles County (the County), acting for all Operators, applied for a permit from the Regional Board. The board issued a permit (the Permit), with conditions intended to "reduce the discharge of pollutants in storm water to the Maximum Extent Practicable" in the Operators' jurisdiction.

The Permit stated that its conditions implemented *both* the Porter–Cologne Act and the CWA.

Part 4 of the Permit contains the four requirements at issue. Part 4(C) addresses commercial and industrial facilities, and required the Operators to inspect certain facilities twice during the five-year term of the Permit. Inspection requirements were set out in substantial detail.[5] Part 4(E) of the Permit addresses construction sites. It required each Operator to "implement a program to control runoff from construction activity at all construction sites within its jurisdiction," and to inspect each construction ***53** site of one acre or greater at least "once during the wet season."[6] Finally, Part 4(F) of the Permit addresses pollution from public agency activities. Among other things, it directed each Operator not otherwise regulated to "[p]lace trash receptacles at all transit stops within its jurisdiction," and to maintain them as necessary.

5 As to commercial facilities, Part 4(C)(2)(a) required each Operator to inspect each restaurant, automotive service facility, retail gasoline outlet, and automotive dealership within its jurisdiction, and to confirm that the facility employed best management practices in compliance with state law, county and municipal ordinances, a Regional Board resolution, and the Operators' storm water quality management program (SQMP). For each type of facility, the Permit set forth specific inspection tasks.
Part 4(C)(2)(b) addressed industrial facilities, requiring the Operators to inspect them and confirm that each complied with county and municipal ordinances, a Regional Board resolution, and the SQMP. The Operators also were required to inspect industrial facilities for violations of the general industrial activity stormwater permit, a statewide permit issued by the State Board that regulates discharges from industrial facilities. (See discussion, *post*, at pp. 62–63, 378 P.3d at pp. 371–372.)

6 Part 4(E)(4) required inspections for violations of the general construction activity stormwater permit, another statewide permit issued by the State Board. (See discussion, *post*, at pp. 62–63, 378 P.3d at pp. 371–372.)

C. Local Agency Claims

1. Applicable procedures for seeking reimbursement

As mentioned, when the Legislature or a state agency requires a local government to provide a new program or higher level of service, the state must "reimburse that local government for the costs of the program or increased level of service." (Cal. Const., art. XIII B, § 6, subd. (a) (hereafter, ***759** section 6).)[7] However, reimbursement is not required if "[t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation." (Gov. Code, § 17556, subd. (c).)

7 " 'Costs mandated by the state' means any increased costs which a local agency or school district is required to incur ... as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution." (Gov. Code, § 17514.)

**364 The Legislature has enacted comprehensive procedures for the resolution of reimbursement claims (Gov. Code, § 17500 et seq.) and created the Commission to adjudicate them. (Gov. Code, §§ 17525, 17551.) It also established "a test-claim procedure to expeditiously resolve disputes affecting multiple agencies." (*Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331, 285 Cal.Rptr. 66, 814 P.2d 1308 (*Kinlaw*).)

The first reimbursement claim filed with the Commission is called a test claim. (Gov. Code, § 17521.) The Commission must hold a public hearing, at which the Department of Finance (the Department), the claimant, and any other affected department or agency may present evidence. (Gov. Code, §§ 17551, 17553.) The Commission then determines "whether a state mandate exists and, if so, the amount to be reimbursed." (*Kinlaw, supra,* 54 Cal.3d at p. 332, 285 Cal.Rptr. 66, 814 P.2d 1308.) The Commission's decision is reviewable by writ of mandate. (Gov. Code, § 17559.)

2. The test claims

The County and other Operators filed test claims with the Commission, seeking reimbursement for the Permit's inspection and trash receptacle requirements. The Department, State Board, and Regional Board (collectively, the State) responded that the Operators were not entitled to reimbursement because each requirement was federally mandated.

The Department argued that the EPA had delegated its federal permitting authority to the Regional Board, which acted as an administrator for the EPA, ensuring the state's program complied with the CWA. The Department acknowledged the Regional Board had discretion to set detailed permit conditions, but urged that the challenged conditions were required for the Permit to comply with federal law.

*****54** The State and Regional Boards argued somewhat differently. They contended the CWA required the Regional Board to impose specific permit ***760** controls to reduce the discharge of pollutants to the "maximum extent practicable." Thus, when the Regional Board determined the Permit's conditions, those conditions were part of the federal mandate. The State and Regional Boards also argued that the challenged conditions were "animated" by EPA regulations. In support of the trash receptacle requirement, they relied on 40 Code of Federal Regulations part 122.26(d)(2)(iv)(A)(3). [8] In support of the inspection requirements, they relied on 40 Code of Federal Regulations part 122.26(d)(2)(iv)(B)(1), [9] (C)(1), [10] and (D)(3). [11]

8 40 Code of Federal Regulations part 122.26(d)(2)(iv)(A) provides that the proposed management plan in an operator's permit application must be based, in part, on a "description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls," and that, at a minimum, that description shall include, among other things, a "description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities." (40 C.F.R. § 122.26(d)(2)(iv)(A), (A)(3).)

9 40 Code of Federal Regulations part 122.26(d)(2)(iv)(B) provides that the proposed management plan in an operator's permit application must be based, in part, on a "description of a program, including a schedule, to detect and remove ... illicit discharges and improper disposal into the storm sewer," and that the proposed program shall include a "description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system." (40 C.F.R. § 122.26(d)(2)(iv)(B), (B)(1).)

10 40 Code of Federal Regulations part 122.26(d)(2)(iv)(C) provides that the proposed management plan in an operator's permit application must be based, in part, on a "description of a program to monitor and control pollutants in storm water discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system," and that the program shall "[i]dentify priorities and procedures for inspections and establishing and implementing control measures for such discharges." (40 C.F.R. § 122.26(d)(2)(iv)(C), (C)(1).)

11 40 Code of Federal Regulations part 122.26(d)(2)(iv)(D) provides that the proposed management plan in an operator's permit application must be based, in part, on a "description of a program to implement and maintain structural and nonstructural best management practices to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system," which shall include, a "description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality." (40 C.F.R. § 122.26(d)(2)(iv)(D), (D)(3).)

**365 The Operators argued the conditions were not mandated by federal law, because nothing in the CWA or in the cited federal regulations required them to install trash receptacles or perform the required site inspections. They also submitted evidence showing that none of the challenged requirements were *761 contained in their previous permits issued by the Regional Board, nor were they imposed on other municipal storm sewer systems by the EPA.

As to the inspection requirements, the Operators argued that state law required ***55 the *state and regional boards* to regulate discharges of waste. This regulatory authority included the power to inspect facilities and sites. The Regional Board had used the Permit conditions to shift those inspection responsibilities to them. They also presented evidence that the Regional Board was required to inspect industrial facilities and construction sites for compliance with statewide permits issued by the State Board (see *ante*, p. 758, fns. 5, 6). They urged that the Regional Board had shifted that obligation to the Operators as well. Finally, the Operators submitted a declaration from a county employee indicating the Regional Board had offered to pay the County to inspect industrial facilities *on behalf of* the Regional Board, but revoked that offer after including the inspection requirement in the Permit.

The EPA submitted comments to the Commission indicating that the challenged permit requirements were designed to reduce the discharge of pollutants to the "maximum extent practicable." Thus, the EPA urged the requirements fell "within the scope" of federal regulations and other EPA guidance regarding stormwater management programs. The Bay Area Stormwater Management Agencies Association, the League of California Cities, and the California State Association of Counties submitted comments urging that the challenged requirements were state, rather than federal, mandates.

3. The commission's decision

By a four-to-two vote, the Commission partially approved the test claims, concluding none of the challenged requirements were mandated by federal law. However, the Commission determined the Operators were not entitled to reimbursement for the inspection requirements because they had authority to levy fees to pay for the required inspections. Under Government Code section 17556, subdivision (d), the constitutional reimbursement requirement does not apply if the local government has the authority to levy fees or assessments sufficient to pay for the mandated program or service.

4. Petitions for writ of mandate

The State challenged the Commission's determination that the requirements were state mandates. By cross-petition, the County and certain cities challenged the Commission's finding that they could impose fees to pay for the inspections.

The trial court concluded that, because each requirement fell "within the maximum extent practicable standard," they were federal mandates not *762 subject to reimbursement. It granted the State's petition and ordered the Commission to issue a new statement of decision. The court did not reach the cross-claims relating to fee authority. Certain Operators appealed.[12] The Court of Appeal affirmed, concluding as a matter of law that the trash receptacle and inspection requirements were federal mandates.

12 The appellants are County and the Cities of Artesia, Azusa, Bellflower, Beverly Hills, Carson, Commerce, Covina, Downey, Monterey Park, Norwalk, Rancho Palo Verdes, Signal Hill, Vernon, and Westlake Village.

**366 II. DISCUSSION

A. Standard of Review

[3] [4] Courts review a decision of the Commission to determine whether it is supported by substantial evidence. (Gov. Code, § 17559.) Ordinarily, when the scope of review in the trial court is whether the administrative decision is supported by substantial evidence, the scope of review on appeal is the same. (***56 *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814, 38 Cal.Rptr.2d 304 (*County of Los Angeles*).) However, the appellate court independently reviews conclusions as to the meaning and effect of constitutional and statutory provisions. (*City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1810, 53 Cal.Rptr.2d 521.) The question whether a statute or executive order imposes a mandate is a question of law. (*Ibid.*) Thus, we review the entire record before the Commission, which includes references to federal and state statutes and regulations, as well as evidence of other permits and the parties' obligations under those

permits, and independently determine whether it supports the Commission's conclusion that the conditions here were not federal mandates. (*Ibid.*)

B. Analysis

The parties do not dispute here that each challenged requirement is a new program or higher level of service. The question here is whether the requirements were mandated by a federal law or regulation.

1. The federal mandate exception

[5] Voters added article XIII B to the California Constitution in 1979. Also known as the "Gann limit," it "restricts the amounts state and local governments may appropriate and spend each year from the 'proceeds of taxes.' " (*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58–59, 266 Cal.Rptr. 139, 785 P.2d 522 (*City of Sacramento*).) "Article XIII B is to be distinguished from article XIII A, which was adopted as Proposition 13 at ***763** the June 1978 election. Article XIII A imposes a direct constitutional limit on state and local power to *adopt and levy taxes*. Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend for public purposes." (*Id.* at p. 59, fn. 1, 266 Cal.Rptr. 139, 785 P.2d 522.)

[6] **[7]** The "concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public." (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202.) The reimbursement provision in section 6 was included in recognition of the fact "that articles XIII A and XIII B severely restrict the taxing and spending powers of local governments." (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81, 61 Cal.Rptr.2d 134, 931 P.2d 312 (*County of San Diego*).) The purpose of section 6 is to prevent "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." (*County of San Diego*, at p. 81, 61 Cal.Rptr.2d 134, 931 P.2d 312.) Thus, with certain exceptions, section 6 "requires the state 'to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies.' " (*County of San Diego*, at p. 81, 61 Cal.Rptr.2d 134, 931 P.2d 312.)

As noted, reimbursement is not required if the statute or executive order imposes "a requirement that is mandated by a federal law or regulation," unless the state mandate imposes costs that exceed the federal mandate. (Gov. Code, § 17556, subd. (c).) The question here is how to apply that *****57** exception when federal law requires a local agency to obtain a permit, authorizes the state to issue the permit, and provides the state discretion in determining which conditions are necessary to achieve a general standard established by federal law, and when state law allows the imposition of conditions that exceed the federal standard. Previous decisions ****367** of this court and the Courts of Appeal provide guidance.

In *City of Sacramento, supra,* 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522, this court addressed local governments' reimbursement claims for the costs of extending unemployment insurance protection to their employees. (*Id.*, at p. 59, 266 Cal.Rptr. 139, 785 P.2d 522.) Since 1935, the applicable federal law had provided powerful incentives for states to implement their own unemployment insurance programs. Those incentives included federal subsidies and a substantial federal tax credit for all corporations in states with certified federal programs. (*Id.* at p. 58, 266 Cal.Rptr. 139, 785 P.2d 522.) California had implemented such a program. (*Ibid.*) In 1976, Congressional legislation required ***764** that unemployment insurance protection be extended to local government employees. (*Ibid.*) If a state failed to comply with that directive, it "faced [the] loss of the federal tax credit and administrative subsidy." (*Ibid.*) The Legislature passed a law requiring local governments to participate in the state's unemployment insurance program. (*Ibid.*)

Two local governments sought reimbursement for the costs of complying with that requirement. Opposing the claims, the state argued its action was compelled by federal law. This court agreed, reasoning that, if the state had "failed to conform its plan to new federal requirements as they arose, its businesses [would have] faced a new and serious penalty" of double taxation, which would have placed those businesses at a competitive disadvantage against businesses in states complying with federal law. (*City of Sacramento, supra,* 50 Cal.3d at p. 74, 266 Cal.Rptr. 139, 785 P.2d 522.) Under those circumstances, we concluded that the "state simply

did what was necessary to avoid certain and severe federal penalties upon its resident businesses." (*Ibid.*) Because "[t]he alternatives were so far beyond the realm of practical reality that they left the state '*without discretion*' to depart from federal standards," we concluded "the state acted in response to a federal 'mandate.' " (*Ibid.* italics added.)

County of Los Angeles, supra, 32 Cal.App.4th 805, 38 Cal.Rptr.2d 304, involved a different kind of federal compulsion. In *Gideon v. Wainwright* (1963) 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, the United States Supreme Court held that states were required by the federal Constitution to provide counsel to indigent criminal defendants. That requirement had been construed to include "the right to the use of any experts that will assist counsel in preparing a defense." (*County of Los Angeles*, at p. 814, 38 Cal.Rptr.2d 304.) The Legislature enacted Penal Code section 987.9, requiring local governments to provide indigent criminal defendants with experts for the preparation of their defense. (*County of Los Angeles*, at p. 811, fn. 3, 38 Cal.Rptr.2d 304.) Los Angeles County sought reimbursement for the costs of complying with the statute. The state argued the statute's requirements were mandated by federal law.

The state prevailed. The Court of Appeal reasoned that, even without Penal Code section 987.9, the county would have been "responsible for providing ancillary services" under binding Supreme Court precedent. (*County of Los Angeles, supra,* 32 Cal.App.4th at p. 815, 38 Cal.Rptr.2d 304.) Penal Code section 987.9 merely codified an existing federal mandate. (***58** *County of Los Angeles*, at p. 815, 38 Cal.Rptr.2d 304.)

Hayes v. Commission on State Mandates (1992) 11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547 (*Hayes*) provides a contrary example. *Hayes* involved the former federal Education of the Handicapped Act (EHA; 20 U.S.C. § 1401 et seq.). EHA was a "comprehensive measure designed to provide all handicapped children with basic educational opportunities." (*Hayes*, at p. 1594, 15 Cal.Rptr.2d 547 ***765** .) EHA required each state to adopt an implementation plan, and mandated "certain substantive and procedural requirements," but left "primary responsibility for implementation to the state." (*Hayes*, at p. 1594, 15 Cal.Rptr.2d 547.)

Two local governments sought reimbursement for the costs of special education assessment hearings which were required under the state's adopted plan. The state argued the requirements imposed under its plan were federally mandated. The *Hayes* court rejected that argument. Reviewing **368 the historical development of special education law (*Hayes, supra,* 11 Cal.App.4th at pp. 1582–1592, 15 Cal.Rptr.2d 547), the court concluded that, so far as the state was concerned, the requirements established by the EHA were federally mandated. (*Hayes*, at p. 1592, 15 Cal.Rptr.2d 547.) However, that conclusion "mark[ed] the starting point rather than the end of [its] consideration." (*Ibid.*) The court explained that, in determining whether federal law requires a specified function, like the assessment hearings, the focus of the inquiry is whether the "manner of implementation of the federal program was left to the *true discretion* of the state." (*Id.* at p. 1593, 15 Cal.Rptr.2d 547, italics added.) If the state "has adopted an implementing statute or regulation pursuant to the federal mandate," and had "no 'true choice' " as to the manner of implementation, the local government is not entitled to reimbursement. (*Ibid.*) If, on the other hand, "the manner of implementation of the federal program was left to the true discretion of the state," the local government might be entitled to reimbursement. (*Ibid.*)

According to the *Hayes* court, the essential question is how the costs came to be imposed upon the agency required to bear them. "If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government." (*Hayes, supra,* 11 Cal.App.4th at p. 1594, 15 Cal.Rptr.2d 547.) Applying those principles, the court concluded that, to the extent "the state implemented the [EHA] by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state mandated and subject to" reimbursement. (*Ibid.*)

From *City of Sacramento*, *County of Los Angeles*, and *Hayes*, we distill the following principle: If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.

Division of Occupational Safety & Health v. State Bd. of Control (1987) 189 Cal.App.3d 794, 234 Cal.Rptr. 661 (*Division of Occupational Safety*) is ***766** instructive. The

federal Occupational Safety and Health Act of 1970 (Fed. OSHA; 29 U.S.C. § 651 et seq.) preempted states from regulating matters covered by Fed. OSHA unless a ***59 state had adopted its own plan and gained federal approval. (*Division of Occupational Safety*, at p. 803, 234 Cal.Rptr. 661.) No state was obligated to adopt its own plan. But, if a state did so, the plan had to include standards at least as effective as Fed. OSHA's and extend those standards to state and local employees. California adopted its own plan, which was federally approved. The state then issued a regulation that, according to local fire districts, required them to maintain three-person firefighting teams. Previously, they had been permitted to maintain two-person teams. (*Division of Occupational Safety*, at pp. 798–799, 234 Cal.Rptr. 661.) The local fire districts sought reimbursement for the increased level of service. The state opposed, arguing the requirement was mandated by federal law.

The court agreed with the fire districts. As the court explained, a Fed. OSHA regulation arguably required the maintenance of three-person firefighting teams. (*Division of Occupational Safety, surpra,* 189 Cal.App.3d at p. 802, 234 Cal.Rptr. 661.) However, that federal regulation specifically excluded local fire districts. (*Id.* at p. 803, 234 Cal.Rptr. 661.) Had the state elected to be governed by *Fed. OSHA standards*, that exclusion would have allowed those fire districts to maintain two-person teams. (*Division of Occupational Safety*, at p. 803, 234 Cal.Rptr. 661.) The conditions for approval of the *state's plan* required effective enforcement and coverage of public employees. But those conditions did not make the costs of complying with the state regulation federally mandated. "[T]he initial decision to establish ... a federally approved [local] plan is an option which the state exercises **369 freely." (*Ibid.*) In other words, the state was not "*compelled* to ... extend jurisdiction over occupational safety to local governmental employers," which would have otherwise fallen under a federal exclusion. (*Ibid.*) Because the state "was not required to promulgate [the state regulation] to comply with federal law, the exemption for federally mandated costs does not apply." (*Id.* at p. 804, 234 Cal.Rptr. 661.) [13]

13 In the end, the court held that the challenged state regulation did not obligate the local fire district to maintain three-person firefighting teams. Accordingly, the state regulation did not mandate an increase in costs. (*Division of Occupational Safety, supra,* 189 Cal.App.3d at pp. 807–808, 234 Cal.Rptr. 661.)

San Diego Unified School Dist. v. Commission on State Mandates (2004) 33 Cal.4th 859, 16 Cal.Rptr.3d 466, 94 P.3d 589 (*San Diego Unified*) provides another example. In *Goss v. Lopez* (1975) 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725, the United States Supreme Court held that if a school principal chose to recommend a student for expulsion, federal due process principles required the school district to give that student a hearing. Education Code section 48918 provided for expulsion hearings. (*San Diego Unified*, at p. 868, 16 Cal.Rptr.3d 466, 94 P.3d 589.) Under Education Code section 48915, a school principal had *767 *discretion* to recommend expulsion under certain circumstances, but was compelled to recommend expulsion for a student who possessed a firearm. (*San Diego Unified*, at p. 869, 16 Cal.Rptr.3d 466, 94 P.3d 589.) Federal law at the time did not require expulsion for a student who brought a gun to school. (*Id.* at p. 883, 16 Cal.Rptr.3d 466, 94 P.3d 589.)

The school district argued it was entitled to reimbursement of *all* expulsion hearing costs. This court drew a distinction between discretionary and mandatory expulsions. We concluded the costs of hearings for *discretionary* expulsions flowed from a federal mandate. (***60 *San Diego Unified, supra,* 33 Cal.4th at pp. 884–890, 16 Cal.Rptr.3d 466, 94 P.3d 589.) [14] We declined, however, to extend that rule to the costs related to *mandatory* expulsions. Because it was *state law* that required an expulsion recommendation for firearm possession, all hearing costs triggered by the mandatory expulsion provision were reimbursable state-mandated expenses. (San Diego Unified, at pp. 881–883.) As was the case in *Hayes*, the key factor was how the costs came to be imposed on the entity that was required to bear them. The school principal could avoid the cost of a federally-mandated hearing by choosing not to recommend an expulsion. But, when a state statute *required* an expulsion recommendation, the attendant hearing costs did not flow from a federal mandate. (*San Diego Unified, supra,* 33 Cal.4th at p. 881, 16 Cal.Rptr.3d 466, 94 P.3d 589.)

14 To the extent Education Code section 48918 imposed requirements that went beyond the mandate of federal law, those requirements were merely incidental to the federal mandate, and at most resulted in "a de minimis cost." (*San Diego Unified, supra,* 33 Cal.4th at p. 890, 16 Cal.Rptr.3d 466, 94 P.3d 589.) The State does not argue here that the costs of the challenged permit conditions were de minimis.

2. Application

Review of the Commission's decision requires a determination as to whether federal statutory, administrative, or case law imposed, or compelled the Regional Board to impose, the challenged requirements on the Operators.

It is clear federal law did not compel the Regional Board to impose these particular requirements. There was no evidence the state was compelled to administer its *own* permitting system rather than allowing the EPA do so under the CWA. (33 U.S.C. § 1342(a).) In this respect, the case is similar to *Division of Occupational Safety, supra,* 189 Cal.App.3d 794, 234 Cal.Rptr. 661. Here, as in that case, the state chose to administer its own program, finding it was "in the interest of the people of the state, *in order to avoid direct regulation by the federal government* of persons already subject to regulation" under state law. (Wat. Code, § 13370, subd. (c), italics added.) Moreover, the Regional Board was not required by federal law to impose any specific permit conditions. The federal CWA broadly directed the board to issue permits with conditions designed to reduce pollutant discharges to the maximum ****370** extent practicable. But the EPA's regulations gave the board discretion to determine which ***768** specific controls were necessary to meet that standard. (40 C.F.R. § 122.26(d)(2)(iv).) This case is distinguishable from *City of Sacramento, supra,* 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522, where the state risked the loss of subsidies and tax credits for all its resident businesses if it failed to comply with federal legislation. Here, the State was not compelled by federal law to impose any particular requirement. Instead, as in *Hayes, supra,* 11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, the Regional Board had discretion to fashion requirements which it determined would meet the CWA's maximum extent practicable standard.

[8] **[9]** The State argues the Commission failed to account for the flexibility in the CWA's regulatory scheme, which conferred discretion on the State and regional boards in deciding what conditions were necessary to comply with the CWA. In exercising that discretion, those agencies were required to rely on their scientific, technical, and experiential knowledge. Thus, the State contends the Permit itself is the best indication of what requirements *would have been imposed* by the EPA if the Regional Board had not done so, and the Commission should have deferred to *****61** the board's determination of what conditions federal law required. We disagree that the Permit itself demonstrates what conditions would have been imposed had the EPA granted the Permit. In issuing the Permit, the Regional Board was implementing both state and federal law and was authorized to include conditions more exacting than federal law required. (*City of Burbank, supra,* 35 Cal.4th at pp. 627–628, 26 Cal.Rptr.3d 304, 108 P.3d 862.) It is simply not the case that, because a condition was in the Permit, it was, ipso facto, required by federal law.

[10] **[11]** We also disagree that the Commission should have deferred to the Regional Board's conclusion that the challenged requirements were federally mandated. That determination is largely a question of law. Had the Regional Board found, when imposing the disputed permit conditions, that those conditions were the only means by which the maximum extent practicable standard could be implemented, deference to the board's expertise in reaching that finding would be appropriate. The board's legal authority to administer the CWA and its technical experience in water quality control would call on sister agencies as well as courts to defer to that finding. [15] The State, however, provides no authority for the proposition that, absent such a finding, the Commission should defer to a state agency as to whether requirements were state or federally mandated. Certainly, in a trial court action challenging a regional *board's authority* to impose specific permit conditions, the board's findings regarding what conditions satisfied the federal standard would be entitled to deference. (See, e.g., *City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4th 1377, 1384, 38 Cal.Rptr.3d 450, citing *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817–818, 85 Cal.Rptr.2d 696, 977 P.2d 693 ***769** .) Resolution of those questions would bring into play the particular technical expertise possessed by members of the regional board. In those circumstances, the party challenging the board's decision would have the burden of demonstrating its findings were not supported by substantial evidence or that the board otherwise abused its discretion. (*Rancho Cucamonga*, at p. 1387, 38 Cal.Rptr.3d 450; *Building Industry, supra,* 124 Cal.App.4th at pp. 888–889, 22 Cal.Rptr.3d 128.)

15 Of course, this finding would be case specific, based among other things on local factual circumstances.

Reimbursement proceedings before the Commission are different. The question here was not whether the Regional Board had authority to impose the challenged requirements.

It did. The narrow question here was who will pay for them. In answering that legal question, the Commission applied California's constitutional, statutory, and common law to the single issue of reimbursement. In the context of these proceedings, the State has the burden to show the challenged conditions were mandated by federal law.

[12] Section 6 establishes a general rule requiring reimbursement of all state-mandated costs. Government Code section 17556, subdivision (c), codifies an exception to that ****371** rule. Typically, the party claiming the applicability of an exception bears the burden of demonstrating that it applies. (See *Simpson Strong–Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 23, 109 Cal.Rptr.3d 329, 230 P.3d 1117; see also, *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 67, 172 Cal.Rptr.3d 56, 325 P.3d 460.) Here, the State must explain why federal law mandated these requirements, rather than forcing the Operators to prove the opposite. The State's proposed rule, requiring the Commission to defer to the Regional Board, would leave the Commission with no role to play on the narrow question of who must pay. Such a result would fail to honor the Legislature's *****62** intent in creating the Commission.

Moreover, the policies supporting article XIII B of the California Constitution and section 6 would be undermined if the Commission were required to defer to the Regional Board on the federal mandate question. The central purpose of article XIII B is to rein in local government spending. (*City of Sacramento, supra,* 50 Cal.3d at pp. 58–59, 266 Cal.Rptr. 139, 785 P.2d 522.) The purpose of section 6 is to protect local governments from state attempts to impose or shift the costs of new programs or increased levels of service by entitling local governments to reimbursement. (*County of San Diego, supra,* 15 Cal.4th at p. 81, 61 Cal.Rptr.2d 134, 931 P.2d 312.) Placing the burden on the state to demonstrate that a requirement is federally mandated, and thus excepted from reimbursement, serves those purposes.

Applying the standard of review described above, we evaluate the entire record and independently review the Commission's determination the challenged conditions were not federal mandates. We conclude the Commission was correct. These permit conditions were not federally mandated.

***770** *a) The inspection requirements*

[13] Neither the CWA's "maximum extent practicable" provision nor the EPA regulations on which the State relies expressly required the Operators to inspect these particular facilities or construction sites. The CWA makes no mention of inspections. (33 U.S.C. § 1342(p)(3)(B)(iii).) The regulations required the Operators to include in their permit application a description of priorities and procedures for inspecting certain industrial facilities and construction sites, but suggested that the Operators would have discretion in selecting which facilities to inspect. (See 40 C.F.R. § 122.26(d)(2)(iv)(C)(1).) The regulations do not mention commercial facility inspections at all.

Further, as the Operators explained, state law made the *Regional Board* responsible for regulating discharges of waste within its jurisdiction. (Wat. Code, §§ 13260, 13263.) This regulatory authority included the power to "inspect the facilities of any person to ascertain whether ... waste discharge requirements are being complied with." (Wat. Code, § 13267, subd. (c).) Thus, state law imposed an overarching mandate that the Regional Board inspect the facilities and sites.

In addition, federal law and practice required the Regional Board to inspect all industrial facilities and construction sites. Under the CWA, the State Board, as an issuer of NPDES permits, was required to issue permits for stormwater discharges "associated with industrial activity." (33 U.S.C. § 1342(p)(3)(A).) The term "industrial activity" includes "construction activity." (40 C.F.R. § 122.26(b)(14)(x).) The Operators submitted evidence that the State Board had satisfied its obligation by issuing a general industrial activity stormwater permit and a general construction activity stormwater permit. Those statewide permits imposed controls designed to reduce pollutant discharges from industrial facilities and construction sites. Under the CWA, those facilities and sites could operate under the statewide permits rather than obtaining site-specific pollutant discharge permits.

The Operators showed that, in those statewide permits, the State Board had placed responsibility for inspecting facilities and sites on the *Regional Board*. The Operators submitted letters from the EPA indicating the State and regional boards were responsible for enforcing the terms of the statewide permits. The Operators also noted the State Board was authorized *****63** to charge a fee to facilities and sites that subscribed to the statewide permits (****372** Wat. Code, § 13260, subd. (d)), and that a portion of that fee was earmarked to pay the Regional Board for "inspection and regulatory compliance issues." (Wat. Code, § 13260, subd. (d)(2)(B)

(iii).) Finally, there was evidence the Regional Board offered to pay the County to inspect industrial facilities. There would have been little reason to make that offer if federal law required the County to inspect those facilities.

***771** This record demonstrates that the Regional Board had primary responsibility for inspecting these facilities and sites. It shifted that responsibility to the Operators by imposing these Permit conditions. The reasoning of *Hayes, supra,* 11 Cal.App.4th 1564, 15 Cal.Rptr.2d 547, provides guidance. There, the EHA required the state to provide certain services to special education students, but gave the state discretion in implementing the federal law. (*Hayes*, at p. 1594, 15 Cal.Rptr.2d 547.) The state exercised its "true discretion" by selecting the specific requirements it imposed on local governments. As a result, the *Hayes* court held the costs incurred by the local governments were state-mandated costs. (*Ibid*.) Here, state and federal law required the Regional Board to conduct inspections. The Regional Board exercised its discretion under the CWA, and shifted that obligation to the Operators. That the Regional Board did so while exercising its permitting authority under the CWA does not change the nature of the Regional Board's action under section 6. Under the reasoning of *Hayes*, the inspection requirements were not federal mandates.

The State argues the inspection requirements were federally mandated because the CWA required the Regional Board to impose permit controls, and the EPA regulations contemplated that some kind of operator inspections would be required. That the EPA regulations contemplated some form of inspections, however, does not mean that federal law required the scope and detail of inspections required by the Permit conditions. [16] As explained, the evidence before the Commission showed the opposite to be true.

16 The State also relied on a 2008 letter from the EPA indicating that the requirements to inspect industrial facilities and construction sites fell within the maximum extent practicable standard under the CWA. That letter, however, does not indicate that federal law required municipal storm sewer system operators to inspect all industrial facilities and construction sites within their jurisdictions.

b) The trash receptacle requirement

[14] The Commission concluded the trash receptacle requirement was not a federal mandate because neither the CWA nor the regulation cited by the State explicitly required the installation and maintenance of trash receptacles. The State contends the requirement was mandated by the CWA and by the EPA regulation that directed the Operators to include in their application a "description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems." (40 C.F.R. § 122.26(d)(2)(iv)(A)(3).)

The Commission's determination was supported by the record. While the Operators were required to include a description of practices and procedures in their permit application, the issuing agency has discretion whether to make ***772** those practices conditions of the permit. (40 C.F.R. § 122.26(d)(2)(iv).) No regulation cited by the State required trash receptacles at *****64** transit stops. In addition, there was evidence that the EPA had issued permits to other municipal storm sewer systems in Anchorage, Boise, Boston, Albuquerque, and Washington, D.C. that did not require trash receptacles at transit stops. The fact the EPA itself had issued permits in other cities, but did not include the trash receptacle condition, undermines the argument that the requirement was federally mandated.

c) Conclusion

Although we have upheld the Commission's determination on the federal mandate question, the State raised other arguments in its writ petition. Further, the issues presented in the Operators' cross-petition were not addressed by either the trial court or the Court of Appeal. We remand the matter so those issues can be addressed in the first instance.

****373 III. DISPOSITION

We reverse the judgment of the Court of Appeal and remand for further proceedings consistent with our opinion.

Cantil–Sakauye, C.J., Werdegar, J., and Chin, J., concurred.

CONCURRING AND DISSENTING OPINION BY CUÉLLAR, J.

A local government is entitled to reimbursement from the state when the Legislature or a state agency requires it to provide new programs or increased service. (Cal. Const., art. XIII B, § 6, subd. (a).) But one crucial exception coexists with this rule. It applies where the new program or increased service is mandated by a federal statute or regulation. (Gov. Code, § 17556, subd. (c).) We consider in this case whether certain conditions to protect water quality included in a permit from the Regional Water Quality Control Board, Los Angeles Region (Regional Board or Board)—specifically, installation and maintenance of trash receptacles at transit stops, as well as inspections of certain commercial and industrial facilities and construction sites—constitute state mandates subject to reimbursement, or federal mandates within the statutory reimbursement exception.

What the majority concludes is that federal law did not compel imposition of the conditions, and that the local agencies would not necessarily have been required to comply with them had they not been imposed by the state. In doing so, the majority upholds and treats as correct a decision by the Commission on State Mandates (the Commission) that is flawed in its approach and far too parsimonious in its analysis. This is no small feat: not ***773** only must the majority discount any expertise the Regional Board might bring to bear on the mandate question (see maj. opn., *ante*, at pp. 768–769.), but it must also overlook the Commission's reliance on an overly narrow analytical framework and prop up the Commission's decision with evidence on which the agency *could have relied*, rather than that on which it did (see *id.* at pp. 770–772).

Moreover, when the majority considers whether the permit conditions are indeed federally mandated, it purports to apply de novo review to the Commission's legal determination. (See maj. opn., *ante*, at pp. 762, 768, 770.) What it actually applies seems far more deferential to the Commission's decision—something akin to substantial evidence review—despite the Commission's own failure in affording deference *****65** to the Regional Board and, more generally, its reliance on the wrong decisionmaking framework. (Cf. *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052, 63 Cal.Rptr.3d 82, 162 P.3d 596 ["A substantial evidence inquiry examines the record in the light most favorable to the judgment and upholds it if the record contains reasonable, credible evidence of solid value upon which a reasonable trier of fact *could* have relied in reaching the conclusion in question"].) Indeed, what the majority overlooks is that the Commission itself should have considered the effect of the evidence on which the majority now relies in deciding whether the challenged permit conditions were necessary to comply with federal law. And in doing so, the Commission should have extended a measure of deference to the Regional Board's expertise in administering the statutory scheme. (See *County of Los Angeles v. Cal. State Water Resources Control Bd.* (2006) 143 Cal.App.4th 985, 997, 50 Cal.Rptr.3d 619 (*State Water Board*).)

Because the Commission failed to do so, and because the Commission's interpretation of the federal Clean Water Act (the CWA; 33 U.S.C. § 1251 et seq.) failed to account for the complexities of the statute, I would reverse the Court of Appeal's judgment and remand with instructions for the Commission to reconsider its decision. So I concur in the majority's judgment reversing the Court of Appeal, but dissent from its conclusion upholding the Commission's decision rather than remanding the matter for further proceedings.

I.

To determine whether it is the state rather than local governments that should bear ****374** the entirety of the financial burden associated with a new program or increased service, the Commission must examine the nature of the federal scheme in question. That scheme is the CWA, a statute Congress amended in 1972 to establish the National Pollutant Discharge Elimination System (the NPDES) as a means of achieving and enforcing limitations on ***774** pollutant discharges. (See *EPA v. State Water Resources Control Bd.* (1976) 426 U.S. 200, 203–204, 96 S.Ct. 2022, 48 L.Ed.2d 578.) The role envisioned for the states under the NPDES is a major one, encompassing both the opportunity to assume the primary responsibility for the implementation and enforcement of federal effluent discharge limitations by issuing permits as well as the discretion to enact requirements that are more onerous than the federal standard. (See 33 U.S.C. §§ 1251(b), 1342(b).)

But states undertaking such implementation must do so in a manner that complies with regulations promulgated by the Environmental Protection Agency (the EPA), as well as the CWA's broad provisions (including the "maximum extent practicable" standard (33 U.S.C. § 1342(p)(3)(B)(iii))), and subject to the EPA's continuing revocation authority (see *id.*, § 1342(c)(3)). Despite the breadth of the requirements the statute imposes on states assuming responsibility for permitting enforcement and the expansive nature of the EPA's revocation authority, neither the statute nor its implementing regulations include a safe harbor

provision establishing a minimum level of compliance with the federal standard—an absence the majority tacitly acknowledges. (See maj. opn., *ante*, at p. 767 ["the Regional Board was not required by federal law to impose any specific permit conditions"].) Instead, implementation of the federal mandate requires the state agency—here, the Regional Board—to exercise technical judgments about the feasibility of alternative permitting conditions ***66** necessary to achieve compliance with the federal statute.

With no statutory safe harbor that the Regional Board could have relied on to ensure the EPA's approval of the state permitting process, the Board interpreted the federal standard in light of the statutory text, implementing regulations, and its technical appraisal of potential alternatives. In discharging its own role, the Commission was then bound to afford the Regional Board a measure of "sister-agency" deference. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7, 78 Cal.Rptr.2d 1, 960 P.2d 1031 [explaining that "the binding power of an agency's *interpretation* of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation"].) In this case, the Regional Board informed localities that, in its view, the various permit conditions it imposed would satisfy the maximum extent practicable standard. The EPA agreed the requirements were within the scope of the federal standard. The Regional Board's judgment that these conditions will control pollutant discharges to the extent required by federal law is at the core of the agency's institutional expertise. That expertise merits a measure of deference because the Regional Board's ken includes not only its greater familiarity with the CWA (relative to other entities), but also technical knowledge relevant to judgments about the water quality consequences of particular permitting conditions relevant to the provisions of the *775 CWA. (See, e.g., 33 U.S.C. § 1342(p)(3)(B)(iii) [requiring that permits include "management practices, control techniques and system, design and engineering methods, and such other provisions as ... the State determines appropriate for the control of such pollutants"].) Casting aside the Regional Board's expertise on the issue at hand, the majority nonetheless upholds the Commission's ruling.

Remand to the Commission would have been the more appropriate course for multiple reasons. First, the Commission applied the wrong framework for its analysis. It failed to consider all the evidence relevant to whether the permit conditions were necessary for compliance with federal law. The commission compounded its error by relying on an interpretation of the CWA that misconstrues the federal statutory scheme governing the state permitting process.

375 In particular, the Commission treated the problem as essentially a simple matter of searching the statutory text and regulations for precisely the same terms used by the Regional Board's permit conditions. Unless the requirement in question is referenced explicitly in a federal statutory or regulatory provision, the Commission's analysis suggests, the requirement cannot be a federal mandate. With respect to trash receptacles, the Commission stated: "Because installing and maintaining trash receptacles at transit stops is not expressly required of cities or counties or municipal separate storm sewer dischargers in the federal statutes or regulations, these are activities that 'mandate costs that exceed the mandate in the federal law or regulation.' " And with respect to industrial facility inspections, the Commission said this: "Inasmuch as the federal regulation (40 CFR § 122.26 (c)) authorizes coverage under a statewide general permit for the inspections of industrial activities, and the federal regulation (40 CFR § 122.26 (d)(2)(iv)(D)) does not expressly require those inspections to be performed by the county or cities (or the 'owner or operator of the discharge') the Commission finds that the state has freely chosen to impose ***67 these activities on the permittees." (Fn. omitted.)

Existing law does not support this method of determining what constitutes a federal mandate. Instead, our past decisions emphasize the need to consider the implications of multiple statutory provisions and broader statutory context when interpreting federal law to determine if a given condition constitutes a federal mandate. (See *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 76, 266 Cal.Rptr. 139, 785 P.2d 522 (*City of Sacramento*); see also *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 890, 16 Cal.Rptr.3d 466, 94 P.3d 589 ["challenged state rules or procedures that are intended to implement an applicable federal law—and whose costs are, *in context*, de minimis—should be treated as part and parcel of the underlying federal mandate" (italics added)].) In contrast, *776 the Commission's overly narrow approach to determining what constitutes a federal mandate risks creating a standard that will never be met so long as the state retains any shred of discretion to implement a federal program. It cannot be that so long as a federal statute or regulation does not expressly require every permit term issued by a state agency, then the permit is a state, rather than a federal, mandate. But this is precisely how the Commission analyzed the issue—an analysis that, remarkably, the majority does

not even question. Instead, the majority combs the record for evidence that could have supported the result the Commission reached. In so doing, the majority implicitly acknowledges that the Commission's approach to resolving the question at the heart of this case was deficient.

But if the Commission applied the wrong framework for its analysis, the right course is to remand. Doing so would obviate the need to cobble together scattered support for a decision by the Commission that was premised, in the first instance, on the Commission's own misconstrual of the inquiry before it. Instead, we should give the Commission an opportunity to reevaluate its conclusion in light of the entire record and to, where appropriate, solicit further information from the parties to shed light on what permit conditions are necessary for compliance with federal law.

The potential consequences of allowing the Commission to continue on its present path are quite troubling. For if the law were as the Commission suggests, the state would be unduly discouraged from participating in federal programs like the NPDES—even though participation might otherwise be in California's interest—if the state knows ex ante that it will be unable to pass along the expenses to the local areas that experience the most costs and benefits from the mandate at issue. Our law on unfunded mandates does not compel such a result. Nor is there an apparent prudential rationale in support of it.

The Commission's approach also fails to appreciate the EPA's role in implementing (through its interpretation and enforcement of the CWA) statutory requirements that the CWA describes in relatively broad terms. Indeed, what may be "practicable" in Los Angeles ****376** may not be in San Francisco, much less in Kansas City or Detroit. (See *Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 889, 22 Cal.Rptr.3d 128 (*Building Industry Assn.*) [explaining that "the maximum extent practicable standard is a highly flexible concept that depends on balancing numerous factors, including the particular control's technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness"].) It also suggests a lack of understanding of two interrelated matters on which the Regional *****68** Board likely has expertise: the consequences of the measures included as permit conditions relative to any ***777** alternatives and the interpretation of a complex federal statute governing regulation of the environment.

Second, beyond failing to consider all the relevant evidence bearing on the necessity of the imposed permit conditions, the Commission failed to extend any meaningful deference to the Regional Board's conclusions—even though such deference was warranted given that the nature of the decisions involved in interpreting the CWA included evaluating appropriate alternatives and determining which of those were necessary to satisfy the federal standard. (See *State Water Board, supra,* 143 Cal.App.4th at p. 997, 50 Cal.Rptr.3d 619 ["we defer to the regional board's expertise in construing language which is not clearly defined in statutes involving pollutant discharge into storm drain sewer systems"]; *City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4th 1377, 1384, 38 Cal.Rptr.3d 450 (*Rancho Cucamonga*) ["consideration [should be] given to the [regional board's] interpretations of its own statutes and regulations"]; *Building Industry Assn., supra,* 124 Cal.App.4th at p. 879, fn. 9, 22 Cal.Rptr.3d 128 ["we do consider and give due deference to the Water Boards' statutory interpretations [of the CWA] in this case"]; see also *Cal. Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 389–390, 196 Cal.Rptr.3d 94, 362 P.3d 792 [explaining that "an agency's expertise and technical knowledge, especially when it pertains to a complex technical statute, is relevant to the court's assessment of the value of an agency interpretation"].) In the direct challenge to the permit at issue here, the local agencies argued that the Regional Board exceeded even those requirements associated with the maximum extent practicable standard, an argument the appellate court rejected in an unpublished section of its opinion. Because of its failure to afford any deference to the Regional Board or to conduct an analysis more consistent with the relevant standard of review, the Commission essentially forces the Board to defend its decision twice: once on direct challenge and a second time before the Commission.

Conditions as prosaic as trash receptacle requirements initially may not seem to implicate the Regional Board's expertise. Yet its unique experience and technical competence matter even with respect to these conditions, because the use of such conditions implicates a decision not to use alternatives that might require greater conventional expert judgment to evaluate. Moreover, the Regional Board is likely to accumulate a distinct and greater degree of knowledge regarding issues such as the reactions of stakeholders to different requirements, and related factors relevant to determining which conditions are necessary to satisfy the CWA's maximum extent practicable standard.

The Commission acknowledged that the State Water Resources Control Board—as well as the EPA—believed the permit requirements did not exceed ***778** this federal standard. "The comments of the State Water Board and U.S. EPA," the Commission noted, "assert that the permit conditions merely implement a federal mandate under the federal Clean Water Act and its regulations." But the Commission afforded these conclusions no clear deference in determining whether the requirements were state mandates.

Nor is the majority correct in suggesting that the Commission had only a limited responsibility, if it had one at all, to extend any deference to the Regional Board. (See maj. opn., *****69** *ante*, at pp. 768–769.) The Regional Board's judgment as to whether the imposed permit ****377** conditions were necessary to comply with federal law was a prerequisite to the Commission's own task, which was to review the Board's determination in light of all the relevant evidence. To the extent ambiguity exists as to whether the Regional Board's conclusions incorporated any findings that these conditions were necessary to meet the federal standard (see *id.* at pp. 768–769), remand to clarify the Board's position is in order. By instead simply upholding the Commission's conclusion without remand, the majority displaces any meaningful role for the Regional Board's expert judgment.

The majority does so even though courts have routinely emphasized the pivotal role regional boards play in interpreting the CWA's intricate mandate. (See *State Water Board, supra,* 143 Cal.App.4th at p. 997, 50 Cal.Rptr.3d 619; *Rancho Cucamonga, supra,* 135 Cal.App.4th at p. 1384, 38 Cal.Rptr.3d 450.) And for good reason: If the Regional Board's judgment is that the trash receptacle and inspection requirements are necessary to control pollutant discharges to the maximum extent practicable, such a conclusion is well within the purview of its expertise. Unsurprisingly, then, we have never concluded that the technical knowledge relevant to interpreting the requirements of the CWA—a statute that lacks a safe harbor and where discerning what phrases such as maximum extent practicable mean given existing conditions and technology is complex—lies beyond the ambit of the Regional Board's expertise, or otherwise proves distinct from the sort of expertise that merits deference.

Third, the Commission devoted insufficient attention in its analysis to the role of states in implementing the CWA, and to how that role can be harmonized with the significant protections against unfunded mandates that the state Constitution provides. (See Cal. Const., art. XIII B, § 6, subd. (a).) By allowing states to assume such an important role in implementing its provisions, the CWA reflects principles of cooperative federalism. (See 33 U.S.C. §§ 1251(b), 1342(b); see also *Boise Cascade Corp. v. EPA* (9th Cir. 1991) 942 F.2d 1427, 1430 ["The federal-state relationship established by the [Clean Water] Act is ... illustrated in Congress' goal of encouraging states to 'assume the major role in the operation of the NPDES program' "].) In accordance with the CWA's express provisions, California chose to assume ***779** the responsibility for implementation of the NPDES program in the state—a role that requires further specification of permitting conditions. (See 33 U.S.C. § 1342(c)(3) [states must administer permitting programs "in accordance with requirements of this section," including compliance with the maximum extent practicable standard].) In the process, the state must comply with the constitutional protections against unfunded mandates requiring reimbursement of localities if permit conditions exceed what is necessary to comply with the relevant federal mandate. But given the nature of the relevant CWA provisions —and particularly the maximum extent practicable standard —it is wrong to assume that the conditions at issue in this case exceed what is necessary to comply with the CWA simply because neither the statute nor its regulations explicitly mention those conditions. The consequence of that assumption, moreover, risks discouraging the state from assuming cooperative federalism responsibilities—and may even encourage the state to withdraw from administering the NPDES. Indeed, counsel for the state indicated at oral argument that if the Commission's reasoning were upheld— and the state were required to foot the bill for any *****70** conditions not expressly mentioned in the applicable federal statutes or regulations—it might think twice about entering into such arrangements of cooperative federalism.

In light of these concerns with the Commission's approach to this case, it is difficult to see the basis for—or utility of—upholding the Commission's decision, even under the inscrutable standard of review the majority employs. (See *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 586, 128 Cal.Rptr.2d 514 [substantial evidence review requires that all evidence be considered, including evidence that does not support the agency's decision]; see also *Sierra Club v. U.S. Army Corps of Engineers* (2d Cir. 1983) 701 F.2d 1011, 1030 ["the court may properly be skeptical as to whether an [agency report's] conclusions have a substantial basis in fact if the responsible agency has ****378** apparently ignored the conflicting views of other agencies having pertinent expertise"].) The better

course, in my view, would be for us to articulate the appropriate standard for evaluating the question whether these permit conditions are state mandates and then remand for the Commission to apply it in the first instance.

II.

The Commission relied on a narrow approach that only compares the terms of a permit with the text of the CWA and its implementing regulations. Instead, the Commission should have employed a more flexible methodology in determining whether the permit conditions were federally mandated. Such a flexible approach accords with our prior case law. (See *City of Sacramento, supra,* 50 Cal.3d at p. 76, 266 Cal.Rptr. 139, 785 P.2d 522 [whether local government appropriations are ***780** federally mandated and therefore exempt from taxing and spending limitations under § 9, subd. (b), of art. XIII B of the Cal. Const. depends on, inter alia, the nature and purpose of the federal program, whether its design suggests an intent to coerce, when state or local participation began, and the legal and practical consequences of nonparticipation or withdrawal].) Moreover, it would have the added benefit of not discouraging the state from participating in ventures of cooperative federalism.

The majority may be correct that the facts of *City of Sacramento* are distinguishable. (See maj. opn., *ante*, at p. 768.) In that case, the state risked forsaking subsidies and tax credits for its resident businesses if it failed to comply with federal law requiring that unemployment insurance protection be extended to local government employees. (*Id.* at p. 764.) Here, in contrast, the negative consequences of failing to comply with federal law may seem less severe, at least in fiscal terms: the EPA may determine that the state is not in compliance with the CWA and reassert authority over permitting. (See 33 U.S.C. § 1342(c)(3).) But *City of Sacramento* nonetheless remains relevant, even though a precisely comparable level of coercion may not exist here. The flexible approach we articulated in that case remains the best way to ensure that some weight is given to the Regional Board's technical expertise, and the conclusions resulting therefrom, while also taking account of the cooperative federalism arrangements built into the CWA.

So instead of adopting an approach foreign to our precedent, the Commission should have begun its analysis with the statutory and regulatory text—and then it should have considered other relevant materials and record evidence bearing on whether the permit conditions are necessary *****71** to satisfy federal law. Crucially, such evidence includes how the federal regulatory scheme operates in practice. The Commission could have examined, for instance, previous permits issued by the EPA in similarly situated jurisdictions, comparing them to the inspection and trash receptacle requirements the Regional Board imposed here and giving due consideration to the EPA's conclusion that the maximum extent practicable standard is applied in a highly site-specific and flexible manner in order to account for unique local challenges and conditions. (See 64 Fed. Reg. 68722, 68754 (Dec. 8, 1999).) The Commission could also have considered whether, instead of identifying permitting conditions necessary to comply with the CWA, the state shifted onto local governments responsibility to conduct inspections or provide trash receptacles. The majority wisely notes that these are factors the Commission *could* have examined. (See maj. opn., *ante*, at pp. 770–772.) But the Commission mentioned this evidence only briefly, failing to grapple in any meaningful way with its implications for the issue at hand. We should allow the Commission an opportunity to do so in the first instance.

***781** The Commission should have also accorded appropriate deference to the Regional Board's conclusions regarding how best to comply with the federal maximum extent practicable standard. One way to ensure that such deference is given would be to place on the party seeking reimbursement the burden of demonstrating that the challenged permit conditions clearly exceed the federal standard, or that they were otherwise unnecessary ****379** to reduce pollutant discharges to the maximum extent practicable. Doing so would make sense where the state is implementing a federal program that envisions routine state participation, the federal program does not itself define the minimum degree of compliance required, and the state's implementing agency reasonably determines in its expertise that certain conditions are necessary to comply with the applicable federal standard.

* * *

The Commission's decision—and the approach that produced it—fails to accord with existing law and with the nature of the applicable federal scheme. The state is not responsible for reimbursing localities for permit conditions that are necessary to comply with federal law, a circumstance that renders interpretation of the CWA central to this case. A core principle of the CWA is to facilitate cooperative federalism, by allowing states to take on a critical responsibility in exchange

for compliance with a set of demanding standards overseen by a federal agency capable of withdrawing approval for noncompliance. (See *Arkansas v. Oklahoma* (1992) 503 U.S. 91, 101, 112 S.Ct. 1046, 117 L.Ed.2d 239 ["The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters' "]; *Shell Oil Co. v. Train* (9th Cir. 1978) 585 F.2d 408, 409 ["Shell's complaint must be read against the background of the cooperative federal-state scheme for the control of water pollution"].) The Commission failed to interpret the statute in light of nuances in its text and structure. And it failed to offer even a modicum of deference to the Regional Board's interpretation, despite the Board's clear expertise that the technical nature of the questions necessary to interpret the scope of the CWA demands.

Accordingly, I would remand the matter to the Court of Appeal with directions that it instruct the Commission to reconsider its decision. On reconsideration, the Commission should appropriately defer to the ***72** Regional Board, consider all relevant evidence bearing on the question at hand, and ensure the evidence clearly shows the challenged permit conditions were not necessary to comply with the federal mandate. This is the standard that most ***782** thoroughly reflects our existing law and the nature of the CWA. Any dilution of it exacerbates the risk of undermining the nuanced federal-state arrangement at the heart of the CWA.

Liu, J., and Kruger, J., concurred.

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85 Cal.App.5th 535
Court of Appeal, Third District, California.

DEPARTMENT OF FINANCE et al.,
Plaintiffs, Cross-defendants and Appellants,
v.
COMMISSION ON STATE MANDATES, Defendant and Respondent;
County of San Diego et al., Defendants, Cross-complainants and Appellants.

C092139
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Filed October 24, 2022

Synopsis

Background: State petitioned for writ of administrative mandate, asserting that Commission on State Mandates erred in ruling that six of eight conditions State imposed on stormwater discharge permit held by local governments were reimbursable mandates. Local governments filed cross-petition challenging decision of non-reimbursability as to two conditions. The Superior Court, Sacramento County, Allen Sumner, J., granted State's petition in part. Local governments appealed. The Third District Court of Appeal, 18 Cal.App.5th 661, 226 Cal.Rptr.3d 846, reversed and remanded. The Superior Court, Sacramento County, No. 34201080000604CUWMGDS, upheld Commission's decision in its entirety, finding six permit conditions were reimbursable mandates and two were not, and denied both petitions. State appealed and local governments cross-appealed.

Holdings: The Court of Appeal, Hull, Acting P.J., held that:

[1] doctrine of law of the case did not preclude determination of whether permit conditions were reimbursable state mandates;

[2] permit conditions were new program;

[3] permit conditions were mandated by State;

[4] statute declaring meaning of term "sewer" did not apply retroactively to Commission's decision;

[5] local governments lacked authority to impose stormwater drainage fees to pay costs of non-development-related permit conditions;

[6] local governments had authority to charge street-sweeping fees; and

[7] local governments had authority to impose valid regulatory fees on developers for costs of complying with development-related conditions.

Affirmed in part and reversed in part.

Procedural Posture(s): On Appeal; Review of Administrative Decision.

West Headnotes (80)

[1] **States** Judgment and relief

Court of Appeal's statement, on prior appeal from trial court's disposition of State's petition for writ of administrative mandate challenging determination of Commission on State Mandates regarding reimbursability of conditions in stormwater discharge permit, that permit conditions were state mandates was premature dictum, and, thus, doctrine of law of the case did not preclude Court of Appeal, on subsequent appeal from trial court's denial of petition on remand, from determining whether permit conditions were reimbursable state mandates; only issue determined by trial court and subject to first appeal was whether conditions were federal mandates, and appellate decision that conditions were not federal mandates did not mean they were automatically reimbursable state mandates. Cal. Const. art. XIII B, § 6.

More cases on this issue

[2] **States** Particular orders or proclamations
Statutes Questions of law or fact

Whether a statute or executive order imposes a reimbursable mandate under California's constitutional mandate provision is a question of law. Cal. Const. art. XIII B, § 6.

[3] **States** State Expenses and Charges; Statutory Liabilities

For purposes of the reimbursable state mandate provision of the California Constitution, a "program" refers to either programs that carry out the governmental function of providing services 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. Cal. Const. art. XIII B, § 6.

[4] **States** State Expenses and Charges; Statutory Liabilities

In the California constitutional provision governing reimbursable state mandates, the term "higher level of service" refers to state-mandated increases in the services provided by local agencies in existing programs. Cal. Const. art. XIII B, § 6.

[5] **Environmental Law** Discharge of pollutants

Water pollution abatement conditions of stormwater drainage permit that State issued to local governments pursuant to National Pollutant Discharge Elimination System (NPDES) required local governments to provide services which they had not provided before, as necessary for permit conditions to constitute new program for purposes of constitutional requirement of subvention for state mandates, even though underlying obligation to abate pollution was unchanged from prior permits; new permit required local governments, which had already been providing stormwater drainage services, to provide new program of water pollution abatement services in new forms. Cal. Const. art. XIII B, § 6; Federal Water Pollution Control Act §§ 402, 502, 33 U.S.C.A. §§ 1342, (D), 1362(5); Cal. Water Code §§ 13376, 13050(c); 40 C.F.R. §§ 122.21, 122.22, 123.25.

[6] **Environmental Law** Discharge of pollutants

Water pollution abatement services that State required local governments to implement as conditions of stormwater drainage permit were meant to carry out governmental function of providing services to public, as necessary for such conditions to constitute new program within meaning of California's constitutional subvention requirement for state mandates imposed on local governments, even though conditions arose under federal and state National Pollutant Discharge Elimination System (NPDES) program rather than being imposed directly upon local governments by law; subvention requirement did not exempt programs arising as conditions of regulatory permits, and permit conditions were not bans or limits on pollution levels, but, rather required performance of specific actions. Cal. Const. art. XIII B, § 6; Federal Water Pollution Control Act §§ 402, 502, 33 U.S.C.A. §§ 1342, (D), 1362(5); Cal. Water Code §§ 13376, 13050(c); 40 C.F.R. §§ 122.21, 122.22, 123.25.

[7] **States** State Expenses and Charges; Statutory Liabilities

California's constitutional subvention requirement for state mandates imposed on local governments applies whenever a new program is imposed directly by law or as a condition of a regulatory permit required by a state agency. Cal. Const. art. XIII B, § 6.

[8] **States** State Expenses and Charges; Statutory Liabilities

Generally, if a local government participates voluntarily, that is, without legal compulsion or compulsion as a practical matter, in a program with a rule requiring increased costs, there is no requirement of state reimbursement under California's constitutional subvention provision; however, that a local governmental entity makes an initial discretionary decision that in turn triggers mandated costs does not by itself preclude reimbursement under this provision, as

the discretionary decision may have been the result of compulsion as a practical matter. Cal. Const. art. XIII B, § 6.

[9] **States** State Expenses and Charges; Statutory Liabilities

For purposes of the constitutional requirement of subvention regarding state mandates, being compelled, as a practical matter, to participate in a state program with a rule requiring increased costs may arise, among other instances, when a local governmental entity or its constituents face certain and severe penalties or consequences for not participating in or complying with an optional state program. Cal. Const. art. XIII B, § 6.

[10] **Environmental Law** Discharge of pollutants

As a practical matter, local governments had no realistic alternative to applying for National Pollutant Discharge Elimination System (NPDES) permits for their stormwater drainage activities and comply with State-imposed permit conditions requiring permittees to implement new water pollution abatement systems, and, thus, local governments' voluntary decision to provide stormwater drainage services did not preclude finding that water pollution abatement conditions were State mandates triggering constitutional subvention requirement; city drainage, which served interest of public health and welfare, was important purpose for which police power could be exercised, and as a matter of practical reality, urbanized cities and counties could not simply cease providing stormwater drainage system. Cal. Const. art. XIII B, § 6; Federal Water Pollution Control Act § 402, 33 U.S.C.A. § 1342(p)(2)(C), (D).

[11] **Environmental Law** Discharge of pollutants

Need for both public and private parties that discharged pollution from point sources into waters to obtain National Pollutant Discharge Elimination System (NPDES) permit to do so was irrelevant to issue of whether State's requirement that local governments provide new water pollution abatement services as conditions of stormwater discharge permits triggered constitutional requirement of reimbursement for state mandates on local governments; what was relevant was that local governments were compelled by state law, including Water Code provisions implementing federal NPDES program, to obtain permit and comply with its conditions. Cal. Const. art. XIII B, § 6; Federal Water Pollution Control Act §§ 402, 502, 33 U.S.C.A. §§ 1342, (D), 1362(5); Cal. Water Code §§ 13376, 13050(c); 40 C.F.R. §§ 122.21, 122.22, 123.25.

[12] **States** State Expenses and Charges; Statutory Liabilities

To determine whether a program imposed on a local government by a permit is new, for purposes of determining whether the California Constitution requires subvention of the local government's expenses in complying with new state mandates, a court compares the legal requirements imposed by the new permit with those in effect before the new permit became effective, even if the conditions were designed to satisfy the same standard of performance. Cal. Const. art. XIII B, § 6.

[13] **States** State Expenses and Charges; Statutory Liabilities

The California Constitution's subvention for costs incurred by a local government when the state requires it to provide a new program or increased level of service unless the local government has authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service, excludes expenses that are recoverable from sources other than taxes. Cal. Const. art. XIII B, § 6; Cal. Gov't Code § 17556(d).

[14] **States** State Expenses and Charges; Statutory Liabilities

The constitutional provision governing subvention when the state requires a local government to provide a new program was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill-equipped to handle the task; specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Cal. Const. art. XIII B, § 6.

[15] **States** State Expenses and Charges; Statutory Liabilities

Although the language of the California constitutional subvention provision broadly declares that the "state shall provide a subvention of funds to reimburse…local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context, this provision requires subvention only when the costs in question can be recovered solely from tax revenues. Cal. Const. art. XIII B, § 6; Cal. Gov't Code § 17556(d).

[16] **Municipal Corporations** Power and Duty to Tax in General

Local governments have authority pursuant to their constitutional police powers to levy regulatory and development fees. Cal. Const. art. 11, § 7.

[17] **Environmental Law** Power to regulate

Prevention of water pollution is a legitimate governmental objective, in furtherance of which a local government's constitutional police power may be exercised. Cal. Const. art. 11, § 7.

[18] **Statutes** Plain language; plain, ordinary, common, or literal meaning

Statutes Relation to plain, literal, or clear meaning; ambiguity

If the language of a statute is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend.

[19] **Statutes** Purpose and intent; determination thereof

Statutes Plain, literal, or clear meaning; ambiguity

If statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.

[20] **Statutes** Construction based on multiple factors

Courts consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.

[21] **Statutes** Construction and operation of initiated statutes

Courts apply the principles of statutory interpretation to the interpretation of voter initiatives, except that they do so to determine the voters' intent.

[22] **Statutes** Construction and operation of initiated statutes

When interpreting a voter initiative, the court turns first to the initiative's language, giving the words their ordinary meaning as understood by the average voter.

[23] **Statutes** Construction and operation of initiated statutes

Absent ambiguity, courts presume that the voters intend the meaning apparent on the face of an initiative measure.

[24] **Statutes** Construction and operation of initiated statutes

A court may not add to a statute or voter initiative or rewrite it to conform to an assumed intent that is not apparent in its language.

[25] **Statutes** Construction and operation of initiated statutes

Where there is ambiguity in the language of a voter initiative, ballot summaries and arguments may be considered when determining the voters' intent and understanding of the ballot measure.

[26] **Statutes** Construction and operation of initiated statutes

Ambiguities in voter initiatives may be resolved by referring to the contemporaneous construction of the Legislature.

[27] **Statutes** Dictionaries

Courts may look to dictionary definitions to determine the usual and ordinary meaning of a statutory term.

2 Cases that cite this headnote

[28] **Statutes** Dictionaries

Courts do not start and end statutory interpretation with dictionary definitions.

2 Cases that cite this headnote

[29] **Statutes** Literal, precise, or strict meaning; letter of the law

Statutes Construing together; harmony

The "plain meaning" rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute.

[30] **Statutes** Context

Statutes Subject or purpose

The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible.

1 Case that cites this headnote

[31] **Statutes** Literal, precise, or strict meaning; letter of the law

Literal construction of a statute should not prevail if it is contrary to the legislative intent apparent in the statute; the intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.

[32] **States** State Expenses and Charges; Statutory Liabilities

At time of subvention decision by Commission on State Mandates, term "sewer," in initiative-adopted constitutional article generally requiring voter approval before local government could impose assessments and property-related fees but exempting fees for sewer, water, and refuse collection, referred only to sanitary sewers, not stormwater drainage systems, for purposes of determining whether local governments had authority to recover costs of complying with State-mandated conditions on stormwater drainage permit; constitutional article at issue was to be construed to limit local government revenue and enhance taxpayer consent, and article used "sewers" distinctly from "drainage systems," which legislation implementing initiative defined so as to include stormwater drainage. Cal. Const. art. XIII B, § 6; Cal. Const. art. XIII D, §§ 5, 6; Cal. Gov't Code § 53750(d).

[33] **Constitutional Law** Giving effect to every word

Statutes Statute as a Whole; Relation of Parts to Whole and to One Another

If possible, courts construe statutes and constitutional provisions to give meaning to every word, phrase, sentence, and part of an act.

[34] **Statutes** Construction based on multiple factors

When the Legislature or voters use different words in the same sentence of a statute or ballot initiative, courts assume they intended the words to have different meanings; were it not so, the use of the terms to convey the same meaning would render them superfluous, an interpretation courts are to avoid.

[35] **Statutes** Express mention and implied exclusion; expressio unius est exclusio alterius

Under the maxim "expressio unius est exclusio alterius," when language is included in one portion of a statute, its omission from a different portion addressing a similar subject suggests that the omission was purposeful, and that the Legislature intended a different meaning.

[36] **States** State Expenses and Charges; Statutory Liabilities

Decision of Commission on State Mandates requiring State to reimburse local governments for costs of complying with six water pollution abatement conditions of stormwater discharge permits but finding that constitutional subvention provision did not apply to two other conditions was not final for purpose of determining whether statute clarifying and defining "sewer," for purposes of voter-approval exception to subvention requirement, applied retroactively to decision at issue; Commission's decision was still under judicial review and subject to direct attack. Cal. Const. art. XIII B, § 6; Cal. Const. art. XIII D, §§ 5, 6; Cal. Gov't Code § 53751.

[37] **Administrative Law and Procedure** Conclusiveness

To be final so as to be binding on the parties and immune from retroactive or clarifying legislation, as opposed to being final in the sense of administrative finality, an administrative decision must be free from direct attack by a petition for writ of administrative mandate either because a judgment resolving such a petition has become final and conclusive or because a petition was not timely filed.

1 Case that cites this headnote

[38] **Statutes** Language and Intent; Express Provisions

Statutes do not operate retrospectively unless the Legislature plainly intended them to do so.

[39] **Constitutional Law** Retrospective laws and decisions; change in law

Statutes Language and Intent; Express Provisions

When the Legislature clearly intends a statute to operate retrospectively, courts are obliged to carry out that intent unless due process considerations prevent them. U.S. Const. Amend. 14.

[40] **Statutes** Declaratory, clarifying, and interpretive statutes

A statute that merely clarifies, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment.

[41] **Statutes** Presumptions

Courts assume the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law.

[42] **Statutes** Presumptions

The circumstances surrounding a statutory amendment can indicate that the Legislature made material changes in statutory language in an effort only to clarify a statute's true meaning; such a legislative act has no retrospective effect because the true meaning of the statute remains the same.

[43] **Statutes** Application to pending actions and proceedings

A statute that merely clarifies, rather than changes, existing law is properly applied to transactions predating its enactment; however, a statute might not apply retroactively when it substantially changes the legal consequences of past actions, or upsets expectations based in prior law.

[44] **Constitutional Law** Interpretation of statutes

The interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts. Cal. Const. art. 6, § 1.

[45] **Constitutional Law** Overturning judgment

When the California Supreme Court finally and definitively interprets a statute, the Legislature does not have the power to then state that a later amendment merely declared existing law.

[46] **Statutes** Legislative Construction

If the courts have not yet finally and conclusively interpreted a statute and are in the process of doing so, a declaration of a later Legislature as to what an earlier Legislature intended is entitled to consideration regarding the statute's meaning, but even then, a legislative declaration of an existing statute's meaning is but a factor for a court to consider and is neither binding nor conclusive in construing the statute.

[47] **Statutes** Legislative Construction

Statutes Clarifying statutes

A legislative declaration that a statutory amendment merely clarified existing law cannot be given an obviously absurd effect, and the court cannot accept the legislative statement that an unmistakable change in the statute is nothing more than a clarification and restatement of its original terms; material changes in language, however, may simply indicate an effort to clarify the statute's true meaning.

[48] **Statutes** Clarifying statutes

A statutory amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute; if the amendment was enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act, a formal change, rebutting the presumption of substantial change.

[49] **Statutes** Clarifying statutes

Courts look to the surrounding circumstances as well as the Legislature's intent when determining whether a statute changed or merely clarified the law.

[50] **States** State Expenses and Charges; Statutory Liabilities

Statute declaring that term "sewer," as used in constitutional article generally subjecting property-related fees imposed by local governments to two-step approval process, included stormwater drainage systems changed the law, for purposes of determining whether statute applied retroactively to constitutional subventions for local governments' costs of complying with conditions of storm drainage permits as mandated by State; legislature

adopted statute to abrogate prior Court of Appeal decision that had excluded storm drainage systems from definition of "sewer," and legislature did so 15 years after decision's issuance rather than soon after controversy arose concerning term's interpretation. Cal. Const. art. XIII B, § 6; Cal. Const. art. XIII D, §§ 5, 6; Cal. Gov't Code § 53751.

[51] **Statutes** Nature and definition of retroactive statute

A new law operates retroactively when it changes the legal consequences of past conduct by imposing new or different liabilities based upon such conduct.

[52] **Statutes** Language and Intent; Express Provisions

Unless there is an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature must have intended a retroactive application.

[53] **Constitutional Law** Policy

A statute's retroactivity is, in the first instance, a policy determination for the Legislature and one to which courts defer absent some constitutional objection to retroactivity.

[54] **Statutes** Language and Intent; Express Provisions

A statute that is ambiguous with respect to retroactive application is construed to be unambiguously prospective.

[55] **States** State Expenses and Charges; Statutory Liabilities

Legislative intent was unclear as to whether statute defining term "sewer" to include drainage systems for purposes of constitutional subvention of costs incurred by local governments in response to state mandates should apply retroactively, and, thus, statute would not apply retroactively to Commission on State Mandates decision, which had held that costs local governments incurred in fulfilling pollution-abatement conditions of stormwater drainage permit were subject to subvention; Legislature did not expressly state intent for retroactive application, and Legislature's statement that statute "reaffirmed and reiterated" that "sewer," for subvention purposes, had definition provided by Public Utilities Code was incorrect, as Legislature had never indicated such meaning before. Cal. Const. art. XIII B, § 6; Cal. Const. art. XIII D, §§ 5, 6; Cal. Gov't Code § 53751; Cal. Pub. Util. Code § 230.5.

[56] **Statutes** Language and Intent; Express Provisions

Where the Legislature's statement that, in new legislation, the Legislature reaffirmed and reiterated a prior position is erroneous, especially when the new legislation changed the law, the statement is insufficient to establish a very clear expression that the new legislation should have retroactive effect.

[57] **States** State Expenses and Charges; Statutory Liabilities

Legislation that provided process whereby a party could request reconsideration of a prior decision by Commission on State Mandates based on subsequent change of law did not indicate that statute defining term "sewer" for subvention purposes to include stormwater drainage systems could apply retroactively to date of Commission decision holding that costs local governments incurred in satisfying pollution-abatement conditions of stormwater drainage permit were subject to subvention; State had not sought reconsideration of Commission's decision, and even if it had, Commission could not revise subvention requirements starting earlier than fiscal year prior to year in which State had sought reconsideration, as necessary to affect years-prior decision on stormwater

drainage permit conditions. Cal. Const. art. XIII B, § 6; Cal. Const. art. XIII D, §§ 5, 6; Cal. Gov't Code §§ 17514, 17556(b), 17570, 53751.

[58] **States** State Expenses and Charges; Statutory Liabilities

Local governments lacked authority to impose stormwater drainage fees to pay costs of complying with pollution-abatement conditions of stormwater drainage permit, and, thus, exception, in constitutional provision generally requiring subvention of costs of compliance with new programs mandated by State, for costs that local governments had authority to recover themselves did not apply to permit conditions, as might have prevented subvention; local governments could not levy property-related fees for stormwater drainage services without voter approval, as served purpose of subvention, namely, to preclude State from shifting financial responsibility for carrying out government functions to local agencies that lacked authority to assume increased costs on their own. Cal. Const. art. XIII B, § 6; Cal. Const. art. XIII D, § 6.

[59] **Municipal Corporations** Cleaning streets

States State Expenses and Charges; Statutory Liabilities

Street-sweeping condition that State entities imposed on local governments as condition of stormwater drainage permits constituted refuse collection, and, thus, under constitutional exemption of fees for water, sewer, and refuse collection services from general requirement of voter approval for property-related fees, local governments had authority to charge such fees to recoup costs of street sweeping without voter approval, such that costs were not subject to subvention under constitutional provision applying to new programs mandated by State; condition expressly required local governments to collect trash and debris, which constituted "refuse," and Public Resources Code authorized local governments to charge fee for refuse collection services. Cal. Const. art. XIII B, § 6; Cal. Const. art. XIII D, § 6; Cal. Gov't Code § 17556(d); Cal. Pub. Res. Code § 40059.

[60] **States** State Expenses and Charges; Statutory Liabilities

The State's purpose for imposing a mandate does not determine whether the mandate is a new program for purposes of the constitutional requirement of subvention of local government's costs arising under new, State-mandated programs. Cal. Const. art. XIII B, § 6.

[61] **States** Presumptions and burden of proof

Typically, the party claiming the applicability of an exception to subvention under the California Constitution bears the burden of demonstrating that it applies. Cal. Const. art. XIII B, § 6.

[62] **States** Presumptions and burden of proof

On State's petition for writ of administrative mandate challenging decision by Commission on State Mandates that found street-sweeping condition of stormwater discharge permits, as imposed by State, was subject to subvention because local governments, as permittees, lacked authority to levy fees to pay for street sweeping, State bore burden of establishing that local governments had fee authority, but such burden did not require State to prove local governments were able, as a matter of law and fact, to promulgate fee that satisfied substantive requirements of constitutional article setting forth process and limits for local property-related fees. Cal. Const. art. XIII B, § 6; Cal. Const. art. XIII D; Cal. Gov't Code § 17556(d).

[63] **States** Questions of Law or Fact

The issue of whether local governments have the authority, that is, the right or power, to levy fees sufficient to cover the costs of a state-mandated program, for purposes of the constitutional subvention requirement, is an issue of law, not a question of fact. Cal. Const. art. XIII B, § 6.

[64] **States** State Expenses and Charges; Statutory Liabilities

Unless it can be shown on undisputed facts in the record or as a matter of law that a fee cannot satisfy the substantive requirements of the constitutional article limiting local authority to impose property-related fees, the establishment by the State of a local agency's power or authority to levy a fee without voter approval or without being subject to other limitations establishes that a local government has sufficient fee authority for purposes of a subvention proceeding before the Commission on State Mandates. Cal. Const. art. XIII B, § 6; Cal. Gov't Code § 17556(d).

[65] **States** State Expenses and Charges; Statutory Liabilities

Constitutional requirement of voter approval for property-related assessments and fees did not apply to any fees local governments would levy to recover costs of developing and implementing hydromodification management plan (HMP) and low impact development (LID) requirements for priority development projects, which were conditions of stormwater discharge permits State granted to local governments, for purposes of determining whether local governments' authority to implement fees precluded subvention of HMP and LID plan costs; constitutional provision containing voter approval requirement did not apply to fees imposed on real property development or on property owners for their voluntary decision to apply for government benefit, namely, approval of new real property development application. Cal. Const. art. XIII B, § 6; Cal. Const. art. XIII D, §§ 1, 6.

[66] **Municipal Corporations** Benefits to Property

Constitutional article restricting imposition of property-related fees does not apply to fees imposed on property owners for their voluntary decision to apply for a government benefit. Cal. Const. art. XIII D, § 1 et seq.

[67] **States** State Expenses and Charges; Statutory Liabilities

Voter-adopted ballot initiative which amended constitution to define local tax subject to voter approval as "any levy, charge, or exaction of any kind imposed by a local government" except for certain charges and fees was not retroactive, and, thus, constitutional amendment's definitions of "tax" and "fee" did not apply to subvention decision of Commission on State Mandates which was rendered before voters approved such amendment. Cal. Const. art. XIII C, §§ 1(e), 2.

[68] **Municipal Corporations** Submission to voters, and levy, assessment, and collection

A levy qualifies as a "regulatory fee," for purposes of the constitutional exemption of certain regulatory fees from the general requirement of voter approval of local taxes related to property, if (1) the amount of the fee does not exceed the reasonable costs of providing the services for which it is charged, (2) the fee is not levied for unrelated revenue purposes, and (3) the amount of the fee bears a reasonable relationship to the burdens created by the feepayers' activities or operations; if those conditions are not met, the levy is a "tax." Cal. Const. art. XIII C, § 2; Cal. Const. art. XIII D, § 1.

[69] **Municipal Corporations** Submission to voters, and levy, assessment, and collection

Whether a levy constitutes a fee or a tax, for purposes of the general constitutional requirement of voter approval for local taxes related to property, is question of law determined upon independent review of record. Cal. Const. art. XIII C, § 2; Cal. Const. art. XIII D, § 1.

[70] **States** State Expenses and Charges; Statutory Liabilities

Local governments failed to establish that, as a matter of law, they would be unable to impose levy in amount that would not exceed reasonable costs of providing service for which levy would be charged, namely, costs of implementing certain water pollution mitigation measures as conditions of approving priority development projects, which State required local governments to implement as condition of stormwater development permits, and, thus, "amount of levy" requirement did not weigh in favor of finding that levy would be tax subject to constitutional requirement of voter approval rather than development or regulatory fee exempt from voter approval; mathematical precision was unnecessary in setting fee, and nothing in record indicated fees could not bear reasonable relationship to costs. Cal. Const. art. XIII C, § 2; Cal. Const. art. XIII D, § 1.

[71] **States** Questions of Law or Fact

Local governments failed to establish that, as a matter of law, they would be unable to impose levy on developers that would bear reasonable relationship to burdens created by future priority development, as factor in analysis of whether any levy imposed by local governments to recoup costs they incurred in complying with State mandate of including certain water pollution mitigation measures as conditions of approval of priority development projects would be tax subject to constitutional voter approval requirement or would be development or regulatory fee exempt from such requirement, where local governments would not levy fees to generate general revenue. Cal. Const. art. XIII C, § 2; Cal. Const. art. XIII D, § 1.

[72] **Municipal Corporations** Submission to voters, and levy, assessment, and collection

A regulatory fee does not become a tax, for purposes of the constitutional requirement of voter approval of property-related taxes, simply because the fee may be disproportionate to the service rendered to individual payors. Cal. Const. art. XIII C, § 2; Cal. Const. art. XIII D, § 1.

[73] **Municipal Corporations** Submission to voters, and levy, assessment, and collection

The question of proportionality of property-related fees, for purposes of determining whether they are in actuality taxes subject to the constitutional requirement of voter approval, is not measured on an individual basis; rather, it is measured collectively, considering all rate payors. Cal. Const. art. XIII C, § 2; Cal. Const. art. XIII D, § 1.

[74] **Municipal Corporations** Power and Duty to Tax in General

Permissible regulatory fees, as opposed to taxes, must be related to the overall cost of the governmental regulation; they need not be finely calibrated to the precise benefit each individual fee payor might derive or the precise burden each payor may create.

[75] **Municipal Corporations** Power and Duty to Tax in General

What a regulatory fee cannot do is exceed the reasonable cost of regulation with the generated surplus used for general revenue collection; an excessive fee that is used to generate general revenue becomes a tax.

[76] **Municipal Corporations** Power and Duty to Tax in General

The substantive test for whether a purported fee is sufficiently proportionate to constitute a valid regulatory fee rather than a tax is a flexible assessment of proportionality within a broad range of reasonableness in setting fees; this flexibility is particularly appropriate where an obvious or accepted method such as an emissions-based fee is impractical.

[77] **Municipal Corporations** Power and Duty to Tax in General

Regulatory fees, unlike other types of user fees, often are not easily correlated to a specific, ascertainable cost; in those cases, even a flat-fee system may be a reasonable means of allocating costs, such that the fees would not be so disproportionate to the costs as to become taxes.

[78] **Municipal Corporations** Public improvements

Any fees that local governments might levy against certain developers to recover costs of creating and implementing hydromodification management plan (HMP) and low impact development (LID) requirements for priority development projects were imposed for specific government service provided directly to developers, as payors, but not provided to those not charged, as necessary for fees to fall into "specific government service" exception to constitutional definition of "tax"; service provided directly and solely to developers of priority development projects, who were only parties that would be charged fees, was preparation, implementation, and approval of HMP and LID water pollution mitigations applicable only to their projects. Cal. Const. art. XIII C, § 1.

[79] **States** State Expenses and Charges; Statutory Liabilities

Fact that whether local governments would actually impose and recover any fees from developers of priority development projects to recoup costs of implementing certain State-mandated water pollution abatement requirements for such projects, given that fees would only be imposed as part of development approval process, was irrelevant to issue of whether local governments had authority to levy such fees, such that subvention of local governments' costs of implementing water pollution abatement requirements would be unwarranted; issue of authority to levy fee did not turn on whether local governments actually imposed fee. Cal. Const. art. XIII D, § 6; Cal. Gov't Code § 17556(d).

[80] **States** State Expenses and Charges; Statutory Liabilities

The issue of whether a local agency has the authority to charge a fee for a state-mandated program or increased level of service, such that the charge cannot be recovered by subvention as a state-mandated cost, turns on the local agency's authority to levy a fee, not on whether the agency actually imposed the fee. Cal. Const. art. XIII D, § 6; Cal. Gov't Code § 17556(d).

****573** (Super. Ct. No. 34201080000604CUWMGDS)

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Opinion

HULL, Acting P. J.

***549** ****574** —The California Constitution requires the state to provide a subvention of funds to compensate local governments for the cost of a new program or higher

level of service mandated by the state. (Cal. Const., art. XIII B, § 6 (article XIII B, Section 6).) Subvention is not available if the local governments have the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or higher level of service. (Gov. Code, § 17556, subd. (d) (section 17556(d)).) Defendant and respondent Commission on State Mandates (the Commission) adjudicates claims for subvention. (Gov. Code, §§ 17525, 17551.)

This appeal concerns whether article XIII B, Section 6 requires the state to reimburse the defendant local governments (collectively permittees) for costs they incurred to satisfy conditions which the state imposed on their stormwater discharge permit. The Commission determined that six of the eight permit conditions challenged in this action were reimbursable state mandates. They required permittees to provide a new program. Permittees also did not have sufficient legal authority to levy a fee for those conditions because doing so required preapproval by the voters.

The Commission also determined that the other two conditions requiring the development and implementation of environmental mitigation plans for certain new development were not reimbursable state mandates. Permittees had authority to levy a fee for those conditions.

On petitions for writ of administrative mandate, the trial court in its most recent ruling in this action upheld the Commission's decision in its entirety and denied the petitions.

Plaintiffs, cross-defendants and appellants State Department of Finance, the State Water Resources Board, and the Regional Water Quality Board, San Diego Region (collectively the State) appeal. They contend the six permit conditions found to be reimbursable state mandates are not mandates because the permit does not require permittees to provide a new program and permittees have authority to levy fees for those conditions without obtaining voter approval.

Defendant, cross-complainant, and appellant permittees cross-appeal. They contend the other two conditions found not to be reimbursable state mandates are reimbursable because permittees do not have authority to levy fees for ***550** those conditions. Specifically, they cannot develop fees that would meet all constitutional requirements for an enforceable fee. [1]

[1] The permittees are the County of San Diego and the Cities of Carlsbad, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Diego, San Marcos, Santee, Solana Beach, and Vista.

The Commission has filed a respondent's brief. As part of its brief, it claims it erred in concluding that part of one of the challenged conditions, which mandates street sweeping, was a reimbursable mandate. The Commission now agrees with the State that permittees have authority to levy a fee to recover the cost of complying with that condition and it is not reimbursable under article XIII B, Section 6.

Except to hold that the street sweeping condition is not a reimbursable mandate, we affirm the judgment.

FACTS AND PROCEEDINGS

For a fuller discussion of the stormwater discharge permitting system and the constitutional ****575** mandate subvention system, please see the discussion in *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 668–675 [226 Cal.Rptr.3d 846] (*San Diego Mandates*). For our purposes, it is sufficient to state that the federal Clean Water Act of 1977 (33 U.S.C. § 1251 et seq.) prohibits pollutant discharges into the nation's waters unless they comply with a permit, established effluent limitations, or standards of performance. The Clean Water Act of 1977 created the National Pollutant Discharge Elimination System (NPDES) to permit water pollutant discharges that comply with all statutory and administrative requirements. (*San Diego Mandates*, at pp. 668–669.)

Pursuant to federal approval granted under the Clean Water Act, California under the Porter-Cologne Water Quality Control Act of 1977 (Wat. Code, § 13000 et seq.) operates the NPDES permitting system and regulates discharges within the state under state and federal law. (*San Diego Mandates I, supra*, 18 Cal.App.5th at pp. 669–670.)

The Clean Water Act of 1977 requires an NPDES permit for any discharge from a municipal separate storm sewer system (MS4) serving a population of 100,000 or more. (33 U.S.C. § 1342 (p)(2)(C), (D).) " '[A] permit may be issued either on a system- or jurisdiction-wide basis, must effectively prohibit non-stormwater discharges into the storm sewers, and must

"require controls to reduce the discharge of pollutants to the maximum extent practicable." (33 U.S.C. § 1342 (p)(3)(B).)' " (*San Diego Mandates I, supra*, 18 Cal.App.5th at p. 670, italics omitted.)

***551** In 2007, the California Regional Water Quality Control Board, San Diego Region (San Diego Regional Board), issued an NPDES permit to permittees for the operation of their MS4. (*San Diego Mandates, supra*, 18 Cal.App.5th at p. 670.) "The permit was actually a renewal of a nation pollutant discharge elimination system (NPDES) permit first issued in 1990 and renewed in 2001. The San Diego Regional Board stated the new permit 'specifies requirements necessary for the Copermittees to reduce the discharge of pollutants in urban runoff to the maximum extent practicable (MEP).' The San Diego Regional Board found that although the permittees had generally been implementing the management programs required in the 2001 permit, 'urban runoff discharges continue to cause or contribute to violations of water quality standards. This [permit] contains new or modified requirements that are necessary to improve Copermittees' efforts to reduce the discharge of pollutants in urban runoff to the MEP and achieve water quality standards.'

"The permit requires the permittees to implement various programs to manage their urban runoff that were not required in the 2001 permit. It requires the permittees to implement programs in their own jurisdictions. It requires the permittees in each watershed to collaborate to implement programs to manage runoff from that watershed, and it requires all of the permittees in the region to collaborate to implement programs to manage regional runoff. The permit also requires the permittees to assess the effectiveness of their programs and collaborate in their efforts.

"The specific permit requirements involved in this case require the permittees to do the following:

"(1) As part of their jurisdictional management programs:

"(a) Sweep streets at certain times, depending on the amount of debris they generate, and report the number of curb miles swept and tons of material collected;

****576** "(b) Inspect, maintain, and clean catch basins, storm drain inlets, and other stormwater conveyances at specified times and report on those activities;

"(c) Collaboratively develop and individually implement a hydromodification management plan to manage increases in runoff discharge rates and durations;

"(d) Collectively update the best management practices requirements listed in their local standard urban stormwater mitigation plans (SUSMP's) and add low impact development best management practices for new real property development and redevelopment;

***552** "(e) Individually implement an education program using all media to inform target communities about [MS4s] and impacts of urban runoff, and to change the communities' behavior and reduce pollutant releases to [MS4s];

"(2) As part of their watershed management programs, collaboratively develop and implement watershed water quality activities and education activities within established schedules and by means of frequent regularly scheduled meetings;

"(3) As part of their regional management programs:

"(a) Collaboratively develop and implement a regional urban runoff management program to reduce the discharge of pollutants from [MS4s] to the maximum extent practicable;

"(b) Collaboratively develop and implement a regional education program focused on residential sources of pollutants;

"(4) Annually assess the effectiveness of the jurisdictional, watershed, and regional urban runoff management programs, and collaboratively develop a long-term effectiveness assessment to assess the effectiveness of all of the urban runoff management programs; and

"(5) Jointly execute a memorandum of understanding, joint powers authority, or other formal agreement that defines the permittees' responsibilities under the permit and establishes a management structure, standards for conducting meetings, guidelines for workgroups, and a process to address permittees' noncompliance with the formal agreement.

"The permittees estimated complying with these conditions would cost them more than $66 million over the life of the permit." (*San Diego Mandates, supra*, 18 Cal.App.5th at pp. 670–672, fn. omitted.) (We note the parties and the trial court consolidated four of the conditions stated above into

two for purposes of their arguments, resulting in a total of eight challenged conditions instead of 10. They considered the requirements to sweep streets and clean stormwater conveyances as one condition and the two requirements for developing educational programs as one condition. For purposes of consistency and argument, we will assume there are the same eight challenged permit conditions before us, although we will discuss the street sweeping condition separately.)

In 2008, permittees filed a test claim with the Commission to seek subvention under article XIII B, section 6 for the eight challenged conditions. In 2010, the ***553** Commission issued its ruling. It first determined that the challenged conditions were not federal mandates. Subvention is not available if the state imposes a requirement that is mandated by the federal government, unless the state mandates costs that exceed those incurred under the federal mandate. (Gov. Code, § 17556, subd. (c).)

Relevant here, the Commission further determined that six of the eight challenged conditions, all of the conditions except the two requiring development of a hydromodification management plan and ****577** low impact development requirements, were reimbursable state mandates. The permit required permittees to provide a new government program of abating water pollution, and the permit conditions were unique to governmental agencies. The Commission also determined that permittees did not have authority to levy fees for complying with the six conditions because such fees would require voter approval under the state constitution. However, permittees had authority to levy fees to recover costs for the other two conditions. Permittees had police power to levy such fees as well as statutory authority to levy development fees, and because those fees would be imposed only on new real property development, they were not subject to voter approval. As a result, the Commission found that those two conditions were not reimbursable state mandates.

The State filed a petition for writ of administrative mandate against the Commission's decision. Permittees filed a cross-petition. The trial court found that the Commission had applied the wrong test in determining whether the challenged conditions were federal mandates. (*San Diego Mandates, supra*, 18 Cal.App.5th at pp. 674–675.) In *San Diego Mandates*, a panel of this court reversed the trial court's judgment, held that the Commission had applied the correct test, and concluded the challenged permit conditions were not federal mandates. Because the trial court had rested its judgment exclusively on the federal mandates ground, we remanded the matter so the trial court could consider the parties' other arguments for and against the Commission's decision. (*Id.* at pp. 667–668.)

The trial court on remand upheld the Commission's decision in its entirety and denied both petitions for writ of mandate. It found that six of the conditions were reimbursable mandates, and the hydromodification management plan and low impact development conditions were not. The NPDES permit mandated permittees to provide a new program for purposes of article XIII B, section 6, permittees lacked authority to levy fees to pay for the six conditions, and permittees had authority to levy fees for the other two conditions.

The State contends the trial court erred. It asserts the permit did not mandate a new program, and permittees have authority to levy fees for the six ***554** permit conditions. In their cross-appeal, permittees contend the trial court erred, and that they do not have fee authority for the other two conditions. The Commission claims that contrary to its and the trial court's rulings, the street sweeping condition is not a reimbursable mandate because permittees have authority to levy fees for that condition.

DISCUSSION

I

Law of the Case and Standard of Review

[1] In *San Diego Mandates*, this court stated that the permit conditions were state mandates. (*San Diego Mandates, supra*, 18 Cal.App.5th at pp. 667, 684–689.) However, the doctrine of law of the case does not apply because whether the conditions were state mandates was not essential to our decision in *San Diego Mandates*. (*Gyerman v. United States Lines Co.* (1972) 7 Cal.3d 488, 498 [102 Cal.Rptr. 795, 498 P.2d 1043].) Concluding the conditions were state mandates was premature since the only issue determined by the trial court and resolved by us was whether the conditions were federal mandates. Our determining the conditions were not federal mandates did not result in the conditions automatically being reimbursable state ****578** mandates, and, thus, stating they were state mandates was not necessary to our decision. We recognized these points because we remanded for the

trial court to address the other issues raised by the parties which neither we nor the trial court had addressed. (*San Diego Mandates*, at p. 668.) Those issues included whether the conditions were a new program or higher level of service for purposes of article XIII B, section 6 and whether the permittees had fee authority to fund the conditions. (*San Diego Mandates*, at p. 674.) The trial court addressed those issues on remand, and the parties have fully briefed them. We now address those issues on their merits.

[2] Whether a statute or executive order imposes a reimbursable mandate under article XIII B, section 6 is a question of law. We review the entire record before the Commission and independently determine whether it supports the Commission's conclusion that six conditions here were reimbursable state mandates and two were not. (*Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 762 [207 Cal.Rptr.3d 44, 378 P.3d 356] (*Los Angeles Mandates I*).)

***555** II

New Program

Under article XIII B, section 6, if the state by statute or executive order requires a local government to provide a "new program" or a "higher level of service" in an existing program, it must "provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service[.]" (Art. XIII B, § 6, subd. (a); see *County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 201 [240 Cal.Rptr.3d 52, 430 P.3d 345].)

[3] **[4]** For purposes of article XIII B, section 6, a "program" refers to either " '[(1)] programs that carry out the governmental function of providing services to the public, or [(2)] 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.' [Citation.]" (*San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874 [16 Cal.Rptr.3d 466, 94 P.3d 589] (*San Diego Unified*).) The term "higher level of service" refers to " 'state mandated increases in the services provided by local agencies in existing "programs." ' " (*Ibid.*)

The Commission and the trial court determined that the permit conditions constituted a new program for purposes of article XIII B, section 6 because the conditions satisfied both definitions of a program. First, they required permittees to implement a new program of providing pollution abatement services to the public in addition to the stormwater drainage services.

Second, the conditions also imposed unique requirements on permittees regarding how they would provide the required pollution abatement services. The State required permittees to reduce water pollution by implementing best management practices to the maximum extent practicable, a standard that purportedly applies exclusively to government entities and not to all other state residents or entities who must also obtain NPDES permits to discharge into the nation's waters. The latter entities who obtain NPDES permits must satisfy numeric effluent limitations.

Neither the Commission nor the trial court determined whether the permit conditions triggered subvention under article XIII B, section 6 on the ground that they required permittees to provide a higher level of service in an existing program.

****579** **[5]** The State claims the conditions are not a new program for purposes of article XIII B, section 6. We agree with the trial court and the Commission that the permit ***556** conditions required permittees to provide a new program. Permittees were providing stormwater drainage systems, and the permit required them to provide a new program of water pollution abatement services in forms which permittees had not provided before and which benefited the public.

The State contends the permit conditions do not satisfy the definitions of a new program under article XIII B, section 6. Regarding the first definition of a program, carrying out the governmental function of providing services to the public, the State argues that the permit conditions were not imposed to provide a service to the public; they were imposed to enforce a general ban on pollution. Federal and state laws prohibit all persons, including municipalities that discharge stormwater and urban runoff, from discharging pollutants from point sources into waters of the United States without an NPDES permit. (33 U.S.C. §§ 1311(a), 1342, 1362(5); 40 C.F.R. §§ 122.21, 122.22, 123.25 (2022); Wat. Code, §§ 13376, 19, 13050, subd. (c).) Thus, permittees had to obtain a permit because they discharge pollution, not because they are local governments. Local governments that do not discharge pollutants into United States waters are not required to have a permit.

[6] The distinction the State attempts to draw is not persuasive. The State cites no authority for the proposition that a mandatory permit condition cannot constitute a reimbursable mandate under article XIII B, section 6 because it is imposed to enforce a government ban on pollution. article XIII B, section 6 requires reimbursement whenever any state law or executive order mandates a new program on a local government. Nothing in the constitutional requirement distinguishes between new programs imposed directly by law and new programs imposed as a condition of a required regulatory permit.

[7] Indeed, when the Legislature attempted to exclude NPDES permit conditions from article XIII B, section 6's scope by statute, the Court of Appeal held the statute was unconstitutional. Originally, the statutory definition of an "executive order" for purposes of Section 6 expressly excluded any order or requirement issued by the State Water Board or any regional water boards pursuant to the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.), such as an NPDES permit. (Gov. Code, former § 17516, subd. (c); Stats. 1984, ch. 1459, § 1, p. 5113.) The Court of Appeal in *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898 [58 Cal.Rptr.3d 762], held that the statutory exclusion of NPDES permit conditions imposed on local governments was contrary to the express terms of article XIII B, section 6 and thus unconstitutional. "This exclusion of any order issued by any Regional Water Board contravenes the clear, unequivocal intent of article XIII B, section 6 that subvention of funds is required '[w]henever ... *any state agency* mandates a new program or higher level of service on any local government ... .' " (***557** *County of Los Angeles v. Commission on State Mandates*, at p. 920, fn., 58 Cal.Rptr.3d 762omitted.) Article XIII B, section 6 requires subvention whether the new program is imposed directly by law or as a condition of a regulatory permit required by a state agency.

The Court of Appeal reached the same conclusion in *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546 [273 Cal.Rptr.3d 619] (*Los Angeles Mandates II*). The State argued there that NPDES permit conditions to require trash receptacles at transit stops and to inspect business sites were not a ****580** new program for purposes of article XIII B, section 6 because they were imposed to prevent pollution, not to provide a public service. The court disagreed: "This view ... ignores the terms of the Regional Board's permit; the challenged requirements are not bans or limits on pollution levels, they are mandates to perform specific actions—installing and maintaining trash receptacles and inspecting business sites—that the local governments were not previously required to perform. Although the purpose of requiring trash collection at transit stops and business site inspections was undoubtedly to reduce pollution in waterways, the state sought to achieve that goal by requiring local governments to undertake new affirmative steps resulting in costs that must be reimbursed under section 6." (" (Los Angeles Mandates II, at p. 560.) So it is here.

Continuing to assert that the NPDES permit does not impose a new program, the State argues the trial court ignored a distinction for purposes of article XIII B, section 6 between a law that requires local governments to provide a public service and one that regulates conduct and applies to local governments because they choose to engage in that conduct. For example, as opposed to requiring a local government to sweep streets at regular intervals (which would be a mandated program), when the state requires a local government to sweep streets as a condition of operating an MS4 that discharges pollutants, the state is regulating the local government as a polluter, not requiring it to provide a public service. That is because the permit does not require permittees to operate an MS4. If they choose to operate one, they must mitigate pollutant discharges, like all other polluters. Because the permit implements a general law that applies to all polluters, public and private, and because permittees chose to develop an MS4, the State claims the permit does not require permittees to provide a new public service or program.

[8] Generally, "if a local government participates 'voluntarily,' i.e., without legal compulsion or compulsion as a practical matter, in a program with a rule requiring increased costs, there is no requirement of state reimbursement." (*Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1365–1366 [89 Cal.Rptr.3d 93].) However, that "an entity makes an initial discretionary decision that in turn triggers mandated costs" does not by itself preclude reimbursement under article XIII B, section 6. (***558** *San Diego Unified, supra*, 33 Cal.4th at pp. 887–-888.) The discretionary decision may have been the result of compulsion "as a practical matter."

[9] Being compelled "as a practical matter" may arise, among other instances, when an entity or its constituents face certain and severe penalties or consequences for not participating in or complying with an optional state program.

For example, in *City of Sacramento v. State of California* (1990) 50 Cal.3d 51 [266 Cal.Rptr. 139, 785 P.2d 522] (*City of Sacramento*), the California Supreme Court determined that a state statute that required state and local governments to provide unemployment insurance benefits to their employees for the first time was a federal mandate and not a reimbursable state mandate. The case is instructive here for describing how a local government could be mandated or compelled as a practical matter to provide a service. The federal government had not required the state to enact the statute, but if the state did not enact it, state private employers would lose a federal tax credit and would face double unemployment taxation by the state and federal governments. (*Id.* at pp. 58, 74.) Much of cost-producing federal influence on state and local governments is "by inducement ****581** or incentive rather than direct compulsion." (*Id.* at p. 73.) California could have terminated its own unemployment insurance system to eliminate the double taxation, but the Supreme Court could not imagine that the drafters and adopters of California Constitution, article XIII B and Section 6 intended to force the state "to such draconian ends." (*City of Sacramento,* at p. 74.) The alternatives to not adopting the statute "were so far beyond the realm of practical reality that they left the state 'without discretion' to depart from federal standards." (*Ibid.*)

[10] Here, the alternative to not obtaining an NPDES permit was for permittees not to provide a stormwater drainage system. If permittees chose to operate an MS4, they were required by the State to obtain a permit. (33 U.S.C. § 1342 (p)(2)(C), (D).) While permittees at some point in the past chose to provide a stormwater drainage system, "[t]he drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised." (*New Orleans Gaslight Co. v. Drainage Comm.* (1905) 197 U.S. 453, 460 [49 L.Ed. 831, 25 S.Ct. 471].) In urbanized cities and counties such as permittees, deciding not to provide a stormwater drainage system is no alternative at all. It is "so far beyond the realm of practical reality" that it left permittees " 'without discretion' " not to obtain a permit. (*City of Sacramento, supra*, 50 Cal.3d at p. 74.) Permittees were thus compelled as a practical matter to obtain an NPDES permit and fulfill the permit's conditions. Permittees " '[did] not voluntarily participate' in applying for a permit to operate their stormwater drainage systems; they were required to do so under state and federal law and the challenged requirements were mandated by the Regional Board." (*Los Angeles Mandates II, supra*, 59 Cal.App.5th at p. 561).)

***559** **[11]** Despite the State's emphasis on the point, it is irrelevant to our analysis that both public and private parties who discharge pollution from point sources into waters must obtain an NPDES permit to do so. "[T]he applicability of permits to public and private discharges does not inform us about whether a particular permit or an obligation thereunder imposed on local governments constitutes a state mandate necessitating subvention under article XIII B, section 6." (*County of Los Angeles v. Commission on State Mandates, supra*, 150 Cal.App.4th at p. 919.) What matters is that permittees were compelled by state law to obtain a permit and comply with its conditions, including the provision of a different public program—water pollution abatement.

The State argues that even if the permit conditions mandate a program, the program is not new. As required by the Clean Water Act of 1977, this permit and permittees' two prior permits required permittees to prohibit non-stormwater discharges into their MS4s and to reduce the discharge of pollutants in stormwater from MS4s to the maximum extent practicable. (33 U.S.C. § 1342 (p)(3)(B)(ii), (iii).) New permit conditions did not change that obligation. The State claims that a condition that did not appear in prior permits or has been updated to require additional expenditures is not new because it does not increase permittees' underlying obligation to eliminate or reduce the discharge of pollutants from their MS4s to the maximum extent practicable. Rather, the condition ensures compliance with the same standard that has applied since 1990 when permittees obtained their first permit.

The application of article XIII B, section 6, however, does not turn on whether the underlying ****582** obligation to abate pollution remains the same. It applies if any executive order, which each permit is, requires permittees to provide a new program or a higher level of existing services. (Gov. Code, § 17514.) Exercising its discretionary authority with each permit, the State imposed specific conditions it found were necessary in order for permittees to satisfy the maximum extent practicable standard. If those conditions required permittees to provide a new program or to increase services in an existing program, they triggered article XIII B, section 6.

[12] To determine whether a program imposed by the permit is new, we compare the legal requirements imposed by the new permit with those in effect before the new permit became effective. (See *San Diego Unified, supra*, 33 Cal.4th at p. 878; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835 [244 Cal.Rptr. 677, 750 P.2d 318].) This is so

even though the conditions were designed to satisfy the same standard of performance.

Here, it is without dispute that the challenged permit conditions impose new requirements when compared to the prior permit. Because those new ***560** requirements constitute a new program for purposes of Section 6, Section 6 requires the State to reimburse permittees for the costs of the new program, subject to certain exceptions discussed next.

Because we have determined that the challenged permit conditions required permittees to provide a new program for purposes of article XIII B, section 6, we need not address the parties' arguments under the second definition of a program, whether the permit conditions impose unique requirements on local governments to implement a state policy that do not apply generally to all residents and entities in the state. Nor need we discuss arguments concerning whether the permit conditions required permittees to provide a higher level of existing services.

III

State's Appeal Regarding Fee Authority

Even if a statute or executive order requires a local government to provide a new program, the mandate does not require subvention under article XIII B, section 6 if the local government "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." (§ 17556(d)).)

[13] **[14]** **[15]** Article XIII B, section 6 's subvention for "costs" excludes expenses that are recoverable from sources other than taxes. (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 488 [280 Cal.Rptr. 92, 808 P.2d 235].) "Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. [Citation.] The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. [Citations.] Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the 'state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service,' read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*." (*County of Fresno v. State of California*, at p. 487.)

****583** The Commission and the trial court determined that whether permittees had authority to levy fees for the eight conditions depended on whether fees for stormwater drainage services would have to be preapproved by the voters under article XIII D of the state Constitution. The Commission and the trial ***561** court found that six of the eight challenged permit conditions were reimbursable mandates because permittees did not have the authority to levy a fee for those conditions that were not subject to voter preapproval. The other two challenged conditions requiring the creation and implementation of a hydromodification management plan and low impact development requirements for certain new development were not reimbursable mandates because permittees could levy a fee for those conditions without voter approval.

The State contends in its appeal that the Commission and the trial court erred in determining the six challenged conditions were reimbursable. Despite published authority holding otherwise at the time, the State claims that fees to fund stormwater drainage systems were not subject to voter approval under California Constitution, article XIII D (article XIII D). According to the State, the published authority was wrongly decided, and a later-enacted statute declaring that fees for stormwater drainage services were not subject to voter approval applies here. The State argues that even if the fees were subject to voter approval, permittees still had authority to levy the fees regardless.

In its briefing, the Commission agrees with the State that, contrary to its earlier decision, the condition requiring street sweeping would be within permittees' fee authority as it would not be subject to voter approval.

A. Background

[16] **[17]** Permittees have authority pursuant to their constitutional police powers to levy regulatory and development fees. (Cal. Const., art. XI, § 7.) "[P]revention of water pollution is a legitimate governmental objective, in furtherance of which the police power may be exercised." (*Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408 [95 Cal.Rptr. 852].)

However, the state constitution imposes procedural and substantive requirements on property-related fees adopted by local governments. Article XIII D, enacted by the voters in 1996 as part of Proposition 218 (as approved by voters, Gen. Elec. (Nov. 5, 1996)), subjects all fees imposed by a local government upon a parcel or upon a person as an incident of property ownership, including a user fee for a property-related service, to a two-step approval process. (Art. XIII D, §§ 1, 6.) The first step is a property owner protest procedure. If a majority of the affected property owners file a written protest against the proposed fee, "the agency shall not impose the fee or charge." (*Id.*, § 6, subd. (a)(2).)

The second step requires the proposed fee to be approved by the voters. If a property owner protest does not succeed, a property-related fee must be approved by either a majority of the property owners subject to the ***562** fee or by a two-thirds vote of the electorate residing in the affected area. (Art. XIII D, § 6, subd. (c).) Of significance here, this voter approval requirement is subject to exceptions. The requirement does not apply to "fees or charges for *sewer*, water, and refuse collection services." (*Ibid.*, italics added.) And no part of article XIII D, including its owner protest and voter approval requirements, applies to fees levied on real property development or fees that result from a property owner's voluntary decision to seek a government benefit. (Art. XIII D, § 1; ****584** *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 425–428 [9 Cal.Rptr.3d 121, 83 P.3d 518].)

In the test claim and after determining permittees had authority under their police power to impose fees for the permit conditions, the Commission had to determine whether permittees had sufficient authority to levy a fee for purposes of section 17556(d) if the fee first had to be approved by voters under article XIII D. Relying on *Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351 [121 Cal.Rptr.2d 228] (*City of Salinas*), a decision by the Sixth Appellate District, the Commission determined that a fee to fund six of the eight permit conditions (all of the conditions except those requiring creation of a hydromodification plan and low impact development requirements) was required to be preapproved by the voters under article XIII D. The fee would be a property-related fee, and it would not be exempt from the voter approval requirement as a fee for sewer or water services.

In *City of Salinas*, the court of appeal determined that a fee to fund a city's program to bring its stormwater drainage system into compliance with the Clean Water Act was not a sewer or water fee for purposes of article XIII D, and thus was required to be adopted by voters. (*City of Salinas, supra*, 98 Cal.App.4th. at pp. 1356–1358.) The Court of Appeal determined the word "sewer" as used in article XIII D was ambiguous and could not be interpreted under the plain meaning rule. (*City of Salinas,* at p. 1357.) The court interpreted the term "sewer services" as excluding stormwater drainage systems and as narrowly referring to "[s]anitary sewerage" which carries " 'putrescible waste' " from residences and businesses and discharges it into the sanitary sewer line for treatment. (*Id.* at p. 1358, fn. 8 .)

Because under *City of Salinas* a fee to fund stormwater drainage systems did not constitute a fee for sewer or water services and was thus subject to voter preapproval under article XIII D, the Commission determined that fees for the six permit conditions would also be subject to voter approval under article XIII D. Further, the voter approval requirement denied permittees sufficient authority to levy a fee for purposes of section 17556(d). As a result, the six conditions were reimbursable state mandates under article XIII B, section 6.

The Commission also reasoned that denying reimbursement for those six conditions would defeat the purpose of article XIII B, section 6. It was possible that ***563** permittees' voters would never approve the proposed fee, but permittees would still be required to comply with the state mandate.

The Commission applied a different analysis to the condition requiring street sweeping. The Commission found that a fee to fund street sweeping was expressly exempt from article XIII D's voting requirement because it was a fee for refuse collection. However, such a fee would still be subject to article XIII D's owner protest procedure. On that basis, the Commission determined permittees did not have sufficient authority to levy a fee to recover the costs of the street sweeping condition, and it was thus a reimbursable mandate.

Approximately seven months after the Commission issued its decision in March 2010, the Legislature broadened the scope of section 17556(d). The amendments, enacted by Senate Bill No. 856 (2009–2010 Reg. Sess.) (Sen. Bill 856), and effective October 19, 2010, declared that section 17556(d)'s prohibition of reimbursement under article XIII B, section 6. if the local agency can fund the mandated costs through fees or assessments "applies regardless of whether ****585** the authority to levy charges, fees, or assessments was enacted

or adopted prior to or after the date on which the statute or executive order was enacted or issued." (Stats. 2010, ch. 719, § 31; Gov. Code, § 17556, subd. (d).)

Senate Bill 856 also provided a procedure to address the effect of newly enacted fee authority. The statute authorizes the state and local agencies to request the Commission to adopt a new test claim decision due to a subsequent change in law that modifies the state's liability for that test claim under article XIII B, section 6. (Stats. 2010, ch. 719, § 33; Gov. Code, § 17570, subds. (b), (c).) If the Commission adopts a new test claim decision, it may revise the subvention requirements effective as of the fiscal year preceding the fiscal year in which the request for redetermination was filed. (Gov. Code, § 17570, subd. (f).)

More than seven years after the Commission issued its decision, the Legislature enacted legislation to overrule *City of Salinas*. It adopted Senate Bill No. 231 (2017–2018 Reg. Sess.) (Senate Bill 231), in which the Legislature for the first time defined a "sewer" for purposes of article XIII D and defined it to include stormwater drainage systems. (Stats. 2017, ch. 536, § 1; Gov. Code § 53750, subd. (k), part of the Prop. 218 Omnibus Implementation Act (Gov. Code, § 53750 et seq., added by Stats. 1997, ch 38, eff. July 1, 1997) (the Implementation Act)].

Enacting Senate Bill 231, the Legislature stated the court in *City of Salinas* disregarded the plain meaning of "sewer." (Gov. Code, § 53751, subds. (e), (f).) The common meaning of "sewer services" was not "sanitary sewerage." (Gov. Code, § 53751, subd. (g).) Numerous sources predating the ***564** enactment of article XIII D defined "sewer" as more than just sanitary sewers and sanitary sewerage. One source was Public Utilities Code section 230.5, enacted in 1970. Senate Bill 231's definition of sewer mirrored that statute's definition. (Gov. Code, § 53751, subd. (i).)

Senate Bill 231 states: "The Legislature reaffirms and reiterates that the definition found in Section 230.5 of the Public Utilities Code is the definition of 'sewer' or 'sewer service' that should be used in the Proposition 218 Omnibus Implementation Act." (Gov. Code, § 53751, subd. (l).) "Sewer" should be interpreted to include services necessary to dispose surface or stormwaters. (Gov. Code, § 53751, subd. (m).)

At trial, the State contended that Senate Bill 231 overturned *City of Salinas*, and that under the new statute, fees for the six conditions were sewer fees exempt from voter approval under article XIII D, and thus within permittees' authority to levy. The trial court disagreed. It stated that even if Senate Bill 231 overturned *City of Salinas*, it found "nothing 'mistaken' about the Commission's reliance on that case when it issued its decision. The Commission issued its decision in 2010, and it was not free to disregard relevant case law—including [*City of Salinas*]—on the theory that the Legislature might change that law in the future. [Senate Bill 231] was enacted in 2017 and went into effect January 1, 2018. How can a law that went into effect in 2018 retroactively invalidate a decision issued in 2010? The State never addresses this question, and the short answer is that it cannot."

The State attempted to argue Senate Bill 231 was retroactive in a supplemental brief, but the trial court found the argument was insufficient to rebut the presumption that statutes operate prospectively only. The court stated that Senate Bill 231 " 'cannot retroactively apply to invalidate the Commission's decision' and 'cannot form the basis for a writ reversing [that decision].' "

****586** B. Analysis

The State contends that fees for the six permit conditions do not require voter approval; thus, permittees have authority to levy such fees, and, as a result, under section 17556(d), article XIII B, section 6 does not require the State to reimburse permittees for the costs incurred to comply with the six conditions. The fees do not require voter approval because the Commission's authority that they do require voter approval, *City of Salinas*, was wrongly decided, and we should not follow it. That court expressly disregarded the plain meaning of the term "sewer" as including storm sewers. The Legislature in Senate Bill 231 criticized *City of Salinas* on that point and declared the plain meaning of "sewer" was to include storm drainage systems.

The State also argues that Senate Bill 231 and its definition of "sewer" govern this case. The Legislature adopted Senate Bill 231 to clarify the meaning ***565** of "sewer" in article XIII D. Statutes that clarify existing law or are retroactive apply to cases such as this that were pending and in which no final judgment had been entered when the statute was enacted. Additionally, the State argues that under Senate Bill 856's amendment to section 17556(d), newly adopted fee authority such as Senate Bill 231 applies to this case.

The State further argues that even if fees to fund the challenged permit conditions are subject to voter approval, that fact does not deprive permittees of adequate authority to adopt fees for purposes of Section 6. For authority to support this argument, the State relies on *Paradise Irrigation Dist. v. Commission on State Mandates* (2019) 33 Cal.App.5th 174 [244 Cal.Rptr.3d 769] (*Paradise Irrigation Dist.*), in which a panel of this court held that article XIII D's owner protest procedure did not deprive a local agency of authority to impose a property-related fee, and thus the mandated expenses in that case were not reimbursable due to section 17556(d). (*Paradise Irrigation Dist.,* at pp. 194–195.) The state argues the same reasoning should apply to article XIII D's voter approval requirement.

The Commission agrees with the State on one point: its determination that the street sweeping condition was a reimbursable mandate and the trial court's affirmance of that finding should be reversed. A fee for this condition is exempt from article XIII D's voter approval requirement because the fee would be for refuse collection. On that basis, and also because this court in *Paradise Irrigation Dist.* determined that article XIII D's owner protest procedure did not deny a local government of authority to levy a fee, the Commission agrees with the State that permittees have authority to levy a fee to recover the costs of street sweeping, and the condition is thus not a reimbursable mandate under article XIII B, section 6.1.

1. Definition of "sewer" at the time of the Commission's decision

We are asked to interpret the term "sewer" as that term was used in the exemption of fees for sewer services from article XIII D's voter approval requirement at the time the Commission issued its decision. (Art. XIII D, § 6, subd. (c).) We do not dispute permittees' point that under stare decisis the Commission and the trial court were required to follow *City of Salinas* when they made their decisions. However, while they may have been bound by *City of Salinas* at the time they ruled, we are not. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937].) Even without considering Sen. Bill 231, we may disagree with *City of Salinas* and not apply it in this direct appeal if we ****587** find it unpersuasive. (See *County of Kern v. State Dept. of Health Care Services* (2009) 180 Cal.App.4th 1504, 1510 [104 Cal.Rptr.3d 43].) Nonetheless, we reach the same holding, setting aside for the moment Sen. Bill 231's possible application.

***566** **[18]** **[19]** **[20]** " 'When we interpret a statute, "[o]ur fundamental task ... is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." [Citation.] "Furthermore, we consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose." ' (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 165–166 [158 Cal.Rptr.3d 639, 302 P.3d 1026].)" (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616–617 [214 Cal.Rptr.3d 274, 389 P.3d 848] (*City of San Jose*).)

[21] **[22]** **[23]** **[24]** **[25]** **[26]** We apply these same principles to interpreting voter initiatives, except we do so to determine the voters' intent. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037 [56 Cal.Rptr.3d 814, 155 P.3d 226].) We turn first to the initiative's language, giving the words their ordinary meaning as understood by "[t]he average voter." (*People v. Adelmann* (2018) 4 Cal.5th 1071, 1080 [232 Cal.Rptr.3d 421, 416 P.3d 786].) " 'The [initiative's] language must also be construed in the context of the statute as a whole and the [initiative's] overall ... scheme.' (*People v. Rizo* (2000) 22 Cal.4th 681, 685 [94 Cal.Rptr.2d 375, 996 P.2d 27].) 'Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure [citation] and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language.' (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 543 [277 Cal.Rptr. 1, 802 P.2d 317].) Where there is ambiguity in the language of the measure, '[b]allot summaries and arguments may be considered when determining the voters' intent and understanding of a ballot measure.' (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 673, fn. 14 [194 Cal.Rptr. 781, 669 P.2d 17].)" (*Professional Engineers in California Government v. Kempton,* at p. 1037.) Ambiguities in initiatives may also be resolved by referring to "the

contemporaneous construction of the Legislature." (*Los Angeles County Transportation Com. v. Richmond* (1982) 31 Cal.3d 197, 203 [182 Cal.Rptr. 324, 643 P.2d 941], italics added.)

Systems that collect water from a residence's toilets and sinks and treat the waste water at a water treatment plant are commonly referred to as sewers or ***567** sanitary sewers. (*City of Salinas, supra*, 98 Cal.App.4th at p. 1357.) Stormwater drainage systems usually deposit stormwater into the surface waters of the state. These are commonly referred to as storm sewers, storm drains, "storm drain systems," and "storm sewer systems." (*Los Angeles Mandates I, supra*, 1 Cal.5th at pp. 754, 757.) The question is whether ****588** voters intended the word "sewer" in article XIII D to exempt fees for only sanitary sewers or both sanitary and stormwater sewers from the measure's voting requirement.

[27] We may look to dictionary definitions to determine the usual and ordinary meaning of a statutory term. (*MCI Communications Services, Inc. v. California Dept. of Tax & Fee Admin.* (2018) 28 Cal.App.5th 635, 644 [239 Cal.Rptr.3d 241].) Dictionary definitions of "sewer" indicate the word can refer to both sanitary sewers and storm drainage systems. The Merriam-Webster's Unabridged Dictionary defines a sewer as "a ditch or surface drain" or "an artificial usually subterranean conduit to carry off water and waste matter (such as surface water from rainfall, household waste from sinks or baths, or waste water from industrial works)." (Merriam-Webster Unabridged Dict. Online (2022) <https://unabridged.merriam-webster.com/unabridged/sewer,par.3> [as of Nov. 21, 2022], archived at <https://perma.cc/EKA3-6ETL>.)

The Oxford English Dictionary defines sewer as an "artificial watercourse for draining marshy land and carrying off surface water into a river or the sea," and an "artificial channel or conduit, now usually covered and underground, for carrying off and discharging waste water and the refuse from houses and towns." (Oxford English Dict. Online (2022) <https://www.oed.com/view/Entry/176971?rskey=EtxAX4&result=1&isAdvanced=false#eid, par.1> [as of Nov. 21, 2022], archived at <https://perma.cc/V4XG-YDVS>.)

[28] **[29]** **[30]** **[31]** But we do not start and end statutory interpretation with dictionary definitions. "[T]he 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].)

[32] Analyzing Proposition 218's use of the word "sewer" in context renders its meaning clear. In the initiative, we find a clause—the measure's only other ***568** use of the word "sewer"—in which the voters distinguished the word "sewer" from a drainage system. Section 4 of article XIII D established procedures and voter approval requirements for creating assessments. Section 5 of article XIII D imposed those requirements on all existing, new, or increased assessments with exceptions. Of relevance here, one of the exempt existing assessments is: "Any assessment imposed exclusively to finance the capital costs or maintenance and operation expenses for sidewalks, streets, *sewers*, water, flood control, *drainage systems* or vector control." (Art. XIII D, § 5, subd. (a), italics added.)

[33] **[34]** If possible, we construe statutes and constitutional provisions to give meaning to every word, phrase, sentence, and part of an act. (*City of San Jose, supra*, 2 Cal.5th at p. 617.) Thus, when the Legislature, or in this case the voters, use different words in the same sentence, we assume they intended the words to have different meanings. (****589** *K.C. v. Superior Court* (2018) 24 Cal.App.5th 1001, 1011–1012 fn. 4 [235 Cal.Rptr.3d 325].) By using "sewers" and "drainage systems" in the same sentence, the voters intended the words to have different meanings. Were it not so, the use of the terms to convey the same meaning would render them superfluous, an interpretation courts are to avoid. (*Klein v. United States of America* (2010) 50 Cal.4th 68, 80 [112 Cal.Rptr.3d 722, 235 P.3d 42].)

[35] Additionally, under the maxim *expressio unius est exclusio alterius*, "[w]hen language is included in one portion of a statute, its omission from a different portion addressing a similar subject suggests that the omission was purposeful," and that the Legislature intended a different meaning. (*In re Ethan C.* (2012) 54 Cal.4th 610, 638 [143 Cal.Rptr.3d 565,

279 P.3d 1052; *Klein v. United States of America, supra*, 50 Cal.4th at p. 80.)

Section 5 of article XIII D addresses "sewers" and "drainage systems," but section 6 of article XIII D, the section that contains the exemption from the measure's voter approval requirement, exempts only fees for sewer, water, and refuse collection services. It does not exempt fees for drainage systems. Storm drainage systems generally are a means to provide surface water drainage. (See *Biron v. City of Redding* (2014) 225 Cal.App.4th 1264, 1269 [170 Cal.Rptr.3d 848].) And although article XIII D and the Implementation Act at the time of the Commission's decision did not define "sewer," the Implementation Act did define a "[d]rainage system" as "any system of public improvements that is intended to provide for erosion control, for landslide abatement, or for *other types of water drainage*." (Gov. Code, § 53750, subd. (d), italics added.) Given that the voters intended to differentiate between "sewers" and "[d]rainage systems," and that storm drainage systems provide water drainage, we conclude the voters did not intend the exemption of "sewer" service fees from article XIII D's voter-approval requirement to include fees for stormwater drainage systems

***569** This interpretation is strengthened by Proposition 218's purposes. The voters adopted Proposition 218 to "limit[ ] the methods by which local governments exact revenue from taxpayers without their consent." (1 Stats. 1996, p. A-295.) To that end, the voters declared that the measure's provisions "shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent." (1 Stats. 1996, p. A-299.)

Thus, required as we are to interpret any exception to the measure's purpose narrowly, we conclude, based on a contextual and narrow reading of the exception of fees for sewer services and not drainage services, that the term sewer in the voter approval exception provision of article XIII D's section 6 referred only to sanitary sewers at the time of the Commission's decision. Because we have determined the term's meaning is clear in its context, we need not rely on other interpretive aids. (*Lungren v. Deukmejian, supra*, 45 Cal.3d at p. 735.)

2. Senate Bill 231

Having determined that article XIII D's exception of sewer fees from voter approval did not include fees for stormwater drainage systems at the time of the Commission's decision, we must determine the effect, if any, of Senate Bill 231. The State contends the statute applies to this case either as a clarification of existing law or as a retroactive statute.

****590** a. Background

Following the enactment of Proposition 218, the Legislature enacted the Implementation Act to prescribe specific procedures and parameters for local jurisdictions in complying with the initiative. (Gov. Code, § 53750 et seq.; Legis. Counsel's Dig., Sen. Bill No. 219 (1997–1998 Reg. Sess.) 6 Stats. 1997, Summary Dig., p. 13.) Government Code section 53750 (section 53750), part of the Implementation Act, defined terms used in articles XIII C and XIII D. At the time of its enactment in 1997, section 53750 did not include a definition of the term "sewer." (Stats. 1997, ch. 38, § 5, p. 366.) An amendment to the statute in 1998 also did not define the term. (Stats. 1998, ch. 876, § 10, p. 550.)

After *City of Salinas* was decided, the Legislature amended section 53750 in 2002. This legislation was filed with the Secretary of State three months after the court of appeal filed *City of Salinas*. (Stats. 2002, ch. 395, p. 2231; *City of Salinas, supra*, 98 Cal.App.4th 1351.) Yet again, the Legislature did not add a definition of the word "sewer" to the statute. (Stats. 2002, ch. 395, § 3, p. 72232.) Another amendment in 2014 also did not define the term. (Stats. 2014, ch. 78, § 2.)

***570** In 2017, 15 years after *City of Salinas* was published, the Legislature enacted Senate Bill 231 to define "sewer" in article XIII D and to overrule *City of Salinas*. Senate Bill 231 amended section 53570 by defining "sewer," for purposes of article XIII D's exemption of sewer fees from its voter approval requirement, to include stormwater drainage systems. "Sewer" includes "systems, all real estate, fixtures, and personal property ... to facilitate sewage collection, treatment, or disposition for sanitary or drainage purposes, including ... sanitary sewage treatment or disposal plants or works, drains, conduits, outlets for surface or storm waters, and any and all other works, property, or structures necessary or convenient for the collection or disposal of sewage, industrial waste, or surface or storm waters." (§ 53750, subd. (k).)

Also as part of Senate Bill 231, the Legislature enacted a new statute, Government Code section 53751 (section 53571), to overrule *City of Salinas*.[2] The Legislature ****591** criticized

the *City of Salinas* court for "disregarding the plain meaning of the term 'sewer' " and "substitut[ing] its own judgment for ***571** the judgement of the voters." (§ 53751, subd. (f).) The Legislature found that sewer and water services ****592** are commonly considered to include "the conveyance and treatment of dirty water, whether that water is rendered unclean by coming into contact with sewage or by flowing over the built-out human environment and becoming urban runoff." (§ 53571, subd. (h).) The ***572** Legislature cited to numerous statutes and cases that it claimed rejected the notion that "sewer" applies only to sanitary sewers. (§ 53751, subd. (i).)

2 Section 53751 reads in full: "The Legislature finds and declares all of the following:
"(a) The ongoing, historic drought has made clear that California must invest in a 21st century water management system capable of effectively meeting the economic, social, and environmental needs of the state.
"(b) Sufficient and reliable funding to pay for local water projects is necessary to improve the state's water infrastructure.
"(c) Proposition 218 was approved by the voters at the November 5, 1996, statewide general election. Some court interpretations of the law have constrained important tools that local governments need to manage storm water and drainage runoff.
"(d) Storm waters are carried off in storm sewers, and careful management is necessary to ensure adequate state water supplies, especially during drought, and to reduce pollution. But a court decision has found storm water subject to the voter-approval provisions of Proposition 218 that apply to property-related fees, preventing many important projects from being built.
"(e) The court of appeal in [*City of Salinas, supra*,] 98 Cal.App.4th 1351 concluded that the term 'sewer,' as used in Proposition 218, is 'ambiguous' and declined to use the statutory definition of the term 'sewer system,' which was part of the then-existing law as Section 230.5 of the Public Utilities Code.
"(f) The court in [*City of Salinas, supra*,] 98 Cal.App.4th 1351 failed to follow long-standing principles of statutory construction by disregarding the plain meaning of the term 'sewer.' Courts have long held that statutory construction rules apply to initiative measures, including in cases that apply specifically to Proposition 218 (see *People v. Bustamante* (1997) 57 Cal.App.4th 693 [67 Cal.Rptr.2d 295]; *Keller v. Chowchilla Water Dist.* (2000) 80 Cal.App.4th 1006 [96 Cal.Rptr.2d 246]). When construing statutes, courts look first to the words of the statute, which should be given their usual, ordinary, and commonsense meaning (*People v. Mejia* (2012) 211 Cal.App.4th 586, 611 [149 Cal.Rptr.3d 815]). The purpose of utilizing the plain meaning of statutory language is to spare the courts the necessity of trying to divine the voters' intent by resorting to secondary or subjective indicators. The court in [*City of Salinas, supra*,] 98 Cal.App.4th 1351 asserted its belief as to what most voters thought when voting for Proposition 218, but did not cite the voter pamphlet or other accepted sources for determining legislative intent. Instead, the court substituted its own judgment for the judgment of voters.
"(g) Neither the words 'sanitary' nor 'sewerage' are used in Proposition 218, and the common meaning of the term 'sewer services' is not 'sanitary sewerage.' In fact, the phrase 'sanitary sewerage' is uncommon.
"(h) Proposition 218 exempts sewer and water services from the voter-approval requirement. Sewer and water services are commonly considered to have a broad reach, encompassing the provision of clean water and then addressing the conveyance and treatment of dirty water, whether that water is rendered unclean by coming into contact with sewage or by flowing over the built-out human environment and becoming urban runoff.
"(i) Numerous sources predating Proposition 218 reject the notion that the term 'sewer' applies only to sanitary sewers and sanitary sewerage, including, but not limited to:
"(1) Section 230.5 of the Public Utilities Code, added by Chapter 1109 of the Statutes of 1970.
"(2) Section 23010.3, added by Chapter 1193 of the Statutes of 1963.
"(3) The Street Improvement Act of 1913.
"(4) *L.A. County Flood Control Dist. v. Southern Cal. Edison Co.* (1958) 51 Cal.2d 331 [333 P.2d 1], where the California Supreme Court stated that 'no distinction has been made between sanitary sewers and storm drains or sewers.'
"(5) Many other cases where the term 'sewer' has been used interchangeably to refer to both

sanitary and storm sewers include, but are not limited to, *County of Riverside v. Whitlock* (1972) 22 Cal.App.3d 863 [99 Cal.Rptr. 710], *Ramseier v. Oakley Sanitary Dist.* (1961) 197 Cal.App.2d 722 [17 Cal.Rptr. 464], and *Torson v. Fleming* (1928) 91 Cal.App. 168 [266 P. 845].

"(6) Dictionary definitions of sewer, which courts have found to be an objective source for determining common or ordinary meaning, including Webster's (1976), American Heritage (1969), and Oxford English Dictionary (1971).

"(j) Prior legislation has affirmed particular interpretations of words in Proposition 218, specifically Assembly Bill 2403 of the 2013–14 Regular Session (Chapter 78 of the Statutes of 2014).

"(k) In *Crawley v. Alameda Waste Management Authority* (2015) 243 Cal.App.4th 396 [196 Cal.Rptr.3d 365], the Court of Appeal relied on the statutory definition of 'refuse collection services' to interpret the meaning of that phrase in Proposition 218, and found that this interpretation was further supported by the plain meaning of refuse. Consistent with this decision, in determining the definition of 'sewer,' the plain meaning rule shall apply in conjunction with the definitions of terms as provided in Section 53750.

"(l) The Legislature reaffirms and reiterates that the definition found in Section 230.5 of the Public Utilities Code is the definition of 'sewer' or 'sewer service' that should be used in the Proposition 218 Omnibus Implementation Act.

"(m) Courts have read the Legislature's definition of 'water' in the Proposition 218 Omnibus Implementation Act to include related services. In *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586 [163 Cal.Rptr.3d 243], the Court of Appeal concurred with the Legislature's view that 'water service means more than just supplying water,' based upon the definition of water provided by the Proposition 218 Omnibus Implementation Act, and found that actions necessary to provide water can be funded through fees for water service. Consistent with this decision, 'sewer' should be interpreted to include services necessary to collect, treat, or dispose of sewage, industrial waste, or surface or storm waters, and any entity that collects, treats, or disposes of any of these necessarily provides sewer service."

Section 53751 declared that the plain meaning rule shall apply when interpreting the definitions set forth in section 53750. (§ 53751, subd. (k).) The statute concluded, "The Legislature reaffirms and reiterates that the definition found in Section 230.5 of the Public Utilities Code is the definition of 'sewer' or 'sewer service' that should be used in the Proposition 218 Omnibus Implementation Act. [¶] ... '[S]ewer' should be interpreted to include services necessary to collect, treat, or dispose of sewage, industrial waste, or surface or storm waters, and any entity that collects, treats, or disposes of any of these necessarily provides sewer service." (§ 53751, subds. (l), (m).)

b. Analysis

The State contends Senate Bill 231 applies here because this matter was pending as of the statute's enactment, and the Legislature intended the statute either to be a clarification of existing law or to apply retroactively to all pending cases.

Permittees and the Commission argue Senate Bill 231 does not apply here because the Legislature adopted the statute to change the law, and it did not clearly express its intent that the measure applied retroactively. They also claim the statute does not apply because at the time the Commission made its decision in this matter, it was required to follow *City of Salinas*, and the Commission's decision is now final.

[36] **[37]** Initially, we disagree with the Commission and permittees that Senate Bill 231 cannot apply here because the Commission's decision is final. That argument confuses administrative finality with finality that binds parties to a fully litigated final judgment. The Commission's decision was administratively final and thus subject to judicial review. However, to be final so as to be binding on the parties and immune from retroactive or clarifying legislation, the decision must be free from direct attack by a petition for writ of administrative mandate either because a judgment resolving such a petition has become final and conclusive or because a petition was not timely filed. (*California School Boards Assn. v. State of California* (2009) 171 Cal.App.4th 1183, 1201 [90 Cal.Rptr.3d 501]; see *Long Beach Unified Sch. Dist. v. State of California* (1990) 225 Cal.App.3d 155, 169 [275 Cal.Rptr. 449].) The Commission's decision obviously is still under judicial review and subject to direct attack. Thus, despite the length of time since the Commission's

decision was made, due to the decision's prolonged and ongoing judicial ***573** review, it is not final for purposes of determining whether a retroactive or clarifying statute applies to it.

[38] **[39]** "A basic canon of statutory interpretation is that statutes do not operate retrospectively unless the Legislature plainly intended them to do so. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207–1208 [246 Cal.Rptr. 629, 753 P.2d 585]; *Aetna Cas[ualty] & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 393 [182 P.2d 159].) ... Of course, when the Legislature clearly intends a statute to operate retrospectively, we are obliged to carry out that intent unless due process considerations prevent us. (****593** *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 587, 592 [128 Cal.Rptr. 427, 546 P.2d 1371].)

[40] **[41]** **[42]** "A corollary to these rules is that a statute that merely *clarifies,* rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment. We assume the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. (Cf. *Williams v. Garcetti* (1993) 5 Cal.4th 561, 568 [20 Cal.Rptr.2d 341, 853 P.2d 507].) Our consideration of the surrounding circumstances can indicate that the Legislature made material changes in statutory language in an effort only to clarify a statute's true meaning. [Citations.] Such a legislative act has no retrospective effect because the true meaning of the statute remains the same." (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243 [62 Cal.Rptr.2d 243, 933 P.2d 507] (*Western Security Bank*).)

[43] We turn first to the State's argument that Sen. Bill 231 merely clarified existing law. "A statute that merely clarifies, rather than changes, existing law is properly applied to transactions predating its enactment. (*Western Security Bank,* [*supra*,] 15 Cal.4th 232, 243.) However, a statute might not apply retroactively when it substantially changes the legal consequences of past actions, or upsets expectations based in prior law. ([*Id.* at p. 243]; see also *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 269 [128 L.Ed.2d 229, 114 S.Ct. 1483] ... .)

[44] **[45]** " '[T]he interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts.' (*Western Security Bank, supra,* 15 Cal.4th at p. 244.) When [the California Supreme Court] 'finally and definitively' interprets a statute, the Legislature does not have the power to then state that a later amendment merely declared existing law. (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 473 [20 Cal.Rptr.3d 428, 99 P.3d 1015] (*McClung*).)

[46] "However, 'if the courts have not yet finally and conclusively interpreted a statute and are in the process of doing so, a declaration of a later ***574** Legislature as to what an earlier Legislature intended is entitled to consideration. [Citation.] But even then, "a legislative declaration of an existing statute's meaning" is but a factor for a court to consider and "is neither binding nor conclusive in construing the statute." [Citations.]' (*McClung, supra,* 34 Cal.4th at p. 473 and cases cited.) ... .

[47] **[48]** "A legislative declaration that an amendment merely clarified existing law 'cannot be given an obviously absurd effect, and the court cannot accept the Legislative statement that an unmistakable change in the statute is nothing more than a clarification and restatement of its original terms.' (*California Empetc. Com. v. Payne* (1947) 31 Cal.2d 210, 214 [187 P.2d 702].) Material changes in language, however, may simply indicate an effort to clarify the statute's true meaning. (*Western Security Bank, supra,* 15 Cal.4th at p. 243.) 'One such circumstance is when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation[.]' (*Ibid.*) ' " 'An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute. ... [¶] If the amendment was enacted soon after controversies ****594** arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act —a formal change—rebutting the presumption of substantial change.' [Citation.]" ' (*Ibid.*)" (*Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922–923 [44 Cal.Rptr.3d 223, 135 P.3d 637].)

[49] "We look to 'the surrounding circumstances' as well as the Legislature's intent when determining whether a statute changed or merely clarified the law." (*In re Marriage of Fellows* (2006) 39 Cal.4th 179, 184 [46 Cal.Rptr.3d 49, 138 P.3d 200].)

[50] Senate Bill 231 did not merely clarify the law; it changed the law. Since 2002, *City of Salinas* had defined the term "sewer" in Proposition 218 as referring only to

sanitary sewers. Nothing in the record indicates any other court had interpreted the term as used in Proposition 218 or was interpreting the term when the Legislature adopted Senate Bill 231. Senate Bill 231 overruled *City of Salinas* and changed the law to define "sewer" to include stormwater drainage systems. "[A]lthough the Legislature may amend a statute to overrule a judicial decision, doing so *changes* the law ... ." (*McClung, supra*, 34 Cal.4th at pp. 473–474.)

In addition, this was not a case where the Legislature adopted an amendment soon after a controversy arose concerning the proper interpretation of Proposition 218. Indeed, there is nothing in the record indicating any controversy arose immediately prior to Senate Bill 231's adoption. The statute ***575** mentions only *City of Salinas* as its reason, and that decision was issued 15 years before Sen. Bill 231 was enacted. The Commission issued its decision in this case seven years before the Legislature adopted Senate Bill 231. We are not required to accept as a legislative declaration or clarification of the original statute's meaning an amendment which was adopted so long after any controversy arose from *City of Salinas's* interpretation of Proposition 218. (See *Carter v. California Dept. of Veterans Affairs, supra*, 38 Cal.4th at p. 923.)

[51] Having concluded Senate Bill 231 did not merely clarify the law, we turn to determine whether the Legislature intended the statute to operate retroactively. "[A] new law operates 'retroactively' when it changes ' " 'the legal consequences of past conduct by imposing new or different liabilities based upon such conduct.' " ' [Citation.] We have asked whether the new law ' " '*substantially* affect[s] existing rights and obligations.' " ' [Citation.]" (*McHugh v. Protective Life Ins. Co.* (2021) 12 Cal.5th 213, 229 [283 Cal.Rptr.3d 323, 494 P.3d 24].)

[52] **[53]** **[54]** "[U]nless there is an 'express retroactivity provision, a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature ... must have intended a retroactive application' (*Evangelatos* [*v. Superior Court*], *supra,* 44 Cal.3d at p. 1209 ...). ... [A] statute's retroactivity is, in the first instance, a policy determination for the Legislature and one to which courts defer absent 'some constitutional objection' to retroactivity. (*Western Security Bank,* [*supra*,] 15 Cal.4th [at p.] 244... .) But 'a statute that is ambiguous with respect to retroactive application is construed ... to be unambiguously prospective.' (*I.N.S. v. St. Cyr* [(2001)] 533 U.S. [289,] 320–321, fn. 45 [150 L.Ed.2d 347, 121 S.Ct. 2271]); *Lindh v. Murphy* (1997) 521 U.S. 320, 328, fn. 4 [[138 L.Ed.2d 481, 117 S.Ct. 2059] [' "retroactive" effect adequately authorized by a statute' only when statutory language was 'so clear that it could sustain only one interpretation'].)" ****595** (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841 [123 Cal.Rptr.2d 40, 50 P.3d 751].)

The State claims the Legislature's statements in section 53751 constitute a legally sufficient expression that the Legislature intended Senate Bill 231 to apply retroactively. The State also contends that Sen. Bill 856's provision, that an agency's authority to levy fees prevents subvention under article XIII B, section 6 regardless of whether the authority was adopted prior to or after the date the Commission issued its decision, further supports the Legislature's intent to apply Senate Bill 231 retroactively.

[55] It is not clear that the Legislature intended Senate Bill 231 to apply retroactively. Senate Bill 231 contains no express statement that the Legislature ***576** intended the bill to apply retroactively. There is no statement that the bill merely declared existing law. Senate Bill 231 overruled *City of Salinas*, but the length of time between that case and Sen. Bill 231's enactment suggests the Legislature did not necessarily intend for Senate Bill 231 to be retroactive. The measure's strongest statement of retroactive intent is the statement in section 53751 that the Legislature "reaffirms and reiterates that the definition found in Section 230.5 of the Public Utilities Code is the definition of 'sewer' or 'sewer service' that should be used in the Proposition 218 Omnibus Implementation Act." (§ 53751, subd. (l).) "Reaffirms and reiterates" is incorrect language when the Legislature had never before declared, affirmed, or iterated the meaning of "sewer" in the Implementation Act.

[56] As discussed above, Proposition 218, enacted in 1996, distinguished between sewers and drainage systems. The Legislature adopted the Implementation Act in 1997, but it did not then nor in a 1998 amendment define the term "sewer." *City of Salinas* defined the term in 2002. The Legislature amended the Implementation Act three months later, but it did not define "sewer" or otherwise respond to *City of Salinas*. Fifteen years later, the Legislature overruled *City of Salinas* in Senate Bill 231 and defined "sewer" in the Implementation Act for the first time. Where the statement that the Legislature reaffirmed and reiterated a prior position is erroneous, especially when the new legislation changed the law, the statement is insufficient to establish a very clear expression of retroactive intent. (See *McClung, supra*,

34 Cal.4th at pp. 475–476 [erroneous statement that an amendment merely declared existing law where it actually changed the law was insufficient to overcome the strong presumption against retroactivity].)

[57] Senate Bill 856 also does not indicate Senate Bill 231 should apply retroactively. That bill amended section 17556(d), the statute that prevents subvention if the local agency has fee authority, to provide that the limitation applied regardless of whether the authority to levy fees was enacted or adopted prior to or after the date on which the mandate was issued. However, Senate Bill 856 also provided a process whereby a party may request the Commission to reconsider a prior decision based on a subsequent change of law. (Gov. Code, §§ 17514, 17570, subds. (b)–(d), (f), 17556(d).) If the Commission determines that a change of law reduces the State's subvention obligation, the Commission can revise the subvention requirements but starting no earlier than the fiscal year preceding the fiscal year in which the request for reconsideration was filed. (Gov. Code, § 17556, subd. (b).) Here, there is no evidence the State pursuant to Senate Bill 856 has sought reconsideration of the Commission's decision based on Senate Bill231. And even if it had, Senate Bill 856 ****596** would not render Senate Bill 231 retroactive to the point in time in 2007 when the Commission issued its decision in this matter.

***577** It is obvious that the Legislature intended Senate Bill 231 to overrule *City of Salinas*. It is not obvious, however, that the Legislature intended Senate Bill 231 to apply retroactively. We therefore conclude Senate Bill 231 does not apply to this case.

3. *Application of Paradise Irrigation Dist.*

The State contends that even if Senate Bill 231 is not retroactive, we still may conclude permittees have authority to levy fees for the six permit conditions. In *Paradise Irrigation Dist., supra*, 33 Cal.App.5th 174, a panel of this court ruled that "the *possibility* of a protest" under article XIII D did not eviscerate the local agencies' ability to levy fees to comply with the state mandate. (*Paradise Irrigation Dist.* at p. 194.) The State argues that our reasoning in *Paradise Irrigation District* applies equally here, that the required voter approval under article XIII D, like the protest procedure, does not extinguish a local agency's ability to raise fees.

In *Paradise Irrigation Dist.*, a group of irrigation and water districts contended they were entitled to subvention under article XIII B, section 6 because they did not have sufficient legal authority to levy fees to pay for water service improvements mandated by the Water Conservation Act of 2009 (Stats. 2009–2010, 7th Ex. Sess. 2009–2010, ch. 4, § 1.) The districts claimed they did not have fee authority because under article XIII D, although the fees would not require voter approval, they could be defeated by a majority of water customers filing written protests. (*Paradise Irrigation Dist., supra*, 33 Cal.App.5th at p. 182.)

We disagreed with the districts. We based our opinion on the analysis in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205 [46 Cal.Rptr.3d 73, 138 P.3d 220] (*Bighorn*). That case concerned the validity of a proposed initiative that sought to reduce a local water district's charges and require any future charges to be preapproved by the voters. The California Supreme Court held the initiative could do the former but not the latter. State statutes had delegated exclusive authority to the districts to set their fees, and such legislative actions made under exclusive authority generally are not subject to initiatives. (*Id.* at pp. 210, 219; see *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775–777 [38 Cal.Rptr.2d 699, 889 P.2d 1019].) However, article XIII C, section 3 of the state Constitution states the initiative power may not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee, or charge. The district's water charges were fees subject to article XIII C, and thus an initiative could seek to reduce the districts' rates. (*Bighorn,* at pp. 212–217.) But nothing in article XIII C authorized initiative measures to impose voter-approval requirements for new or increased fees and charges. And article XIII D expressed the voters' intent ***578** that water service fees do not need to be approved by voters. Thus, the exclusive delegation rule barred the proposed initiative's attempt to subject the district's exercise of its fee-setting authority to voter approval. (*Bighorn,* at pp. 215–216, 218–219.)

In a long passage, the Supreme Court commented, "[B]y exercising the initiative power voters may decrease a public water agency's fees and charges for water service, ****597** but the agency's governing board may then raise other fees or impose new fees without prior voter approval. Although this power-sharing arrangement has the potential for conflict, we must presume that both sides will act reasonably and in good faith, and that the political process will eventually lead to compromises that are mutually acceptable and both financially and legally sound. (See *DeVita v. County of Napa,*

supra, 9 Cal.4th at pp. 792–793 ['We should not presume ... that the electorate will fail to do the legally proper thing.'].) We presume local voters will give appropriate consideration and deference to a governing board's judgments about the rate structure needed to ensure a public water agency's fiscal solvency, and we assume the board, whose members are elected ... will give appropriate consideration and deference to the voters' expressed wishes for affordable water service. The notice and hearing requirements of subdivision (a) of section 6 of California Constitution article XIII D [the owner protest procedures] will facilitate communications between a public water agency's board and its customers, and the substantive restrictions on property-related charges in subdivision (b) of the same section should allay customers' concerns that the agency's water delivery charges are excessive." (*Bighorn, supra*, 39 Cal.4th at pp. 220–221, citations & fns. omitted.)

Deciding *Paradise Irrigation Dist.*, we found in *Bighorn* "an approach to understanding how voter powers to affect water district rates affect the ability of the water districts to recover their costs." (*Paradise Irrigation Dist., supra*, 33 Cal.App.5th at p. 191.) Like the water district in *Bighorn*, the districts in *Paradise Irrigation Dist*. had statutory authority to set their fees for water service improvements, and those fees were not subject to prior voter approval. We held the districts thus had sufficient authority to set fees to recover the costs of complying with the state mandate. (*Id.* at pp. 192–193.) Article XIII D's protest procedure and similar statutory protest procedures, like the limited initiative power affirmed in *Bighorn*, did not divest the districts of their fee authority. Rather, the protest procedures created a power-sharing arrangement similar to that in *Bighorn* where presumably voters would appropriately consider the state-mandated requirements imposed on the districts. (*Paradise Irrigation Dist.*, at pp. 194–195,.) "[T]he *possibility* of a protest under article XIII D, section 6, does not eviscerate [the districts'] ability to raise fees to comply with the [Water] Conservation Act." (*Id.* at p. 194.)

***579** The State contends the reasoning in *Paradise Irrigation Dist*. applies equally here where article XIII D requires the voters to preapprove fees. It argues that as with the voter protest procedure, under article XIII D permittees' governing bodies and the voters who elected those officials share power to impose fees. The governing bodies propose the fee, and the voters must approve it. The "fact that San Diego property owners could theoretically withhold approval —just as a majority of the governing body could theoretically withhold approval to impose a fee—does not 'eviscerate' San Diego's police power; that power exists regardless of what the property owners, or the governing body, might decide about any given fee."

The State's argument does not recognize a key distinction we made in *Paradise Irrigation Dist*.: water service fees were not subject to voter approval. We contrasted article XIII D's protest procedure with the voter-approval requirement imposed by Proposition 218 on new taxes. Under ****598** article XIII C, no local government may impose or increase any general or special tax "unless and until that tax is submitted to the electorate and approved" by a majority of the voters for a general tax and by a two-thirds vote for a special tax. (Cal. Const., art. XIII C, § 2, subds. (b), (d).) Under article XIII D, however, water service fees do not require the consent of the voters. (Art. XIII D, § 6, subd. (c); (*Paradise Irrigation Dist., supra*, 33 Cal.App.5th at p. 192.) The implication is the voter approval requirement would deprive the districts of fee authority.

Since the fees in *Paradise Irrigation Dist*. were not subject to voter approval, the protest procedure created a power-sharing arrangement like that in *Bighorn* which did not deprive the districts of their fee authority. In *Bighorn*, the power-sharing arrangement existed because voters could possibly bring an initiative or referendum to reduce charges, but the validity of the fee was not contingent on the voters preapproving it. In *Paradise Irrigation Dist.*, the power-sharing arrangement existed because voters could possibly protest the water fee, but the validity of the fee was not contingent on voters preapproving the fee. The water fee was valid unless the voters successfully protested, an event the trial court in *Paradise Irrigation Dist*. correctly described as a " 'speculative and uncertain threat.' " (*Paradise Irrigation Dist., supra*, 33 Cal.App.5th at p. 184.)

[58] Here, a fee for stormwater drainage services is *not* valid unless and until the voters approve it. For property-related fees, article XIII D limits permittees' police power to proposing the fee. Like article XIII C's limitation on local governments' taxing authority, article XIII D provides that "[e]xcept for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the ***580** property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area." (Art. XIII D, § 6, subd. (c).) The State's argument ignores the actual

limitation article XIII D imposes on permittees' police power. Permittees expressly have no authority to levy a property-related fee unless and until the voters approve it. There is no power-sharing arrangement.

This limitation is crucial to our analysis. The voter approval requirement is a primary reason article XIII B, section 6 exists and requires subvention. As stated earlier, the purpose of article XIII B, section 6 "is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose." (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81 [61 Cal.Rptr.2d 134, 931 P.2d 312].) And what are those limitations? Voter approval requirements, to name some.

Articles XIII A and XIII B "work in tandem, together restricting California governments' power both to levy and to spend for public purposes." (*City of Sacramento, supra*, 50 Cal.3d at p. 59, fn. 1.) Article XIII A prevents local governments from levying special taxes without approval by two-thirds of the voters. (Cal. Const., art. XIII A, § 4.) It also prevents local governments from levying an ad valorem tax on real and personal property. (Cal. Const., art. XIII A, § 1.) Article XIII B, adopted as the " 'next logical step' " to article XIII A, limits the growth of appropriations made from ****599** the proceeds of taxes. (*City Council v. South* (1983) 146 Cal.App.3d 320, 333–334 [194 Cal.Rptr. 110]; see Cal. Const., art. XIII B, §§ 1,2,8.) And, as stated above, article XIII C extends the voter approval requirement to local government general taxes. (Cal. Const., art. XIII C, § 2, subd. (b).)

Subvention is required under article XIII B, section 6 because these limits on local governments' taxing and spending authority, especially the voter approval requirements, deprive local governments of the authority to enact taxes to pay for new state mandates. They do not create a power-sharing arrangement with voters. They limit local government's authority to proposing a tax only, a level of authority that does not guarantee resources to pay for a new mandate. Article XIII B, section 6 provides them with those resources.

Article XIII D's voter approval requirement for property-related fees operates to the same effect. Unlike the owner protest procedure at issue in *Paradise Irrigation Dist.*, the voter approval requirement does not create a powers-haring arrangement. It limits a local government's authority to proposing a fee only; again, a level of authority that does not guarantee resources to pay for a state mandate. Article XIII B, section 6 thus requires subvention because of ***581** article XIII D's voter approval requirement. Contrary to the State's argument, *Paradise Irrigation Dist*. does not compel a different result.

4. Street sweeping condition

The Commission originally determined that permittees lacked sufficient authority to levy a fee for the street sweeping condition, and thus it was a reimbursable mandate. The Commission found that although permittees had authority to levy a fee for street sweeping pursuant to Public Resources Code section 40059, and that such a fee would be exempt from article XIII D's voter approval requirement as a refuse collection fee, the fee would not be exempt from article XIII D's owner protest procedure. (Art. XIII D, § 6.) The Commission concluded that the owner protest procedure denied permittees sufficient authority to levy a fee for the street sweeping condition, and the condition was a reimbursable mandate.

After the Commission issued its decision, this court issued *Paradise Irrigation Dist.* and, as already explained, determined that article XIII D's owner protest procedure did not deprive local governments of authority to levy water service fees. (*Paradise Irrigation Dist., supra*, 33 Cal.App.5th at pp. 192–195.) In its respondent's brief, the Commission now agrees with the State that, as a result of *Paradise Irrigation Dist.*, permittees have authority to levy fees for the street sweeping condition, and that the condition is not a reimbursable mandate. The fee is not subject to voter approval, and voter protest requirements applicable to refuse service fees do not deprive permittees of their authority to levy fees for that service.

Permittees disagree with the Commission's new position. They claim *Paradise Irrigation Dist*. does not affect the issue. Public Resources Code section 40059 authorizes a fee for solid waste handling, but the street sweeping condition was imposed to prevent and abate pollution in waterways and on beaches, not to collect solid waste. The State and the Commission also have not established that street sweeping qualifies as solid waste handling under Public Resources Code section 40059, or that a fee for such activity qualifies as "refuse collection" for purposes of article XIII D. In addition, the State has not established how a fee for street sweeping

can satisfy article XIII D's substantive ****600** requirements which apply to all property-related fees.

Before reaching its original holding, the Commission concluded the street sweeping fees qualified as refuse collection fees for purposes of article XIII D's voter approval exemption. The Commission determined that permittees had authority to adopt street cleaning fees pursuant to their authority to adopt fees for solid waste handling. Public Resources Code section 40059 grants ***582** local agencies the authority to determine fees and charges for "solid waste handling." (Pub. Resources Code, § 40059, subd. (a)(1).) " 'Solid waste handling' " means "the collection, transportation, storage, transfer, or processing of solid wastes." (Pub. Resources Code, § 40195.) " '[S]olid waste' " includes "all putrescible and nonputrescible solid, semisolid, and liquid wastes" including garbage, trash, refuse, paper, rubbish, ashes, and the like. (Pub. Resources Code, § 40191.) The Commission determined that " '[g]iven the nature of material swept from city streets, street sweeping falls under the rubric of "solid waste handling," ' " and permittees thus had authority to adopt fees for street sweeping.

Article XIII D exempts "refuse collection" fees from its voter approval requirement, but neither it nor the Implementation Act define "refuse collection." The Commission determined the plain meaning of refuse collection is the same as solid waste handling. "Refuse is collected via solid waste handling." As a result, the Commission concluded that street cleaning fees would qualify as refuse collection fees and were therefore expressly exempt from article XIII D's voter approval requirement.

[59] Permittees assert that "no one" has demonstrated that a fee for street sweeping qualifies as refuse collection for purposes of article XIII D. Yet permittees offer no alternative to the Commission's interpretation that street sweeping is waste handling, and that waste handling is refuse collecting. We independently review the Commission's interpretation of the permit and statutory provisions. (*Los Angeles Mandates I, supra*, 1 Cal.5th at p. 762.) Giving the language a plain and commonsense meaning as we are required to do (*City of San Jose, supra,* 2 Cal.5th at p. 616), we agree with the Commission's interpretation that street sweeping, as required by the permit, is refuse collecting for purposes of article XIII D.

The permit requires each permittee to implement a program "to sweep improved (possessing a curb and gutter) municipal roads, streets, highways, and parking facilities." Frequency depends on the volume of trash each street generates. Roads "consistently generating the highest volumes of trash and/or debris shall be swept at least two times per month." Roads that generate "moderate" or "low" "volumes of trash and/or debris" are to be swept less frequently.

As part of their reporting responsibilities, permittees must annually identify the total distance of curb miles of roads identified "as consistently generating the highest volumes of trash and/or debris," and also the curb miles of roads identified as "consistently generating moderate volumes of trash and/or debris" and "low volumes of trash and/or debris." Additionally, permittees must annually report the "[a]mount of material (tons) collected from street and parking lot sweeping."

***583** It is obvious that the street sweeping condition expressly requires permittees to collect refuse. Refuse means "rubbish," "trash," "garbage." (Merriam-Webster Unabridged Dict. Online (2022) <https://unabridged.merriam-webster.com/unabridged/refuse, ****601** par.3> [as of Nov. 21, 2022], archived at <https://perma.cc/YDN3-8T7W> (capitalization omitted).) Permittees must collect and record the volumes of trash removed by street sweeping. Thus, a fee for collecting that refuse and charged pursuant to Public Resources Code section 40059 would as a fee for refuse collection services be exempt from article XIII D's voter approval requirement.

[60] Permittees claim the street sweeping requirement was not imposed to collect solid waste as contemplated by Public Resources Code section 40059 but was intended to prevent or abate pollution. We rejected this type of argument earlier when the State made it. Recall that for purposes of article XIII B, section 6, the State's purpose for imposing a mandate does not determine whether the mandate is a new program. Similarly, if street sweeping qualifies as waste handling for purposes of Public Resources Code section 40059, then permittees have authority to levy a fee for it, regardless of why the state imposed the street sweeping condition.

Relying on *Los Angeles Mandates II, supra*, 59 Cal.App.5th at page 568, permittees claim the State has the burden of proving their fee authority, and specifically that a fee for street sweeping would satisfy article XIII D's substantive requirements for property-related fees. Permittees assert the State has not met its burden. *Los Angeles Mandates II* is distinguishable. There, the Court of Appeal determined that

an NPDES permit condition requiring the local governments to install and maintain trash receptacles at public transit stops owned by other public entities required subvention under article XIII B, section 6 because the local agencies did not have sufficient authority to levy fees for the requirement. (*Los Angeles Mandates II,* at p. 561.) The local governments did not have authority to install equipment on another public entity's property and then charge that entity for installation and ongoing maintenance. (*Id.* at pp. 565–567.)

The state in that case contended the local agencies could impose a fee on private property owners, and that such a fee would survive limitations imposed by article XIII D. Assuming for purposes of argument that the fee would overcome all of article XIII D's procedural hurdles, such as the owner protest and voter approval requirements, the Court of Appeal determined the state had not shown the fee would meet article XIII D's substantive requirements for property-related fees. (*Los Angeles Mandates II, supra*, 59 Cal.App.5th at pp. 567–568.) The state did not cite to the record or to authority showing such a fee could satisfy the substantive requirements, and common sense dictated it could not. (*Id.* at p. 568.)

***584** Three of the substantive requirements permit a property-related fee only if the amount of the fee does not exceed the proportional cost of that attributable to the parcel, the fee is imposed for a service that is actually used by, or immediately available to, the owner of the property in question, and the fee is not imposed for general governmental services where the service was available to the public at large in substantially the same manner as it was to property owners. (Art. XIII D, § 6, subd. (b)(3)–(5).) The state could not satisfy the requirements because the vast majority of persons who would use trash receptacles at transit stops would be pedestrians, transit riders, and other members of the public, not the owners of adjacent properties. Any benefit to them would be incidental. Moreover, the placement of the receptacles at public transit stops ****602** would make the service available to the public at large in the same manner as it would to property owners. (*Los Angeles Mandates II, supra*, 59 Cal.App.5th at pp. 568–569.)

The state claimed two other statutes, including Public Resources Code section 40059, gave the local agencies sufficient fee authority. The Court of Appeal did not dispute that the statutes authorized the agencies to impose fees, including waste management fees under Public Resources Code section 40059, but the statutes did not exempt such fees from the constitutional requirements imposed by article XIII D. (*Los Angeles Mandates II, supra*, 59 Cal.App.5th at pp. 569–570.)

[61] There is no dispute that any fee permittees may charge for the street sweeping condition will be subject to article XIII D's substantive requirements. Permittees, however, citing *Los Angeles Mandate II*, claim the State, as the party seeking to establish an exception to subvention under article XIII B, section 6, has the burden at this stage to establish that any fee permittees may adopt will meet all of the substantive requirements, and the state has not met that burden. "Typically, the party claiming the applicability of an exception bears the burden of demonstrating that it applies." (*Los Angeles Mandates I, supra,* 1 Cal.5th at p. 769.)

The State argues that this typical approach should not apply to the burden of showing fee authority under section 17556(d). It claims the inherent flexibility in permittees' police power means permittees may develop fees in any number of ways. Also, local governments like permittees have significantly more expertise and experience than the State agencies before us in designing, implementing, and defending local government fees. The State asserts that permittees' expertise means they should bear the burden on this point.

[62] **[63]** We agree the State has the burden of establishing that permittees have fee authority, but that burden does not require the State also to prove ***585** permittees as a matter of law and fact are able to promulgate a fee that satisfies article XIII D's substantive requirements. The sole issue before us is whether permittees have "the authority, i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program." (*Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401 [69 Cal.Rptr.2d 231].) The inquiry is an issue of law, not a question of fact. (*Ibid.*)

"The lay meaning of 'authority' includes 'the power or right to give commands [or] take action ... .' (Webster's New World Dictionary (3d college ed.1988) p. 92.) Thus, when we commonly ask whether a police officer has the 'authority' to arrest a suspect, we want to know whether the officer has the legal sanction to effect the arrest, not whether the arrest can be effected as a practical matter. [¶] Thus, the plain language of the statute precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program." (*Connell v. Superior Court, supra*, 59 Cal.App.4th at p. 401.)

[64] The State has established that permittees have the right or power to levy a fee for the street cleaning condition pursuant to Public Resources Code section 40059. Implicit in that determination is that permittees have the right or power to levy a fee that complies with article XIII D's substantive requirements. Unless it can be shown on undisputed facts in the record or as a matter of law that a fee cannot satisfy article XIII D's substantive requirements, as was found in ****603** *Los Angeles Mandates II*, the establishment by the State of the local agencies' power or authority to levy a fee without voter approval or without being subject to other limitations establishes that a local government has sufficient fee authority for purposes of section 17556(d).

Although the Court of Appeal in *Los Angeles Mandates II* stated the state bore the burden to show that a fee for public trash receptacles could satisfy the substantive requirements, and that the state did not satisfy its burden, the court actually ruled that the local governments could not establish a fee that could meet the substantive requirements as a matter of law or undisputed fact. (*Los Angeles Mandates II, supra*, 59 Cal.App.5th at pp. 568–569 ["common sense dictates" that fee would not meet requirements].) To require the State to show affirmatively how permittees can create a fee that meets the substantive requirements where no fee yet exists requires the State effectively to engage in the rulemaking process itself. That asks the State to do more than establish permittees have the lawful authority to enact a fee, which is the sole issue. To the extent *Los Angeles Mandates II* requires the State to prove more, we respectively disagree with its interpretation.

Here, the State has established that permittees have sufficient fee authority to levy a fee for the street sweeping condition. As a result, the ***586** condition does not trigger subvention under article XIII B, section 6. We will reverse the trial court's contrary holding on this issue.

IV

Permittees' Cross-appeal

A. Background

Permittees' cross appeal challenges the Commission's decision that permittees have sufficient authority to levy fees to recover the costs for two of the challenged conditions: the development and implementation of a hydromodification management plan (HMP) and low impact development (LID) requirements, both for use on "priority development projects."

Under the permit, priority development projects in general are certain new developments that increase pollutants in stormwater and in discharges from MS4s. These include certain residential, commercial, and industrial uses along with parking lots and roads that add impervious surfaces or are built on hillsides or in environmentally sensitive areas.

The permit requires permittees to develop and implement an HMP to mitigate increases in runoff discharge rates and durations from priority development projects. Hydromodification refers to the change in natural hydrologic processes and runoff characteristics caused by urbanization or other land use changes that result in increased stream flows and sediment transport. The plan would apply where increased runoff rates and durations from priority development projects would likely cause increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat.

LID requirements are stormwater management and land development strategies to minimize directly connected impervious areas and promote ground infiltration at priority development projects. They emphasize conservation and the use of on-site natural features, integrated with engineered, small-scale hydrologic controls to reflect predevelopment hydrologic functions more closely. The permit requires permittees to add LID requirements to their local standard urban storm water mitigation plans.

****604** The Commission determined that permittees had authority to levy fees to recover the costs of developing and implementing the HMP and the LID requirements because fees for those actions would not require voter approval under article XIII D. The purpose of the two conditions "is to prevent or abate pollution in waterways and beaches in San Diego County." Permittees ***587** have authority to impose the fees for this purpose under their police power, and article XIII D does not apply to fees imposed under the police power as a condition of property development or as a result of a property owner's voluntary decision to seek a government benefit. Additionally, the Mitigation Fee Act (Gov. Code, § 66000 et seq.) grants permittees statutory authority to impose development fees to recover the costs for complying with the HMP and LID conditions which, again, are exempt from article XIII D. Because permittees had the authority to levy fees to recover the costs of the HMP and LID conditions

without having to obtain voter approval, the Commission concluded the conditions were not reimbursable mandates under article XIII B, section 6.

The trial court upheld the Commission's determinations on the same grounds.

B. Analysis

Permittees contend the Commission and the trial court erred. They do not dispute that they may enact regulatory fees pursuant to their police power. They focus their argument on recovering only the costs of creating the HMP and the LID requirements, and they claim that fees to recover those costs cannot meet the "substantive requirements" to be exempt from the voter approval requirements found in section 6 of article XIII D or article XIII C, section 1, subdivision (e)(2) of the state Constitution. They also contend that fees to recover those costs cannot satisfy the substantive requirements of the Mitigation Fee Act.

[65] **[66]** Before addressing permittees' authority to levy a fee for the HMP and LID conditions, we refute an assumption underlying their argument. Section 6 of article XIII D and its voter approval requirements do not apply in this instance. The Commission found that permittees had authority to recover the costs of preparing the HMP and the LID requirements by imposing a fee as a condition for approving new priority development projects. Article XIII D does not apply to fees imposed on real property development. (Art. XIII D, § 1.) Article XIII D also does not apply to fees imposed on property owners for their voluntary decision to apply for a government benefit. (*Richmond v. Shasta Community Services Dist., supra*, 32 Cal.4th at pp. 425–428.) The proposed fee at issue here would be imposed as a condition for approving new real property development and based on the developer's application for government approval to proceed with the development. Article XIII D does not apply in this circumstance.

[67] Also, at the time the Commission issued its decision, the state Constitution did not expressly define taxes and fees or their differences. In November 2010, shortly after the Commission issued its decision, voters ***588** approved Proposition 26, which amended section 1 of article XIII C by adding subdivision (e), the provision cited by permittees. (Cal. Const., art. XIII C, § 3, approved by voters, Gen. Elec. (Nov. 2, 2010), eff. (Nov. 3, 2010, commonly known as Prop. 26.) Proposition 26 defined a local tax subject to voter approval as "any levy, charge, or exaction of any kind imposed by a local government" except for certain enumerated charges and fees. (Cal. Const., art. XIII C, §§ 1, subd. (e), 2.) Proposition 26 is not ****605** retroactive, and thus its definitions of a tax and fee do not apply to the Commission's decision. (*Brooktrails Township Community Services Dist. v. Board of Supervisors of Mendocino County* (2013) 218 Cal.App.4th 195, 205–207 [159 Cal.Rptr.3d 424].) However, Proposition 26 codified much, but not all, of the relevant case authority that existed at the time of the measure's enactment regarding the requirements for a valid fee. (*City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210 [226 Cal.Rptr.3d 51, 406 P.3d 733].) In determining whether permittees can levy a fee or whether a fee they enact would be valid, we will restrict ourselves to authority and rules established before Proposition 26 was adopted or which the measure codified.

[68] In general, all taxes imposed by local governments must be approved by the voters, but development fees and regulatory fees that meet certain requirements are not required to be approved by the voters. (Cal. Const., arts. XIII C, § 2, XIII D, § 1, subd. (b); *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 875–876 [64 Cal.Rptr.2d 447, 937 P.2d 1350].) A levy qualifies as a regulatory fee if "(1) the amount of the fee does not exceed the reasonable costs of providing the services for which it is charged, (2) the fee is not levied for unrelated revenue purposes, and (3) the amount of the fee bears a reasonable relationship to the burdens created by the fee payers' activities or operations. ([*Sinclair Paint Co. v. State Bd. of Equalization, supra*, 15 Cal.4th at p. 881].) If those conditions are not met, the levy is a tax." (*California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1046 [232 Cal.Rptr.3d 64, 416 P.3d 53].)

These are the substantive requirements that permittees claim a fee for the HMP and LID conditions cannot satisfy. Specifically, they claim that a fee to recover the cost of creating the HMP and the LID requirements cannot meet the first and third required elements of a valid regulatory fee. They assert that any fee revenue they collected from developers of priority development projects would exceed the cost of creating the HMP and the LID requirements. They incurred $1.1 million in drafting the plans, and the plans were drafted before any development projects could be charged a fee. They argue that if they collected fees from all applicable developers, eventually the fees collected would exceed the $1.1 million cost to write the plans. If they stopped charging fees after collecting $1.1 million, developers who paid the fee

would have paid more than they should for their benefit or burden.

***589** Permittees also claim that the amount of a fee for recovering the costs of creating the HMP and the LID requirements would not have a fair or reasonable relationship to the burdens created by future developers' activities or operations. Permittees assert they lack any means of reasonably allocating the costs of creating the HMP and the LID requirements among particular development projects and their proponents. Case authority requires the fee to be based on a project's contribution to the impact being addressed, but permittees assert they cannot monitor pollutants from all future development projects to establish an emissions-based formula for allocating the fee. (See *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1146 [250 Cal.Rptr. 420] (*San Diego Gas*).) Permittees argue that case authority also prevents them from allocating a fee based on the physical characteristics of individual properties. (See *City of Salinas, supra*, 98 Cal.App.4th at p. 1355.)

****606** **[69]** Whether a levy constitutes a fee or tax is a question of law determined upon an independent review of the record. (*California Building Industry Assn v. State Water Resources Control Bd., supra*, 4 Cal.5th at p. 1046.) Here, of course, there is no adopted fee to which we could apply the substantive requirements. And permittees direct us to no evidence in the record supporting their claim that, in effect, it is factually and legally impossible for them to adopt a valid regulatory fee to recover the cost of creating the HMP and the LID requirements.

As with the street sweeping condition, the sole issue before us is whether permittees have the authority, i.e., "the right or power, to levy fees sufficient to cover the costs." (*Connell v. Superior Court, supra*, 59 Cal.App.4th at p. 401.) There is no dispute that permittees' police power vests them with the legal authority to levy fees that will satisfy the substantive requirements to avoid being considered as taxes. That fact ends our analysis unless permittees can establish they cannot levy a regulatory or development fee as a matter of law.

[70] There is no evidence in the record that permittees cannot levy a fee in an amount that will not exceed their costs for creating the HMP and the LID requirements. "The scope of a regulatory fee is somewhat flexible and is related to the overall purposes of the regulatory governmental action. ' "A regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation." [Citation.] "Such costs ... include all those incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement." [Citation.] Regulatory fees are valid despite the absence of any perceived "benefit" accruing to the fee payers. [Citation.] Legislators "need only apply sound judgment and ***590** consider 'probabilities according to the best honest viewpoint of informed officials' in determining the amount of the regulatory fee." [Citation.]' ([*California Assn. of Prof. Scientists v. Department of Fish & Game* (2000)] 79 Cal.App.4th [935,] 945 [94 Cal.Rptr.2d 535] 'Simply because a fee exceeds the reasonable cost of providing the service or regulatory activity for which it is charged does not transform it into a tax.' (*Barratt American, Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 700 [37 Cal.Rptr.3d 149, 124 P.3d 719].)" (*California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 438 [121 Cal.Rptr.3d 37, 247 P.3d 112].)

Creating the HMP and the LID requirements constitute costs incident to the development permit which permittees will issue to priority development projects and the administration of permittees' pollution abatement program. Setting the fee will not require mathematical precision. Permittees' legislative bodies need only " ' "conside 'probabilities according to the best honest viewpoint of [their] informed officials' " ' " to set the amount of the fee. (*California Farm Bureau Federation v. State Water Resources Control Bd., supra*, 51 Cal.4th at p. 438.) "No one is suggesting [permittees] levy fees that exceed their costs." (*Connell v. Superior Court, supra*, 59 Cal.App.4th at p. 402.)

[71] **[72]** **[73]** **[74]** **[75]** There is also no evidence in the record indicating permittees cannot levy a fee that will bear a reasonable relationship to the burdens created by future priority development. "A regulatory fee does not become a tax simply because the fee may be disproportionate to the service rendered to individual payors. (****607** *Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178, 194 [29 Cal.Rptr.2d 128].) The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors. (*[California Assn. of Prof. Scientists v. Department of Fish & Game], supra*, 79 Cal.App.4th at p. 948.) [¶] Thus, permissible fees must be related to the overall cost of the governmental regulation. They need not be finely calibrated to the precise benefit

each individual fee payor might derive [or the precise burden each payer may create]. What a fee cannot do is exceed the reasonable cost of regulation with the generated surplus used for general revenue collection. An excessive fee that is used to generate general revenue becomes a tax." (*California Farm Bureau Federation v. State Water Resources Control Bd., supra*, 51 Cal.4th at p. 438.) Again, no one is suggesting permittees levy a fee to generate general revenue.

Permittees cite to *San Diego Gas, supra*, 203 Cal.App.3d at pages 1145 throught 1149, and *City of Salinas, supra*, 98 Cal.App.4th at page 1355, to claim they lack any means of fairly or reasonably allocating the costs of creating the HMP and the LID requirements among priority development project proponents. Those cases, however, concern only the facts before them ***591** and do not establish that permittees as a matter of law cannot enact a fee that meets the substantive requirements for regulatory fees.

In *San Diego Gas*, the Court of Appeal upheld an air pollution control district's imposition of a regulatory fee to cover the administrative cost of its permit program for industrial polluters. The fee was apportioned based on the amount of emissions discharged by a stationary pollution source. The record showed that the allocation of costs based on emissions fairly related to the permit holder's burden on the district's programs. (*San Diego Gas, supra*, 203 Cal.App.3d. at p. 1146.) The district's determination that a fee based on the labor costs incurred in the permit program would result in small polluters paying fees greater than their proportionate share of pollution reasonably justified using the emissions-based fee schedule to divide the costs more equitably. (*Id.* at pp. 1146–1147.)

Permittees contend that, similar to the labor-based fee in *San Diego Gas* that was not imposed, allocating the costs of preparing the HMP and the LID requirements pursuant to a formula unrelated to an individual project's contribution to pollution would not provide a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity. However, *San Diego Gas* does not stand for the proposition that an emissions-based, or discharge-based fee requiring direct monitoring is the only lawful fee for funding a pollution mitigation program. The case is limited to its facts, and the court in that case determined that the emissions-based fee before it met the substantive requirements for regulatory fees.

[76] **[77]** The substantive test is "a flexible assessment of proportionality within a broad range of reasonableness in setting fees." (*California Assn. Prof. Scientists v. Department of Fish & Game, supra*, 79 Cal.App.4th at p. 949.) This flexibility would be particularly appropriate where an obvious or accepted method such as an emissions-based fee is impractical. Indeed, "[r]egulatory fees, unlike other types of user fees, often are not easily correlated to a specific, ascertainable cost." (*Id.* at p. 950.) In those cases, even a flat-fee system may be a reasonable means of allocating costs. (*Id.* at pp. 939, 950–955 [flat fee schedule to defray ****608** costs of performing environmental review was valid regulatory fee as long as the cumulative amount of the fee did not surpass the cost of the regulatory service and the record discloses a reasonable basis to justify distributing the cost among payors].) Permittees have not shown they cannot meet this flexible test.

Relying on *City of Salinas*, permittees also claim that charges based on the physical characteristics of a property, such as the amount of impervious surface area as a proxy for actual discharges, are not proportional to the amount of services requested or used and thus must be approved by the ***592** voters. (*City of Salinas, supra*, 98 Cal.App.4th at p. 1355.) Permittees misread the court's statement. The particular issue in *City of Salinas* was whether a fee charged by a city on all developed parcels to finance improvements to storm and surface water facilities was a property-related fee subject to article XIII D's voter approval requirements or a user fee comparable to the metered use of water or the operation of a business. The fee was calculated according to the degree to which the property contributed runoff to the city's drainage facilities, and a property's contribution was to be measured by the amount of " 'impervious area' " on the parcel. (*City of Salinas,* at p. 1353.)

The city had argued the fee was a user fee because a property owner could theoretically opt out of paying it by maintaining its own stormwater management facility on the property. The court disagreed, finding the fee was appliable to each developed parcel in the city. (*City of Salinas, supra*, 98 Cal.App.4th at pp. 1354–1355.) One indicator the fee was not a user fee was the fact that any reduction in the fee based on lack of contribution of water was "not proportional to the amount of services requested or used by the occupant, but on the physical properties of the parcel." (*Id.* at p. 1355.) The statement concerned the limited issue of whether the fee was a user fee. Contrary to permittees' interpretation, the Court of Appeal's statement does not mean that charges based on

a property's physical characteristics, such as the amount of impervious surface area as a proxy for actual discharges, are as a matter of law not proportional to the amount or level of services provided and must be approved by voters as a tax.

Permittees also raise an argument based on Proposition 26. They assert they cannot legally levy a fee to recover the cost of preparing the HMP and LID conditions because those planning actions benefit the public at large, citing *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1451 [197 Cal.Rptr.3d 429] (*Newhall*). Permittees misapply *Newhall*. *Newhall* concerned rates that a public water wholesaler of imported water charged to four public retail water purveyors. Part of the wholesaler's rates consisted of a fixed charge based on each retailer's rolling average of demand for the wholesaler's imported water and for groundwater which was not supplied by the wholesaler. Although the wholesaler was required to manage groundwater supplies in the basin, it did not sell groundwater to the retailers. (*Id.* at pp. 1434–1440.)

The Court of Appeal determined the rates did not qualify as fees under Proposition 26. Proposition 26 states a levy is not a tax where, among other uses, it is imposed "for a specific government service or product provided directly to the payor that is not provided to those not charged ... ." (Cal. Const., art. XIII C, § 1, subd. (e)(2).) The only specific government service ***593** the wholesaler provided to the retailers was imported water. It did not provide groundwater, ****609** and the groundwater management activities it provided were not services provided just to the retailers. Instead, those activities "redound[ed] to the benefit of all groundwater extractors in the Basin." (*Newhall, supra*, 243 Cal.App.4th at p. 1451.) The wholesaler could not base its fee and allocate its costs based on groundwater use because the wholesaler's groundwater management activities were provided to those who were not charged with the fee. (*Ibid*.; see also *Los Angeles Mandates II, supra*, 59 Cal.App.5th at p. 569 [art. XIII D prohibits MS4 permittees from charging property owners for the cost of providing trash receptacles at public transit locations in part because service was made available to the public at large].)

Permittees argue that, as in *Newhall*, the costs of preparing the HMP and the LID requirements are part of their stormwater management programs. Although only proponents of priority development projects will be required to comply with the plans, the plans will "redound to the benefit of all" property owners, residents, and visitors in the region by improving water quality. Thus, a charge to recover the costs of creating the plan would not qualify as a fee and would be subject to voter approval, and as a result, permittees do not have authority to levy a fee for that purpose.

Assuming only for purposes of argument that Proposition 26 applies here, we disagree with permittees. Article XIII C, section 1, subdivision (e) defines a local tax subject to voter approval as "any levy, charge, or exaction of any kind imposed by a local government," with the express exception of seven different types of charges. Satisfying any one of those exceptions removes the charge from being a tax. The proposed fee permittees may impose satisfies two of those exceptions: a charge imposed for the reasonable regulatory cost to a local government for issuing permits, and a charge imposed as a condition of property development. (Cal. Const., art. XIII C, § 1, subd. (e)(3), (6).)

[78] Under the exception at issue in *Newhall*, a charge is not a tax if it is "imposed for a specific government service or product provided directly to the payor that is not provided to those not charged ... ." (Cal. Const., art. XIII C, § 1, subd. (e)(2).) The focus is on a service or product "provided directly" to the payor that is not provided to those not charged. Here, the service provided directly to developers of priority development projects is the preparation, implementation, and approval of water pollution mitigations applicable only to their projects. Unlike in *Newhall*, that service is not provided to anyone else, and only affected priority project developers will be charged for the service. The service will not be provided to those not charged. To interpret the provision as permittees do, that the exception from being a tax excludes fees ***594** for services that ultimately but not directly redound to the public benefit,—which is not what *Newhall* held—is contrary to the statutory exception's express wording.

Separately, the County of San Diego (the County) raises another argument. It notes that under existing law, if a local agency has some fee authority, but not sufficient fee authority to cover the entire cost of a mandated activity, the mandate is reimbursable under article XIII B, section 6 to the extent the cost cannot be recovered through fees. (See *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 812 [116 Cal.Rptr.3d 33] (*Clovis Unified*).) The County contends the same principle should be true if a local agency only has fee authority contingent on the actions of third parties, in this case the prospective developers, whom the County and permittees do not control. ****610** Such a "contingent" mandate, so labeled by the County, is not "sufficient to pay

for" the mandate, as required by section 17556(d), and should be deemed a reimbursable mandate.

[79] The County misunderstands the principle. The County describes a situation where whether it collects revenue from the fee is contingent not on its legal authority to levy a fee, but on developers seeking permits for priority development projects. The latter is not relevant to our analysis. The authority the County cites, *Clovis Unified*, acknowledges this distinction and undercuts the County's argument. In *Clovis Unified*, community college districts who provided health care services were mandated to provide those services in the future at the level of care they had provided in the 1986–1987 fiscal year. The districts were required to maintain this level of care even if, as they were permitted to do, they eliminated a student health fee they were authorized by statute to charge. Auditing the districts' approved claims for reimbursement under article XIII B, section 6, the state controller determined the districts would be reimbursed for their health service costs at the level of service they provided in 1986–1987 subject to a reduction by the amount of student fees the districts were statutorily authorized to charge, even if the districts chose not to charge the fee. (*Clovis Unified, supra*, 188 Cal.App.4th at pp. 810–811.)

[80] A panel of this court upheld the controller's auditing rule as consistent with section 17556(d). We stated that section 17556(d)'s fee authority exception to article XIII B, section 6 's subvention requirement embodied a basic principle underlying the state mandate process: "To the extent a local agency or school district 'has the authority' to charge for the mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost." (*Clovis Unified, supra*, 188 Cal.App.4th at p. 812, fn. omitted.) In other words, the issue turns on the local agency's authority to levy a fee, not on whether the agency actually imposed the fee.

***595** This holding does not support the County's argument. The issue raised by the County is not that permittees do not have fee authority. It is that after they exercise that authority and enact a fee, the fee may not be paid if no developers apply for permits. The County's authority to levy a fee is not contingent on future developers, only the actual collection of the fee is contingent. The authority to levy the fee is derived from police power, and nothing in the County's argument, or permittees' arguments, indicates permittees do not have the authority to levy fees for the HMP and the LID requirements.

DISPOSITION

We reverse the judgment only to the extent it holds that the street sweeping condition is a reimbursable mandate under article XIII B, section 6. In all other respects, the judgment is affirmed. Each party shall bear its own costs. (Cal. Rules of Court, rule 8.278(a)(5).)

Mauro, J., and Duarte, J., concurred.

Appellants' petition for review by the Supreme Court was denied March 1, 2023, S277832.

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Supreme Court of California

LUCIA MAR UNIFIED SCHOOL
DISTRICT et al., Plaintiffs and Appellants,
v.
BILL HONIG, as Superintendent, etc.,
et al., Defendants and Respondents

No. S000064.
Mar 14, 1988.

SUMMARY

School districts filed a test claim with the Commission on State Mandates to determine whether Ed. Code, § 59300 (requiring school districts to contribute part of the cost of educating pupils from the district at state schools for the severely handicapped), imposed on them a state-mandated "new program or higher level of service" for which the state must provide reimbursement under Cal. Const., art. XIIIB, § 6. The commission found that § 59300 did not impose a new program or higher level of service. The districts filed a petition for writ of mandate, declaratory relief, and restitution against the commission, the State Superintendent of Public Instruction, and the Department of Education. The trial court affirmed the commission's decision. (Superior Court of San Luis Obispo County, No. 60152, Walter W. Charamza, Judge. [*]) The Court of Appeal, Sixth Dist., No. B019083, affirmed the trial court's judgment.

The Supreme Court reversed the judgment of the Court of Appeal. It held that § 59300 does impose a new program or higher level of service but that remand to the commission was necessary to determine whether the provision was state-mandated. However, the court held, the superintendent and the department did not act in excess of their authority in deducting the amounts owed by the districts from funds appropriated by the state for their support after the districts refused to pay invoices submitted to them pursuant to § 59300.

* Retired judge of the superior court sitting under assignment by the Chairperson of the Judicial Council.(Opinion by Mosk, J., with Lucas, C. J., Broussard, Panelli, Arguelles, Eagleson and Kaufman, JJ., concurring.) ***831**

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b)
Schools § 4--School Districts; Financing; Funds--State Reimbursement for New Programs and Higher Levels of Service--Cost of Educating Severely Handicapped at State Schools.
Ed. Code, § 59300 (requiring school districts to contribute part of the cost of educating pupils from the district at state schools for the severely handicapped), imposes on school districts a "new program" within the meaning of Cal. Const., art. XIIIB, § 6 (providing reimbursement to local agencies for state-mandated new programs or higher levels of service). Thus, in a test claim filed by school districts, the Commission on State Mandates erred in finding to the contrary; however, remand to the commission was necessary to determine whether § 59300 was a state mandate.

(2)
State of California § 11--Fiscal Matters--Reimbursement of Local Agencies for State-mandated New Programs or Higher Levels of Service.
The intent of Cal. Const., art. XIIIB, § 6, was to preclude the state from shifting to local agencies the financial responsibility for providing public services, in view of restrictions imposed on the taxing and spending power of local entities by Cal. Const., art. XIIIA.

[See **Cal.Jur.3d,** Municipalities, § 361; **Am.Jur.2d,** Municipal Corporations, Counties, and Other Political Subdivisions, § 582.]

(3)
State of California § 11--Fiscal Matters--Deduction From School Appropriations of Amounts Owed State.
Where, following enactment of Ed. Code, § 59300 (requiring school districts to contribute part of cost of educating pupils from district at state schools for severely handicapped), school district refuse to pay invoices sent them by the state pursuant to § 59300, the State Superintendent of Public Instruction and the Department of Education did not act in excess of their authority in deducting the amounts owed by the districts from funds appropriated by the state for their support.

Under the circumstances the method of collection was left to the reasonable discretion of the department, and, in view of the fact that no test claim had been filed when the school districts failed to pay the invoices, the method of collection the department chose was not unreasonable. ***832**

COUNSEL

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Joseph R. Symkowick, Roger D. Wolfertz, Joanne Lowe, John K. Van de Kamp, Attorney General, N. Eugene Hill, Assistant Attorney General, and Henry G. Ullerich, Deputy Attorney General, for Defendants and Respondents.

MOSK, J.

Section 59300 of the Education Code requires a school district to contribute part of the cost of educating pupils from the district at state schools for the severely handicapped. We must determine if that section imposes on a district a state-mandated "new program or higher level of service" for which the state must provide reimbursement under section 6 of article XIIIB of the California Constitution. [1] The constitutional provision, adopted by initiative in 1979, declares, with exceptions not relevant here, that "[w]henever the Legislature ... 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. ..."

1 Hereafter all statutory references are to the Education Code unless otherwise noted, and all references to articles are to the California Constitution.

The resolution of the question before us turns on whether the contributions made by a district pursuant to section 59300 are used to fund "a new program or higher level of service" and, if so, whether the statute "mandates" that a district make the contribution set forth therein. We conclude that the contribution required by section 59300 is utilized to fund a "new program" as defined in the constitutional provision, but that it is not clear from the record whether districts are "mandated" to pay these costs. The matter will therefore be remanded to the Commission on State Mandates to make that determination.

The State Department of Education (department) operates schools for severely handicapped students, including schools for the deaf (§ 59000 et seq.), the blind (§ 59100 et seq.), and the neurologically handicapped (§ 59200 et seq.). Although prior to 1979, school districts were required by statute to contribute to the education of pupils from the districts at the state ***833** schools (former §§ 59021, 59121, 59221), these provisions were repealed in that year and on July 12, 1979, the state assumed the responsibility for full funding. (Stats. 1979, ch. 237, § 3, p. 493.) This responsibility existed when article XIIIB became effective on July 1, 1980 (art. XIIIB, § 10), and continued until section 59300 became effective on June 28, 1981. (Stats. 1981, ch. 102, § 17, p. 703.)

Section 59300 represents an attempt by the state to compel school districts to share in these costs. The section provides, "Notwithstanding any provision of this part to the contrary, the district of residence of the parent or guardian of any pupil attending a state-operated school pursuant to this part, excluding day pupils, shall pay the school of attendance for each pupil an amount equal to 10 percent of the excess annual cost of education of pupils attending a state-operated school pursuant to this part." [2]

2 "Excess annual cost" means the total cost of educating a pupil in a state-operated school less a school district's annual base revenue limit, multiplied by the estimated average daily attendance of the state-operated school.

Starting in 1981, the department attempted to collect the contributions called for in the section by sending invoices to the school district superintendents. When the invoices were not paid, their amount was deducted from the appropriations made by the state to the districts for the support of the schools.

The Government Code sets forth a procedure to determine whether a statute imposes state-mandated costs on a school district or other local agency under article XIIIB. (Gov. Code, § 17500 et seq.). The district must file a test claim with the Commission on State Mandates (commission) which, after a hearing, decides whether the statute mandates a "new program or increased level of service." (*Id.*, §§ 17521, 17551, 17556.) If a claim is found to be reimbursable, the commission must determine the amount to be reimbursed. (*Id.*, § 17557.) The code specifies the procedure to be followed by a local agency to obtain reimbursement if the commission has determined that reimbursement is due. (*Id.*, § 17558 et seq.) If the Legislature refuses to appropriate money to satisfy a mandate found to be reimbursable by the commission, a claimant may bring an action for declaratory

relief to enjoin enforcement of the mandate. (*Id.*, § 17612, subd.(b).)[3] In the event the commission finds against the local agency, it may bring a proceeding in administrative mandate under section 1094.5 of the Code of Civil Procedure to challenge the commission's determination. (***834** Gov. Code, § 17559.) The procedure provided in the code is the exclusive means by which a local agency may claim reimbursement for mandated costs. (*Id.*, § 17552.)

3 In *Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 549 [234 Cal.Rptr. 795], the court observed that this remedy would afford relief only prospectively, and not as to funds previously paid out by a local agency to satisfy a state mandate.

In 1984 plaintiff Lucia Mar Unified School District and other school districts (plaintiffs) filed a test claim before the commission,[4] asserting that section 59300 requires them to make payments for a "new program or increased level of service," and that they are entitled to reimbursement pursuant to section 6 of article XIIIB. The commission denied the claim, finding no reimbursable mandate because, although section 59300 increased plaintiffs' costs for educating students at state-operated schools, it did not impose on the districts a new program or higher level of service.

4 The claim was originally filed with the State Board of Control, which preceded the commission; when the commission was created in 1984, the claim was transferred to it for determination.

Plaintiffs then filed a petition for writ of mandate, declaratory relief, and restitution against the commission, the State Superintendent of Public Instruction (superintendent), and the department. They sought a declaration that section 59300 violates section 6 of article XIIIB, and prayed for orders to compel the commission to reverse its determination, and the superintendent and the department to reimburse them for the amounts withheld under the authority of section 59300. The trial court affirmed the commission's decision. It, too, held that section 59300 does not mandate a new program or higher level of service, finding that the section only calls for an "adjustment of costs."[5]

5 The court found that this "adjustment" was "precipitated" by the Special Education Program, enacted in 1980 (Stats. 1980, ch. 797, § 9, p. 2411 et seq.), discussed in a later part of this opinion, which afforded local governments certain options to educate the handicapped.

The court held, further, that it had no jurisdiction to issue orders to the superintendent to refund the sums withheld from plaintiffs because the commission's decisions may only be challenged by a proceeding in administrative mandate under section 1094.5 of the Code of Civil Procedure. (Gov. Code, §§ 17552, 17559.) Plaintiffs appealed. The Court of Appeal affirmed the judgment, reasoning that a shift in the funding of an existing program is not a new program or a higher level of service. It declined to rule whether restitution from the superintendent was an appropriate remedy.

(1a) The commission argues before this court, as it did below, that section 59300 does not mandate a new program or a higher level of service. The superintendent and the department express no opinion as to the merits of plaintiffs' assertions, but argue that if we should find a reimbursable mandate, plaintiffs' remedy is to seek an appropriation from the Legislature rather than reimbursement from the department. ***835**

We recognize that, as is made indisputably clear from the language of the constitutional provision, local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state. In keeping with this principle, we recently held in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46 [233 Cal.Rptr. 38, 729 P.2d 202] that legislation requiring local governments and other employers to increase certain workers' compensation benefits did not invoke the subvention requirement because the state mandate did not provide for a "program." We reasoned that the additional expense to the local agency mandated by the legislation arose as an incidental impact of a law which applied generally to all state residents and entities, and this type of expense was not what the voters had in mind when they adopted section 6 of article XIIIB. (See also *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1484 [235 Cal.Rptr. 101].)

We defined a "program" as used in article XIIIB as one that carries out the "governmental function of providing services 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." (*County of Los Angeles, supra*, 43 Cal.3d at p. 56.) Unquestionably the contributions called for in section 59300 are used to fund a "program" within this definition, for the

education of handicapped children is clearly a governmental function providing a service to the public, and the section imposes requirements on school districts not imposed on all the state's residents. Nor can there be any doubt that although the schools for the handicapped have been operated by the state for many years, the program was new insofar as plaintiffs are concerned, since at the time section 59300 became effective they were not required to contribute to the education of students from their districts at such schools.

The fact that the impact of the section is to require plaintiffs to contribute funds to operate the state schools for the handicapped rather than to themselves administer the program does not detract from our conclusion that it calls for the establishment of a new program within the meaning of the constitutional provision. To hold, under the circumstances of this case, that a shift in funding of an existing program from the state to a local entity is not a new program as to the local agency would, we think, violate the intent underlying section 6 of article XIIIB. That article imposed spending limits on state and local governments, and it followed by one year the adoption by initiative of article XIIIA, which severely limited the taxing power of local governments. (2) Section 6 was intended to preclude the state from shifting to local agencies the financial responsibility for providing public services ***836** in view of these restrictions on the taxing and spending power of the local entities. (See *County of Los Angeles, supra*, 43 Cal.3d at p. 61.) [6]

(1b) The intent of the section would plainly be violated if the state could, while retaining administrative control of programs it has supported with state tax money, simply shift the cost of the programs to local government on the theory that the shift does not violate section 6 of article XIIIB because the programs are not "new." Whether the shifting of costs is accomplished by compelling local governments to pay the cost of entirely new programs created by the state, or by compelling them to accept financial responsibility in whole or in part for a program which was funded entirely by the state before the advent of article XIIIB, the result seems equally violative of the fundamental purpose underlying section 6 of that article. [7] We conclude, therefore, that because section 59300 shifts partial financial responsibility for the support of students in the state-operated schools from the state to school districts—an obligation the school districts did not have at the time article XIIIB was adopted—it calls for plaintiffs to support a "new program" within the meaning of section 6. [8]

7 There is a statement in *County of Los Angeles, supra*, that a concern prompting the adoption of section 6 in article XIIIB "was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public." (43 Cal.3d at p. 56.) We do not read the phrase "administered by local agencies" to mean that the electorate intended that only locally administered programs require state reimbursement. The underlying premise of the sentence is that reimbursement is required if the state transfers fiscal responsibility to a local agency for a program the state deems desirable.

8 An opinion of the Attorney General, relied on by the commission, is inapposite. It suggests that a law increasing the number of judges in a municipal court district does not constitute a higher level of service under section 6 of article XIIIB because the district has a constitutional obligation to provide for an adequate number of judges. (63 Ops.Cal.Atty.Gen. 700, 702. (1980)) In the present case, the issue is whether section 59300 involves a new program rather than a higher level of service, and it is clear that at the time the section was enacted, plaintiffs did not have an obligation to contribute to the support of the students from their districts at the state schools for the severely handicapped.

The question remains whether school districts are "mandated" by section 59300 to make the contributions called for therein. The commission claims that plaintiffs are not compelled to contribute to the education of handicapped children at the state schools because they possess other options to educate such students. In 1980, the Legislature passed a law codified in the Education Code, which requires local education agencies to assess the needs ***837** of handicapped pupils residing in their districts, and to formulate an appropriate plan to educate them. (§ 56000 et seq.)

The commission asserts that a local agency has the option under section 56361 to provide a local program for handicapped children, to send them to private schools, or to refer them to the state-operated schools. At the hearing before the commission, the Department of Finance recommended

that the commission find that section 59300 does not impose a state mandate because plaintiffs were not required to send students from their districts to the state schools but had the additional options described in section 56361. The commission staff recommended against adoption of this position on the ground that the plaintiffs "had no other reasonable alternative than to utilize the services of the state-operated schools, as they are the least expensive alternative in educating handicapped children."[9]

9 According to the Department of Finance, in 1979-1980, the average cost to educate a student in a local program was $5,527, for private school the cost was $9,527, and for the least expensive state school $15,556. The local agency is required to pay 30 percent of the cost for students placed in private schools.

The commission did not and was not required to decide whether section 59300 constitutes a state mandate since it concluded that plaintiffs were not entitled to reimbursement in any event because the section does not provide for a new program or increased level of service. The issue is for the commission to determine, as it is charged by section 17551 of the Government Code with the duty to decide in the first instance whether a local agency is entitled to reimbursement under section 6 of article XIIIB.

In view of our conclusion that the question whether section 59300 amounts to a state mandate must be remanded to the commission, we do not decide whether, as the superintendent and the department argue, plaintiffs' sole remedy, in the event a reimbursable mandate is ultimately found, is to seek relief under the procedure set forth in section 17500 et seq. of the Government Code.

(3) The final question is whether the superintendent and the department acted in excess of their authority in deducting the amount of the contributions required of plaintiffs by section 59300 from the funds appropriated by the state to them for the support of the districts' schools. Plaintiffs cite no authority for the proposition that such conduct was improper. Section 59300 does not specify the method by which the contributions of the school districts to the state schools shall be paid. We agree with the Court of Appeal that in these circumstances the method of collection is left to the reasonable discretion of the department, and in view of the fact no test claim had been filed when the school districts failed to pay the invoices, the ***838** method of collection the Department chose was not unreasonable. (See, e.g., *Carmel Valley Fire Protection Dist. v. State of California, supra*, 190 Cal.App.3d 521, 550.)

The judgment of the Court of Appeal is reversed, and the court is directed to remand the matter to the commission for further proceedings consistent with this opinion.

Lucas, C. J., Broussard, J., Panelli, J., Arguelles, J., Eagleson, J., and Kaufman, J., concurred.

The petition of respondent Commission on State Mandates for a rehearing was denied April 27, 1988. ***839**

Footnotes

FN6 The Revenue and Taxation Code also contains provisions requiring reimbursement of local agencies for state-mandated costs. (Rev. & Tax Code, § 2201 et seq.) These provisions were enacted before the adoption of article XIIIB (Stats. 1973, ch. 358, § 3, p. 780), but the principle of reimbursement was enshrined in the Constitution in 1979 with the adoption of section 6 of article XIIIB to provide local entities with the assurance that state mandates would not place additional burdens on their increasingly limited revenue resources.

STATE of CALIFORNIA
COMMISSION ON STATE MANDATES

May 24, 2019

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

Ms. Erika Li
Department of Finance
915 L Street, 10th Floor
Sacramento, CA 95814

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

Re: Decision
Peace Officer Training: Mental Health/Crisis Intervention, 17-TC-06
Penal Code Sections 13515.26, 13515.27, 13515.28, 13515.29, and 13515.295;
as added or amended by Statutes 2015, Chapter 468 (SB 11) and
Statutes 2015, Chapter 469 (SB 29)
Cities of Claremont and South Lake Tahoe, Claimants

Dear Ms. Chinn and Ms. Li:

On May 24, 2019, the Commission on State Mandates adopted the Decision partially approving the Test Claim on the above-entitled matter.

Sincerely,

Heather Halsey
Executive Director

J:\MANDATES\2017\TC\17-TC-06 Peace Officer Training Mental Health Crisis Intervention\Correspondence\decisiontrans.docx

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM Penal Code Sections 13515.26; 13515.27; 13515.28; 13515.29; and 13515.295 Statutes 2015, Chapter 468 (SB 11); and Statutes 2015, Chapter 469 (SB 29) Filed on May 10, 2018 Cities of Claremont and South Lake Tahoe, Claimants	Case No.: 17-TC-06 *Peace Officer Training: Mental Health/Crisis Intervention* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted May 24, 2019*) (*Served May 24, 2019*)

DECISION

The Commission in State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on May 24, 2019. No appearances were made by the claimants, the Cities of Claremont and South Lake Tahoe. Susan Geanacou appeared on behalf of the Department of Finance (Finance).

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

The Commission adopted the Proposed Decision to partially approve the Test Claim by a vote of 7-0, as follows:

Member	**Vote**
Lee Adams, County Supervisor	Yes
Jeannie Lee, Representative of the Director of the Office of Planning and Research	Yes
Gayle Miller, Representative of the Director of the Department of Finance, Chairperson	Yes
Sarah Olsen, Public Member	Yes
Carmen Ramirez, City Council Member	Yes
Andre Rivera, Representative of the State Treasurer	Yes
Yvette Stowers, Representative of the State Controller, Vice Chairperson	Yes

Summary of the Findings

This Test Claim addresses Statutes, 2015, chapters 468 and 469 (SB 11 and SB 29), which require the Commission on Peace Officer Standards and Training (POST) to establish, and for Field Training Officers (FTOs) to take, training courses on law enforcement interaction with persons with mental illness or intellectual disability.

The Commission finds that the Test Claim is timely filed within 365 days of the date that the claimants first incurred costs.

The Commission further finds that Penal Code sections 13515.26, 13515.27, and 13515.295 impose requirements on POST, a state agency, but do not impose any state-mandated activities on local government.

The Commission also finds that Penal Code section 13515.29, which requires prospective FTOs to receive four hours of training that addresses how to interact with persons with mental illness or intellectual disability as part of the existing FTO course, does not mandate a new program or higher level of service or result in increased costs mandated by the state since there is no requirement for the law enforcement employer to develop and present the course, and the total number of training hours in the existing FTO course remains the same.

However, the Commission finds that Penal Code section 13515.28, as added by Statutes 2015, chapter 469, imposes a reimbursable state-mandated program for cities and counties, and those police protection districts *that wholly supplant the law enforcement functions of the county within their jurisdiction* pursuant to Government Code section 53060.7, that are required to have a Field Training Program under California Code of Regulations, title 11, section 1004 and have appointed or assigned FTOs for that program, to:[1]

- Ensure that each FTO assigned or appointed prior to January 1, 2017 shall attend a one-time, eight-hour training on crisis intervention and behavioral health before June 30, 2017.
- Ensure that each FTO assigned or appointed after January 1, 2017 shall attend a one-time, eight-hour training on crisis intervention and behavioral health within 180 days of being assigned or appointed as an FTO.

FTOs who have completed 40 hours of crisis intervention and behavioral health training or who have completed eight hours of crisis intervention and behavioral health training in the past 24 months, are *exempt* from these requirements. In addition, reimbursement is not required for the local law enforcement employer to develop or present the training since these activities are not mandated.

All other statutes and code sections pled, and claims for reimbursement asserted are denied.

[1] California Code of Regulations, title 11, section 1004(a), states that "[a]ny department which employs peace officers and/or Level 1 Reserve peace officers shall have a POST-approved Field Training Program." Section 1004(b) states that a department that does not provide general law enforcement uniformed patrol services, or hires only lateral entry officers possessing a POST basic certificate and who have completed a similar POST approved Field Training Program may request an exemption and not comply with this requirement.

COMMISSION FINDINGS

I. Chronology

01/01/2016	The effective date of the test claim statutes.
05/23/2017	The date the City of Lake Tahoe first incurred costs.[2]
06/06/2017	The date the City of Claremont first incurred costs.[3]
05/10/2018	The claimants filed the Test Claim.[4]
09/26/2018	Commission staff issued the Notice of Complete Test Claim, Schedule for Comments, and Notice of Tentative Hearing Date.
10/26/2018	The Department of Finance (Finance) filed comments on the Test Claim.[5]
02/12/2019	Commission staff issued the Draft Proposed Decision.[6]
03/04/2019	The claimants filed comments on the Draft Proposed Decision.[7]

II. Background

This Test Claim addresses Statutes 2015, chapters 468 and 469, requiring the Commission on Peace Officer Standards and Training (POST) to establish, and for Field Training Officers (FTOs) to take, training courses on law enforcement interaction with persons with mental illness or intellectual disability.

POST was established by the Legislature in 1959 to set minimum selection and training standards for California law enforcement.[8] POST consists of sheriffs and chiefs of police; rank and file officers; city and county elected officials; educators or trainers in criminal justice; two public members who are not peace officers; and the Attorney General as an ex officio member.[9] POST is charged with developing and implementing programs to increase the effectiveness of law enforcement, including training and education courses for officers.[10] POST adopts minimum standards for physical and mental fitness, and minimum training standards, for peace

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[2] Exhibit A, Test Claim, pages 20, 47-55 [Declaration of Deborah McIntryre, Finance Director and Chief Fiscal Officer for the City of Lake Tahoe; POST report of training dated May 23, 2017 for Officers Robertson and Spaeth of the City of Lake Tahoe].

[3] Exhibit A, Test Claim, pages 24, 56-60 [Declaration of Adam Pirrie, Finance Director and Chief Fiscal Officer for the City of Claremont; POST report of training dated June 6, 2017 for City of Claremont officers].

[4] Exhibit A, Test Claim, page 1.

[5] Exhibit B, Finance's Comments on the Test Claim, page 1.

[6] Exhibit C, Draft Proposed Decision.

[7] Exhibit D, Claimants' Comments on the Draft Proposed Decision.

[8] Penal Code section 13500 et seq.

[9] Penal Code section 13500(b-c) (Stats. 2007, ch. 409).

[10] Penal Code section 13503.

officers.[11] The minimum training standards and rules "shall apply to those cities, counties, cities and counties, and districts receiving state aid pursuant to this chapter . . . ."[12] Participating agencies agree to abide by the standards established by POST and may apply to POST for state aid.[13]

A. Prior Law

1. Training Requirements for all Peace Officers Performing General Law Enforcement Uniformed Patrol Duties

Penal Code sections 832 and 13510, and California Code of Regulations, title 11, section 1005 (POST regulations) require every person described as a peace officer (except certain reserve officers, peace officers whose primary duties are investigative, coroners or deputy coroners, and jail deputies) to complete a regular basic training course certified by POST before being assigned duties, which include the exercise of peace officer powers. Those powers include, but are not limited to, the power to make an arrest,[14] to take a person into custody for mental health assessment and evaluation,[15] and to serve and execute a search warrant.[16] The regular basic course is described in detail in the POST Administrative Manual (PAM) Section D-1, with links to the content and curriculum. The minimum hour requirement for basic training is currently set at 664 hours,[17] and includes content such as "Leadership, Professionalism, and Ethics," "Laws of Arrest," "Search and Seizure," "Investigative Report Writing," and many other competencies.[18]

Section 1005 of the POST regulations also requires, with exceptions, that every peace officer "following completion of the Regular Basic Course and before being assigned to perform general law enforcement uniformed patrol duties without direct and immediate supervision, shall complete a POST-approved Field Training Program." "General law enforcement duties" are defined in POST regulations as "duties which include the investigation of crime, patrol of a geographic area, responding to the full range of requests for police services, and performing any enforcement action on the full range of law violations."[19]

The Field Training Program is governed by section 1004 of the POST regulations, which provides that "[a]ny department which employs peace officers and/or Level 1 Reserve peace

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[11] Penal Code section 13510.

[12] Penal Code section 13510(a).

[13] Penal Code sections 13522 and 13523.

[14] Penal Code section 836.

[15] Welfare and Institutions Code section 5150.

[16] Penal Code sections 1523; 1530; 1532; 1534.

[17] Exhibit E, PAM section D-1-3 (d) Basic Training, RBC Standard Format-Training, Testing, and Hourly Requirements, https://post.ca.gov/commission-procedure-d-1-basic-training#d11 (accessed on December 14, 2018).

[18] Exhibit E, Regular Basic Course Training Specifications, POST, https://post.ca.gov/regular-basic-course-training-specifications (accessed on December 14, 2018).

[19] California Code of Regulations, title 11, section 1001.

officers shall have a POST-approved Field Training Program."[20] A department "may request an exemption" from the Field Training Program if it only hires "lateral entry officers" who have completed the Regular Basic Course *and* completed a POST-approved Field Training Program, or "[t]he department does not provide general law enforcement uniformed patrol services." Section 1004 further provides that the Field Training Program "shall be delivered over a minimum of 10 weeks," and be based on the structured learning content specified in PAM, section D-13.[21] The Field Training content requirements identified in PAM, section D-13 include agency orientation (including standards and conduct), ethics, leadership, patrol procedures and vehicle operations, officer safety, report writing, California Codes and law, department policies, control of persons and prisoners, traffic, use of force, search and seizure, investigations and evidence, community relations, and conflict resolution.[22]

In addition, all officers are required by regulation, once appointed, to complete 24 hours of continuing training every two years, including at least two hours of "communications training, either tactical or interpersonal," and at least 12 hours of "perishable skills," such as tactical driving, use of firearms, and "arrest and control."[23] Officers are also required to complete First Aid and CPR training every two years (at least eight hours);[24] training on responding to Domestic Violence Complaints every two years (two hours);[25] Racial Profiling training every five years (two hours);[26] and *annual* refresher training on High Speed Vehicle Pursuit,[27] Blood-Borne Pathogen precautions,[28] and Respiratory Protection Fitting.[29]

2. Training Requirements for Field Training Officers

Section 1004(a)(4) of the POST regulations requires that each department's Field Training Program have Field Training Officers (FTOs) to train new officers before they can be assigned to general law enforcement uniformed patrol duties without direct and immediate supervision. The FTOs must first have been awarded a POST Basic Certificate, have a minimum of one year general law enforcement uniformed patrol experience, have been selected based upon a department-specific selection process, and have met the requirements in section 1004(d).

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[20] California Code of Regulations, title 11, section 1004(a) (Register 2015, No. 50).

[21] California Code of Regulations, title 11, section 1004(a) (Register 2015, No. 50); Exhibit E, PAM section D-13, Field Training, https://post.ca.gov/commission-procedure-d-13-field-training (accessed on December 13, 2018).

[22] Exhibit E, PAM section D-13, Field Training, https://post.ca.gov/commission-procedure-d-13-field-training (accessed on December 13, 2018).

[23] California Code of Regulations, title 11, section 1005(d) (Register 2015, No. 50).

[24] Penal Code section 13518; California Code of Regulations, title 22, section 100022.

[25] Penal Code section 13519; California Code of Regulations, title 11, section 1081.

[26] Penal Code section 13519.4; California Code of Regulations, title 11, section 1081.

[27] Penal Code section 13519.8; California Code of Regulations, title 11, section 1081.

[28] California Code of Regulations, title 8, section 5193.

[29] California Code of Regulations, title 8, section 5144.

Section 1004(d) requires FTOs to complete a POST-certified Field Training Officer Course (40 hours) and 24 hours of update training every three years, which may be satisfied by either completing "a POST-certified Field Training Officer Update Course," or "24 hours of department-specific training in the field training topics contained in the Field Training Officer Update Course."[30]

Sections D-13-4 and D-13-6 of the PAM describe the minimum course requirements for the FTO course and FTO update course. The FTO course is required to be a minimum of 40 hours, and to cover, for example: "Teaching and Training Skills Development," "Expectations and Roles of the FTO," "Evaluation/Documentation," "Driver Safety," "Officer Safety," "Intervention," "Legal Issues and Liabilities," "Competency Expectations," and, "Trainee Termination."[31] An FTO Update Course, in order to be POST-certified, must be a minimum of 24 hours, and must include the following topics: Review of Regular Basic Course Training; Legal Issues and Liabilities; Contemporary Learning Methods; Training/Teaching Skills Development; Leadership, Ethics, and Professionalism; Driver Safety; Remediation/Testing/Scenarios; Trainee Termination; Evaluation/Documentation; Teaching Skills/Demonstration Competency Expectations; and Additional Agency/Presenter-specific topics (which may include: Community Oriented Policing, Challenging Traits of Today's Trainees, Report Writing for FTOs, Problem Solving for FTOs, Supervisory Skills Development, etc.).[32]

B. Test Claim Statutes

Statutes 2015, chapter 468 added sections 13515.26 and 13515.27 to the Penal Code, which address new requirements for the POST basic training course for peace officers, and new continuing training content for peace officers that POST was required to create and make available as an elective training course.[33] The plain language of Penal Code sections 13515.26 and 13515.27 is directed entirely to POST. Section 13515.26 requires POST to "review the training module in the regular basic course relating to persons with mental illness, intellectual disability, or substance abuse disorder, and analyze existing training curricula in order to identify areas where additional training is needed…"[34] "Upon identifying what additional training is needed," section 13515.26 requires POST to "update the training in consultation with appropriate community, local, and state organizations, and agencies that have expertise in the area of mental illness, intellectual disability, and substance abuse disorders, and with appropriate consumer and

[30] California Code of Regulations, title 11, section 1004(a; d) (Register 2015, No. 50); Exhibit E, PAM section D-13-4, Field Training, https://post.ca.gov/commission-procedure-d-13-field-training (accessed on December 13, 2018).

[31] Exhibit E, PAM section D-13-4, Field Training, https://post.ca.gov/commission-procedure-d-13-field-training (accessed on December 13, 2018).

[32] Exhibit E, PAM section D-13-3, Field Training, https://post.ca.gov/commission-procedure-d-13-field-training (accessed on December 13, 2018).

[33] See, Exhibit A, Test Claim, page 29 (Stats. 2015, ch. 468).

[34] Penal Code section 13515.26(a) (Stats. 2015, ch. 468).

family advocate groups."[35] The updated training "shall address issues related to stigma, shall be culturally relevant and appropriate, and shall include:"

> (1) Recognizing indicators of mental illness, intellectual disability, and substance use disorders.
>
> (2) Conflict resolution and deescalation techniques for potentially dangerous situations,
>
> (3) Use of force options and alternatives.
>
> (4) The perspective of individuals or families who have experiences with persons with mental illness, intellectual disability, and substance use disorders.
>
> (5) Mental health resources available to the first responders to events that involve mentally disabled persons.[36]

Finally, section 13515.26 requires that the training "shall be at least 15 hours, and shall include training scenarios and facilitated learning activities…" and "shall be presented within the existing hours allotted for the regular basic course."[37]

Section 13515.27 requires POST to "establish and keep updated a classroom-based continuing training course…relating to behavioral health and law enforcement interaction with persons with mental illness, intellectual disability, and substance abuse disorders."[38] That course "shall be at least three consecutive hours…shall address issues related to stigma, be culturally relevant and appropriate, and shall include:"

> (1) The cause and nature of mental illness, intellectual disability, and substance use disorders.
>
> (2) Indicators of mental illness, intellectual disability, and substance use disorders.
>
> (3) Appropriate responses to a variety of situations involving persons with mental illness, intellectual disability, and substance use disorders.
>
> (4) Conflict resolution and deescalation techniques for potentially dangerous situations.
>
> (5) Appropriate language usage when interacting with potentially emotionally distressed persons.
>
> (6) Resources available to serve persons with mental illness or intellectual disability,

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[35] Penal Code section 13515.26(b) (Stats. 2015, ch. 468).

[36] Penal Code section 13515.26(c) (Stats. 2015, ch. 468).

[37] Penal Code section 13515.26(d-e) (Stats. 2015, ch. 468).

[38] Penal Code section 13515.27(a) (Stats. 2015, ch. 468).

(7) The perspective of individuals or families who have experiences with persons with mental illness, intellectual disability, and substance use disorders.[39]

The course "shall be made available by [POST] to each law enforcement officer with a rank of supervisor or below and who is assigned to patrol duties or to supervise officers who are assigned to patrol duties." POST was required to implement this new course on or before August 1, 2016.[40]

The other test claim statute pled is Statutes 2015, chapter 469, which added Penal Code sections 13515.28, 13515.29, and 13515.295, relating to the Field Training Program. Section 13515.28 states that POST "shall require…[FTOs]…to have at least eight hours of crisis intervention behavioral health training to better train new peace officers on how to effectively interact with persons with mental illness or intellectual disability."[41] That eight-hour course "shall include classroom instruction and instructor-led active learning, such as scenario-based training, and shall be taught in segments that are at least four hours long."[42] However, if an FTO "has completed eight hours of crisis intervention behavioral health training within the past 24 months, or if [an FTO] has completed 40 hours of crisis intervention behavioral health training, the requirement…shall not apply."[43] The required training "shall address issues related to stigma, shall be culturally relevant and appropriate, and shall include all of the following topics:"

(1) The cause and nature of mental illnesses and intellectual disabilities.

(2) (A) How to identify indicators of mental illness, intellectual disability, and substance use disorders.

(B) How to distinguish between mental illness, intellectual disability, and substance use disorders.

(C) How to respond appropriately in a variety of situations involving persons with mental illness, intellectual disability, and substance use disorders.

(3) Conflict resolution and deescalation techniques for potentially dangerous situations.

(4) Appropriate language usage when interacting with potentially emotionally distressed persons.

(5) Community and state resources available to serve persons with mental illness or intellectual disability, and how these resources can be best utilized by law enforcement.

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[39] Penal Code section 13515.27(b) (Stats. 2015, ch. 468).

[40] Penal Code section 13515.27(c-d) (Stats. 2015, ch. 468).

[41] Penal Code section 13515.28(a) (Stats. 2015, ch. 469).

[42] Penal Code section 13515.28(a) (Stats. 2015, ch. 469).

[43] Penal Code section 13515.28(a) (Stats. 2015, ch. 469).

(6) The perspective of individuals or families who have experiences with persons with mental illness, intellectual disability, and substance use disorders.[44]

FTOs "assigned or appointed before January 1, 2017 shall complete the crisis intervention behavioral health training by June 30, 2017," while FTOs "assigned or appointed on or after January 1, 2017, shall complete the crisis intervention behavioral health training within 180 days of assignment or appointment."[45]

Section 13515.29 provides that POST "shall establish and keep updated a field training officer course relating to competencies of the field training program that addresses how to interact with persons with mental illness or intellectual disability."[46] That course "shall consist of at least four hours of classroom instruction and instructor-led active learning, such as scenario-based training, shall address issues related to stigma, and shall be culturally relevant and appropriate."[47] "All prospective [FTOs] shall complete the course…as part of the existing field training officer program."[48] POST is required to implement this section on or before August 1, 2016.[49]

Section 13515.295 provides that POST "shall, by May 1, 2016, conduct a review and evaluation of the required competencies of the field training program and police training program to identify areas where additional training is necessary to better prepare law enforcement officers to effectively address incidents involving persons with a mental illness or intellectual disability."[50] POST "shall update the training in consultation with appropriate community, local, and state organizations, and agencies that have expertise in the area of mental illness, intellectual disabilities, and substance abuse disorders, and with appropriate consumer and family advocate groups."[51] The training "shall address issues related to stigma, shall be culturally relevant and appropriate, and shall include all of the following topics:"

(1) How to identify indicators of mental illness, intellectual disability, substance use disorders, neurological disorders, traumatic brain injury, post-traumatic stress disorder, and dementia.

(2) Autism spectrum disorder.

(3) Genetic disorders, including, but not limited to, Down syndrome.

(4) Conflict resolution and deescalation techniques for potentially dangerous situations.

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[44] Penal Code section 13515.28(b) (Stats. 2015, ch. 469).

[45] Penal Code section 13515.28(c) (Stats. 2015, ch. 469).

[46] Penal Code section 13515.29(a) (Stats. 2015, ch. 469).

[47] Penal Code section 13515.29(b) (Stats. 2015, ch. 469).

[48] Penal Code section 13515.29(c) (Stats. 2015, ch. 469).

[49] Penal Code section 13515.29(d) (Stats. 2015, ch. 469).

[50] Penal Code section 13515.295(a) (Stats. 2015, ch. 469).

[51] Penal Code section 13515.295(b) (Stats. 2015, ch. 469).

(5) Alternatives to the use of force when interacting with potentially dangerous persons with mental illness or intellectual disabilities.

(6) The perspective of individuals or families who have experiences with persons with mental illness, intellectual disability, and substance use disorders.

(7) Involuntary holds.

(8) Community and state resources available to serve persons with mental illness or intellectual disability, and how these resources can be best utilized by law enforcement.[52]

C. POST's Notice Issued in Response to the Test Claim Statutes

In response to Statutes 2015, chapter 468, POST developed a three-hour continuing training course entitled "Police Response to People with Mental Illness, Intellectual Disabilities, and Substance Abuse Disorders."[53] POST states that officers attending this course can meet their perishable skills requirement for Communications, but the course itself is not mandatory.[54]

POST responded to the requirements of Statutes 2015, chapter 469 by issuing the following notice:

> On October 3, 2015, Governor Brown, signed into law Senate Bill 29. In brief, the resulting laws mandate mental health training for Field Training Officers (FTO) and an increase in hours in Learning Domain 37 of the Regular Basic Course. This information is intended to facilitate an understanding of the new laws and how they will be implemented. Please refer to the California Penal Code (PC) for a full description of each law.
>
> **Field Training Officers shall have 8 hours of crisis intervention behavioral health training**
>
> PC 13515.28(a)(1)
>
> Field Training Officers (FTO) will complete 8 hours of crisis intervention behavioral health training (CIT) as follows;
>
> - FTOs assigned or appointed on or before January 1, 2017 shall complete the training by June 30, 2017
> - FTOs assigned or appointed after January 1, 2017 shall complete the training within 180 days of assignment or appointment
>
> FTOs are exempted if they have attended;

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[52] Penal Code section 13515.295(c) (Stats. 2015, ch. 469).

[53] Exhibit E, "Crisis Intervention Behavioral Health Training, Senate Bill 11, Impact on Law Enforcement," https://post.ca.gov/crisis-intervention-behavioral-health-training (accessed on January 18, 2019).

[54] Exhibit E, "Crisis Intervention Behavioral Health Training, Senate Bill 11, Impact on Law Enforcement," https://post.ca.gov/crisis-intervention-behavioral-health-training (accessed on January 18, 2019).

- a 40 hour CIT course or
- an 8 hour or more CIT course since October 3, 2013, that meets the criteria enumerated in PC13515.28(a)(1)

To assist agencies with PC 13515.28(a)(1), POST is offering the following resources and services;

- An expanded course outline (ECO) (pdf) and hourly distribution (pdf) for a Mental Health Course that satisfies the 8 hour training requirement for FTOs. Agencies or training centers may utilize the ECO to deliver a course by certifying it through their Regional Consultant.
- Mental health training course providers may request their course outline be reviewed by POST to ensure it meets the required criteria of PC 13515.28(a)(1). Please initiate this review through the appropriate POST Regional Consultant. If the course does not meet the criteria of SB 29, providers will be advised what to include in the course to satisfy the requirements.

Field Training Officers shall have 4 hours of crisis intervention behavioral health training as part of the Field Training Officer Course

PC 13515.29(a)

FTOs are required to have 4 hours of crisis intervention behavioral health training (**in addition to** the mandated **8 hours** of training required by PC 13515(a)(1)) as part of the Field Training Officer Course. POST has utilized subject matter experts to incorporate the 4 hours of CIT training into the FTO course. The FTO course will remain at 40 hours.

Law Enforcement Agencies shall provide additional training in the Field Training Programs (FTP) or Police Training Programs (PTP) to better prepare law enforcement officers to effectively address incidents involving persons with a mental illness or intellectual disability.

PC 13515.295

In response to PC 13515.295, POST has reviewed existing programs and developed an additional competency 12.7.09 (Address Issues Related to Stigma) that must be added to all Field Training Programs and Police Training Program.

Competency 12.7.09 (Address Issues Related to Stigma);

- Must be added to all existing Field Training Programs (docx) or Police Training Programs (pdf), as an addendum, to include an attestation (doc)
- Incorporated into any new program submitted to POST for approval.[55]

[55] Exhibit E, "Crisis Intervention Behavioral Health Training, Senate Bill 29, Impact on Law Enforcement," https://post.ca.gov/FTO-Crisis-Intervention-Behavioral-Health-Training (accessed on January 29, 2019).

Accordingly, POST has interpreted Statutes 2015, chapter 469, which added Penal Code sections 13515.28, 13515.29, and 13515.295, to require that all FTOs, unless exempt under section 13515.28(a)(2),[56] complete eight hours of crisis intervention behavioral health training by June 30, 2017, or within 180 days of appointment as an FTO;[57] that the 40 hour FTO Course for *prospective* FTOs include four hours of crisis intervention behavioral health training, on or before August 1, 2016;[58] and that pursuant to its review of existing training required by section 13515.295, "an additional competency 12.7.09 (Address Issues Related to Stigma)…must be added to all Field Training Programs and Police Training Program."[59]

III. Positions of the Parties

A. City of South Lake Tahoe and City of Claremont

The claimants have pled, on the Test Claim form, both Statutes 2015, chapter 468, which added Penal Code sections 13515.26 and 13515.27; and Statutes 2015, chapter 469, which added sections 13515.28, 13515.28, and 13515.295. However, claimants' narrative and declarations only allege reimbursable costs and activities arising from Penal Code sections 13515.28 and 13515.29.[60]

Claimants alleged in the Test Claim that the test claim statutes require FTOs who provide instruction in the Field Training Program to have at least eight hours of crisis intervention behavioral health training every 24 months.[61] However, in their comments on the Draft Proposed Decision, claimants acknowledge the conclusion in the Draft Proposed Decision that the eight-hour training required by section 13515.28 is required only once per employee: "If it is the State's determination that field training officers are not mandated to attend any further training on this topic once they have attended a one-time, eight-hour segment, we are happy to

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[56] Penal Code section 13515.28(a)(2) (Stats. 2015, ch. 469) ["If a field training officer has completed eight hours of crisis intervention behavioral health training within the past 24 months, or if a field training officer has completed 40 hours of crisis intervention behavioral health training, the requirement described in paragraph (1) shall not apply."].

[57] Penal Code section 13515.28 (Stats. 2015, ch. 469); Exhibit E, "Crisis Intervention Behavioral Health Training, Senate Bill 29, Impact on Law Enforcement," https://post.ca.gov/FTO-Crisis-Intervention-Behavioral-Health-Training (accessed on January 29, 2019).

[58] Penal Code section 13515.29 (Stats. 2015, ch. 469); Exhibit E, "Crisis Intervention Behavioral Health Training, Senate Bill 29, Impact on Law Enforcement," https://post.ca.gov/FTO-Crisis-Intervention-Behavioral-Health-Training (accessed on January 29, 2019).

[59] Penal Code section 13515.295 (Stats. 2015, ch. 469); Exhibit E, "Crisis Intervention Behavioral Health Training, Senate Bill 29, Impact on Law Enforcement," https://post.ca.gov/FTO-Crisis-Intervention-Behavioral-Health-Training (accessed on January 29, 2019).

[60] See Exhibit A, Test Claim, pages 13-15; 20; 22; 24; 26.

[61] Exhibit A, Test Claim, page 10.

comply with this interpretation and to avoid additional training and costs."[62] FTOs assigned or appointed before January 1, 2017 shall complete crisis intervention behavioral health training prior to June 30, 2017. FTOs assigned or appointed after January 1, 2017 shall complete the crisis intervention behavioral health training within 180 days of assignment or appointment.[63] Prospective FTOs shall complete a four-hour course addressing how to interact with persons with mental illness or intellectual disability.[64]

Claimants allege new mandated activities, including:

1) Field Training Officers (FTOs) time and expense to attend the 8-hour mandated training sessions. Including: compensating of staff time to attend mandated sessions; compensating costs for backfilling positions (including overtime) during mandated training; travel expenses, instructor fees, facility costs, and training material.
2) FTOs time and expense to repeat the mandated 8-hour training after every 24 months (unless a field training officer has completed 40 hours of crisis intervention behavioral training). Including: compensating of staff time to attend mandated sessions; compensating costs for backfilling positions (including overtime) during mandated training, if required by the department; travel expenses, instructor fees, facility costs, and training material.[65]

The City of South Lake Tahoe alleges it incurred $11,150 to implement the alleged mandate in fiscal year 2016-2017. The City does not project costs for fiscal year 2017-2018, but expects similar costs in 2018-2019.[66]

The City of Claremont alleges that it incurred $2,981 to implement the alleged mandate in fiscal year 2016-2017, after receiving a one-time grant for direct staff costs and the trainer course fees. The City alleges the net costs after the grant include benefits costs for the officers attending the training and indirect costs. The City does not project costs for fiscal year 2017-2018, but projects $5,890 in mandated costs in fiscal year 2018-2019.[67]

The claimants argue that the requirements are new; that they are unique to government and carry out a state policy to provide a service to the public, and are therefore a new program or higher level of service; and that the activities are not mandated by any federal law or voter-approved ballot measure. Neither claimant anticipates non-local funds in the future.[68]

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[62] Exhibit C, Claimants' Comments on the Draft Proposed Decision.

[63] Exhibit A, Test Claim, page 10.

[64] Exhibit A, Test Claim, pages 12-13.

[65] Exhibit A, Test Claim, page 13.

[66] Exhibit A, Test Claim, page 14.

[67] Exhibit A, Test Claim, pages 14-15.

[68] Exhibit A, Test Claim, pages 17-18.

B. Department of Finance

Finance acknowledges that section 13515.28 appears to impose new state-mandated requirements on cities and counties, but asserts that the requirement is one-time, rather than an ongoing mandate:

> Contrary to what appears to be Claimants' contention, SB 29 does not require FTOs to receive eight hours of crisis intervention behavioral health training every 24 months. SB 29 actually requires FTOs to receive this training only once. Furthermore, FTOs serving on January 1, 2017, were exempt from the SB 29 training if they completed either eight hours of crisis intervention behavioral health training within the previous 24 months, or 40 hours of such training at any time prior to January 1, 2017.[69]

Finance continues: "Based on Claimants' characterization of the test claim legislation, Finance is concerned the required costs may be significantly overstated."[70] Finance concludes that "the Commission should require Claimants to address these points as the analysis of the claim proceeds."[71]

IV. Discussion

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

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

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[72] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[73]

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

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[74]
2. The mandated activity constitutes a "program" that either:
   a. Carries out the governmental function of providing a service to the public; or

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[69] Exhibit B, Finance's Comments on the Test Claim, page 2.

[70] Exhibit B, Finance's Comments on the Test Claim, page 2.

[71] Exhibit B, Finance's Comments on the Test Claim, page 2.

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

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

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

b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[75]

3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[76]

4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[77]

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[78] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[79] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[80]

A. The Test Claim Was Timely Filed.

Government Code section 17551 states that test claims must be filed "not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later."[81]

Section 1183.1(c) of the Commission's regulations, in turn, defines "12 months" for purposes of filing a test claim as "365 days" and specifically provides:

> Except as provided in Government Code sections 17573 and 17574, any test claim or amendment filed with the Commission must be filed not later than 12 months (365 days) following the effective date of a statute or executive order, or

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

[76] *San Diego Unified School Dist.* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal3d 830, 835.

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

[78] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

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

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

[81] Government Code section 17551(c).

within 12 months (365 days) of first incurring increased costs as a result of a statute or executive order, whichever is later.[82]

The test claim statutes were enacted October 3, 2015, effective January 1, 2016. A timely-filed test claim on the basis of the effective date of the test claim statutes therefore had to be filed no later than January 1, 2017. This Test Claim was filed May 10, 2018 and is therefore not timely on that basis.

However, the claimants have filed evidence in the form of declarations and POST training records showing they first incurred costs under the test claim statutes on May 23, 2017 and June 6, 2017, respectively.[83] The Test Claim was filed May 10, 2018, within 365 days of first incurring costs. Therefore, based on the date costs were first incurred, the Test Claim was timely filed in accordance with Government Code section 17551 and Title 2, California Code of Regulations, section 1183.1(c).

B. Penal Code Sections 13515.26, 13515.27, and 13515.295 Impose Requirements on POST, a State Agency, But Do Not Impose Any State-Mandated Activities on Local Government.

Penal Code sections 13515.26, 13515.27, and 13515.295 are addressed to POST, a state entity, and do not impose any requirements on local government.

Section 13515.26 requires POST to review its training modules and course content "in the *regular basic course* relating to persons with mental illness, intellectual disability, or substance abuse disorder," and identify areas where additional training is needed.[84] POST shall then update its training "in consultation with appropriate community, local, and state organizations, and agencies that have expertise in the area of mental illness, intellectual disability, and substance abuse disorders…"[85] The training "shall be at least 15 hours," including training scenarios and activities "relating to law enforcement interaction with persons with mental illness, intellectual disability, and substance abuse disorders," and "shall be presented within the existing hours allotted for the regular basic course."[86]

Nothing in the plain language of section 13515.26 requires the local government employer to perform any activities. The regular basic course is a requirement for *persons* seeking peace officer status, but does not require the local government employer that hires an officer to pay for

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[82] Title 2, California Code of Regulations, section 1183.1(c) (Register 2018, No. 9, eff. April 1, 2018.)

[83] Exhibit A, Test Claim, pages 20, 24, 48, 57-60 [Declaration of Deborah McIntryre, Finance Director and Chief Fiscal Officer for the City of Lake Tahoe; Declaration of Adam Pirrie, Finance Director and Chief Fiscal Officer for the City of Claremont; POST report of training dated May 23, 2017 for Officers Robertson and Spaeth of the City of Lake Tahoe; POST report of training dated June 6, 2017 for City of Claremont officers].

[84] Penal Code section 13515.26(a) (Stats. 2015, ch. 468).

[85] Penal Code section 13515.26(b) (Stats. 2015, ch. 468).

[86] Penal Code section 13515.26(d-e) (Stats. 2015, ch. 468).

the training or otherwise provide the training.[87] Specifically, Penal Code section 832 requires "every person described in this chapter as a peace officer" to satisfactorily complete an introductory course of training prescribed by POST before they can exercise the powers of a peace officer. Any "person" completing the basic training course "who does not become employed as a peace officer" within three years is required to pass an examination developed or approved by POST.[88] POST is authorized to charge a fee for the basic training examination to each "applicant" who is not sponsored or employed by a local law enforcement agency.[89] In addition, the Legislature has instructed POST to permit the required training to be conducted by any institution approved by POST, which includes community colleges.[90] Thus, the requirement to take basic training is on the person, and not on the local government employer.

Section 13515.27 requires POST to establish a continuing training course for existing peace officers, of "at least three consecutive hours," which "may include training scenarios and facilitated learning activities, shall address issues related to stigma, shall be culturally relevant and appropriate, and shall include" other specified topics such as the causes and nature of mental illness; indicators of mental illness, disability, or substance abuse; appropriate responses; conflict resolution and de-escalation; appropriate language when interacting with potentially emotionally distressed persons; resources available for persons with mental illness or intellectual disability; and perspectives of individuals or families who have experiences with persons with mental illness, intellectual disability, and substance abuse disorders.[91] That course "shall be *made available by the commission* to each law enforcement officer with a rank of supervisor or below and who is assigned to patrol duties or to supervise officers who are assigned to patrol duties."[92] Section 13515.27 requires POST to create a new training course and to make it *available* to peace officers, but does not require officers to take the course, or require the local government employer to provide or pay for the new course. POST has established a course to comply with section 13515.27 that can be utilized for training and makes it clear that the course is "not mandatory for law enforcement."[93]

Penal Code section 13515.295 is similarly directed only to POST. Section 13515.295 requires POST to "conduct a review and evaluation of the required competencies of the field training program," especially with respect to how officers effectively address incidents involving persons with mental illness or intellectual disability, and to update the training accordingly.[94] There is

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[87] See Penal Code section 832; 13510; 13511.

[88] Penal Code section 832(e).

[89] Penal Code section 832(g).

[90] Penal Code section 13511; Exhibit E, POST's List of Basic Training Academies, https://post.ca.gov/basic-training-academies (accessed on January 18, 2019).

[91] Penal Code section 13515.27(a-b) (Stats. 2015, ch. 468).

[92] Penal Code section 13515.27(c) (Stats. 2015, ch. 468).

[93] Exhibit E, "Crisis Intervention Behavioral Health Training, Senate Bill 11, Impact on Law Enforcement," https://post.ca.gov/crisis-intervention-behavioral-health-training (accessed on January 18, 2019).

[94] Penal Code section 13515.295 (Stats. 2015, ch. 469).

nothing in the plain language of section 13515.295 that imposes any express requirements on local government, and the claimants have made no argument and presented no evidence that section 13515.295 imposes additional activities or costs. As noted above, POST implemented the requirement in 13515.295 by adding, after review, "an additional competency 12.7.09 (Address Issues Related to Stigma)" to "all Field Training Programs and Police Training Program."[95] The POST competency 12.7.09 has not been pled in this test claim.

Moreover, the claimants, in their Test Claim narrative and declarations, have not alleged that Penal Code sections 13515.26, 13515.27, and 13515.295 impose any new state-mandated activities or costs on local government.

Accordingly, Penal Code sections 13515.26, 13515.27, and 13515.295 do not impose any state-mandated activities on local government.

C. Penal Code Section 13515.29, Which Requires *Prospective* FTOs to Receive Four Hours of Training as Part of the FTO Course That Addresses How to Interact with Persons with Mental Illness or Intellectual Disability, Does Not Mandate a New Program or Higher Level of Service or Result in Increased Costs Mandated by the State Since There Is No Requirement for the Law Enforcement Employer to Develop and Present the Course, and the Total Number of Training Hours in the FTO Course Remains the Same.

POST regulations require, with some exceptions, that every peace officer "following completion of the Regular Basic Course and before being assigned to perform general law enforcement uniformed patrol duties without direct and immediate supervision, to complete a POST-approved Field Training Program."[96] POST regulations further provide, with some exceptions, that "[a]ny department which employs peace officers and/or Level 1 Reserve peace officers shall have a POST-approved Field Training Program."[97] Each department's Field Training Program is required to have Field Training Officers (FTOs) to train new officers before they can be assigned to general law enforcement uniformed patrol duties without direct and immediate supervision.[98] And FTOs are required to first complete a POST-certified, 40-hour, Field Training Officer Course before they can provide the training to other officers.[99]

Statutes 2015, chapter 469 added section 13515.29 to the Penal Code to require POST to establish and keep updated an FTO course "relating to competencies of the field training program and police training program that addresses how to interact with persons with mental

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[95] Exhibit E, "Crisis Intervention Behavioral Health Training, Senate Bill 29, Impact on Law Enforcement," https://post.ca.gov/FTO-Crisis-Intervention-Behavioral-Health-Training (accessed on January 29, 2019), page 2.

[96] California Code of Regulations, title 11, section 1005.

[97] California Code of Regulations, title 11, section 1004(a) (Register 2015, No. 50).

[98] California Code of Regulations, title 11, section 1004(a)(4).

[99] California Code of Regulations, title 11, section 1004(d); Exhibit E, PAM section D-13-4, Field Training, https://post.ca.gov/commission-procedure-d-13-field-training (accessed on December 13, 2018).

illness or intellectual disability."[100] That course is required to be "at least four hours of classroom instruction and instructor-led active learning" and "[a]ll *prospective field training officers* shall complete the course…*as part of the existing field training officer program*."[101]

This statute does not require local law enforcement employers to develop the training. Rather, Penal Code section 13515.29 directs POST to establish and keep updated the field training officer course, which addresses how to interact with persons with mental illness or intellectual disability. In response to Penal Code section 13515.29, POST issued the following bulletin stating that it "utilized subject matter experts to incorporate the 4 hours of crisis intervention behavioral health training into the FTO course, and that the FTO course will remain at 40 hours:[102]

> PC 13515.29(a)
>
> FTOs are required to have 4 hours of crisis intervention behavioral health training (**in addition to** the mandated **8 hours** of training required by PC 13515(a)(1)) as part of the Field Training Officer Course. POST has utilized subject matter experts to *incorporate the 4 hours of CIT training into the FTO course*. *The FTO course will remain at 40 hours*.[103]

And POST has certified several entities, including community colleges, to present the FTO training.[104] Thus, the local agency employer is not required by state law to present the FTO course.

Although the local law enforcement employer may incur costs for its prospective FTOs to attend the FTO course, the Commission finds that Penal Code section 13515.29 does not impose a new program or higher level of service, or result in increased costs mandated by the state since the total number hours required by the state for the existing FTO course did not increase as a result of the test claim statute. The plain language of the statute requires the updated training to be "part of the existing field training officer program," and POST has clarified that the FTO course remains at 40 hours.

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[100] Penal Code section 13515.29(a) (Stats. 2015, ch. 469).

[101] Penal Code section 13515.29(b)(c) (Stats. 2015, ch. 469).

[102] Exhibit E, "Crisis Intervention and Behavioral Health Training, Senate Bill 29, Impact on Law Enforcement," https://post.ca.gov/FTO-Crisis-Intervention-Behavioral-Health-Training (accessed on January 23, 2019), emphasis added.

[103] Exhibit E, "Crisis Intervention and Behavioral Health Training, Senate Bill 29, Impact on Law Enforcement," https://post.ca.gov/FTO-Crisis-Intervention-Behavioral-Health-Training (accessed on January 29, 2019), emphasis added.

[104] Exhibit E, California POST Course Catalog, list of certified presenters for the FTO program, https://catalog.post.ca.gov/PresenterCourseDescription.aspx?crs_no=31725&crs_title=FIELD+TRAINING+OFFICER&numPresentations=17&pageId=10 (accessed on January 23, 2019).

In this respect, the requirements of section 13515.29 are similar to those in the statute at issue in *County of Los Angeles II.*[105] In that case, the County sought reimbursement for updated domestic violence training for peace officers, required to be completed every two years by Penal Code section 13519(e).[106] The test claim statute stated that the training "shall be funded from existing resources" and further stated the Legislature's intent "not to increase the annual training costs of local government."[107] The Test Claim alleged that although POST bore the cost of producing two-hour telecourses on domestic violence, POST did not provide for any local law enforcement salary reimbursement for attendance at the training, and thus the County sought reimbursement for those costs.[108] The Commission found in the test claim proceedings that POST allows flexibility for local law enforcement agencies to choose training to meet their needs, and that the two-hour training could be fit into the existing 24 hours of POST-required training every two years and, thus, there were no increased costs mandated by the state.[109] The County disagreed, arguing that it could not simply eliminate another training course to make room for domestic violence training without incurring costs.[110] The court concluded that even though the County would "lose some flexibility" in selecting training requirements for its officers, the statute did not mandate a higher level of service, or shift costs from the state to the local governments, or impose increased costs mandated by the state because the *total number of training hours* could remain the same:

> Based upon principles discernable from the cases discussed, we find that in the instant case, the legislation does not mandate a "higher level of service." In the case of an existing program, an increase in existing costs does not result in a reimbursement requirement. Indeed, "costs" for purposes of Constitution article XIII B, section 6 does not equal every increase in a locality's budget resulting from compliance with a new state directive. Rather, the state must be attempting to divest itself of its responsibility to provide fiscal support for a program, or forcing a new program on a locality for which it is ill-equipped to allocate funding.
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> . . . . POST training and certification is ongoing and extensive, and local law enforcement agencies may chose [sic] from a menu of course offerings to fulfill the 24-hour requirement. Adding domestic violence training obviously may displace other courses from the menu, or require the adding of courses. Officer downtime will be incurred. However, merely by adding a course requirement to POST's certification, the state has not shifted from itself to the County the burdens of state government. Rather, it has directed local law enforcement

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[105] *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176 (*County of Los Angeles II*).

[106] The requirement is now in Penal Code section 13519(g).

[107] *County of Los Angeles v. Commission on State Mandates* 110 Cal.App.4th 1176, 1179.

[108] *County of Los Angeles v. Commission on State Mandates* 110 Cal.App.4th 1176, 1181.

[109] *County of Los Angeles v. Commission on State Mandates* 110 Cal.App.4th 1176, 1181, 1184.

[110] *County of Los Angeles v. Commission on State Mandates* 110 Cal.App.4th 1176, 1181, 1187.

> agencies to reallocate their training resources in a certain manner by mandating the inclusion of domestic violence training.
>
> . . . . Every increase in cost that results from a new state directive does not automatically result in a valid subvention claim where, as here, the directive can be complied with by a minimal reallocation of resources within the entity seeking reimbursement. Thus, while there may be a mandate, there are no increased costs mandated by Penal Code section 13519.[111]

As was the case in *County of Los Angeles II*, local agencies in this case will not incur any additional costs for prospective FTOs to attend four hours of training required by section 13515.29. The training is part of the existing 40-hour FTO course that all prospective FTOs are required to take. Thus, the total number of training hours required by the state remains the same.

Accordingly, Penal Code section 13515.29 does not mandate a new program or higher level of service or result in increased costs mandated by the state.

D. <u>Penal Code Section 13515.28, Which Requires Assigned or Appointed FTO's to Receive an Additional Eight Hours of Crisis Intervention Behavioral Health Training to Better Train New Peace Officers on How to Effectively Interact with Persons with Mental Illness or Intellectual Disability, Imposes a Reimbursable State-Mandated Program on City and County Law Enforcement Agencies, and Police Protection Districts That Wholly Supplant the Law Enforcement Functions of the County Within their Jurisdiction.</u>

1. Penal Code section 13515.28 imposes new FTO training requirements on local law enforcement agencies.

As indicated in the section above, before a law enforcement agency can assign or appoint a peace officer as an FTO to provide field training to other officers, the peace officer is required to first complete a POST-certified, 40-hour, Field Training Officer Course.[112]

Penal Code section 13515.28, enacted by Statutes 2015, chapter 469, now requires assigned or appointed FTOs, except those specified FTOs who have previous similar training, to complete an additional eight hours of crisis intervention behavioral health training by a date certain, in order to better train new peace officers on how to effectively interact with persons with mental illness or intellectual disability. Section 13515.28 states the following:

> (a)(1) The commission shall require the field training officers who provide instruction in the field training program to have at least eight hours of crisis intervention behavioral health training to better train new peace officers on how to effectively interact with persons with mental illness or intellectual disability. This course shall include classroom instruction and instructor-led active learning, such

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[111] *County of Los Angeles v. Commission on State Mandates* 110 Cal.App.4th 1176, 1194-1195.

[112] California Code of Regulations, title 11, section 1004(d); Exhibit E, PAM section D-13-4, Field Training, https://post.ca.gov/commission-procedure-d-13-field-training (accessed on December 13, 2018).

as scenario-based training, and shall be taught in segments that are at least four hours long.

(2) If a field training officer has completed eight hours of crisis intervention behavioral health training within the past 24 months, or if a field training officer has completed 40 hours of crisis intervention behavioral health training, the requirement described in paragraph (1) shall not apply.

(b) The crisis intervention behavioral health training shall address issues relating to stigma, shall be culturally relevant and appropriate, and shall include all of the following topics:

(1) The cause and nature of mental illnesses and intellectual disabilities.

(2)(A) How to identify indicators of mental illness, intellectual disability, and substance use disorders.

(B) How to distinguish between mental illness, intellectual disability, and substance use disorders.

(C) How to respond appropriately in a variety of situations involving persons with mental illness, intellectual disability, and substance use disorders.

(3) Conflict resolution and deescalation techniques for potentially dangerous situations.

(4) Appropriate language usage when interacting with potentially emotionally distressed persons.

(5) Community and state resources available to serve persons with mental illness or intellectual disability, and how these resources can be best utilized by law enforcement.

(6) The perspective of individuals or families who have experiences with persons with mental illness, intellectual disability, and substance use disorders.

(c) Field training officers assigned or appointed before January 1, 2017, shall complete the crisis intervention behavioral health training by June 30, 2017. Field training officers assigned or appointed on or after January 1, 2017, shall complete the crisis intervention behavioral health training within 180 days of assignment or appointment.

(d) This section does not prevent an agency from requiring its field training officers to complete additional hours of crisis intervention behavioral health training or requiring its field training officers to complete that training earlier than as required by this section.[113]

The claimants alleged in their Test Claim that section 13515.28 requires eight hours of repeated or continuing crisis intervention behavioral health training *every 24 months*.[114] Finance

[113] Penal Code section 13515.28 (Stats. 2015, ch. 469).

[114] Exhibit A, Test Claim, pages 12-13.

interprets the test claim statute to require eight hours of crisis intervention behavioral health training only once per appointed or assigned FTO.[115] The claimants concede this issue in their comments on the Draft Proposed Decision.[116]

The Commission finds that eight hours of crisis intervention behavioral health training is required *one* time per employee providing training as an FTO, and not every 24 months as alleged by the claimant. This interpretation is supported by the plain language of Penal Code section 13515.28, the legislative history of SB 29, and POST's implementation of the test claim statute.

First, nothing in the plain language of Penal Code section 13515.28 suggests the training must be repeated every 24 months, as the claimants suggested in the Test Claim. Unlike Penal Code section 13515.27, which expressly provides for a separate three-hour "*continuing* training course" on similar subject matter,[117] the Legislature did not use that language in Penal Code section 13515.28. Instead, Penal Code section 13515.28(c) requires the training to be completed by June 30, 2017 for FTO's assigned or appointed before January 1, 2017 or within 180 days of assignment or appointment for FTOs assigned thereafter, rather than incorporated into FTOs' normal continuing training hours. As discussed in the Background, all peace officers are required to have at least 24 hours of continuing training every two years, at least 12 hours of which must relate to "perishable skills," and at least two hours of which must relate to communication skills.[118] In addition, *FTOs* are required to have at least 24 hours of "update training" every three years, relating to the assignment as an FTO. In accordance with the regulations, the updated training for FTOs can be satisfied either by completing a POST-certified "Field Training Officer Update Course," or "Completing 24 hours of department-specific training in the field training topics contained in the Field Training Officer Update Course."[119] The Legislature is presumed to be aware of the state of the law,[120] and rather than direct POST to include crisis intervention behavioral health training within the continuing training requirements for all peace officers, or in the Field Training Officer Update Course specifically, Penal Code section 13515.28 instead articulates a specific training requirement (eight hours of crisis intervention for FTOs) and a specific time frame in which it must be completed (before June 30, 2017 for existing FTOs, and within 180 days for FTOs assigned after January 1, 2017).[121] Section 13515.28(d) further states that "[t]his section does not prevent an agency from requiring its field training officers to complete additional hours of crisis intervention behavioral health training." Thus, the plain language of section 13515.28 requires eight hours of crisis intervention behavioral health training *one* time per officer appointed or assigned as an FTO.

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[115] Exhibit B, Finance's Comments on the Test Claim, page 2.

[116] Exhibit D, Claimants' Comments on the Draft Proposed Decision, page 1.

[117] Penal Code section 13515.27 (Stats. 2015, ch. 468).

[118] See California Code of Regulations, title 11, section 1005(d)(4) (Register 2015, No. 50).

[119] See California Code of Regulations, title 11, section 1004(d)(1) (Register 2015, No. 50).

[120] *Arthur Andersen v. Superior Court* (1998) 67 Cal.App.4th 1481, 1500.

[121] Penal Code section 13515.28 (Stats. 2015, ch. 469).

The statute allows training in addition to the required eight hours, but does not require training every 24 months as previously alleged by the claimants.[122]

The legislative history further supports this interpretation. The Senate Third Reading analysis of Senate Bill 29, as amended August 31, 2015, states the following:

> 1) Requires field training officers who provide instruction in the field training program to have at least eight hours of crisis intervention behavioral health training to better train new peace officers to effectively interact with persons with mental illness or intellectual disability. Training should be taught segments that are at least four hours long.
>
> 2) Excludes a field training officer who has completed eight hours of crisis intervention behavioral health training within the past 24 months, or 40 hours of crisis intervention behavioral health training, from the training requirement.
>
> 3) Specifies that field training officers assigned or appointed before January 1, 2017, shall complete the crisis intervention behavioral health training by June 30, 2017. Field training officers assigned or appointed on or after January 1, 2017, shall complete the crisis intervention course within 180 days of assignment or appointment.[123]

Nothing in the bill analyses suggests that the training must be repeated.[124] The bill analyses further state, in terms of fiscal effects:

> 1) Reimbursable state mandated costs in the $2.57 million (General Fund) range initially and $600,000 ongoing to backfill for officers participating in the training. There are currently 482 cities and 58 counties in California. To the extent local agency expenditures qualify as a reimbursable state mandate, agencies could claim reimbursement of those costs for missed work hours for all field training officers in training.[125]

Accordingly, the bill analysis suggests that the test claim statute could have significant initial costs, but much smaller ongoing costs; nothing in the plain language suggests that this training is required to be repeated by FTOs, and the legislative history indicates that the initial costs, to send all or nearly all existing FTOs to the eight hour training, are projected to be much larger than the ongoing costs to "backfill" as new FTOs are appointed or assigned. If the intent of the Legislature is an eight-hour training that must be repeated, there is no reason that projected initial costs would be so far out of proportion to projected ongoing costs.

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[122] See Exhibit D, Claimants' Comments on the Draft Proposed Decision [Claimants acknowledge and concede this conclusion].

[123] Exhibit A, Test Claim, page 35 [Senate Third Reading Analysis of SB 29, as amended August 31, 2015, p. 1]

[124] See also, Exhibit A, Test Claim, pages 39-40 [Senate Unfinished Business Analysis of SB 29, as amended August 31, 2015].

[125] Exhibit A, Test Claim, pages 38; 45 [Senate Third Reading, p. 4; Senate Unfinished Business Analysis of SB 29, as amended August 31, 2015, p. 7].

Finally, POST interprets section 13515.28 as imposing a one-time training requirement per FTO as follows:

> Field Training Officers (FTO) will complete 8 hours of crisis intervention behavioral health training (CIT) as follows;
>
> - FTOs assigned or appointed on or before January 1, 2017 shall complete the training by June 30, 2017
> - FTOs assigned or appointed after January 1, 2017 shall complete the training within 180 days of assignment or appointment
>
> FTOs are exempted if they have attended;
>
> - a 40 hour CIT course or
> - an 8 hour or more CIT course since October 3, 2013, that meets the criteria enumerated in PC13515.28(a)(1)[126]

POST is the agency charged with implementing the statute and its interpretation has been adopted within POST regulations,[127] and thus, its interpretation is entitled to great weight.[128]

Therefore, Penal Code section 13515.28 requires each FTO assigned or appointed before January 1, 2017 to have one-time crisis intervention behavioral health training (to consist of at least eight hours of training that includes the topics required by section 13515.28(b)) by June 30, 2017, and each FTO assigned or appointed after January 1, 2017 is required to have the same one-time training within 180 days. Nothing in the test claim statute indicates that the eight-hour crisis intervention training called for in section 13515.28(a) must be repeated every 24 months, as the claimants suggest.[129]

Although the requirements of section 13515.28 are expressly directed to the officers themselves, the requirements imposed on the officers fall on the local law enforcement agencies required by section 1004 of the POST regulations to have a Field Training Program. The training of the officers occurs within the scope of employment and their appointment or assignment as an FTO by the employer.[130] In addition, under the Federal Fair Labor Standards Act (FLSA), which

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[126] Exhibit E, "Crisis Intervention Behavioral Health Training, Senate Bill 29, Impact on Law Enforcement," https://post.ca.gov/FTO-Crisis-Intervention-Behavioral-Health-Training (accessed on January 29, 2019).

[127] California Code of Regulations, title 11, section 1004(d)(3).

[128] *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 12-13.

[129] See, e.g. Exhibit A, Test Claim, page 20 [Declaration of Deborah McIntyre, Finance Director for the City of South Lake Tahoe (asserting that the test claim statutes require FTO crisis intervention behavioral health training to be repeated every 24 months)].

[130] California Code of Regulations, title 11, section 1004(a), which states that "[a]ny department which employs peace officers and/or Level 1 Reserve peace officers shall have a POST-approved Field Training Program." Section 1004(b) provides that a department that does not provide general law enforcement uniformed patrol services, or hires only lateral entry officers

applies to local government employers, the employer is responsible for compensating the employee for job-related training time that is required and not voluntary.[131]

However, Penal Code section 13515.28 does not require local law enforcement employers to develop or present the training. Rather, Penal Code sections 13515.29 and 13515.295 direct POST to establish, review, and keep updated the field training officer course, which addresses how to interact with persons with mental illness or intellectual disability. In response to Penal Code section 13515.28, POST created an expanded course outline for the required eight-hour training.[132] In addition, POST issued a bulletin *allowing* agencies to present the course required by Penal Code section 13515.28 using the POST outline as follows:

> Senate Bill 29 (SB29) requires Field Training Officers who are instructors for the field training program to have at least 8 hours of crisis intervention behavioral health training. Agencies *may* certify this expanded course outline (ECO) (pdf) and hourly distribution (pdf) through their Regional Consultant to present an 8 hour behavioral health course that satisfies the 8 hour training requirements for FTOs.[133]

In this case, the claimants utilized outside organizations to provide the training required by Penal Code section 13515.28; their officers attended training provided by California State Parks, Butte College Public Safety Training Center, South Bay Regional Training Consortium, Yolo County Sheriff's Department, and Embassy Consulting Services.[134]

Accordingly, Penal Code section 13515.28 imposes the following new requirements on local law enforcement agencies required to have a Field Training Program under California Code of Regulations, title 11, section 1004 and have appointed or assigned FTOs for that program:[135]

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possessing a POST basic certificate and completed a similar POST approved Field Training Program may request an exemption.

[131] See Code of Federal Regulations, title 29, sections 785.27, 785.29; *Garcia v. San Antonio Metropolitan Transit Authority et al.* (1985) 469 U.S. 528.

[132] Exhibit E, "Regulation 1081 Minimum Standards for Legislatively Mandated Courses, Crisis Intervention Behavioral Health Training for Field Training Officers, Expanded Course Outline (8 hours)," https://post.ca.gov/Portals/0/post_docs/resources/CIT/SB29_FTO_8HR_Course_ECO.pdf (accessed on January 23, 2019).

[133] Exhibit E, "Crisis Intervention Behavioral Health Training, Senate Bill 29, Impact on Law Enforcement," https://post.ca.gov/FTO-Crisis-Intervention-Behavioral-Health-Training (accessed on January 29, 2019), emphasis added.

[134] Exhibit A, Test Claim, pages 48-61.

[135] California Code of Regulations, title 11, section 1004(a), states that "[a]ny department which employs peace officers and/or Level 1 Reserve peace officers shall have a POST-approved Field Training Program." Section 1004(b) states that a department that does not provide general law enforcement uniformed patrol services, or hires only lateral entry officers possessing a POST

- Ensure that each FTO assigned or appointed prior to January 1, 2017 shall attend a one-time, eight-hour training on crisis intervention and behavioral health before June 30, 2017. (Penal Code section 13515.28, Statutes 2015, chapter 469.)
- Ensure that each FTO assigned or appointed after January 1, 2017 shall attend a one-time, eight-hour training on crisis intervention and behavioral health within 180 days of being assigned or appointed as an FTO. Penal Code section 13515.28, Statutes 2015, chapter 469.)

FTOs who have completed 40 hours of crisis intervention and behavioral health training or who have completed eight hours of crisis intervention and behavioral health training in the past 24 months, are *exempt* from these requirements. In addition, reimbursement is not required for the local law enforcement employer to develop or present the training since these activities are not mandated.

2. The New Requirements of Penal Code Section 13515.28 Are Mandated by the State Only on City and County Law Enforcement Agencies, and Police Protection Districts That Wholly Supplant the Law Enforcement Functions of the County Within their Jurisdiction, That Are Required to Have a Field Training Program and Have Appointed or Assigned FTOs for that Program.

As indicated in the Background, the minimum training standards and rules for peace officers that are outlined in Penal Code sections 13510 et seq. (which includes section 13515.28) "shall apply to those cities, counties, cities and counties, and districts receiving state aid pursuant to this chapter . . . ."[136] Participating agencies agree to abide by the standards established by POST and may apply to POST for state aid.[137] Although this statutory language only requires local agencies to comply with the training standards as a condition of their participation in POST, the court in *County of Los Angeles II* held that POST training "for all practical purposes" is not voluntary.[138] Like the facts in *County of Los Angeles II*, this case also addresses peace officer training required by state law. Thus, the holding in *County of Los Angeles II* applies in this case.

However, the Third District Court of Appeal, in *Department of Finance v. Commission on State Mandates (POBRA)* held that school districts, community college districts, and special districts that are permitted by statute, but not required by state law, to employ peace officers who *supplement* the general law enforcement units of cities and counties, are not legally compelled by state law to comply with the new requirements and, thus, were not eligible claimants entitled to

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basic certificate and who have completed a similar POST approved Field Training Program may request an exemption and not comply with this requirement.

[136] Penal Code section 13510(a).

[137] Penal Code sections 13522 and 13523.

[138] *County of Los Angeles v. Commission on State Mandates* 110 Cal.App.4th 1176, 1194 ["POST certification is, for all practical purposes, not a 'voluntary' program and therefore the County must, in order to comply with [the test claim statute], add domestic violence training to its curriculum."].

reimbursement under article XIII B, section 6 of the California Constitution.[139] The other law enforcement agencies at issue in the *POBRA* case (cities, counties, and special police protection districts that wholly supplant the law enforcement functions of the county within the jurisdiction of that district pursuant to Government Code section 53060.7), were found to be prima facie eligible for reimbursement because they have "as an *ordinary, principal, and mandatory duty* the provision of policing services within their territorial jurisdiction." The court stated the following:

> The Commission notes that *Carmel Valley Fire Protection Dist. v. State* characterizes police protection as one of "the most essential and basic functions of local government." (*Carmel Valley Fire Protection Dist. v. State, supra,* 190 Cal.App.3d at p. 537, 234 Cal.Rptr. 795, quoting *Verreos v. City and County of San Francisco* (1976) 63 Cal.App.3d 86, 107, 133 Cal.Rptr. 649.) However, that characterization is in the context of cities, counties, and districts that have as an *ordinary, principal, and mandatory duty* the provision of policing services within their territorial jurisdiction. A fire protection district perforce must hire firefighters to supply that protection.
>
> Thus, as to cities, counties, and such districts, new statutory duties that increase the costs of such services are prima facie reimbursable. This is true, notwithstanding a potential argument that such a local government's decision is voluntary in part, as to the number of personnel it hires. (See *San Diego Unified School Dist., supra,* 33 Cal.4th at p. 888, 16 Cal.Rptr.3d 466, 94 P.3d 589.) A school district, for example, has an analogous basic and mandatory duty to educate students. In the course of carrying out that duty, some "discretionary" expulsions will necessarily occur. (*Id.* at p. 887, fn. 22, 16 Cal.Rptr.3d 466, 94 P.3d 589.) Accordingly, *San Diego Unified School Dist.* suggests additional costs of "discretionary" expulsions should not be considered voluntary. Where, as a practical matter, it is inevitable that certain actions will occur in the administration of a mandatory program, costs attendant to those actions cannot fairly and reasonably be characterized as voluntary under the rationale of *City of Merced.* (See *San Diego Unified School Dist., supra,* 33 Cal.4th at pp. 887-888, 16 Cal.Rptr.3d 466, 94 P.3d 589.)
>
> However, the districts in issue are authorized, but not required, to provide their own peace officers and do not have provision of police protection as an essential and basic function. It is not essential unless there is a showing that, as a practical matter, exercising the authority to hire peace officers is the only reasonable means to carry out their core mandatory functions. As there is no such showing in the record, the Commission erred in finding that POBRA constitutes a state-mandated

[139] *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1357

> program for school districts and the special districts identified in Government Code section 3301.[140]

Thus, only city and county law enforcement agencies, and those police protection districts *that wholly supplant the law enforcement functions of the county within their jurisdiction* pursuant to Government Code section 53060.7, are mandated by the state to comply with the new training requirements imposed by Penal Code sections 13515.28.

3. The New Requirements Imposed by Penal Code Section 13515.28 Constitute a New Program or Higher Level of Service.

State mandate reimbursement is not required for any and all costs that might be incurred by local government as an incident of a change in law or regulation. Alleged costs must be *mandated by the state*, and must constitute a *new program or higher level of service*, within the meaning of article XIII B, section 6. The California Supreme Court explained in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46:

> Looking at the language of section 6 then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning. Thus read, 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 existing "programs." But the term "program" itself is not defined in article XIII B. What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term – programs that carry out the governmental function of providing services 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.[141]

Here, section 13515.28 requires an additional eight hours of training relating to crisis intervention behavioral health, and requires that training to be completed within a six-month period (depending on when an FTO was appointed or assigned). This training is above and beyond existing training requirements imposed by law. In addition, POST interprets Penal Code section 13515.28 to require the development and implementation of an entirely new course of one-time training.

Further, Penal Code section 13515.28 carries out the governmental function of providing a service to the public, and imposes unique requirements on local government that do not apply generally to all residents and entities in the state. The Senate Floor Analysis for the bill that added section 13515.28 states that "[p]eople with mental illnesses or intellectual disabilities are involved in nearly half of all police shootings…[t]he bill responds to the public's demand to increase safety by mandating stronger evidence-based behavioral health training that has proven to reduce volatile confrontations between police officers and people with mental illnesses or

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

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

intellectual disabilities."[142] Thus, the additional training is required pursuant to a state policy that peace officers should be trained to interact with persons with mental illness or intellectual disability and deescalate such situations non-violently.

Based on the foregoing, the Commission finds that the additional eight hours of training required by Penal Code section 13515.28 constitutes a new program or higher level of service.

4. The New Requirements Mandated by Penal Code section 13515.28 Result in Increased Costs Mandated by the State.

For the mandated activities to constitute reimbursable state-mandated activities under article XIII B, section 6 of the California Constitution, they must result in local agencies incurring increased costs mandated by the state. Government Code section 17514 defines "costs mandated by the state" as any increased cost that a local agency or school district incurs as a result of any statute or executive order that mandates a new program or higher level of service. Government Code section 17564(a) further requires that no claim shall be made nor shall any payment be made unless the claim exceeds $1,000. In addition, a finding of costs mandated by the state means that none of the exceptions in Government Code section 17556 apply to deny the claim.

The claimants have alleged new costs incurred to comply with Penal Code section 13515.28, and have alleged that there are no ongoing offsetting revenues. Specifically, the City of South Lake Tahoe alleges $11,150 in costs mandated by the state for fiscal year 2016-2017, and projects $11,485 in fiscal year 2018-2019, for officers to attend the eight hour training course required by section 13515.28.[143] The City of Claremont alleges $2,981 net costs (after a one-time grant) for fiscal year 2016-2017, and projects $5,718 for fiscal year 2018-2019, without the grant, for its officers to attend the eight-hour training. The claimants have submitted documentation of their officers' time and tuition expenses to attend the required training, which are authenticated by declarations sworn under penalty of perjury.[144] And, as discussed above, the training required by section 13515.28 is required only one time per FTO employee assigned or appointed; therefore some claimants may experience *recurring* costs when new FTOs are assigned, but not *ongoing* costs for FTOs who have already completed the required eight-hour training.

Moreover, there is no evidence in the record or in the law that local agencies have received any state aid from POST, or other additional revenue, sufficient to cover the costs of the new mandated activities pursuant to Government Code section 17556(e), or that the other exceptions to costs mandated by the state in section 17556 apply to deny this claim.

Based on the foregoing, the Commission finds, pursuant to Government Code section 17514, that the new requirements mandated by Penal Code section 13515.28 result in increased costs mandated by the state. In addition, any grants or other state funding that may be received by an eligible claimant will be identified in Parameters and Guidelines as offsetting revenue.

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[142] See, Exhibit A, Test Claim, page 38 [Senate Third Reading Analysis of SB 29, as amended August 31, 2015, p. 4].

[143] Exhibit A, Test Claim, pages 13-15.

[144] See Exhibit A, Test Claim, pages 47-55 [Cost Documentation for Each Officer]; 20-27 [Declarations].

V. Conclusion

Based on the foregoing analysis, the Commission partially approves this Test Claim and finds that Penal Code section 13515.28, as added by Statutes 2015, chapter 469, imposes a reimbursable state-mandated program for city and county law enforcement agencies, and those police protection districts *that wholly supplant the law enforcement functions of the county within their jurisdiction* pursuant to Government Code section 53060.7, that are required to have a Field Training Program under California Code of Regulations, title 11, section 1004 and have appointed or assigned FTOs for that program, to:[145]

- Ensure that each FTO assigned or appointed prior to January 1, 2017 shall attend a one-time, eight-hour training on crisis intervention and behavioral health before June 30, 2017. (Penal Code section 13515.28, Stats 2015, ch. 469.)
- Ensure that each FTO assigned or appointed after January 1, 2017 shall attend a one-time, eight-hour training on crisis intervention and behavioral health within 180 days of being assigned or appointed as an FTO. (Penal Code section 13515.28, Stats 2015, ch. 469.)

FTOs who have completed 40 hours of crisis intervention and behavioral health training; or who have completed eight hours of crisis intervention and behavioral health training in the past 24 months, are *exempt* from these requirements. In addition, reimbursement is not required for the local law enforcement employer to develop or present the training since these activities are not mandated.

All other statutes and code sections pled, and claims for reimbursement asserted are denied.

[145] California Code of Regulations, title 11, section 1004(a), states that "[a]ny department which employs peace officers and/or Level 1 Reserve peace officers shall have a POST-approved Field Training Program." Section 1004(b) states that a department that does not provide general law enforcement uniformed patrol services, or hires only lateral entry officers possessing a POST basic certificate and who have completed a similar POST approved Field Training Program may request an exemption and not comply with this requirement.

STATE of CALIFORNIA
COMMISSION ON STATE MANDATES

RE: **Decision**

Peace Officer Training: Mental Health/Crisis Intervention, 17-TC-06
Penal Code Sections 13515.26, 13515.27, 13515.28, 13515.29, and 13515.295;
as added or amended by Statutes 2015, Chapter 468 (SB 11) and
Statutes 2015, Chapter 469 (SB 29)
Cities of Claremont and South Lake Tahoe, Claimants

On May 24, 2019, the foregoing Decision of the Commission on State Mandates was adopted on the above-entitled matter.

Dated: May 24, 2019

Heather Halsey, Executive Director

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 May 24, 2019, I served the:

- **Draft Expedited Parameters and Guidelines, Schedule for Comments, and Notice of Hearing issued May 24, 2019**
- **Decision adopted May 24, 2019**

  Peace Officer Training: Mental Health/Crisis Intervention, 17-TC-06
  Penal Code Section 13515.28; Statutes 2015, Chapter 469 (SB 29)
  Cities of Claremont and South Lake Tahoe, Claimants

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 May 24, 2019 at Sacramento, California.

Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 5/24/19

Claim Number: 17-TC-06

Matter: Peace Officer Training: Mental Health/Crisis Intervention

Claimant: Cities of Claremont and South Lake Tahoe

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.)

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33 Cal.4th 859
Supreme Court of California

SAN DIEGO UNIFIED SCHOOL DISTRICT, Plaintiff and Respondent,
v.
COMMISSION ON STATE MANDATES, Defendant and Appellant;
California Department of Finance,
Real Party in Interest and Appellant.

No. S109125.
|
Aug. 2, 2004.

Synopsis

Background: School district petitioned for writ of administrative mandate to require the Commission on State Mandates to approve test claim for costs of mandatory and discretionary expulsion of students. The Superior Court, San Diego County, No. GIC737638, Linda B. Quinn, J., granted the petition. Commission and Department of Finance appealed. The Court of Appeal affirmed. Review was granted, superseding opinion of Court of Appeal.

Holdings: The Supreme Court, George, C.J., held that:

[1] all hearing costs incurred by district as result of mandatory actions related to expulsions for student's possession of firearm, at time relevant to this proceeding, constituted "higher level of service" within meaning of state constitutional provision, and thus were fully reimbursable, and

[2] hearing costs incurred by district as result of actions related to discretionary expulsions did not constitute "new program or higher level of service," and, in any event, did not trigger right to reimbursement, as costs of procedures exceeding federal due process requirements were de minimis.

Affirmed in part and reversed in part.

Opinion, 122 Cal.Rptr.2d 614, superseded.

West Headnotes (2)

[1] **Education** Apportionment and Disbursement

All hearing costs incurred by school district as result of mandatory actions related to expulsions of students for possession of firearm, at time relevant to mandamus proceeding initiated by district, constituted state–mandated "higher level of service" within meaning of state constitutional provision providing for reimbursement of local government for costs of "new program or higher level of service" imposed on local government by statute or state regulation, and thus were fully reimbursable; providing public schooling clearly constituted governmental function, enhancing safety of those who attended such schools constituted service to public, and mandatory expulsion provision did not implement federal law or regulation then extant. West's Ann.Cal. Const. Art. 13B, § 6; West's Ann.Cal.Educ.Code §§ 48915(c, d), 48918; West's Ann.Cal.Educ.Code § 48915(b) (1994).

See 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 549.

13 Cases that cite this headnote

[2] **Education** Apportionment and Disbursement

Hearing costs incurred by school district as result of actions related to discretionary expulsions did not constitute "new program or higher level of service," triggering right to reimbursement under state constitutional provision mandating reimbursement of local government for costs of "new program or higher level of service" imposed on local government by statute or state regulation, and, in any event, procedures related to discretionary expulsions were adopted to implement federal due process mandate, and thus were nonreimbursable, and costs exceeding federal requirements were de minimis, and so also nonreimbursable. U.S.C.A. Const.Amend. 14; West's Ann.Cal. Const. Art. 13B, § 6;

West's Ann.Cal.Educ.Code §§ 48915(e), 48918; West's Ann.Cal.Educ.Code § 48915(c) (1994); West's Ann.Cal.Gov.Code §§ 17514, 17556(c), 17561(a).

13 Cases that cite this headnote

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***866** Steven M. Woodside, County Counsel (Sonoma) as Amicus Curiae on behalf of Plaintiff and Respondent.

Opinion

****591** GEORGE, C.J.

Article XIII B, section 6, 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 such local government for the costs of such program or increased level of service...." [1] (Hereafter article XIII B, section 6.)

1 The provision continues: "except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (a) Legislative mandates requested by the local agency affected; [¶] (b) Legislation defining a new crime or changing an existing definition of a crime; or [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." (Cal. Const., art. XIII B, § 6.)

Plaintiff San Diego Unified School District (District), like all other public school districts in the state, is, and was at the time relevant in this proceeding, governed by statutes that regulate the expulsion of students. (Ed.Code, § 48900 et seq.) Whenever an expulsion recommendation is made (and before a student may be expelled), the District is required by Education Code section 48918 to afford the student a hearing with various procedural protections—including notice of the hearing and the right to representation by *****468** counsel, preparation of findings of fact, notices related to any expulsion and the right of appeal, and preparation of a hearing record. Providing these procedural protections requires the District to expend funds, for which the District asserts a right to reimbursement from the state pursuant to article XIII B, section 6, and implementing legislation, Government Code section 17500 et seq.

We granted review to consider two questions: (1) Are the hearing costs incurred as a result of the *mandatory* actions related to expulsions that are compelled by Education Code section 48915 fully reimbursable—or are those hearing costs reimbursable only to the extent such costs are attributable to hearing procedures that exceed the procedures required by federal law? (2) Are any hearing costs incurred in carrying out expulsions that are *discretionary* under Education Code section 48915 reimbursable? After we granted review and filed our decision in *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 134 Cal.Rptr.2d 237, 68 P.3d 1203 (*Kern High School Dist.*), we added the following preliminary question to be addressed: Do the Education Code ***867** statutes cited above establish a "new program" or "higher level of service" under article XIII B, section 6? Finally, we also asked the parties to brief the effect of the decision in *Kern High School Dist., supra,* 30 Cal.4th 727, 134 Cal.Rptr.2d 237, 68 P.3d 1203, on the present case.

We conclude that Education Code section 48915, insofar as it compels suspension and mandates a recommendation of expulsion for certain offenses, constitutes a "higher level of service" under article XIII B, section 6, and imposes a reimbursable state mandate for *all* resulting hearing costs—even those costs attributable to procedures required by federal

law. In this respect, we shall affirm the judgment of the Court of Appeal.

We also conclude that *no* hearing costs incurred in carrying out those expulsions that are *discretionary* under Education Code section 48915—including costs related to hearing procedures claimed to exceed the requirements of federal law—are reimbursable. As we shall explain, to the extent that statute makes expulsions discretionary, it does not reflect a new program or a higher level of service related to an existing program. Moreover, even if the hearing *procedures* set forth in Education Code section *48918* constitute a new program or higher level of service, we conclude that *this* statute does not trigger any right to reimbursement, because the hearing provisions that assertedly exceed federal requirements are merely incidental to fundamental federal due process requirements and the added costs of such procedures are de minimis. For these reasons, we conclude such hearing provisions should be treated, for purposes of ruling upon a request for reimbursement, as part of the nonreimbursable underlying *federal* mandate and not as a state mandate. Accordingly, we shall reverse the judgment of the Court of Appeal insofar as it compels reimbursement ****592** of any costs incurred pursuant to discretionary expulsions.

I

A. *Education Code sections 48918 and 48915*

We first describe the relevant provisions of two statutes —Education Code sections 48918 and 48915—pertaining to the expulsion of students from public schools.

Education Code section 48918 specifies the right of a student to an expulsion hearing and sets forth procedures that a school district must ***868** follow when conducting *****469** such a hearing. (Stats.1990, ch. 1231, § 2, pp. 5136–5139.) [2]

[2] For purposes of our present inquiry, section 48918, at the time relevant here (mid–1993 through mid–1994) read essentially as it had for the prior decade, and as it has in the ensuing decade. That provision first was enacted in 1975 (see Stats.1975, ch. 1253, § 4, pp. 3277–3278) as Education Code, former section 10608. (This enactment apparently was a response to the United States Supreme Court's decision in *Goss v. Lopez* (1975) 419 U.S. 565, 581, 95 S.Ct. 729, 42 L.Ed.2d 725 (*Goss*) [recognizing due process requirements applicable to public school students who are suspended for more than 10 days].) The statute was renumbered as Education Code, former section 48914 in 1976 (Stats.1976, ch. 1010, § 2, pp. 3589–3590) and was substantially augmented in 1977 (Stats.1977, ch. 965, § 24, pp. 2924–2926). After relatively minor amendments in 1978 and 1982, the section in 1983 was substantially restated, further augmented, and renumbered as Education Code section 48918 (Stats.1983, ch. 498, § 91, p. 2118). Amendments adopted in 1984 and 1988 made relatively minor changes, and further similar modifications were made in 1990, reflecting the version of the statute here at issue. Subsequent amendments in 1995, 1996, 1998, and 1999 made further changes that are irrelevant to the issue presented in the case now before us.

In identifying the right to a hearing, subdivision (a) of this statute declares that a student is "entitled" to an expulsion hearing within 30 days after the school principal determines that the student has committed an act warranting expulsion. [3] *In practical effect, this means that whenever a school principal makes such a determination and recommends to the school board that a student be expelled, an expulsion hearing is mandated.* [4]

[3] The provision reads: "The pupil shall be entitled to a hearing to determine whether the pupil should be expelled. An expulsion hearing shall be held within 30 schooldays after the date the principal or the superintendent of schools determines that the pupil has committed any of the acts enumerated in Section 48900...." (Ed.Code, § 48918, subd. (a). (Subdivision (b) of § 48900 presently includes—as it did at the time relevant here—the offense of possession of a firearm.)

[4] Of course, if a student does not invoke his or her entitlement to such a hearing, and instead waives the right to such a hearing, the hearing need not be held.

In specifying the substantive and procedural requirements for such an expulsion hearing, Education Code section 48918 sets forth rules and procedures, some of which, the parties agree, codify requirements of federal due process and some of which may exceed those requirements. [5] These rules and procedures

govern, among other things, notice of a hearing and the right to representation by counsel, preparation of findings of fact, notices related to the expulsion and the right of appeal, and preparation of a hearing record. (See § 48918, subds. (a) through former subd. (j) (currently subd. (k).)

[5] See *Goss, supra,* 419 U.S. 565, 581, 95 S.Ct. 729, 42 L.Ed.2d 725; *Gonzales v. McEuen* (C.D.Cal.1977) 435 F.Supp. 460, 466–467 (concluding that former Education Code section 10608 [current § 48918] met federal due process requirements pertaining to expulsions from public schools); 7 Witkin, Summary of California Law (9th ed.1988), Constitutional Law, § 549, p. 754 (noting that Education Code section 48918 and related legislation were enacted in response to the decision in *Goss*).

***869** The second statute at issue in this matter is Education Code section 48915. Discrete subdivisions of this statute address circumstances in which a principal *must* recommend to the school board that a student be expelled, and circumstances in which a principal *may* recommend that a student be expelled.

First, there is what the parties characterize as the "mandatory expulsion provision," Education Code section 48915, former subdivision (b). As it read during the time relevant in this proceeding (mid–1993 *****470** through mid–1994), this subdivision (1) compelled a school principal to *immediately suspend* any ****593** student found to be in possession of a firearm at school or at a school activity off school grounds, and (2) mandated a *recommendation* to the school district governing board that the student be *expelled.* The provision further required the governing board, upon confirmation of the student's knowing possession of a firearm, either to expel the student or "refer" him or her to an alternative education program housed at a separate school site.[6] (Compare this former provision with *current* Ed.Code, § 48915, subds. (c) and (d).)[7]

[6] An earlier and similar, albeit broader, version of the provision—extending not only to possession of firearms but also to possession of explosives and certain knives—existed briefly and was effective for approximately two and one-half months in late 1993. That initial statute, former section 48915, subdivision (b) (as amended Stats.1993, ch. 1255, § 2, pp. 7284–7285), which was effective only from October 11, 1993 through December 31, 1993, provided: "The principal or the superintendent of schools shall immediately suspend pursuant to Section 48911, and shall recommend to the governing board the expulsion of, any pupil found to be in possession of a firearm, knife of no reasonable use to the pupil, or explosive at school or at a school activity off school grounds. The governing board shall expel that pupil or, as an alternative, refer that pupil to an alternative education program, whenever the principal or the superintendent of schools and the governing board confirm that: [¶] (1) The pupil was in knowing possession of the firearm, knife, or explosive. [¶] (2) Possession of the firearm, knife of no reasonable use to the pupil, or explosive was verified by an employee of the school district. [¶] (3) There was no reasonable cause for the pupil to be in possession of the firearm, knife, or explosive."

As subsequently amended by Statutes 1993, chapter 1256, section 2, pages 7286–7287, effective January 1, 1994, Education Code section 48915, former subdivision (b), read: "The principal or the superintendent of schools shall immediately suspend, pursuant to Section 48911, any pupil found to be in possession of a firearm at school or at a school activity off school grounds and shall recommend expulsion of that pupil to the governing board. The governing board shall expel that pupil or refer that pupil to a program of study that is appropriately prepared to accommodate students who exhibit discipline problems and is not provided at a comprehensive middle, junior, or senior high school or housed at the schoolsite attended by the pupil at the time the expulsion was recommended to the school board, whenever the principal or superintendent of schools and the governing board confirm the following: [¶] (1) The pupil was in knowing possession of the firearm. [¶] (2) An employee of the school district verifies the pupil's possession of the firearm."

[7] The current subdivisions of Education Code section 48915 set forth a list of mandatory expulsion conduct broader than that set forth in former subdivision (b), and require a school board both to *expel and refer* to other institutions all students found to have committed such conduct.

> The present subdivisions read: "(c) The principal or superintendent of schools shall immediately suspend, pursuant to Section 48911, and shall recommend expulsion of a pupil that he or she determines has committed any of the following acts at school or at a school activity off school grounds: [¶] (1) Possessing, selling, or otherwise furnishing a firearm. This subdivision does not apply to an act of possessing a firearm if the pupil had obtained prior written permission to possess the firearm from a certificated school employee, which is concurred in by the principal or the designee of the principal. This subdivision applies to an act of possessing a firearm only if the possession is verified by an employee of a school district. [¶] (2) Brandishing a knife at another person. [¶] (3) Unlawfully selling a controlled substance listed in Chapter 2 (commencing with Section 11053) of Division 10 of the Health and Safety Code. [¶] (4) Committing or attempting to commit a sexual assault as defined in subdivision (n) of Section 48900 or committing a sexual battery as defined in subdivision (n) of Section 48900.[¶] (5) Possession of an explosive. [¶] (d) The governing board shall order a pupil expelled upon finding that the pupil committed an act listed in subdivision (c), and shall refer that pupil to a program of study that meets all of the following conditions: [¶] (1) Is appropriately prepared to accommodate pupils who exhibit discipline problems. [¶] (2) Is not provided at a comprehensive middle, junior, or senior high school, or at any elementary school. [¶] (3) Is not housed at the schoolsite attended by the pupil at the time of suspension." (Stats.2001, ch. 116, § 1.)

*****471** ***870** This provision, as it read at the time relevant here, did not mandate expulsion per se [8]—but it *did* require immediate suspension followed by a mandatory expulsion recommendation (and it provided that a student found by the governing board to have possessed ****594** a firearm would be removed from the school site by limiting disposition to either expulsion or "referral" to an alternative school). Moreover, as noted above, whenever expulsion is recommended a student has a right to an expulsion hearing. Accordingly, it is appropriate to characterize the former provision as *mandating* immediate suspension, a recommendation of expulsion, *and hence, an expulsion hearing.* For convenience, we accept the parties' description of this aspect of Education Code section 48915 as constituting a "mandatory expulsion provision."

8 As the Department of Finance observed in an August 22, 1994, communication to the Commission in this matter, "nothing in [Education Code section 48915] ... requires a district governing board or a county board of education to expel a pupil," and even "unauthorized and knowing possession of a firearm, does not result in mandated expulsion. Section 48915 subdivision (b) provides for the choice of the governing board to either expel the pupil in possession of a firearm, or refer the pupil to an alternative program of study...."

The second aspect of Education Code section 48915 relevant here consists of what we shall call the "discretionary expulsion provision." (*Id.,* former subd. (c), subsequently subd. (d), currently subd. (e).) During the period relevant in this proceeding (as well as currently), this subdivision of Education Code section 48915 recognized that a principal possesses *discretion* to recommend that a student be expelled for specified conduct other than firearm possession (conduct such as damaging or stealing school property or private property, using or selling illicit drugs, receiving stolen property, possessing tobacco or drug paraphernalia, or engaging in disruptive behavior). The former provision (like the current provision) further specified that the school district governing board "may" order a student expelled upon finding that the ***871** student, while at school or at a school activity off school grounds, engaged in such conduct. [9]

9 Education Code, section 48915, former subdivision (c) (as amended Stats.1992, ch. 909, § 3, p. 4226; amended and redesignated as former subd. (d) by Stats.1993, ch. 1255, § 2, pp. 7284–7285; further amended Stats.1993, ch. 1256, § 2, p. 7287, and Stats.1994, ch. 1198, § 7, p. 7271) provided, at the time relevant here: "Upon recommendation by the principal, superintendent of schools, or by a hearing officer or administrative panel appointed pursuant to subdivision (d) of Section 48918, the governing board *may* order a pupil expelled upon finding that the pupil violated subdivision (f), (g), (h), (i), (j), (k), or (*l*) of Section 48900, or Section 48900.2 or 48900.3, and either of the following: [¶] (1) That other means of correction are not feasible or have repeatedly failed to bring about proper conduct. [¶] (2) That due to the nature of the violation, the presence of the pupil causes a

continuing danger to the physical safety of the pupil or others." (Italics added.)

At the time relevant here, subdivisions (f) through (*l*) of section 48900 (as amended Stats.1992, ch. 909, § 1, pp. 4224–4225; Stats.1994, ch. 1198, § 5, pp. 7269–5270) provided: "A pupil shall *not* be suspended from school or recommended for expulsion *unless* the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has: [¶] ... [¶] (f) Caused or attempted to cause damage to school property or private property. [¶] (g) Stolen or attempted to steal school property or private property. [¶] (h) Possessed or used tobacco, or any products containing tobacco or nicotine products.... However, this section does not prohibit use or possession by a pupil of his or her own prescription products. [¶] (i) Committed an obscene act or engaged in habitual profanity or vulgarity. [¶] (j) Had unlawful possession of, or unlawfully offered, arranged, or negotiated to sell any drug paraphernalia, as defined in Section 11014.5 of the Health and Safety Code. [¶] (k) Disrupted school activities or otherwise willfully defied the valid authority of supervisors, teachers, administrators, school officials, or other school personnel engaged in the performance of their duties. [¶] (*l*) Knowingly received stolen school property or private property." (Italics added.)

At the time relevant here, section 48900.2 (Stats.1992, ch. 909, § 2, p. 4225) provided: "In addition to the reasons specified in Section 48900, a pupil may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has committed sexual harassment as defined in Section 212.5.[¶] For the purposes of this chapter, the conduct described in Section 212.5 must be considered by a reasonable person of the same gender as the victim to be sufficiently severe or pervasive to have a negative impact upon the individual's academic performance or to create an intimidating, hostile, or offensive educational environment. This section shall not apply to pupils enrolled in kindergarten and grades 1 to 3, inclusive."

Section 48900.3 (Stats.1994, ch. 1198, § 6, p. 7270), at the time relevant here, provided: "In addition to the reasons specified in Sections 48900 and 48900.2, a pupil in any of grades 4 to 12, inclusive, may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has caused, attempted to cause, threatened to cause, or participated in an act of, hate violence, as defined in subdivision (e) of [former] Section 33032.5 [current section 233]." In addition, section 48900.4 (Stats.1994, ch. 1017, § 1, p. 6196) provided, at the time relevant here: "In addition to the grounds specified in Sections 48900 and 48900.2, a pupil enrolled in any of grades 4 to 12, inclusive, may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has intentionally engaged in harassment, threats, or intimidation, directed against a pupil or group of pupils, that is sufficiently severe or pervasive to have the actual and reasonably expected effect of materially disrupting classwork, creating substantial disorder, and invading the rights of that pupil or group of pupils by creating an intimidating or hostile educational environment."

(All of these current provisions—sections 48915, subdivision (e), 48900, 48900.2, 48900.3, and 48900.4—read today substantially the same as they did at the time relevant in the present case.)

*****472 *872 **595** B. *Proceedings under Government Code section 17500 et seq.*

Procedures governing the constitutional requirement of reimbursement under article XIII B, section 6, are set forth in Government Code section 17500 et seq. The Commission on State Mandates (Commission) (Gov.Code, § 17525) is charged with the responsibility of hearing and deciding, subject to judicial review by an administrative writ of mandate, claims for reimbursement made by local governments or school districts. (Gov.Code, § 17551.) Government Code section 17561, subdivision (a), provides that the "state shall reimburse each ... school district for

all 'costs mandated by the state,' as defined in section 17514." Government Code section 17514, in turn, defines "costs mandated by the state" to mean, in relevant part, "any increased costs which a ... school district is required to incur ... as a result of any statute ... 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." Finally, Government Code section 17556 sets forth circumstances in which there shall be no reimbursement, including, under subdivision (c), circumstances in which "[t]he statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or ***473** executive order mandates costs which exceed the mandate in that federal law or regulation."

In March 1994, the District filed a "test claim" with the Commission, asserting entitlement to reimbursement for the costs of hearings provided with respect to both categories of cases described above—that is, those hearings triggered by mandatory expulsion recommendations, and those hearings resulting from discretionary expulsion recommendations. (See Gov.Code, § 17521; *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331–333, 285 Cal.Rptr. 66, 814 P.2d 1308.) [10] The District sought reimbursement for costs incurred between July 1, 1993, and June 30, 1994, under statutes effective through the latter date.

10 As observed by amicus curiae California School Boards Association, a "test claim is like a class action—the Commission's decision applies to all school districts in the state. If the district is successful, the Commission goes to the Legislature to fund the statewide costs of the mandate for that year and annually thereafter as long as the statute is in effect."

In August 1998, after holding hearings on the District's claim (as amended in April 1995, to reflect legislation that became effective in 1994), the Commission issued a "Corrected Statement of Decision" in which it determined that Education Code section 48915's requirement of suspension and a ***873** mandatory recommendation of expulsion for firearm possession constituted a "new program or higher level of service," and found that because costs related to some of the resulting hearing provisions set forth in Education Code section 48918 (primarily various notice, right of inspection, and recording provisions) exceeded the requirements of federal due process, those additional hearing costs constituted reimbursable state-mandated costs. [11] As to the vast majority of the remaining ****596** hearing procedures triggered by Education Code section 48915's requirement of suspension and a mandatory recommendation of expulsion for firearm possession—for example, procedures governing such matters as the hearing itself and the board's decision; a statement of facts and charges; notice of the right to representation by counsel; written findings; recording of the hearing; and the making of a record of the expulsion—the Commission found that those procedures were enacted to comply with federal due process requirements, and hence fell within the exception set forth in Government Code section 17556, subdivision (c), and ***474** did not impose a reimbursable state mandate. The Commission further found that with respect to Education Code section 48915's *discretionary* expulsions, there was no right to reimbursement for costs incurred in holding expulsion hearings, because such expulsions do not constitute a new program or higher level of service, and in any event such expulsions are not *mandated* by the state, but instead represent a choice by the principal and the school board.

11 The Commission concluded that the costs incurred in providing the following state-mandated procedures under Education Code section 48918 exceeded federal due process requirements, and were reimbursable: (i) adoption of rules and regulations pertaining to pupil expulsions (§ 48918, first par. & *passim*); (ii) inclusion in the notice of hearing of (a) a copy of the disciplinary rules of the District, (b) a notice of the parents' obligation to notify a new school district, upon enrollment, of the pupil's expulsion, and (c) a notice of the opportunity to inspect and obtain copies of all documents to be used at the hearing (§ 48918, subd. (b)); (iii) allowing, upon request, the pupil or parent to inspect and obtain copies of the documents to be used at the hearing (§ 48918, subd. (b)); (iv) sending of written notice concerning (a) any decision to expel or suspend the enforcement of an expulsion order during a period of probation, (b) the right to appeal the expulsion to the county board of education, and (c) the obligation of the parent to notify a new school district, upon enrollment, of the pupil's expulsion (§ 48918, former subd. (i), currently subd. (j); (v) maintenance of a record of each expulsion, including the cause thereof (§ 48918, former subd. (j), currently subd. (k); and (vi) the recording of expulsion orders and the causes thereof in the pupil's mandatory

> interim record (and, upon request, the forwarding of this record to any school in which the pupil subsequently enrolls) (§ 48918, former subd. (j), currently subd. (k)).

In October 1999, the District brought this proceeding for an administrative writ of mandate challenging the Commission's decision. The trial court issued a writ commanding the Commission to render a new decision finding (i) all costs associated with hearings triggered by compulsory suspensions and mandatory expulsion recommendations are reimbursable, and (ii) hearing costs associated with discretionary expulsions are reimbursable to the limited ***874** extent that required hearing procedures exceed federal due process mandates. The Commission (defendant) and the Department of Finance (real party in interest, hereafter Department) appealed, and the Court of Appeal affirmed the judgment rendered by the trial court.

II

A. *Costs associated with hearings triggered by compulsory suspensions and mandatory expulsion recommendations*

1. *"New program or higher level of service"?*

We address first the issue that we asked the parties to brief: Does Education Code section 48915, former subdivision (b) (current subds. (c) & (d)), which mandated suspension and an expulsion recommendation for those students who possess a firearm at school or at a school activity off school grounds, and which also required a school board, if it found the charge proved, either to expel or to "refer" such a student to an alternative educational program housed at a separate school site, constitute a "new program or higher level of service" under article XIII B, section 6 of the state Constitution, and under Government Code section 17514?

We addressed the meaning of the Constitution's phrase "new program or higher level of service" in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202 (*County of Los Angeles*). That case concerned whether local governments are entitled to reimbursement for costs incurred in complying with legislation that required local agencies to provide the same increased level of workers' compensation benefits for their employees as private individuals or organizations were required to provide for their employees. We stated:

"Looking at the language of [article XIII B, section 6] then, it seems clear that by itself the term 'higher level of service' is meaningless. It must be read in conjunction with the predecessor phrase 'new program' to give it meaning. Thus read, 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 existing 'programs.' But the term 'program' itself is not defined in article XIII B. What programs ****597** then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term—[(1)] programs that carry out the governmental function of providing services to the public, or [(2)] laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents *****475** and entities in the state." (*County of Los Angeles, supra,* 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202.)

***875** We continued in *County of Los Angeles:* "The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public. In their ballot arguments, the proponents of article XIII B explained section 6 to the voters: 'Additionally, this measure: (1) Will not allow the state government to *force programs* on local governments without the state paying for them.' (Ballot Pamp., Proposed Amend. to Cal. Const. with arguments to voters, Spec. Statewide Elec. (Nov. 6, 1979) p. 18. Italics added.) In this context the phrase 'to force programs on local governments' confirms that *the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities.*" (*County of Los Angeles, supra,* 43 Cal.3d 46, 56–57, 233 Cal.Rptr. 38, 729 P.2d 202, italics added.)

It was clear in *County of Los Angeles, supra,* 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202, that the law at issue did not meet the second test for a "program or higher level of service"—it did not implement a state policy by imposing unique requirements upon local governments, but instead applied workers' compensation contribution rules generally to all employers in the state. Nor, we held, did the law requiring local agencies to shoulder a general increase in workers'

compensation benefits amount to a reimbursable "program or higher level of service" under the first test described above. (*Id.,* at pp. 57–58, 233 Cal.Rptr. 38, 729 P.2d 202.) The law increased the cost of employing public servants, but it did not in any tangible manner increase the level of service provided by those employees to the public.

We reaffirmed and applied the test set out in *County of Los Angeles, supra,* 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202, in *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 244 Cal.Rptr. 677, 750 P.2d 318 (*Lucia Mar*). The state law at issue in *Lucia Mar* required local school districts to pay a portion of the cost of educating pupils in *state* schools for the severely handicapped—costs that the state previously had paid in full.

We determined that the contributions called for under the law were used to fund a "program" within both definitions of that term set forth in *County of Los Angeles.* (*Lucia Mar, supra,* 44 Cal.3d 830, 835, 244 Cal.Rptr. 677, 750 P.2d 318.) We stated: "[T]he education of handicapped children is clearly a governmental function providing a service to the public, and the [state law] imposes requirements on school districts not imposed on all the states residents. Nor can there be any doubt that although the schools for the handicapped have been operated by the state for many years, the program was new insofar as plaintiffs are ***876** concerned, since at the time [the state law] became effective they were not required to contribute to the education of students from their districts at such schools. [ ] ... To hold, under the circumstances of this case, that a shift in funding of an existing program from the state to a local entity is not a new program as to the local agency would, we think, violate the intent underlying section 6 of article XIII B.... Section 6 was intended to preclude the state from shifting to local *****476** agencies the financial responsibility for providing public services in view of ... restrictions on the taxing and spending power of the local entities." (*Lucia Mar, supra,* 44 Cal.3d 830, 835–836, 244 Cal.Rptr. 677, 750 P.2d 318; see also ****598** *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 98, 61 Cal.Rptr.2d 134, 931 P.2d 312 [legislation excluding indigents from Medi–Cal coverage transferred obligation for such costs from state to counties, and constituted a reimbursable "new program or higher level of service"].)

We again applied the alternative tests set forth in *County of Los Angeles, supra,* 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202, in *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522 (*City of Sacramento*). In that case we considered whether a state law implementing federal "incentives" that encouraged states to extend unemployment insurance coverage to all public employees constituted a program or higher level of service under article XIII B, section 6. We concluded that it did not because, as in *County of Los Angeles,* (1) providing unemployment compensation protection to a city's own employees was not a service to the public; and (2) the statute did not apply uniquely to local governments—indeed, the same requirements previously had been applied to most employers, and extension of the requirement (by eliminating a prior exemption for local governments) merely placed local government employers on the same footing as most private employers. (*City of Sacramento, supra,* 50 Cal.3d at pp. 67–68, 266 Cal.Rptr. 139, 785 P.2d 522.)

Subsequently, the Court of Appeal in *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 75 Cal.Rptr.2d 754 (*City of Richmond*), following *County of Los Angeles, supra,* 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202, and *City of Sacramento, supra,* 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522, concluded that requiring local governments to provide death benefits to local safety officers, under both the Public Employees Retirement System and the workers' compensation system, did not constitute a higher level of service to the public. The Court of Appeal arrived at that determination even though—as might also have been argued in *County of Los Angeles* and *City of Sacramento*—such benefits may "generate a higher quality of local safety officers" and thereby, in a general and indirect sense, provide the public with a "higher level of service" by its employees. (*City of Richmond, supra,* 64 Cal.App.4th 1190, 1195, 75 Cal.Rptr.2d 754.)

Viewed together, these cases (*County of Los Angeles, supra,* 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202, *City of Sacramento, supra,* 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522, and *City of Richmond,* ***877** *supra,* 64 Cal.App.4th 1190, 75 Cal.Rptr.2d 754) illustrate the circumstance that simply because a state law or order may *increase the costs* borne by local government *in providing services,* this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting "service to the public" under article XIII B, section 6, and Government Code section 17514. [12]

12 Indeed, as the court in *City of Richmond, supra,* 64 Cal.App.4th 1190, 75 Cal.Rptr.2d 754, observed: "Increasing the cost of providing services cannot

> be equated with requiring an increased level of service under [article XIII B,] section 6.... A higher cost to the local government for compensating its employees is not the same as a higher cost of providing [an increased level of] services to the public." (*Id.,* at p. 1196, 75 Cal.Rptr.2d 754; accord, *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1484, 235 Cal.Rptr. 101 [temporary increase in PERS benefit to retired employees, resulting in higher contribution rate by local government, does not constitute a higher level of service to the public].)

*****477** By contrast, Courts of Appeal have found a reimbursable "higher level of service" concerning an existing "program" when a state law or executive order mandates not merely some change that increases the cost of providing services, but an increase in the actual level or quality of governmental services provided. In *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537–538, 234 Cal.Rptr. 795 (*Carmel Valley*), for example, an executive order required that county firefighters be provided with protective clothing and safety equipment. Because this increased safety equipment apparently was designed to result in more effective fire protection, the mandate evidently was intended to produce a higher level of service to the public, thereby satisfying the first alternative test set out in *County of Los Angeles, supra,* 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202. Similarly, in ****599** *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 173, 275 Cal.Rptr. 449 (*Long Beach*), an executive order required school districts to take specific steps to measure and address racial segregation in local public schools. The appellate court held that this constituted a "higher level of service" to the extent the order's requirements exceeded federal constitutional and case law requirements by mandating school districts to undertake defined remedial actions and measures that were merely advisory under prior governing law.

[1] The District and the Commission assert that the "mandatory" aspect of Education Code section 48915, insofar as it compels suspension and mandates an expulsion recommendation for firearm possession (and thereafter restricts the board's options to expulsion or referral to an off-site alternative school), carries out a governmental function of providing services to the public and hence constitutes an increased or higher level of service concerning an existing program under the first alternative test of *County of Los Angeles, supra,* 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202. They argue, in essence, that the present matter is more analogous to the latter cases ***878** (*Carmel Valley, supra,* 190 Cal.App.3d 521, 234 Cal.Rptr. 795, and *Long Beach, supra,* 225 Cal.App.3d 155, 275 Cal.Rptr. 449)—both of which involved measures designed to increase the level of governmental service provided to the public—than to the former cases (*County of Los Angeles, supra,* 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202, *City of Sacramento, supra,* 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522, and *City of Richmond, supra,* 64 Cal.App.4th 1190, 75 Cal.Rptr.2d 754)—in which the cost of employment was increased but the resulting governmental services themselves were not directly enhanced or increased. As we shall explain, we agree with the District and the Commission.

The statutory requirements here at issue—immediate suspension and mandatory recommendation of expulsion for students who possess a firearm, and the limitation upon the ensuing options of the school board (expulsion or referral)—reasonably are viewed as providing a "higher level of service" to the public under the commonly understood sense of that term: (i) the requirements are new in comparison with the preexisting scheme in view of the circumstance that they did not exist prior to the enactment of Statutes of 1993, chapters 1255 (Assem. Bill No. 342 (1993–1994 Reg. Sess.) (Assembly Bill No. 342)) and 1256 (Senate Bill *****478** No. 1198 (1993–1994 Reg. Sess.) (Senate Bill No. 1198)); and (ii) the requirements were intended to provide an enhanced service to the public—*safer schools for the vast majority of students* (that is, those who are not expelled or referred to other school sites). In other words, the legislation was premised upon the idea that by removing potentially violent students from the general school population, the safety of those students who remain thereby is increased. (See, e.g., Stats.1993, ch. 1255, § 4, pp. 7285–7286 ["In order to ensure public safety on school campuses ... it is necessary that this act take effect immediately"]; Sen. Com. on Ed. (Apr. 28, 1993), Analysis of Assem. Bill No. 342, p. 2 [noting legislative purpose to enhance public safety]; see also Assem. Com. on Ed. (July 14, 1993), Analysis of Sen. Bill No. 1198, p. 1 [noting legislative purpose to remove those who possess firearms from the general school population by increasing the frequency of expulsion for such conduct].)

In challenging this conclusion, the Department relies upon *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 263 Cal.Rptr. 351 (*Department of Industrial Relations*). In that case, the state enacted enhanced statewide safety regulations that governed all public

and private elevators, and thereafter the County of Los Angeles sought reimbursement for the costs of complying with the new regulations. The Court of Appeal found that the regulations constituted neither a new program nor a higher level of service concerning an existing program under either of the two alternative tests set out in *County of Los Angeles, supra,* 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202. The court concluded that the elevator regulations did not meet the first alternative test, because the regulations did not carry out a governmental function of providing services to the public; the court found instead that ***879** "[p]roviding elevators equipped with fire and earthquake ****600** safety features simply is not a 'government function of providing services to the public.' " (*Department of Industrial Relations, supra,* 214 Cal.App.3d at p. 1546, 263 Cal.Rptr. 351.) Moreover, the court found, the second ("uniqueness") test was not met—the regulation applied to all elevators, not only those owned or operated by local governments.

The Department asserts that *Department of Industrial Relations, supra,* 214 Cal.App.3d 1538, 263 Cal.Rptr. 351, is analogous, and argues that the "service" afforded by mandatory suspensions followed by a required expulsion recommendation, etc., is "not qualitatively different from the safety regulations at issue in [*Department of Industrial Relations*]. School districts carrying out such expulsions are not providing a service to the public...." We disagree. Providing public schooling clearly constitutes a governmental function, and enhancing the safety of those who attend such schools constitutes a service to the public. Moreover, here, unlike the situation in *Department of Industrial Relations,* the law implementing this state policy applies uniquely to local public schools. We conclude that *Department of Industrial Relations* does not conflict with the conclusion that the mandatory suspension and expulsion recommendation requirements, together with restrictions placed upon a district's resolution of such a case, constitute an increased or higher level of service to the public under the constitutional provision and the implementing statutes.

Of course, even if, as we have concluded above, a statute effectuates an increased or higher level of governmental service to the public concerning an existing program, this "does not necessarily lead to the conclusion that the program is a *state* mandate *****479** under California Constitution, article XIII B, section 6." (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 818, 38 Cal.Rptr.2d 304, italics added (*County of Los Angeles II*).) We turn to the question whether the hearing costs at issue, flowing from compulsory suspensions and mandatory expulsion recommendations, are mandated by the state.

2. *Are the hearing costs state mandated?*

As noted above, a compulsory suspension and a mandatory recommendation of expulsion under Education Code section 48915 in turn trigger a mandatory expulsion hearing. All parties agree that any such resulting expulsion hearing must comply with basic federal due process requirements, such as notice of charges, a right to representation by counsel, an explanation of the evidence supporting the charges, and an opportunity to call and cross-examine witnesses and to present evidence. (See *ante,* fn. 5.) But as also noted above, article XIII B, section 6, and the implementing statutes ***880** (Gov.Code, § 17500 et seq.), by their terms, provide for reimbursement only of *state*-mandated costs, not *federally* mandated costs. The Commission and the Department assert that this circumstance raises the question: Do all or some of a district's costs in complying with the mandatory expulsion provision of Education Code section 48915 constitute a nonreimbursable *federal* mandate?

In the absence of the operation of Education Code section 48915's mandatory provision (specifically, compulsory immediate suspension and a mandatory expulsion recommendation), a school district would not automatically incur the due process hearing costs that are mandated by federal law pursuant to *Goss, supra,* 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725, and related cases, and codified in Education Code section 48918. Instead, a district would incur such hearing costs only if a school principal first were to exercise discretion to recommend expulsion. Accordingly, in its mandatory aspect, Education Code section 48915 appears to constitute a state mandate, in that it establishes conditions under which the state, rather than local officials, has made the decision requiring a school district to incur the costs of an expulsion hearing.

The Department and the Commission agree to a point, but argue that a district's costs incurred in complying with this state mandate are reimbursable only if, and to the extent that, hearing procedures set forth in Education Code section 48918 exceed the requirements of federal due process. In support, they rely upon ****601** Government Code section 17556, which—in setting forth circumstances in which the Commission shall *not* find costs to be mandated by the state—provides that "[t]he commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after

a hearing, the commission finds that: ... (c) The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation." [13]

13 Government Code section 17556 reads in full: "The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: [¶] (a) The claim is submitted by a local agency or school district which requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district which requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this paragraph. [¶] (b) The statute or executive order affirmed for the state that which had been declared existing law or regulation by action of the courts. [¶] (c) The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation. [¶] (d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. [¶] (e) The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate. [¶] (f) The statute or executive order imposed duties which were expressly included in a ballot measure approved by the voters in a statewide election. [¶] (g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction."

***480 *881 We agree with the District and the Court of Appeal below that, as applied to the present case, it cannot be said that Education Code section 48915's mandatory expulsion provision "*implemented a federal law or regulation.*" (Italics added.) Education Code section 48915, at the time relevant here, did not implement any federal law; as explained below, federal law did not *then* mandate an expulsion recommendation—or expulsion—for firearm possession. [14] Moreover, although the Department argues that in this context Government Code section 17556, subdivision (c)'s phrase "the statute" should be viewed as referring not to Education Code section 48915's mandatory expulsion recommendation requirement, but instead to the mandatory due process hearing under Education Code section 48918 that is triggered by such an expulsion recommendation, it still cannot be said that section 48918 itself required the District to incur any costs. As noted above, Education Code section 48918 sets out requirements for expulsion hearings that must be held when a district seeks to expel a student—but neither section 48918 nor federal law requires that any such expulsion recommendation be made in the first place, and hence section 48918 does not implement any federal mandate that school districts hold such hearings and incur such costs whenever a student is found in possession of a firearm. Accordingly, we conclude that the so-called exception to reimbursement described in Government Code section 17556, subdivision (c), is inapplicable in this context.

14 Subsequent amendments to federal law may alter this conclusion with regard to future test claims concerning Education Code section 48915's mandatory expulsion provision—see *post,* 16 Cal.Rptr.3d pages 481–482, 94 P.3d pages 602–603.

Because it is state law (Education Code section 48915's mandatory expulsion provision), and not federal due process law, that requires the District to take steps that in turn require it to incur hearing costs, it follows, contrary to the view of the Commission and the Department, that we cannot characterize *any* of the hearing costs incurred by the District, triggered by the mandatory provision of Education Code section 48915, as constituting a federal mandate (and hence being nonreimbursable). We conclude **602 that under the statutes existing at the time of the test claim in this case (state legislation in effect through ***481 mid–1994), *all* such hearing costs—those designed to satisfy the

minimum requirements of federal due process, and those that may exceed ***882** those requirements—are, with respect to the mandatory expulsion provision of section 48915, state mandated costs, fully reimbursable by the state. [15]

15 In Exhibit No. 1 to its claim, the District presented the declaration of a San Diego Unified School District official, estimating that in order to process "350 proposed expulsions" during the period spanning July 1, 1993, to June 30, 1994, the District would incur approximately $94,200 "in staffing and other costs"—yielding an average estimated cost of approximately $270 per hearing during the relevant period. It is unclear from the record how many of these 350 hearings would be triggered by Education Code section 48915's mandatory expulsion provision (and constitute state-mandated costs subject to reimbursement under article XIII B, section 6), and how many of these 350 hearings would be triggered by Education Code section 48915's discretionary provision (and, as explained *post,* in part II.B, constitute a nonreimbursable *federal* mandate).

We note that in the proceedings below, the Commission did not confine reimbursement only to those matters as to which the district on its own initiative would not have sought expulsion in the absence of the statutory requirement that it seek expulsion—and the Department has not raised that point in the trial court or on appeal.

Against this conclusion, the Department, in its supplemental briefing, offers a wholly new theory, not advanced in any of the proceedings below, in support of its belated claim that *all* hearing costs triggered by Education Code section 48915's mandatory expulsion provision are in fact nonreimbursable *federal* mandates, and not, as we have concluded above, reimbursable state mandates. As we shall explain, we reject the Department's contention, as applied to the test case here at issue (involving state statutes in effect through mid–1994).

The Department cites 20 United States Code section 7151, part of the federal No Child Left Behind Act of 2001, which provides, as relevant here: "Each State receiving Federal funds under any subchapter of this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than 1 year a student who is determined to have brought a firearm to a school, or to have possessed a firearm at a school, under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of a local educational agency to modify such expulsion requirement for a student on a case-by-case basis if such modification is in writing." [16]

16 "Firearm," as defined in 18 United States Code section 921, includes guns and explosives.

The Department further asserts that more than $2.8 billion in federal funds under the No Child Left Behind Act are included "for local use" in the 2003–04 state budget. (Cal. State Budget, 2003–04, Budget Highlights, p. 4.) The Department argues that in light of the requirements set forth in 20 United States Code section 7151, and the amount of federal program funds at issue under the No Child Left Behind Act, the financial consequences to the state and to the school districts of failing to comply with 20 United States Code section 7151 are such that as a practical matter, ***883** Education Code section 48915's mandatory expulsion provision in reality constitutes an implementation of federal law, and hence resulting costs are nonreimbursable except to the extent they exceed the requirements of federal law. (See Govt.Code, § 17556, subd. (c); see also *Kern High School Dist., supra,* 30 Cal.4th 727, 749–751, 134 Cal.Rptr.2d 237, 68 P.3d 1203; *City of Sacramento, supra,* 50 Cal.3d 51, 70–76, 266 Cal.Rptr. 139, 785 P.2d 522.) Moreover, the Department asserts, to the extent school districts are *****482** compelled by federal law, through Education Code section 48915's mandatory expulsion provision, to hold hearings pursuant to section 48918 in cases of firearm possession on school grounds, under 20 United States Code section 7164 (defining prohibited uses of program funds), *all* costs of such hearings properly may be paid out of federal program funds, and hence we should "view the ... provision of program funding as satisfying, in advance, any reimbursement requirement." (*Kern High School Dist., supra,* 30 Cal.4th 727, 747, 134 Cal.Rptr.2d 237, 68 P.3d 1203.)

****603** Although the Department asserts that this federal law and program existed at the time relevant in this matter (that is, through mid–1994), our review of the statutes and relevant history suggests otherwise. Title 20 of the United States Code, section 7151, and the remainder of the No Child Left Behind Act, became effective on January 8, 2002. The predecessor legislation cited by the Department —the Gun–Free Schools Act of 1994 (former 20 U.S.C. § 8921(a)), although containing a substantially identical

mandatory expulsion provision (*id.,* § 8921(b)(1)) [17] —was not effective until July 1, 1995 (108 Stat. 3518, § 3). In turn, the predecessor legislation to *that* Act cited by the Department, the Elementary and Secondary Education Act of 1965 (former 20 U.S.C. § 6301 et seq.)—as it existed at the time relevant here (July 1, 1993, through June 30, 1994)—contained no such mandatory expulsion provision. Accordingly, it appears that despite the Department's late discovery of 20 United States Code section 7151, at the time relevant here (regarding legislation in effect through mid–1994), neither 20 United States Code section 7151, nor either of its predecessors, compelled states to enact a law such as Education Code section 48915's mandatory expulsion provision. Therefore, we reject the Department's assertion that, during the time period at issue in this case, Education Code section 48915's mandatory expulsion provision constituted an implementation of a federal, rather than a state, mandate.

17 The prior law stated: "Except as provided in paragraph (3), each State receiving Federal funds under this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a weapon to a school under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of such local educational agency to modify such expulsion requirement for a student on a case-by-case basis." (Pub.L. No. 103–382, § 14601(b)(1) (Oct. 20, 1994) 108 Stat. 3518.)

Although we conclude that all hearing costs triggered by Education Code section 48915's mandatory expulsion provision constitute reimbursable state-mandated expenses under the statutes as they existed during the period ***884** covered by the District's present test claim, we do not foreclose the possibility that 20 United States Code section 7151 or its predecessor, 20 United States Code section 8921, may lead to a different conclusion when applied to versions of Education Code section 48915 effective in years 1995 and thereafter. Indeed, we note that at least one subsequent test claim that has been filed with the Commission may raise the federal statutory issue advanced by the Department. [18]

18 See Pupil Expulsions II (4th Amendment), CSM No. 01–TC–18 (filed June 3, 2002). This claim, filed by the San Juan Unified School District, asserts reimbursable state mandates with respect to, among numerous other statutes, Education Code section 48915, as amended effective in 2002.

B. *Costs associated with hearings triggered by discretionary expulsion recommendations*

[2] We next consider whether reimbursement is required for the costs associated *****483** with hearings triggered under discretionary expulsion provisions. Again, we address first the issue that we asked the parties to brief: Does the discretionary expulsion provision of Education Code section 48915 (former subd. (c), thereafter subd. (d), currently subd. (e)), which, as noted above, recognized that a principal possesses *discretion* to recommend that a student be expelled for specified conduct other than firearm possession (conduct such as damaging or stealing property, using or selling illicit drugs, possessing tobacco or drug paraphernalia, etc.), and further specified that the school district governing board "may" order a student expelled upon finding that the student, while at school or at a school activity off school grounds, engaged in such conduct, constitute a "new program or higher level of service" under article XIII B, section 6 of the state Constitution, and under Government Code section 17514?

We answer this question in the negative. The discretionary expulsion provision of Education Code section 48915 does not constitute a "new" program or higher level of service, because provisions recognizing discretion to suspend or expel were set forth in statutes predating 1975. (See Educ.Code, former ****604** § 10601, Stats.1959, ch. 2, § 3, p. 860 [providing that a student may be suspended for good cause]; *id.,* former § 10602 (Stats.1970, ch. 102, § 102, p. 159 (defining "good cause"); *id.,* former section 10601.6 (Stats.1972, ch. 164, § 2, p. 384 (further defining "good cause").))) [19] Accordingly, the discretionary expulsion provision of Education Code section 48915 is not a "new" program under article XIII B, section 6, and the implementing statutes, ***885** nor does it reflect a higher level of service related to an existing program. (*County of Los Angeles, supra,* 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202.)

19 As the Commission observed in its Corrected Statement of Decision in this matter: "The authorization for governing boards to expel pupils from school for inappropriate behaviors has been in existence since before 1975. The behaviors defined as inappropriate under current law, subdivisions (a)

> though (*l*) of section 48900, 48900.2, and 48900.3, meet prior laws' definitions of 'good cause' and 'misconduct' as reasons for expulsion." (Italics deleted.)

The District maintains, nevertheless, that once it elects to pursue expulsion, it is obligated to abide by the procedural hearing requirements of Education Code section 48918 and accordingly is mandated by that section to incur costs associated with such compliance. The District asserts that in this respect, *section 48918* constitutes a "new program or higher level of service" related to an existing program under article XIII B, section 6 and under Government Code section 17514. We shall assume for analysis that this is so. [20]

20 The requirements of Education Code section 48918 would appear to be "new" for purposes of the reimbursement provisions, in that they did not exist prior to 1975 and were enacted in that year and subsequently. (See *ante,* fn. 2.) The requirements also would appear to meet both alternative tests set forth in *County of Los Angeles, supra,* 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202—that is, by implementing procedures that direct and guide the process of expulsion from public school, the statute appears to carry out a governmental function of providing services to public school students who face expulsion; or, it would seem, section 48918 constitutes a law that, to implement state policy, imposes unique requirements on local governments.

The District recognizes, of course, that under Government Code, section 17556, subdivision (c), it is not entitled to reimbursement to the extent Education Code section 48918 merely implements federal due process law, but the District argues that it has a right to reimbursement for its costs of complying with section 48918 *to* ***484** *the extent* those costs are attributable to hearing procedures that *exceed* federal due process requirements. (See Govt.Code, § 17556, subd. (c).) The District asserts that its costs in complying with various notice, right of inspection, and recording requirements (see *ante,* fn. 11) fall into this category and are reimbursable.

The Department and the Commission argue in response that any right to reimbursement for hearing costs triggered by discretionary expulsions—even costs limited to those procedures that assertedly exceed federal due process hearing requirements—is foreclosed by virtue of the circumstance that when a school pursues a discretionary expulsion, it is not acting under compulsion of any law but instead is exercising a choice. In support, the Department and the Commission rely upon *Kern High School Dist., supra,* 30 Cal.4th 727, 134 Cal.Rptr.2d 237, 68 P.3d 1203, and *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 200 Cal.Rptr. 642 (*City of Merced*).

In *Kern High School Dist., supra,* 30 Cal.4th 727, 134 Cal.Rptr.2d 237, 68 P.3d 1203, school districts asserted that costs incurred in complying with statutory notice and agenda requirements for committee meetings concerning various state and federally funded educational programs constituted a reimbursable state mandate, because once ***886** school districts *elected* to participate in the underlying state and federal programs, the districts had no option but to hold program-related committee meetings and abide by the challenged notice and agenda requirements. (*Id.,* at p. 742, 134 Cal.Rptr.2d 237, 68 P.3d 1203.) We rejected the school districts' position, reasoning in part that because the districts' participation in the underlying programs was voluntary, the notice and agenda costs incurred as a result of that voluntary participation were not the product of legal compulsion and did not constitute a reimbursable state mandate on that basis. ****605** (*Id.,* at p. 745, 134 Cal.Rptr.2d 237, 68 P.3d 1203.) [21]

21 We also proceeded to hold that in any event, because the school districts were free to use program funds to pay for the challenged increased costs, the districts had, in practical effect, already been given funds by the Legislature to cover the challenged costs. (*Kern High School Dist., supra,* 30 Cal.4th at pp. 748–754, 134 Cal.Rptr.2d 237, 68 P.3d 1203.)

In reaching that conclusion in *Kern High School Dist., supra,* 30 Cal.4th 727, 134 Cal.Rptr.2d 237, 68 P.3d 1203, we discussed *City of Merced, supra,* 153 Cal.App.3d 777, 200 Cal.Rptr. 642. In that case, the city wished either to purchase or to condemn, pursuant to its eminent domain authority, certain privately owned real property. The city elected to proceed by eminent domain, under which it was required by then recent legislation (Code Civ. Proc., § 1263.510) to compensate the property owner for loss of "business goodwill." The city so compensated the property owner and then sought reimbursement from the state, arguing that the new statutory requirement that it compensate for business goodwill amounted to a reimbursable state mandate. (*City of Merced, supra,* 153 Cal.App.3d at p. 780, 200 Cal.Rptr. 642.)

The Court of Appeal concluded that the city's increased costs flowing from its election to condemn the property did not constitute a reimbursable state mandate. (*Id.,* at pp. 781–783, 200 Cal.Rptr. 642.) The court reasoned: "[W]hether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. *The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is* ***485** *exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost.*" (*Id.,* at p. 783, 200 Cal.Rptr. 642, italics added.)

Summarizing this aspect of *City of Merced, supra,* 153 Cal.App.3d 777, 200 Cal.Rptr. 642, in *Kern High School Dist., supra,* 30 Cal.4th 727, 134 Cal.Rptr.2d 237, 68 P.3d 1203, we stated: "[T]he core point articulated by the court in *City of Merced* is that *activities undertaken at the option or discretion of a local government entity* (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) *do not trigger a state mandate and hence do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.*" (*Kern High School Dist.,* at p. 742, 134 Cal.Rptr.2d 237, 68 P.3d 1203, italics added.)

The Department and the Commission argue that in the present case the District, like the claimants in *Kern High School Dist.,* errs by focusing upon *887 the final result—a school district's legal obligation to comply with statutory hearing procedures—rather than focusing upon whether the school district has been *compelled* to put itself in the position in which such a hearing (with resulting costs) is required.

The District and amici curiae on its behalf (consistently with the opinion of the Court of Appeal below) argue that the holding of *City of Merced, supra,* 153 Cal.App.3d 777, 200 Cal.Rptr. 642, should not be extended to apply to situations beyond the context presented in that case and in *Kern High School Dist., supra,* 30 Cal.4th 727, 134 Cal.Rptr.2d 237, 68 P.3d 1203. The District and amici curiae note that although any particular expulsion recommendation may be discretionary, as a practical matter it is inevitable that some school expulsions will occur in the administration of any public school program. [22]

22 Indeed, the Court of Appeal below suggested that the present case is distinguishable from *City of Merced, supra,* 153 Cal.App.3d 777, 200 Cal.Rptr. 642, in light of article I, section 28, subdivision (c), of the state Constitution. That constitutional subdivision, part of Proposition 8 (known as the Victims' Bill of Rights initiative, adopted by the voters at the Primary Election in June 1982), states: "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful." The Court of Appeal below concluded: "In light of a school district's constitutional obligation to provide a safe educational environment ..., the incurring of [hearing] costs [under Education Code section 48918] cannot properly be viewed as a nonreimbursable 'downstream' consequence of a decision to [seek to] expel a student under [Education Code section 48915's discretionary provision] for damaging or stealing school or private property, using or selling illicit drugs, receiving stolen property, engaging in sexual harassment or hate violence, or committing other specified acts of misconduct ... that warrant such expulsion."

Building upon this theme, amicus curiae on behalf of the District, California School Boards Association, argues that based upon article I, section 28, subdivision (c), of the state Constitution, together with Education Code section 48200 et seq. and article IX, section 5 of the state Constitution (establishing and implementing a right of public education), *no* expulsion recommendation is "truly discretionary." Indeed, amicus curiae argues, school districts may not, "either as a matter of law or policy, realistically choose to [forgo] expelling [a] student [who commits one of the acts, other than firearm possession, referenced in Education Code section 48915's discretionary provision], because doing so would fail to meet that school district's legal obligations to provide a safe, secure and peaceful learning environment for the other students."

**606 Upon reflection, we agree with the District and amici curiae that there is reason to question an extension of the holding of *City of Merced* so as to preclude reimbursement ***486 under *888 article XIII B, section 6 of the state Constitution and Government Code section 17514, whenever an entity makes an initial discretionary decision that in turn

triggers mandated costs. Indeed, it would appear that under a strict application of the language in *City of Merced,* public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section 6 of the state Constitution and Government Code section 17514[23] and contrary to past decisions in which it has been established that reimbursement was in fact proper. For example, as explained above, in *Carmel Valley, supra,* 190 Cal.App.3d 521, 234 Cal.Rptr. 795, an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. (*Id.,* at pp. 537–538, 234 Cal.Rptr. 795.) The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ—and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced, supra,* 153 Cal.App.3d 777, 200 Cal.Rptr. 642, such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and hence we are reluctant to endorse, in this case, an application of the rule of *City of Merced* that might lead to such a result.

23 As we observed in *Kern High School Dist., supra,* 30 Cal.4th 727, 751–752, 134 Cal.Rptr.2d 237, 68 P.3d 1203, "article XIII B, section 6's '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.' "

In any event, we have determined that we need not address in this case the problems posed by such an application of the rule articulated in *City of Merced,* because this aspect of the present case can be resolved on an alternative basis. As we shall explain, we conclude, regarding the reimbursement claim that we face presently, that *all* hearing procedures set forth in Education Code section 48918 properly should be considered to have been adopted to implement a federal due process mandate, and hence that all such hearing costs are nonreimbursable under article XIII B, section 6, and Government Code section 17557, subdivision (c).

In this regard, we find the decision in *County of Los Angeles II, supra,* 32 Cal.App.4th 805, 38 Cal.Rptr.2d 304, to be instructive. That case concerned Penal Code section 987.9, which requires counties to provide indigent criminal defendants with defense funds for ancillary investigation services related to capital trials and certain other trials, and further provides related procedural protections—namely, the confidentiality of a request for funds, the right to have the request ruled upon by a judge other than the trial judge, and the right to an in camera hearing on the request. The county in that case asserted that funds expended under the statute constituted reimbursable ****607** state mandates. The Court of Appeal disagreed, finding instead that the Penal Code section merely implements the requirements of federal constitutional law, and that "even in the ***889** absence of *****487** [Penal Code] section 987.9, ... counties would be responsible for providing ancillary services under the constitutional guarantees of due process ... and under the Sixth Amendment...." (32 Cal.App.4th at p. 815, 38 Cal.Rptr.2d 304.) Moreover, the Court of Appeal concluded, the procedural protections that the Legislature had built into the statute—requirements of confidentiality of a request for funds, the right to have the request ruled upon by a judge other than the trial judge, and the right to an in camera hearing on the request—were merely incidental to the federal rights codified by the statute, and their "financial impact" was de minimis. (*Id.,* at p. 817, fn. 7, 38 Cal.Rptr.2d 304.) Accordingly, the Court of Appeal concluded, the Penal Code section, in its entirety—that is, *even those incidental aspects of the statute that articulated specific procedures, not expressly set forth in federal law, for the filing and resolution of requests for funds*—constituted an implementation of federal law, and hence those costs were nonreimbursable under article XIII B, section 6.

We conclude that the same reasoning applies in the present setting, concerning the District's request for reimbursement for procedural hearing costs triggered by its discretionary decision to seek expulsion. As in *County of Los Angeles II, supra,* 32 Cal.App.4th 805, 38 Cal.Rptr.2d 304, the initial discretionary decision (in the former case, to file charges and prosecute a crime; in the present case, to seek expulsion) in turn triggers a federal constitutional mandate (in the former case, to provide ancillary defense services; in the present case, to provide an expulsion hearing). In both circumstances, the Legislature, in adopting specific statutory procedures

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

Indeed, to proceed otherwise in the context of a reimbursement claim would produce impractical and detrimental consequences. The present case demonstrates the point. The record reveals that in the extended proceedings before the Commission, the parties spent numerous hours producing voluminous pages of analysis directed toward determining whether various provisions of Education Code section 48918 exceeded federal due process requirements. That task below was complicated by the circumstance that this area of federal due process law is not well developed. The Commission, which is not a judicial body, did as best it could and concluded that in certain ***890** respects the various provisions (as observed *ante,* footnote 11, predominantly concerning notice, right of inspection, and recording requirements) "exceeded" the requirements of federal due process.

Even for an appellate court, it would be difficult and problematic in this setting to categorize the various notice, right of inspection, and recording requirements here at issue as falling either within or without the general federal due process mandate. The difficulty results not only from the circumstance that, as noted, the case law *****488** in the area of due process procedures concerning expulsion matters is relatively undeveloped, but also from the circumstance that when such an issue is raised in an action for reimbursement, as opposed to its being raised in litigation challenging an actual expulsion on the ground of allegedly inadequate hearing procedures, the issue inevitably is presented in the abstract, without any factual context that might help frame the legal issue. In such circumstances, courts are—and should be — ****608** wary of venturing pronouncements (especially concerning matters of constitutional law).

In light of these considerations, we agree with the conclusion reached by the Court of Appeal in *County of Los Angeles II, supra,* 32 Cal.App.4th 805, 38 Cal.Rptr.2d 304: for purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law—and whose costs are, in context, de minimis—should be treated as part and parcel of the underlying federal mandate.

Applying that approach to the case now before us, we conclude there can be no doubt that the assertedly "excessive due process" aspects of Education Code section 48918 for which the District seeks reimbursement in connection with hearings triggered by discretionary expulsions (see *ante,* footnote 11—primarily, as noted, various notice, right of inspection, and recording rules) fall within the category of matters that are merely incidental to the underlying federal mandate, and that produce at most a de minimis cost. Accordingly, for purposes of the District's reimbursement claim, all hearing costs incurred under Education Code section 48918, triggered by the District's exercise of discretion to seek expulsion, should be treated as having been incurred pursuant to a mandate of federal law, and hence all such costs are nonreimbursable under Government Code section 17556, subdivision (c). [24]

24 We do not foreclose the possibility that a local government might, under appropriate facts, demonstrate that a state law, though codifying federal requirements in part, also imposes more than "incidental" or "de minimis" expenses in excess of those demanded by federal law, and thus gives rise to a reimbursable state mandate to that extent.

***891 III**

The judgment of the Court of Appeal is affirmed insofar as it provides for full reimbursement of all costs related to hearings triggered by the mandatory expulsion provision of Education Code section 48915. The judgment of the Court of Appeal is reversed insofar as it provides for reimbursement of any costs related to hearings triggered by the discretionary provision of section 48915. All parties shall bear their own costs on appeal.

WE CONCUR: KENNARD, BAXTER, WERDEGAR, CHIN, BROWN, and MORENO, JJ.

All Citations

33 Cal.4th 859, 94 P.3d 589, 16 Cal.Rptr.3d 466, 190 Ed. Law Rep. 636, 04 Cal. Daily Op. Serv. 6945, 2004 Daily Journal D.A.R. 9404

Date of Hearing: May 17, 2023

1) ASSEMBLY COMMITTEE ON APPROPRIATIONS

Chris Holden , Chair

2) AB 1637

(Irwin) – As Amended April 27, 2023

Policy Committee:	Local Government	Vote: 6 - 0
	Privacy and Consumer Protection	9 - 0

Urgency: No State Mandated Local Program: Yes Reimbursable: No

SUMMARY:

This bill requires a local agency that maintains a website and email addresses accessible to the public to utilize a ".gov" or ".ca.gov" domain no later than January 1, 2026.

Specifically, this bill:

1) Requires, no later than January 1, 2026, any local agency that maintains an internet website for use by the public to ensure that the internet website utilizes a ".gov" top-level domain or a ".ca.gov" second-level domain.

2) Specifies that if a local agency currently maintains a website for use by the public that does not comply with 1) above by January 1, 2026, then that local agency shall redirect that website to a domain name that does comply with 1) above.

3) Requires, no later than January 1, 2026, a local agency that maintains public email addresses for its employees to ensure that each email address provided to its employees utilizes a ".gov" domain name or a ".ca.gov" domain name.

4) Defines "local agency" to mean a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency.

FISCAL EFFECT:

Costs to local agencies, including cities, counties, special districts and school districts, is unknown but likely in the millions of dollars statewide. Although this bill contains local mandate fee disclaimer language, it is unclear on what basis a local agency may charge a fee or other assessment to recover the costs of migrating to a .gov or .ca.gov domain. If this

disclaimer does not apply, these costs would be reimbursable by the state, subject to a determination by the Commission on State Mandates.

Local agencies have also raised the concern the disclaimer may be in conflict with Article XIII C (Proposition 26 of 2010); fees cannot be charged for the ability to access a public agency website due to constitutional limitations on local agencies' authority to impose fees and taxes or they lack fee authority outright.

COMMENTS :

1) **Purpose.** According to the author:

> The public's trust in government is foundational for a healthy democracy. With rising levels of misinformation and fraud perpetrated online, and more sophisticated threat actors intending to confuse and mislead, we can no longer be haphazard about how governments are presented online. California's public agencies should take every effort to safeguard the public's trust in our institutions, especially when they are recommended and offered free of charge by federal and state authorities. [This bill] requires local agencies to transition their websites and e-mails to the .gov or ca.gov domain, so when Californians look for government information or services, they can know with confidence they are receiving official information.

2) **Background.** The top-level domain ".gov" was originally meant to be used by federal, state, and local government entities. The other original top-level domains each had their own particular functions: ".com" was meant for commercial use; ".org" was for nonprofits; ".edu" was for institutions of higher education; "net" was for internet service providers and other entities providing network infrastructure; and ".mil" was for the U.S. Department of Defense (DOD). Some of the original domain requirements remain strictly enforced; no one but the DOD can get a ".mil" domain, and it is difficult for non-educational institutions to obtain an ".edu" domain. Other requirements have not been strictly enforced; anyone can quickly obtain a ".com," ".net," or ".org" domain if it is available.

   It is relatively easy for a fraudulent actor to obtain a domain name similar to that of an existing local governmental agency, also using a non-.gov top level domain, and set up a fake website at that domain. If its content is sufficiently similar to a real website, search engines may pick up the fake website and display it when people search for the entity. There is no quick, convenient way for users to verify the authenticity of the website they are visiting. A fake website that lures in real users who believe they are visiting a legitimate government website could then

convince those users to share personal information, make payments, and conduct other compromising activities.

The Cybersecurity and Infrastructure Security Agency (CISA), part of the U.S. Department of Homeland Security (DHS), leads the federal government's effort to understand, manage, and reduce risk to cyber and physical infrastructure. In 2020, administration of the .gov domain program was transferred from the federal General Services Administration to CISA. ".gov" has been reserved for U.S.-based government organizations and publicly controlled entities. This includes state, tribal, interstate, independent intrastate, city, and county governments.

The California Department of Technology (CDT) administers the .ca.gov second-level domain. ".ca.gov" may be used by any state entity, county, city, state-recognized tribal government, joint powers authority, or independent local district within the State of California. There is no annual fee associated with a .gov or .ca.gov domain name.

3) **Local Agencies.** Of California's 14 urban counties, five have .gov websites, including the counties of Contra Costa, Los Angeles, San Bernardino, San Diego and San Francisco. Of the state's 13 largest cities, 10 have a .gov website. These cities include Fresno, Los Angeles, Long Beach, Oakland, Riverside, Sacramento, San Diego, San Francisco, San Jose and Stockton.

   Sacramento County recently completed the migration to a .gov domain. It took the county 14 months to complete the project and dedicated staff of at least 15 full-time employees. The project included changing all the websites, web applications, emails, and active directory accounts of over 12,000 employees and contractors. It also included updated applications and systems access rights to accommodate the change.

   Cost estimates to migrate to a .gov domain vary widely among local agencies. For small to medium single-focused special districts, an informal sample revealed estimates ranging from $6,000, for a very small sanitary district, to $100,000 for a mosquito and vector control district and several medium-sized water districts. For larger special districts, primarily water and sanitation districts, estimates ranged from $500,000 to $1 million. Estimates for larger counties were generally in the low millions of dollars. One district indicated difficulties obtaining a .gov or .ca.gov designation.

   Local agency costs to migrate their systems include IT costs, often for vendors, as well as labor costs and indirect costs, such as changes to outreach and promotional materials, business cards, letter head, and elections materials. Some agencies may also have costs for media campaigns to alert the public to the changes.

In response, the author points to the State and Local Cybersecurity Grant Program (SLCGP). In September 2022, DHS announced the SLCGP funded through the 2022 Infrastructure Investment and Jobs Act to better address cybersecurity risks and threats to information systems to state, local and territorial governments. SLCGP will distribute funds over four years to support projects throughout the period of performance. On December 27, 2022, California was awarded nearly $8 million for SLCGP first-year funding (federal fiscal year 2022) with the California Office of Emergency Services formally accepting the award on January 23, 2022.

According to the author:

> Federal amounts are "likely to total $50 million over the 4 year program. Additional state matching fund requirements, increasing year over year (10% up to 40%), will also bring more state funds to the table to achieve local cybersecurity goals. The SLCGP requires certain critical activities of local agencies, this includes the transition to the .gov.

4) **Arguments in Support.** The bill is supported by the City of Agoura Hills, located in Los Angeles County. The city, who uses the .org domain, writes: "This bill creates cybersecurity benefits and gives our community the confidence and assurance that when they are accessing a ".gov" or ".ca.gov" website, that they are viewing official and accurate information, and are not visiting a fake website."

5) **Arguments in Opposition.** A coalition of local agencies, including the League of California Cities, the California State Association of Counties (CSAC), Urban Counties of California, the Rural County Representatives of California (RCRC), the California Special Districts Association (CSDA), the California Association of Recreation and Park Districts, the Association of California School Administrators, and the City Clerks Association of California are opposed unless amended, expressing cost concerns in the absence of dedicated resources. The coalition writes:

> Initial sampling of local governments has identified considerable costs and programmatic impacts that would result from [this bill]. Extrapolated to all local agencies throughout the state, cumulative costs to local agencies (cities, counties, special districts, school districts) are likely in the hundreds of millions of dollars. Further, we know that smaller local entities will be challenged to meet the current deadline with existing staff. In this constrained fiscal climate, we are hard-pressed to consider a project of this scope as a statewide, jurisdiction-wide priority among other direct service responsibilities to local communities for which our members are already obligated.

Analysis Prepared by: Jennifer Swenson / APPR. / (916) 319-2081

Date of Hearing:

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Jesse Gabriel, Chair

ABPCA Bill Id:AB 1637 (

Author:Irwin) – As Amended Ver:March 16, 2023

As Proposed to be Amended

SUBJECT: Local government: internet websites and email addresses

SYNOPSIS

This bill would require local governments to ensure that their public-facing internet websites and email addresses use a ".gov" or ".ca.gov" domain name, no later than January 1, 2026.

It would have been helpful for internet cybersecurity if government entities had been legally required to take this step decades ago. Unfortunately, these requirements were not placed into law, meaning that there has been a proliferation of local government entities using .com, .net, and .org addresses.

The problem is that it is a trivial matter for a fraudulent actor to obtain a domain name that is similar to that of an existing local governmental agency, also using a non-.gov top level domain, and set up a fake website at that domain. If its content is sufficiently similar to a real website, search engines may pick up the fake website and display it when people search for the entity.

Because so many local governmental entities don't have .gov domain names, visitors have no reason to be suspicious of such domains; moreover, there is no quick, convenient way for users to verify the authenticity of the website they are visiting. A fake website that lures in real users who believe they are visiting a legitimate government website could then lure those users into sharing personal information, making payments, and conducting other compromising activities. A fake site could also spread misinformation, such as providing erroneous dates and addresses for voting sites or touting the supposed dangers of vaccines.

As discussed below, there are undoubted cybersecurity benefits from requiring the use of .gov or .ca.gov domain names. Transition difficulties could be addressed by a state-level help desk, perhaps housed at the California Department of Technology.

The bill is author-sponsored. It is opposed by the City Clerks Association of California and two California cities. A coalition of six local government associations, including the California Special Districts Association and the League of California Cities, have taken an "oppose unless amended" position on the bill.

This bill previously passed the Assembly Local Government Committee on a 5-0-2 vote.

SUMMARY: Requires California local agencies that maintain websites and email addresses accessible to the public to utilize a ".gov" or ".ca.gov" domain no later than January 1, 2026. Specifically, **this bill**:

1) Requires, no later than January 1, 2026, any local agency that maintains an internet website for use by the public to ensure that the internet website utilizes a ".gov" top-level domain or a ".ca.gov" second-level domain.

2) Specifies that if a local agency currently maintains an internet website for use by the public that does not comply with 1) above by January 1, 2026, then that local agency shall redirect that internet website to a domain name that does comply with 1) above.

3) Requires, no later than January 1, 2026, a local agency that maintains public email addresses for its employees to ensure that each email address provided to its employees utilizes a ".gov" domain name or a ".ca.gov" domain name.

4) Defines "local agency" to mean a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency.

5) Makes findings and declarations in support of the foregoing.

EXISTING LAW:

1) Establishes the California Department of Technology in the Government Operations Agency (GovOps). (Gov. Code § 11545.)

2) Requires every independent special district to maintain an Internet website, though provides an exemption for hardship such as inadequate broadband availability, limited financial resources, or insufficient staff resources. (Gov. Code § 53087.8)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS:

1) **Need for this bill.** When you type a URL like https://www.assembly.ca.gov into a Web browser or email someone at an address such as first.last@asm.ca.gov, you are implicitly relying on the internet's domain name system (DNS). The DNS is based on computers, called domain name servers, distributed throughout the global internet to translate human-readable domain names like "assembly.ca.gov" and "asm.ca.gov" into numeric Internet Protocol (IP) addresses. Once the numeric IP address is acquired, data sent on the internet to a particular domain (such as "asm.ca.gov") can be routed to the computer or network where it is meant to be delivered.

The top-level domain ".gov" was originally meant to be used by federal, state, and local government entities. The other original top-level domains each had their own particular functions: ".com" was meant for commercial use; ".org" was for nonprofits; ".edu" was for institutions of higher education; "net" was for internet service providers and other entities providing network infrastructure; and ".mil" was for the U.S. Department of Defense (DOD). Since then, a plethora of other top-level domains have emerged, such as ".info," ".biz," and even ".beer." Some of the original domain requirements remain strictly enforced; no one but the DOD can get a ".mil" domain, and it is difficult for non-educational institutions to obtain an ".edu" domain. Other requirements have not been strictly enforced; anyone can quickly obtain a ".com," ".net," or ".org" domain (to say nothing of ".beer") if it is available.

It would have been helpful for internet cybersecurity if government entities had been legally required to obtain .gov domain names decades ago. Unfortunately, these requirements were not placed into law, meaning that there has been a proliferation of local government entities using .com, .net, and .org addresses. In part, this is because the process for obtaining a .gov domain can be a bit time-consuming (because the applicant must verify that it is actually a governmental entity), whereas a .com, .net, or .org, domain can be obtained in minutes.

As a result, we now live in a world where the Los Angeles Unified School District uses the domain "lausd.net," the Metropolitan Water District of Southern California uses the domain "mwdh20.com," and the City of Norwalk uses the domain "norwalk.org." Many other local governments have also foregone .gov domains for these quicker-to-obtain alternatives.

The problem is that it is a trivial matter for a fraudulent actor to obtain a domain name that is similar to that of an existing local governmental agency, also using a non-.gov top level domain, and set up a fake website at that domain. If its content is sufficiently similar to a real website, search engines may pick up the fake website and display it when people search for the entity. Take, for example, Los Angeles Unified School District's "lausd.net" domain. According to the author, as of March 2023, "la-usd.net," "la-usd.org," and "lausdca.org" were all available on GoDaddy, a popular, low-cost

domain name registrar; each of these would be easy options for setting up a fake L.A. Unified website.

Because so many local governmental entities don't have .gov domain names, visitors have no reason to be suspicious of such domains; moreover, there is no quick, convenient way for users to verify the authenticity of the website they are visiting. A fake website that lures in real users who believe they are visiting a legitimate government website could then lure those users into sharing personal information, making payments, and conducting other compromising activities. A fake site could also spread misinformation, such as providing erroneous dates and addresses for voting sites or touting the supposed dangers of vaccines.

In response, this bill would require local governments to ensure that their public-facing internet websites and email addresses use a ".gov" or ".ca.gov" domain name, no later than January 1, 2026.

The requirements of this bill would apply to any county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency.

2) **Author's statement.** According to the author:

> The public's trust in government is foundational for a healthy democracy. With rising levels of misinformation and fraud perpetrated online, and more sophisticated threat actors intending to confuse and mislead, we can no longer be haphazard about how governments are presented online. California's public agencies should take every effort to safeguard the public's trust in our institutions, especially when they are recommended and offered free of charge by federal and state authorities. AB 1637 requires local agencies to transition their websites and e-mails to the .gov or ca.gov domain, so when Californians look for government information or services, they can know with confidence they are receiving official information.

3) **How local governments can obtain .gov and .ca.gov domains.** The Cybersecurity and Infrastructure Security Agency (CISA), part of the U.S. Department of Homeland Security, leads the federal government's effort to understand, manage, and reduce risk to cyber and physical infrastructure. In 2020, administration of the .gov domain program was transferred from the federal General Services Administration to CISA. ".gov" has been reserved for U.S.-based government organizations and publicly controlled entities. This includes state, tribal, interstate, independent intrastate, city, and county governments. If a local government wishes to obtain a .gov domain, it may follow the instructions available at https://get.gov/registration/requirements/.

The California Department of Technology (CDT) administers the .ca.gov second-level

The California Department of Technology (CDT) administers the .ca.gov second-level domain. ".ca.gov" may be used by any state entity, county, city, state-recognized tribal government, Joint Powers Authority, or independent local district within the State of California. If a local government wishes to obtain a .ca.gov domain, it can use CDT's Domain Name Request System, available at https://domainnamerequest.cdt.ca.gov/.

There is no annual fee associated with a .gov or .ca.gov domain name.

4) **The contested aspects of this measure are largely in other Committees' jurisdictions.** Most of the opposition's arguments raise issues that lie in other Committees' jurisdictions. For example, the City Clerks Association of California writes, "Switching our website and email addresses would create an unnecessary, costly issue for cities and would direct public resources away from serving residents in other ways. This unfunded mandate is not the best use of limited local resources during a time of fiscal instability and uncertainty." The question of whether this measure would be a worthwhile use of local government resources is a topic for the Assembly Local Government Committee, which heard and passed the bill last week.

.If passed by this Committee, the bill will next be heard by the Assembly Appropriations Committee, which will consider its costs. Accordingly, the sole focus of this Committee's analysis are the bill's impacts on cybersecurity.

5) **What are the benefits of this measure for cybersecurity?** As discussed above under "Need for this bill," the main benefit of this measure will be to ensure that members of the public know that when they access a California local governmental website with an internet address ending with ".gov" or ".ca.gov," or email a government employee at such an address, that they are not going to be the victim of a hacker's fake website.

While it is of course possible for a ".gov" or ".ca.gov" website to be hacked, this is much more difficult than setting up a fake website using a ".org" or ".net" top-level domain. Moreover, as noted in the Assembly Local Government Committee analysis:

> Using a ".gov" domain increases security in the following ways:
>
> a) Multi-factor authentication is enforced on all accounts in the ".gov" registrar, which is different than commercial registrars.
>
> b) All new domains are "preloaded." This requires browsers to only use a hypertext transfer protocol secure (HTTPS) connection with a website. This protects a visitor's privacy and ensures the content [published on the website] is exactly what is received.

c) A security contact can be added for the domain, making it easier for the public to report potential security issues with the online services.

Eligibility for a ".gov" domain is attested through a letter signed by the public agency. CISA reviews the letter, may review or request founding documentation, and may review or request additional records to verify the public agency's claim that they are a United States based government organization. There are requirements for choosing a name, and activities that are required and prohibited, among others, for local governments. Requests from non-federal organizations are reviewed in approximately 20 business days, but may take longer in some instances.

The City Clerks Association of California objects on the grounds that public trust could be weakened during the transition to the new domain, writing:

> [T]he impacts of the measure go beyond websites and email addresses to include the need to convert all public facing branding, including fleets, outreach, materials, ballots, etc. While these do have natural turnover, waiting to transition current supply could take many years and create confusion in branding and ultimately compromise the trust of the public. Although the measure allows for website redirection, this only adds to the confusion as residents are redirected from our current website, the one they have checked for many years, to a new landing page that wouldn't comport to the addresses on public facing material. The result could compromise local communities' trust in their local leaders and would only add to the frustration in transparent and user-focused government administration.

But this issue—potential resident confusion during the transition to a .gov domain—will never go away. It always take time and money to migrate to a .gov or .ca.gov domain. To accept this as a reason not to make the transition would mean never making the transition.

6) **How burdensome is it to migrate domains to .gov and .ca.gov?** Local governments report vast discrepancies as to the time, effort, and expense required to transition to using ".gov" and ".ca.gov" domains.

The Chief Information Officer of Ventura County (population 847,000) was asked by the author to provide feedback on what this bill would require, as the county uses a "ventura.org" domain name. He responded that the county operates over 70 websites that use the "ventura.org" domain name. Here is how he explained the migration process:

> We would start with our home site and once that is complete, move to the others.
>
> 1. [C]lone the site

2. [M]ass change all ventura.org references to the new .gov name
3. Internal test for some weeks
4. Add Domain to DNS (local and outside)
5. Redirect .org to .gov. Both sites kept in synch and both active.
6. Press release
7. Decommission .org site.

[Ventura County's hosting provider] can convert a site very quickly (hours). A small number of days to convert all our sites.

Only one [full time employee] would be required in addition to [the hosting provider's] efforts…with some misc support for less than a week for the technical efforts. This is within our budget.

By contrast, an opposition coalition consisting of six local government associations reports:

> [O]ne large local government that recently went through the process of migrating to a .gov domain required 15 full-time information technology professionals and over 14 months to complete the project. This included changing all websites, web applications, emails, and active directory accounts for over 12,000 employees and contractors–a considerable endeavor and exactly what is required, should AB 1637 be enacted as currently drafted. One suburban local government ran preliminary estimates that suggested that the costs for migration to .gov could range from $750,000 to $1 million. Another large urban local government itemized costs of about $6.3 million and anticipates that most of the work that would be required would have to be completed by contract labor due to the large number of high-priority projects that information technology staff are currently completing.

Given these discrepancies, one wonders if there is some fundamental misunderstanding as to what is required to implement this bill. Perhaps there are easy steps that could be taken by all, or most, local governments to facilitate an efficient transition to a .gov domain.

To that end, one possible amendment discussed by the author would be to set up help desk functionality at an appropriate state agency in order to provide technical assistance and advice on best practice to local governments transitioning to .gov and .ca.gov domains. A state-level help desk could possibly be paid for through federal grant funding. According to the author, the bipartisan Infrastructure Investment and Jobs Act (Pub. L. 117-58) created the State and Local Cybersecurity Grant Program (SLCGP), which allocated $1 billion over four years to states for cybersecurity initiatives, with a requirement of 80% pass through to local governments. It may be possible for an

SLCGP grant to fund a state-level help desk, perhaps housed at CDT. According to the author, total SLCGP grant funding for California could amount to $50 million over the four years. More information about the SLGCP can be found at https://www.cisa.gov/sites/default/files/publications/SLCGP_FAQ-FINAL_508c.pdf; migration to a .gov domain is among the seven best practices listed therein.

7) **Committee amendment—extending implementation deadline by one year.** The bill in print would have required migration to a ".gov" or ".ca.gov" domain by January 1, 2025. An amendment agreed upon in the Assembly Local Government Committee permits local government agencies an additional year to comply with this measure, as follows:

> **Government Code 50034.**
>
> (a) (1) No later than January 1, ~~2025~~ ***2026,*** a local agency that maintains an internet website for use by the public shall ensure that the internet website utilizes a ".gov" top-level domain or a ".ca.gov" second-level domain.
>
> (2) If local agency that is subject to paragraph (1) maintains an internet website for use by the public that is noncompliant with paragraph (1) by January 1, ~~2025~~ ***2026,*** that local agency shall redirect that internet website to a domain name that does comply with paragraph (1).
>
> (b) No later than January 1, ~~2025~~ ***2026***, a local agency that maintains public email addresses for its employees shall ensure that each email address provided to its employees utilizes a ".gov" domain name or a ".ca.gov" domain name.

8) **Related legislation.** SB 386 (Newman, 2023), as originally introduced, would have required a county elections internet website to have a .gov domain. That provision has been amended out of the bill. Status: Senate Appropriations.

SB 929 (McGuire, Chap. 408, Stats. 2020) required every independent special district to maintain an internet website by January 1, 2020, but permitted a hardship exemption for districts without sufficient resources or broadband connectivity.

AB 1344 (Feuer, Chap. 692, Stats. 2011) required all local agencies that have a website to post their meeting agendas on the website 72 hours in advance.

ARGUMENTS IN OPPOSITION: A coalition of six local government associations, including California Special Districts Association and League of California Cities, summarizes its opposition to the bill:

> While we appreciate the intended goal of this measure and the perceived benefits

that some believe utilizing a new domain may provide, we remain deeply concerned about the added costs associated with migrating to a new domain and corresponding email addresses; confusion that will be created by forcing a new website to be utilized; and the absence of any resources to better assist local agencies with this proposed migration.

REGISTERED SUPPORT / OPPOSITION:

Support

None on file

Oppose unless Amended

Association of California School Administrators

California Special Districts Association

California State Association of Counties (CSAC)

League of California Cities

Rural County Representatives of California (RCRC)

Urban Counties of California (UCC)

Opposition

City Clerks Association of California

City of Redwood City

City of San Marcos

Analysis Prepared by:Jith Meganathan / P. & C.P. / (916) 319-2200

DEPARTMENT OF FINANCE BILL ANALYSIS

AMENDMENT DATE: 06/29/2023
POSITION: Oppose

BILL NUMBER: AB 1637
AUTHOR: Irwin, Jacqui

BILL SUMMARY: Local government: internet websites and email addresses.

By January 1, 2029, this bill requires the public websites of cities and counties to have a ".gov" or a ".ca.gov" domain names, or to redirect to such a domain name. This bill also requires emails addresses of city and county employees to have a ".gov" or a ".ca.gov" domain name by the same timeframe.

FISCAL SUMMARY

The Department of Finance anticipates this bill likely creates a significant state-reimbursable mandate for cities and counties to change their websites, web applications, email addresses, and active directory accounts.

The California State Association of Counties reports only 15 percent of the state's 58 counties use one of the required domain names, while the League of Cities reports only 5 percent of the state's 482 cities use one of the required domain names.

Assuming an average cost of $100,000 for 50 counties and 460 cities to make the required updates, the state-reimbursable mandate exposure could be $51 million General Fund.

COMMENTS

Finance is opposed to this bill because it likely creates a significant state-reimbursable mandate in the tens of millions of dollars.

Existing law requires cities and counties to make records available on their internet websites for the public.

By January 1, 2029, this bill requires the public websites of cities and counties to have a ".gov" or a ".ca.gov" domain name, or to redirect to such a domain name. This bill also requires emails addresses of city and county employees to have a ".gov" or a ".ca.gov" domain name by the same timeframe.

As anyone can register an internet domain for a fee, Finance understands the purpose of this bill is to prevent fraudulent actors from creating websites and claiming to be a city or county.

Analyst/Principal	Date	Program Budget Manager	Date
Ted Doan/Chris Hill		Calvert, Teresa	

Department Deputy Director — Date

Governor's Office: By: Date: Position Approved / Position Disapproved

BILL ANALYSIS — Form DF-43 (Rev 03/95 Buff)

(2)

BILL ANALYSIS--(CONTINUED) **Form DF-43**

AUTHOR	**AMENDMENT DATE**	**BILL NUMBER**
Irwin, Jacqui	06/29/2023	AB 1637

Code/Department Agency or Revenue Type	SOLA CO RV	PROP 98	(Fiscal Impact by Fiscal Year) (Dollars in Thousands) 2023-2024 FC	2024-2025 FC	2025-2026 Fund Code
8885/Comm St Mndt	LA	No	A 51,000	A 51,000	A 51,000 0001

SENATE COMMITTEE ON GOVERNANCE AND FINANCE

Senator Anna M. Caballero, Chair

2023 - 2024 Regular

Bill No:	AB 1637	**Hearing Date:**	6/28/23
Author:	Irwin	**Tax Levy:**	No
Version:	5/18/23	**Fiscal:**	Yes
Consultant:	Krueger		

LOCAL GOVERNMENT: INTERNET WEBSITES AND EMAIL ADDRESSES

Requires cities and counties to transition to a ".gov" top-level domain or ".ca.gov" second-level domain and ensure public employee e-mail addresses are updated accordingly.

Background

Domain Names. The Advanced Research Project Agency Network (ARPANET) designed a new organizational model for internet protocol (IP) addresses in the 1980s known as the domain name system, which translates IP addresses into easy-to-remember names (like www.senate.ca.gov). These names included a restrictive number of 'top-level domains', (TLDs) which in the early days of the internet consisted of primarily .gov, .edu, .com, .mil, and .org. Each of these top-level domain names held a particular organizational function (".org" for nonprofits, for instance, and ".com" for commercial use). Today, there are thousands of top-level domains, and their purpose has also evolved into a branding and marketing mechanism for many companies and organizations.

The Cybersecurity and Infrastructure Security Agency (CISA), in the Department of Homeland Security, leads the federal government's actions to understand, manage, and reduce risk to cyber and physical infrastructure. According to CISA's website, "In many well-known TLDs, anyone can register a domain for a fee, and as long as they pay there aren't many questions asked about whether the name they chose corresponds to their real-life name or services. While this can be a useful property for creative communication, it can also make it difficult to know whether the people behind a name are *really* who they claim to be." The cost of a top-level domain name is often in the range of $3-$20 dollars per year

CISA currently administers the ".gov" top-level domain and makes it solely available to United-States based government organizations and publicly controlled entities. According to CISA, the ".gov" domain name is meant to assure members of the public that they are using a verifiable government website. A .gov TLD is also associated with a number of additional security features. These include:

Multi-factor authentication, which is enforced by CISA on all ".gov" accounts and stops domains from being stolen.
"Preloaded" domains, requiring browsers to use secure connections with a website.
A security contact for the domain, so the public can report security issues.

The California Department of Technology (Department) provides oversight of statewide information technology (IT) strategic planning, project delivery, procurement, policy and standards, and enterprise architecture. The Department's Government Operations Agency oversees the ".ca.gov" second-level domain. The Department has established policies and protocols for obtaining a ".ca.gov" domain consistent with federal policy, and there is no annual fee associated with a .ca.gov domain name.

Cybersecurity Plan. The 2022 federal Infrastructure Investment and Jobs Act established the State and Local Cybersecurity Grant Program (SLCGP) under the Department of Homeland Security (DHS). The program will distribute funds to states over four years to support state and local government efforts to battle cybersecurity risks and threats to information systems. On December 7, 2022, the federal government awarded California $8 million in first-year funding for the SLCGP.

The California Office of Emergency Services (CalOES) will administer the funds. To use 95% of the funds, CalOES must develop a Cybersecurity Plan, which the federal government must approve. The federal government requires the cybersecurity plan to address 16 elements. Element 5 and Element 6 call for the state to follow best cybersecurity practices and promote recognizable online services, respectively. A part of achieving each of these two elements is transitioning government websites to a .gov internet domain. The Cybersecurity Plan must include a plan for how each of the 16 elements will be achieved, but it may also include a brief explanation as to why certain elements are not currently being prioritized. Organizations are not required to immediately pursue each of these 16 elements in order to receive SLCGP funding.

To create the Cybersecurity Plan, CalOES created a Cybersecurity Investment Planning Subcommittee, which completed a survey in May designed to identify gaps in the state's cybersecurity infrastructure. CalOES intended the survey to inform the plan it will submit to the federal government for approval in September 2023.

Local Governments. According to the California State Association of Counties (CSAC), 9 of California's 58 counties use a .gov domain (15%), while the League of Cities states 24 of the more than 480 California cities use a .gov domain (5%).

Transitioning to a .gov domain isn't quick, easy, or inexpensive. According to CSAC, it took Sacramento County 14 months and 15 full-time employees to complete the project. The project included changing all the websites, web applications, emails, and active directory accounts of over 12,000 employees

and contractors. It also included updated applications and systems access rights to accommodate the change.

To address elements of the Cybersecurity plan and enhance cybersecurity, the author wants to require all California cities and counties to migrate to a ".gov" or ".ca.gov" domain name.

Proposed Law

Assembly Bill 1637 requires all cities, counties, and cities & counties by January 1, 2027, to:

Ensure their internet website utilizes a ".gov" top-level domain or a ".ca.gov" second-level domain.
Redirect a noncompliant internet website to a domain name that utilizes a ".gov" or a ".ca.gov."
Ensure each email address provided to employees utilizes a ".gov" domain name or a ".ca.gov" domain name.

The bill makes findings and declarations to further its intent.

State Revenue Impact

No estimate.

Comments

1. Purpose of the bill. According to the author: "The public's trust in government is foundational for a healthy democracy. With rising levels of misinformation and fraud perpetrated online, and more sophisticated threat actors intending to confuse and mislead, we can no longer be haphazard about how local governments are presented online. California's cities and counties should take every effort to safeguard the public's trust in our institutions, especially when they are recommended and offered free of charge by federal and state authorities. AB 1637 requires cities and counties to transition their websites and e-mails to the .gov or ca.gov domain, so when Californians look for government information or services, they can know with confidence they are receiving official information."

2. What is the cost, exactly...? A primary concern related to the ".gov" transition is what it will cost cities and counties to comply with the bill. Several cities and counties estimate that it would cost them upwards of $900k or even several million dollars. Multiplying 900k by 480+ cities and 58 counties means the total statewide cost could exceed $484M. The costs in city and county estimates primarily include hiring IT personnel or contracting for outside assistance, though they may also include changes to promotional materials and new business cards.

The cost and time it would take to make the transition will depend in large part on the size of the local government, the number of employees it has, and the size of its presence on the internet. As noted above, Sacramento County reported the transition took 15 full-time employees 14 months to complete. At the other end of the spectrum, Ventura County reported to the author's office that the transition would only require one full time employee and some support efforts, and that it could be done in less than a week and be

accomplished within the County's existing budget. Additionally, CISA must sign a letter attesting eligibility for a ".gov" domain before they provide it, which is a process that requires no fee but may take 20 or more business days. The Committee may wish to consider whether the potential cybersecurity benefits of transition to ".gov" websites outweigh the costs for local agencies to complete the transition.

3. Will local governments be funded for this? One could point to the State and Local Cybersecurity Grant Program itself as a funding mechanism for the cities' and counties' .gov transition. About $8 million was awarded for fiscal year 2022, and 80% of those funds will be passed through to local governments for a variety of cybersecurity purposes, which possibly may include the transition to .gov. The federal government will provide $1 billion in total SLCGP funding to states over the next four years, which may include additional funding for California. The Homeland Security Grant Program (HSGP) is an additional federal grant program that allows for funds to be used for a variety of homeland security purposes, including to migrate online services to the .gov internet domain. The program is providing 1.12 billion for fiscal year (FY) 2023, available to state, local, tribal, and territorial governments across the United States. On the other hand, the total costs of the transition could potentially exceed $484M as noted above, based on cities' and counties' self-estimates.

4. What problem is the bill addressing? The author's office states a primary purpose of the bill is to make it easy for the public to verify that a government website is actually a government website. This would make it harder for fraudsters to impersonate government websites and trick members of the public into providing personal information. It is true that it is relatively easy for fraudsters to impersonate a government website with many common top-level domain names such as .com or .net that are relatively easy to obtain. This type of fraud was evidenced during the pandemic, such as when the federal government launched "covidtests.gov" in early 2023. A number of domain names very similar to "covidtests.gov" were subsequently registered (including "covidtestsgov.com" and "covidtestgov.net"). Threat researchers state that such lookalike domain names are often used in cyberattacks. Additional fraud frequently takes place over the phone, through which fraudsters impersonate the government to obtain personal information. However, there aren't any known examples of fraudsters impersonating local government websites in California. The Committee may wish to consider whether there is sufficient evidence that such fraud exists to justify additional costs and work for local governments, and whether the bill would effectively address such fraud.

5. Will the bill create confusion? While top-level domains such as ".gov," ".org" and ".com" were established for merely organizational purposes, they have arguably evolved to become an important part of some organizations' brands. Furthermore, the type of top-level domain sometimes impacts the rest of the website's name, with a .gov domain requiring a specific naming convention for local governments that may exclude certain acronyms. Some local officials fear a transition to the .gov domain will result in a substantial name change to their local government's website, creating possible confusion and loss of trust amongst the public. On the other hand, the bill does provide

that an old website with another top-level domain could be redirected to the new .gov website, possibly reducing public confusion if executed correctly.

6. Is the timeline sufficient? As discussed, the transition to a ".gov" top-level domain or a ".ca.gov" second-level domain is not without certain financial hurdles and other possible challenges. For example, it took Sacramento County 14 months to complete, and present challenges to local governments, such as fires, flooding, homelessness, and countless others, may make it more difficult for them to make the transition in the immediate future. The Committee may wish to consider amending the bill to increase the amount of time local governments have to comply with the bill's requirements.

7. Mandate. The California Constitution requires the state to reimburse local governments for the costs of new or expanded state mandated local programs. Because AB 1637 adds to the duties of local officials, Legislative Counsel says that the bill imposes a new state mandate. The measure states that if the Commission on State Mandates determines that the bill imposes a reimbursable mandate, then reimbursement must be made pursuant to existing statutory provisions.

Assembly Actions

Assembly Local Government	5-0
Assembly Privacy and Consumer Protection	9-0
Assembly Appropriations	12-2
Assembly Floor	56-4

Support and Opposition

(6/23/23)

Support: None submitted.

Opposition: California Airports Council
California Municipal Utilities Association
California State Association of Counties
City Clerks Association of California
City of Downey
City of Elk Grove
City of Jurupa Valley
City of Lafayette
City of Lakewood CA
City of Modesto
City of Palo Alto
City of Pico Rivera
City of Rancho Cucamonga
City of Redwood City
City of Roseville
City of West Hollywood
League of California Cities
Los Angeles County Division, League of California Cities
Northern California Power Agency
Rural County Representatives of California
Southern California Public Power Authority (SCPPA)
Urban Counties of California (UCC)

-- END --

DEPARTMENT OF JUSTICE

28 CFR Part 35

[CRT Docket No. 144; AG Order No. 5919–2024]

RIN 1190–AA79

Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities

AGENCY: Civil Rights Division, Department of Justice.

ACTION: Final rule.

SUMMARY: The Department of Justice (''Department'') issues its final rule revising the regulation implementing title II of the Americans with Disabilities Act (''ADA'') to establish specific requirements, including the adoption of specific technical standards, for making accessible the services, programs, and activities offered by State and local government entities to the public through the web and mobile applications (''apps'').

DATES:

Effective date: This rule is effective June 24, 2024.

Compliance dates: A public entity, other than a special district government, with a total population of 50,000 or more shall begin complying with this rule April 24, 2026. A public entity with a total population of less than 50,000 or any public entity that is a special district government shall begin complying with this rule April 26, 2027.

Incorporation by reference: The incorporation by reference of certain material listed in the rule is approved by the Director of the Federal Register as of June 24, 2024.

FOR FURTHER INFORMATION CONTACT: Rebecca B. Bond, Chief, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, at (202) 307–0663 (voice or TTY). This is not a toll-free number. Information may also be obtained from the Department's toll-free ADA Information Line at (800) 514–0301 (voice) or 1–833–610–1264 (TTY). You may obtain copies of this rule in an alternative format by calling the ADA Information Line at (800) 514–0301 (voice) or 1–833–610–1264 (TTY). This rule is also available on *www.ada.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose of and Need for the Rule

Title II of the ADA provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity.[1] The Department has consistently made clear that the title II nondiscrimination requirements apply to all services, programs, and activities of public entities (also referred to as ''government services''), including those provided via the web. It also includes those provided via mobile apps.[2] In this rule, the Department establishes technical standards for web content and mobile app accessibility to give public entities greater clarity in exactly how to meet their ADA obligations and to help ensure equal access to government services for individuals with disabilities.

Public entities are increasingly providing the public access to government services through their web content and mobile apps. For example, government websites and mobile apps often allow the public to obtain information or correspond with local officials without having to wait in line or be placed on hold. Members of the public can also pay fines, apply for State benefits, renew State-issued identification, register to vote, file taxes, obtain up-to-date health and safety resources, request copies of vital records, access mass transit schedules, and complete numerous other tasks via government websites. Individuals can perform many of these same functions on mobile apps. Often, however, State and local government entities' web- and mobile app-based services are not designed or built accessibly and as a result are not equally available to individuals with disabilities. Just as stairs can exclude people who use wheelchairs from accessing government buildings, inaccessible web content and mobile apps can exclude people with a range of disabilities from accessing government services.

It is critical to ensure that individuals with disabilities can access important web content and mobile apps quickly, easily, independently, privately, and equally. Accessible web content and mobile apps help to make this possible. By allowing individuals with disabilities to engage more fully with their governments, accessible web content and mobile apps also promote the equal enjoyment of fundamental constitutional rights, such as rights with respect to speech, assembly, association, petitioning, voting, and due process of law.

Accordingly, the Department is establishing technical requirements to provide concrete standards to public entities on how to fulfill their obligations under title II to provide equal access to all of their services, programs, and activities that are provided via the web and mobile apps. The Department believes, and public comments have reinforced, that the requirements described in this rule are necessary to assure ''equality of opportunity, full participation, independent living, and economic self-sufficiency'' for individuals with disabilities, as set forth in the ADA.[3]

B. Legal Authority

On July 26, 1990, President George H.W. Bush signed into law the ADA, a comprehensive civil rights law prohibiting discrimination on the basis of disability.[4] Title II of the ADA, which this rule addresses, applies to State and local government entities. Title II extends the prohibition on discrimination established by section 504 of the Rehabilitation Act of 1973 (''Rehabilitation Act''), as amended, 29 U.S.C. 794 (''section 504''), to all activities of State and local government entities regardless of whether the entities receive Federal financial assistance.[5] Part A of title II protects qualified individuals with disabilities from discrimination on the basis of disability in services, programs, and activities of State and local government entities. Section 204(a) of the ADA directs the Attorney General to issue regulations implementing part A of title II but exempts matters within the scope of the authority of the Secretary of Transportation under section 223, 229, or 244.[6]

The Department is the only Federal agency with authority to issue regulations under title II, part A, of the ADA regarding the accessibility of State and local government entities' web content and mobile apps. In addition, under Executive Order 12250, the Department is responsible for ensuring consistency and effectiveness in the implementation of section 504 across the Federal Government (aside from provisions relating to equal

[1] 42 U.S.C. 12132. The Department uses the phrases ''State and local government entities'' and ''public entities'' interchangeably throughout this rule to refer to ''public entit[ies]'' as defined in 42 U.S.C. 12131(1) that are covered under part A of title II of the ADA.

[2] As discussed in the proposed definition in this rule, mobile apps are software applications that are downloaded and designed to run on mobile devices, such as smartphones and tablets.

[3] 42 U.S.C. 12101(a)(7).

[4] 42 U.S.C. 12101–12213.

[5] 42 U.S.C. 12131–12165.

[6] *See* 42 U.S.C. 12134. Section 229(a) and section 244 of the ADA direct the Secretary of Transportation to issue regulations implementing part B of title II, except for section 223. *See* 42 U.S.C. 12149(a), 12164.

employment).[7] Given Congress's intent for parity between section 504 and title II of the ADA, the Department must also ensure the consistency of any related agency interpretations of those provisions.[8] The Department, therefore, also has a lead role in coordinating interpretations of section 504 (again, aside from provisions relating to equal employment), including its application to web content and mobile apps, across the Federal Government.

C. Organization of This Rule

Appendix D to 28 CFR part 35 provides a section-by-section analysis of the Department's changes to the title II regulation and the reasoning behind those changes, in addition to responses to public comments received on the notice of proposed rulemaking (''NPRM'').[9] The section of appendix D entitled ''Public Comments on Other Issues in Response to NPRM'' discusses public comments on several issues that are not otherwise specifically addressed in the section-by-section analysis. The Final Regulatory Impact Analysis (''FRIA'') and Final Regulatory Flexibility Analysis (''FRFA'') accompanying this rulemaking both contain further responses to comments relating to those analyses.

D. Overview of Key Provisions of This Final Rule

In this final rule, the Department adds a new subpart H to the title II ADA regulation, 28 CFR part 35, that sets forth technical requirements for ensuring that web content that State and local government entities provide or make available, directly or through contractual, licensing, or other arrangements, is readily accessible to and usable by individuals with disabilities. Web content is defined by § 35.104 to mean the information and sensory experience to be communicated to the user by means of a user agent (*e.g.,* a web browser), including code or markup that defines the content's structure, presentation, and interactions. This includes text, images, sounds, videos, controls, animations, and conventional electronic documents. Subpart H also sets forth technical requirements for ensuring the accessibility of mobile apps that a public entity provides or makes available, directly or through contractual, licensing, or other arrangements.

The Department adopts an internationally recognized accessibility standard for web access, the Web Content Accessibility Guidelines (''WCAG'') 2.1 [10] published in June 2018, *https://www.w3.org/TR/2018/REC-WCAG21-20180605/* and *https://perma.cc/UB8A-GG2F*,[11] as the technical standard for web content and mobile app accessibility under title II of the ADA. As will be explained in more detail, the Department is requiring that public entities comply with the WCAG 2.1 Level AA success criteria and conformance requirements.[12] The applicable technical standard will be referred to hereinafter as ''WCAG 2.1.'' The applicable conformance level will be referred to hereinafter as ''Level AA.'' To the extent there are differences between WCAG 2.1 Level AA and the standards articulated in this rule, the standards articulated in this rule prevail. As noted below, WCAG 2.1 Level AA is not restated in full in this final rule but is instead incorporated by reference.

In recognition of the challenges that small public entities may face with respect to resources for implementing the new requirements, the Department has staggered the compliance dates for public entities according to their total population.[13] This final rule in § 35.200(b)(1) specifies that a public entity, other than a special district government,[14] with a total population of 50,000 or more must ensure that web content and mobile apps that the public entity provides or makes available, directly or through contractual, licensing, or other arrangements, comply with WCAG 2.1 Level AA success criteria and conformance requirements beginning two years after the publication of this final rule. Under § 35.200(b)(2), a public entity with a total population of less than 50,000 must comply with these requirements beginning three years after the publication of this final rule. In addition, under § 35.200(b)(2), all special district governments have three years following the publication of this final rule before they must begin complying with these requirements. After the compliance date, ongoing compliance with this final rule is required.

TABLE 1—COMPLIANCE DATES FOR WCAG 2.1 LEVEL AA

Public entity size	Compliance date
Fewer than 50,000 persons/special district governments	Three years after publication of the final rule.
50,000 or more persons	Two years after publication of the final rule.

In addition, the Department has set forth exceptions from compliance with the technical standard required under § 35.200 for certain types of content, which are described in detail below in the section-by-section analysis. If the content falls under an exception, that means that the public entity generally does not need to make the content conform to WCAG 2.1 Level AA.

As will be explained more fully, the Department has set forth five specific exceptions from compliance with the technical standard required under § 35.200: (1) archived web content; (2)

[7] E.O. 12250 secs. 1–201(c), 1–503 (Nov. 2, 1980), 45 FR 72995, 72995, 72997 (Nov. 4, 1980).

[8] U.S. Dep't of Just., *Disability Rights Section: Federal Coordination of Section 504 and Title II of the ADA,* C.R. Div. (Oct. 12, 2021), *https://www.justice.gov/crt/disability-rights-section#:~:text=Federal%20Coordination%20of%20Section%20504,required%20by%20Executive%20Order%2012250* [*https://perma.cc/S5JX-WD82*] (see Civil Rights Division (CRT) Memorandum on Federal Agencies' Implementation of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act under the heading ''Section 504 and ADA Federal Coordination Resources'').

[9] 88 FR 51948 (Aug. 4, 2023).

[10] Copyright© 2023 W3C®. This document includes material copied from or derived from *https://www.w3.org/TR/2018/REC-WCAG21-20180605/* and *https://perma.cc/UB8A-GG2F.* As explained elsewhere, WCAG 2.1 was updated in 2023, but this rule requires conformance to the 2018 version.

[11] The Permalink used for WCAG 2.1 throughout this rule shows the 2018 version of WCAG 2.1 as it appeared on W3C's website at the time the NPRM was published.

[12] As explained in more detail under ''WCAG Conformance Level'' in the section-by-section analysis of § 35.200 in appendix D, conformance to Level AA requires satisfying the success criteria labeled Level A as well as those labeled Level AA, in addition to satisfying the relevant conformance requirements.

[13] Total population, defined in § 35.104 and explained further in the section-by-section analysis, is generally determined by reference to the population estimate for a public entity (or the population estimate for a public entity of which an entity is an instrumentality) as calculated by the United States Census Bureau.

[14] *See* U.S. Census Bureau, *Special District Governments, https://www.census.gov/glossary/?term=Special+district+governments* [*https://perma.cc/8V43-KKL9*]. ''Special district government'' is also defined in this rule at § 35.104.

preexisting conventional electronic documents, unless such documents are currently used to apply for, gain access to, or participate in the public entity's services, programs, or activities; (3) content posted by a third party, unless the third party is posting due to contractual, licensing, or other arrangements with the public entity; (4) conventional electronic documents that are about a specific individual, their property, or their account and that are password-protected or otherwise secured; and (5) preexisting social media posts. As discussed further, if one of these exceptions applies, then the public entity's web content or content in mobile apps that is covered by an exception would not need to comply with the rule's technical standard. The Department has developed these exceptions because it believes that requiring public entities to make the particular content described in these categories accessible under all circumstances could be too burdensome at this time. In addition, requiring accessibility in all circumstances may divert important resources from making accessible key web content and mobile apps that public entities provide or make available. However, upon request from a specific individual, a public entity may have to provide the web content or content in mobile apps to that individual in an accessible format to comply with the entity's existing obligations under other regulatory provisions implementing title II of the ADA. For example, archived town meeting minutes from 2011 might be covered by an exception from the requirement to conform to WCAG 2.1 Level AA. But if a person with low vision, for example, requests an accessible version, then the town would still need to address the person's request under its existing effective communication obligations in 28 CFR 35.160. The way that the town does this could vary based on the facts. For example, in some circumstances, providing a large-print version of the minutes might satisfy the town's obligations, and in other circumstances it might need to provide an electronic version that conforms to the aspects of WCAG 2.1 Level AA relevant to the person's particular access needs.

The final rule contains a series of other mechanisms that are designed to make it feasible for public entities to comply with the rule. The final rule makes clear in § 35.202 the limited circumstances in which ''conforming alternate versions'' of web content, as defined in WCAG 2.1, can be used as a means of achieving accessibility. As WCAG 2.1 defines it, a conforming alternate version is a separate version of web content that is accessible, up to date, contains the same information and functionality as the inaccessible web content, and can be reached in particular ways, such as through a conforming page or an accessibility-supported mechanism. However, the Department is concerned that WCAG 2.1 could be interpreted to permit a segregated approach and a worse experience for individuals with disabilities. The Department also understands that, in practice, it can be difficult to maintain conforming alternate versions because it is often challenging to keep two different versions of web content up to date. For these reasons, as discussed in the section-by-section analysis of § 35.202, conforming alternate versions are permissible only when it is not possible to make web content directly accessible due to technical or legal limitations. Also, under § 35.203, the final rule allows a public entity flexibility to show that its use of other designs, methods, or techniques as alternatives to WCAG 2.1 Level AA provides substantially equivalent or greater accessibility and usability of the web content or mobile app. Nothing in this final rule prohibits an entity from going above and beyond the minimum accessibility standards this rule sets out.

Additionally, the final rule in §§ 35.200(b)(1) and (2) and 35.204 explains that conformance to WCAG 2.1 Level AA is not required under title II of the ADA to the extent that such conformance would result in a fundamental alteration in the nature of a service, program, or activity of the public entity or in undue financial and administrative burdens.

The final rule also explains in § 35.205 the limited circumstances in which a public entity that is not in full compliance with the technical standard will be deemed to have met the requirements of § 35.200. As discussed further in the section-by-section analysis of § 35.205, a public entity will be deemed to have satisfied its obligations under § 35.200 in the limited circumstance in which the public entity can demonstrate that its nonconformance to the technical standard has such a minimal impact on access that it would not affect the ability of individuals with disabilities to use the public entity's web content or mobile app to access the same information, engage in the same interactions, conduct the same transactions, and otherwise participate in or benefit from the same services, programs, and activities as individuals without disabilities, in a manner that provides substantially equivalent timeliness, privacy, independence, and ease of use.

More information about these provisions is provided in the section-by-section analysis.

E. Summary of Costs and Benefits

To estimate the costs and benefits associated with this rule, the Department conducted a FRIA. This analysis is required for significant regulatory actions under Executive Order 12866, as amended.[15] The FRIA serves to inform the public about the rule's costs and benefits to society, taking into account both quantitative and qualitative costs and benefits. A detailed summary of the FRIA is included in Section IV of this preamble. Table 2 below shows a high-level overview of the Department's monetized findings. Further, this rule will benefit individuals with disabilities uniquely and in their day-to-day lives in many ways that could not be quantified due to unavailable data. Non-monetized costs and benefits are discussed in the FRIA.

Comparing annualized costs and benefits of this rule, monetized benefits to society outweigh the costs. Net annualized benefits over the first 10 years following publication of this rule total $1.9 billion per year using a 3 percent discount rate and $1.5 billion per year using a 7 percent discount rate (Table 2). Additionally, beyond this 10-year period, benefits are likely to continue to accrue at a greater rate than costs because many of the costs are upfront costs and the benefits tend to have a delay before beginning to accrue.

To consider the relative magnitude of the estimated costs of this regulation, the Department compares the costs to revenues for public entities. Because calculating this ratio for every public entity would be impractical, the Department used the estimated average annualized cost compared to the average annual revenue by each public entity type. The costs for each public entity type and size are generally estimated to be below 1 percent of revenues (the one exception is small independent community colleges, for which the cost-to-revenue ratio is 1.05 percent and 1.10 percent using a 3 percent and 7 percent

[15] *See* E.O. 14094, 88 FR 21879 (Apr. 6, 2023); E.O. 13563, 76 FR 3821 (Jan. 18, 2011); E.O. 13272, 67 FR 53461 (Aug. 13, 2002); E.O. 13132, 64 FR 43255 (Aug. 4, 1999); E.O. 12866, 58 FR 51735 (Sept. 30, 1993).

discount rate, respectively),[16] so the Department does not believe the rule will be unduly burdensome or costly for public entities.[17]

TABLE 2—10-YEAR AVERAGE ANNUALIZED COMPARISON OF COSTS AND BENEFITS

Figure	3% Discount rate	7% Discount rate
Average annualized costs (millions)	$3,331.3	$3,515.0
Average annualized benefits (millions)	$5,229.5	$5,029.2
Net benefits (millions)	$1,898.2	$1,514.2
Cost-to-benefit ratio	0.6	0.7

II. Relationship to Other Laws

The ADA and the Department's implementing regulation state that except as otherwise provided, the ADA shall not be construed to apply a lesser standard than title V of the Rehabilitation Act (29 U.S.C. 791) or its accompanying regulations.[18] They further state that the ADA does not invalidate or limit the remedies, rights, and procedures of any other laws that provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them.[19]

The Department recognizes that entities subject to title II of the ADA may also be subject to other statutes that prohibit discrimination on the basis of disability. Compliance with the Department's title II regulation does not necessarily ensure compliance with other statutes and their implementing regulations. Title II entities are also obligated to fulfill the ADA's title I requirements in their capacity as employers,[20] and those requirements are distinct from the obligations under this rule.

Education is another context in which entities have obligations to comply with other laws imposing affirmative obligations regarding individuals with disabilities. The Department of Education's regulations implementing the Individuals with Disabilities Education Act (''IDEA'') and section 504 of the Rehabilitation Act include longstanding, affirmative obligations for covered schools to identify children with disabilities, and both require covered schools to provide a free appropriate public education.[21] This final rule builds on, and does not supplant, those preexisting requirements. A public entity must continue to meet all of its existing obligations under other laws.

III. Background

A. ADA Statutory and Regulatory History

The ADA broadly protects the rights of individuals with disabilities in important areas of everyday life, such as in employment (title I), State and local government entities' services, programs, and activities (title II, part A), transportation (title II, part B), and places of public accommodation (title III). The ADA requires newly designed and constructed or altered State and local government entities' facilities, public accommodations, and commercial facilities to be readily accessible to and usable by individuals with disabilities.[22] Section 204(a) of title II and section 306(b) of title III of the ADA direct the Attorney General to promulgate regulations to carry out the provisions of titles II and III, other than certain provisions dealing specifically with transportation.[23] Title II, part A, applies to State and local government entities and protects qualified individuals with disabilities from discrimination on the basis of disability in services, programs, and activities of State and local government entities.

On July 26, 1991, the Department issued its final rules implementing title II and title III, which are codified at 28 CFR part 35 (title II) and part 36 (title III),[24] and include the ADA Standards for Accessible Design (''ADA Standards'').[25] At that time, the web was in its infancy—and mobile apps did not exist—so State and local government entities did not use either the web or mobile apps as a means of providing services to the public. Thus, web content and mobile apps were not mentioned in the Department's title II regulation. Only a few years later, however, as web content of general interest became available, public entities began using web content to provide information to the public. Public entities and members of the public also now rely on mobile apps for critical government services.

B. History of the Department's Title II Web-Related Interpretation and Guidance

The Department first articulated its interpretation that the ADA applies to websites of covered entities in 1996.[26] Under title II, this includes ensuring that individuals with disabilities are

[16] However, the Department notes that revenue for small independent community colleges was estimated using the 2012 Census of Governments, so revenue for small independent community colleges would likely be underestimated if small independent community colleges had a greater share of total local government revenue in 2022 than in 2012. If this were true, the Department expects that the cost-to-revenue ratio for small independent community colleges would be lower.

[17] As a point of reference, the United States Small Business Administration advises agencies that a potential indicator that the impact of a regulation may be ''significant'' is whether the costs exceed 1 percent of the gross revenues of the entities in a particular sector, although the threshold may vary based on the particular types of entities at issue. *See* U.S. Small Bus. Admin., *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act,* at 19 (Aug. 2017), *https://advocacy.sba.gov/wp-content/uploads/2019/07/How-to-Comply-with-the-RFA-WEB.pdf* [*https://perma.cc/PWL9-ZTW6*]; *see also* U.S. Env't Prot. Agency, *EPA's Action Development Process: Final Guidance for EPA Rulewriters: Regulatory Flexibility Act,* at 24 (Nov. 2006), *https://www.epa.gov/sites/default/files/2015-06/documents/guidance-regflexact.pdf* [*https://perma.cc/9XFZ-3EVA*] (providing an illustrative example of a hypothetical analysis under the RFA in which, for certain small entities, economic impact of ''[l]ess than 1% for all affected small entities'' may be ''presumed'' to have ''no significant economic impact on a substantial number of small entities'').

[18] 42 U.S.C. 12201(a); 28 CFR 35.103(a).

[19] 42 U.S.C. 12201(b); 28 CFR 35.103(b).

[20] 42 U.S.C. 12111–12117.

[21] *See* 20 U.S.C. 1412; 29 U.S.C. 794; 34 CFR 104.32 through 104.33.

[22] 42 U.S.C. 12101 *et seq.*

[23] 42 U.S.C. 12134(a), 12186(b).

[24] Title III prohibits discrimination on the basis of disability in the full and equal enjoyment of places of public accommodation (privately operated entities whose operations affect commerce and fall within at least one of 12 categories listed in the ADA, such as restaurants, movie theaters, schools, day care facilities, recreational facilities, and doctors' offices) and requires newly constructed or altered places of public accommodation—as well as commercial facilities (facilities intended for nonresidential use by a private entity and whose operations affect commerce, such as factories, warehouses, and office buildings)—to comply with the ADA Standards. 42 U.S.C. 12181–12189.

[25] *See* 28 CFR 35.104, 36.104.

[26] *See* Letter for Tom Harkin, U.S. Senator, from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice (Sept. 9, 1996), *https://www.justice.gov/crt/foia/file/666366/download* [*https://perma.cc/56ZB-WTHA*].

not, by reason of such disability, excluded from participation in or denied the benefits of the services, programs, or activities offered by State and local government entities, including those offered via the web, such as education services, voting, town meetings, vaccine registration, tax filing systems, applications for housing, and applications for benefits.[27] The Department has since reiterated this interpretation in a variety of online contexts.[28] Title II of the ADA also applies when public entities use mobile apps to offer their services, programs, or activities.

As with many other statutes, the ADA's requirements are broad and its implementing regulations do not include specific standards for every obligation under the statute. This has been the case in the context of web accessibility under the ADA. Because the Department had not previously adopted specific technical requirements for web content and mobile apps through rulemaking, public entities have not had specific direction on how to comply with the ADA's general requirements of nondiscrimination and effective communication. However, public entities still must comply with these ADA obligations with respect to their web content and mobile apps, including before this rule's effective date.

The Department has consistently heard from members of the public—including public entities and individuals with disabilities—that there is a need for additional information on how to specifically comply with the ADA in this context. In June 2003, the Department published a document entitled ''Accessibility of State and Local Government websites to People with Disabilities,'' which provides tips for State and local government entities on ways they can make their websites accessible so that they can better ensure that individuals with disabilities have equal access to the services, programs, and activities that are provided through those websites.[29]

In March 2022, the Department released additional guidance addressing web accessibility for individuals with disabilities.[30] This guidance expanded on the Department's previous ADA guidance by providing practical tips and resources for making websites accessible for both title II and title III entities. It also reiterated the Department's longstanding interpretation that the ADA applies to all services, programs, and activities of covered entities, including when they are offered via the web.

The Department's 2003 guidance on State and local government entities' websites noted that ''an agency with an inaccessible website may also meet its legal obligations by providing an alternative accessible way for citizens to use the programs or services, such as a staffed telephone information line,'' while also acknowledging that this is unlikely to provide an equal degree of access.[31] The Department's March 2022 guidance did not include 24/7 staffed telephone lines as an alternative to accessible websites. Given the way the modern web has developed, the Department no longer believes 24/7 staffed telephone lines can realistically provide equal opportunity to individuals with disabilities. Websites—and often mobile apps—allow members of the public to get information or request a service within just a few minutes, and often to do so independently. Getting the same information or requesting the same service using a staffed telephone line takes more steps and may result in wait times or difficulty getting the information.

For example, State and local government entities' websites may allow members of the public to quickly review large quantities of information, like information about how to register for government services, information on pending government ordinances, or instructions about how to apply for a government benefit. Members of the public can then use government websites to promptly act on that information by, for example, registering for programs or activities, submitting comments on pending government ordinances, or filling out an application for a government benefit. A member of the public could not realistically accomplish these tasks efficiently over the phone.

Additionally, a person with a disability who cannot use an inaccessible online tax form might have to call to request assistance with filling out either online or mailed forms, which could involve significant delay, added costs, and could require providing private information such as banking details or Social Security numbers over the phone without the benefit of certain security features available for online transactions. A staffed telephone line also may not be accessible to someone who is deafblind, or who may have combinations of other disabilities, such as a coordination issue impacting typing and an audio processing disability impacting comprehension over the phone. Finally, calling a staffed telephone line lacks the privacy of looking up information on a website. A caller needing public safety resources, for example, might be unable to access a private location to ask for help on the phone, whereas an accessible website would allow users to privately locate resources. For these reasons, the Department does not now believe that a staffed telephone line—even if it is offered 24/7—provides equal opportunity in the way that an accessible website can.

C. The Department's Previous Web Accessibility-Related Rulemaking Efforts

The Department has previously pursued rulemaking efforts regarding web accessibility under title II. On July 26, 2010, the Department's advance notice of proposed rulemaking (''ANPRM'') entitled ''Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations'' was published in the **Federal Register**.[32] The ANPRM

[27] *See* 42 U.S.C. 12132.

[28] *See* U.S. Dep't of Just., *Guidance on Web Accessibility and the ADA, ADA.gov* (Mar. 18, 2022), *https://www.ada.gov/resources/web-guidance/* [*https://perma.cc/WH9E-VTCY*]; Settlement Agreement Between the United States of America and the Champaign-Urbana Mass Transit District (Dec. 14, 2021), *https://www.ada.gov/champaign-urbana_sa.pdf* [*https://perma.cc/VZU2-E6FZ*]; Consent Decree, *United States* v. *The Regents of the Univ. of Cal.* (Nov. 21, 2022), *https://www.justice.gov/opa/press-release/file/1553291/download* [*https://perma.cc/9AMQ-GPP3*]; Consent Decree, *Dudley* v. *Miami Univ.* (Oct. 13, 2016), *https://www.ada.gov/miami_university_cd.html*[*https://perma.cc/T3FX-G7RZ*]; Settlement Agreement Between the United States of America and Nueces County, Texas Under the Americans with Disabilities Act (effective Jan. 30, 2015), *https://archive.ada.gov/nueces_co_tx_pca/nueces_co_tx_sa.html* [*https://perma.cc/TX66-WQY7*]; Settlement Agreement Between the United States of America, Louisiana Tech University, and the Board of Supervisors for the University of Louisiana System Under the Americans with Disabilities Act (July 22, 2013), *https://www.ada.gov/louisiana-tech.htm* [*https://perma.cc/78ES-4FQR*]; Settlement Agreement Between the United States of America and the City and County of Denver, Colorado Under the Americans with Disabilities Act (Jan. 8, 2018), *https://www.ada.gov/denver_pca/denver_sa.html* [*https://perma.cc/U7VE-MBSG*].

[29] U.S. Dep't of Just., *Accessibility of State and Local Government websites to People with Disabilities, ADA.gov* (June 2003), *https://www.ada.gov/websites2.htm* [*https://perma.cc/Z7JT-USAN*].

[30] U.S. Dep't of Just., *Guidance on Web Accessibility and the ADA, ADA.gov* (Mar. 18, 2022), *https://www.ada.gov/resources/web-guidance/* [*https://perma.cc/874V-JK5Z*].

[31] U.S. Dep't of Just., *Accessibility of State and Local Government websites to People with Disabilities, ADA.gov* (June 2003), *https://www.ada.gov/websites2.htm* [*https://perma.cc/Z7JT-USAN*].

[32] 75 FR 43460 (July 26, 2010).

announced that the Department was considering revising the regulations implementing titles II and III of the ADA to establish specific requirements for State and local government entities and public accommodations to make their websites accessible to individuals with disabilities.[33] In the ANPRM, the Department sought information on various topics, including what standards, if any, it should adopt for web accessibility; whether the Department should adopt coverage limitations for certain entities, like small businesses; and what resources and services are available to make existing websites accessible to individuals with disabilities.[34] The Department also requested comments on the costs of making websites accessible; whether there are effective and reasonable alternatives to make websites accessible that the Department should consider permitting; and when any web accessibility requirements adopted by the Department should become effective.[35] The Department received approximately 400 public comments addressing issues germane to both titles II and III in response to the ANPRM. The Department later announced that it had decided to pursue separate rulemakings addressing web accessibility under titles II and III.[36]

On May 9, 2016, the Department followed up on its 2010 ANPRM with a detailed Supplemental ANPRM that was published in the **Federal Register**.[37] The Supplemental ANPRM solicited public comment about a variety of issues regarding establishing technical standards for web access under title II.[38] The Department received more than 200 public comments in response to the title II Supplemental ANPRM.

On December 26, 2017, the Department published a document in the **Federal Register** withdrawing four rulemaking actions, including the titles II and III web rulemakings, stating that it was evaluating whether promulgating specific web accessibility standards through regulations was necessary and appropriate to ensure compliance with the ADA.[39] The Department has also previously stated that it would continue to review its entire regulatory landscape and associated agenda, pursuant to the regulatory reform provisions of Executive Order 13771 and Executive Order 13777.[40] Those Executive orders were revoked by Executive Order 13992 in early 2021.[41]

The Department is now reengaging in efforts to promulgate regulations establishing technical standards for web accessibility as well as mobile app accessibility for public entities. On August 4, 2023, the Department published an NPRM in the **Federal Register** as part of this rulemaking effort.[42] The NPRM set forth the Department's specific proposals and sought public feedback. The NPRM included more than 60 questions for public input.[43] The public comment period closed on October 3, 2023.[44] The Department received approximately 345 comments from members of the public, including individuals with disabilities, public entities, disability advocacy groups, members of the accessible technology industry, web developers, and many others. The Department also published a fact sheet describing the NPRM's proposed requirements in plain language to help ensure that members of the public understood the rule and had an opportunity to provide feedback.[45] In addition, the Department attended listening sessions with various stakeholders while the public comment period was open. Those sessions provided important opportunities to receive through an additional avenue the information that members of the public wanted to share about the proposed rule. The three listening sessions that the Department attended were hosted by the U.S. Small Business Administration (''SBA'') Office of Advocacy, the Association on Higher Education and Disability (''AHEAD''), and the Great Lakes ADA Center at the University of Illinois at Chicago, in conjunction with the ADA National Network. The sessions convened by the SBA Office of Advocacy and the Great Lakes ADA Center were open to members of the public. There were approximately 200 attendees at the SBA session and 380 attendees at the Great Lakes ADA Center session.[46] The session with AHEAD included two representatives from AHEAD along with five representatives from public universities. The Department welcomed the opportunity to hear from public stakeholders. However, the Department informed attendees that these listening sessions did not serve as a substitute for submitting written comments during the notice and comment period.

D. Need for Department Action

1. Use of Web Content by Title II Entities

As public comments have reinforced, public entities regularly use the web to offer services, programs, or activities to the public.[47] The web can often help public entities streamline their services, programs, or activities and disseminate important information quickly and effectively. For example, members of the public routinely make online service requests—from requesting streetlight repairs and bulk trash pickups to reporting broken parking meters—and can often check the status of those service requests online. Public entities' websites also offer the opportunity for people to, for example, renew their vehicle registrations, submit complaints, purchase event permits, reserve public facilities, sign up for recreational activities, and pay traffic fines and property taxes, making some of these

[33] *Id.*

[34] 75 FR 43465–43467.

[35] *Id.*

[36] *See* U.S. Dep't of Just., *Statement of Regulatory Priorities* (Fall 2015), *https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201510/Statement_1100.html* [*https://perma.cc/YF2L-FTSK*].

[37] *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities,* 81 FR 28658 (May 9, 2016).

[38] 81 FR 28662–28686.

[39] *Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions,* 82 FR 60932 (Dec. 26, 2017).

[40] *See* Letter for Charles E. Grassley, U.S. Senator, from Stephen E. Boyd, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice (Oct. 11, 2018), *https://www.grassley.senate.gov/imo/media/doc/2018-10-11%20DOJ%20to%20Grassley%20-%20ADA%20website%20Accessibility.pdf* [*https://perma.cc/8JHS-FK2Q*].

[41] E.O. 13992 sec. 2, 86 FR 7049, 7049 (Jan. 20, 2021).

[42] *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities,* 88 FR 51948 (Aug. 4, 2023).

[43] 88 FR 51958–51986.

[44] *See* 88 FR 51948.

[45] U.S. Dep't of Just., *Fact Sheet: Notice of Proposed Rulemaking on Accessibility of Web Information and Services of State and Local Government Entities, ADA.gov* (July 20, 2023), *https://www.ada.gov/resources/2023-07-20-web-nprm/#* [*https://perma.cc/B7JL-9CVS*].

[46] U.S. Dep't of Just., *Ex Parte Communication Record on Proposed Rule on Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations* (Sept. 29, 2023), *https://www.regulations.gov/document/DOJ-CRT-2023-0007-0158* [*https://perma.cc/43JX-AAMG*]; U.S. Dep't of Just., *Ex Parte Communication Record on Proposed Rule on Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations* (Nov. 17, 2023), *https://www.regulations.gov/document/DOJ-CRT-2023-0007-0355* [*https://perma.cc/W45S-XDQH*].

[47] *See, e.g.,* John B. Horrigan & Lee Rainie, Pew Research Ctr., *Connecting with Government or Government Data* (Apr. 21, 2015), *https://www.pewresearch.org/internet/2015/04/21/connecting-with-government-or-government-data/* [*https://perma.cc/BFA6-QRQU*]; Samantha Becker et al., *Opportunity for All: How the American Public Benefits from internet Access at U.S. Libraries,* at 7–8, 120–27 (2010), *https://www.imls.gov/sites/default/files/publications/documents/opportunityforall_0.pdf* [*https://perma.cc/3FDG-553G*].

otherwise time-consuming tasks relatively easy and expanding their availability beyond regular business hours. Access to these services via the web can be particularly important for those who live in rural communities and might otherwise need to travel long distances to reach government buildings.[48]

Many public entities use online resources to promote access to public benefits. People can use websites of public entities to file for unemployment or other benefits and find and apply for job openings. Applications for many Federal benefits, such as unemployment benefits and food stamps, are also available through State websites. Through the websites of State and local government entities, business owners can register their businesses, apply for occupational and professional licenses, bid on contracts to provide products and services to public entities, and obtain information about laws and regulations with which they must comply. The websites of many State and local government entities also allow members of the public to research and verify business licenses online and report unsavory business practices.

People also rely on public entities' websites to engage in civic participation. People can frequently watch local public hearings, find schedules for community meetings, or take part in live chats with government officials on the websites of State and local government entities. Many public entities allow voters to begin the voter registration process and obtain candidate information on their websites. Individuals interested in running for local public offices can often find pertinent information concerning candidate qualifications and filing requirements on these websites as well. The websites of public entities also include information about a range of issues of concern to the community and about how people can get involved in community efforts to improve the administration of government services.

Public entities are also using websites as an integral part of public education.[49] Public schools at all levels, including public colleges and universities, offer programs, reading material, and classroom instruction through websites. Most public colleges and universities rely heavily on websites and other online technologies in the application process for prospective students; for housing eligibility and on-campus living assignments; for course registration and assignments; and for a wide variety of administrative and logistical functions in which students must participate. Similarly, in many public elementary and secondary school settings, teachers and administrators communicate via the web to parents and students about grades, assignments, and administrative matters.

As public comments on the NPRM have reinforced, access to the web has become increasingly important as a result of the COVID–19 pandemic, which shut down workplaces, schools, and in-person services, and forced millions of Americans to stay home for extended periods.[50] In response, the American public increasingly turned to the web for work, activities, and learning.[51] A study conducted in April 2021 found that 90 percent of adults reported the web was essential or important to them.[52] Several commenters on the NPRM specifically highlighted challenges underscored by the COVID–19 pandemic such as the denial of access to safety information and pandemic-related services, including vaccination appointments.

While important for everyone during the pandemic, access to web-based services took on heightened importance for people with disabilities, many of whom face a greater risk of COVID–19 exposure, serious illness, and death.[53] A report by the National Council on Disability indicated that COVID–19 has had a disproportionately negative impact on the ability of people with disabilities to access healthcare, education, and employment, among other areas, making remote access to these opportunities via the web even more important.[54] The Department believes that although many public health measures addressing the COVID–19 pandemic are no longer in place, there have been durable changes to State and local government entities' operations and public preferences that necessitate greater access to online services, programs, and activities.

As discussed at greater length below, many public entities' web content is not fully accessible, which often means that individuals with disabilities are denied equal access to important services, programs, or activities.

2. Use of Mobile Applications by Title II Entities

This rule also covers mobile apps because public entities often use mobile apps to offer their services, programs, or activities to the public. Mobile apps are software applications that are downloaded and designed to run on mobile devices, such as smartphones and tablets.[55] Many public entities use

[48] *See, e.g.,* NORC Walsh Ctr. for Rural Health Analysis & Rural Health Info. Hub, *Access to Care for Rural People with Disabilities Toolkit* (Dec. 2016), *https://www.ruralhealthinfo.org/toolkits/disabilities.pdf* [*https://perma.cc/YX4E-QWEE*].

[49] *See, e.g.,* Consent Decree, *United States* v. *The Regents of the Univ. of Cal.* (Nov. 20, 2022), *https://www.justice.gov/opa/press-release/file/1553291/download* [*https://perma.cc/9AMQ-GPP3*]; Natasha Singer, *Online Schools Are Here To Stay, Even After the Pandemic,* N.Y. Times, Apr. 11, 2021, *https://www.nytimes.com/2021/04/11/technology/remote-learning-online-school.html* [*https://perma.cc/ZYF6-79EE*] (June 23, 2023); Institute of Education Sciences, National Ctr. for Education Statistics, *Distance Learning,* National Center for Education Statistics, *https://nces.ed.gov/fastfacts/display.asp?id=80* [*https://perma.cc/XZT2-UKAD*].

[50] *See* Volker Stocker et al., *Chapter 2: COVID–19 and the Internet: Lessons Learned, in* Beyond the Pandemic? Exploring the Impact of COVID–19 on Telecommunications and the Internet 17, 21–29 (2023), *https://www.emerald.com/insight/content/doi/10.1108/978-1-80262-049-820231002/full/pdf* [*https://perma.cc/82P5-GVRV*]; Colleen McClain et al., Pew Research Ctr., *The Internet and the Pandemic* 3 (Sep. 1, 2021), *https://www.pewresearch.org/internet/2021/09/01/the-internet-and-the-pandemic/* [*https://perma.cc/4WVA-FQ9P*].

[51] *See* Jina Suh et al., *Disparate Impacts on Online Information Access During the COVID–19 Pandemic,* 13 Nature Comms. 1, 2–6 (Nov. 19, 2022), *https://www.nature.com/articles/s41467-022-34592-z#Sec6* [*https://perma.cc/CP2X-3ES6*]; Sara Fischer & Margaret Harding McGill, *Broadband Usage Will Keep Growing Post-Pandemic,* Axios (May 4, 2021), *https://www.axios.com/2021/05/04/broadband-usage-post-pandemic-increase.* A Perma archive link was unavailable for this citation; Kerry Dobransky & Eszter Hargittai, *Piercing the Pandemic Social Bubble: Disability and Social Media Use About COVID–19,* American Behavioral Scientist (Mar. 29, 2021), *https://doi.org/10.1177/00027642211003146.* A Perma archive link was unavailable for this citation.

[52] Colleen McClain et al., Pew Research Ctr., *The Internet and the Pandemic,* at 3 (Sept. 1, 2021), *https://www.pewresearch.org/internet/2021/09/01/the-internet-and-the-pandemic/* [*https://perma.cc/4WVA-FQ9P*].

[53] According to the CDC, some people with disabilities ''might be more likely to get infected or have severe illness because of underlying medical conditions, congregate living settings, or systemic health and social inequities. All people with serious underlying chronic medical conditions like chronic lung disease, a serious heart condition, or a weakened immune system seem to be more likely to get severely ill from COVID–19.'' *See* Ctrs. for Disease Control and Prevention, *People with Disabilities, https://www.cdc.gov/ncbddd/humandevelopment/covid-19/people-with-disabilities.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fpeople-with-disabilities.html* [*https://perma.cc/WZ7U-2EQE*].

[54] *See* Nat'l Council on Disability, *2021 Progress Report: The Impact of COVID–19 on People with Disabilities,* (Oct. 29, 2021), *https://www.ncd.gov/report/an-extra/* [*https://perma.cc/2AUU-6R73*].

[55] Mobile apps are distinct from a website that can be accessed by a mobile device because, in part, mobile apps are not directly accessible on the web; they are often downloaded on a mobile device. Mona Bushnell, *What Is the Difference Between an App and a Mobile website?,* Bus. News Daily, *https://www.businessnewsdaily.com/6783-mobile-website-vs-mobile-app.html* [*https://perma.cc/9LKC-GUEM*] (Aug. 3, 2022). A mobile website, by contrast, is a website that is designed so that it can be accessed by a mobile device similarly to how it

mobile apps to provide services and reach the public in various ways, including the purposes for which public entities use websites, in addition to others. For example, as with websites, residents can often use mobile apps provided or made available by public entities to submit service requests, such as requests to clean graffiti or repair a street-light outage, and track the status of these requests. Public entities' apps often take advantage of common features of mobile devices, such as camera and Global Positioning System (''GPS'') functions,[56] so individuals can provide public entities with a precise description and location of issues. These may include issues such as potholes,[57] physical barriers created by illegal dumping or parking, or curb ramps that need to be fixed to ensure accessibility for some people with disabilities. Some public transit authorities have transit apps that use a mobile device's GPS function to provide bus riders with the location of nearby bus stops and real-time arrival and departure times.[58] In addition, public entities are also using mobile apps to assist with emergency planning for natural disasters like wildfires; provide information about local schools; and promote tourism, civic culture, and community initiatives.[59] During the COVID–19 pandemic, when many State and local government entities' offices were closed, public entities used mobile apps to inform people about benefits and resources, to provide updates about the pandemic, and as a means to show proof of vaccination status, among other things.[60]

can be accessed on a desktop computer. *Id.* Both mobile apps and mobile websites are covered by this rule.

[56] *See* IBM Ctr. for the Bus. of Gov't, *Using Mobile Apps in Government,* at 11 (2015), *https://www.businessofgovernment.org/sites/default/files/Using%20Mobile%20Apps%20in%20Government.pdf* [*https://perma.cc/248X-8A6C*].

[57] *Id.* at 32.

[58] *See id.* at 28, 30–31.

[59] *See id.* at 7–8.

[60] *See* Rob Pegoraro, *COVID–19 Tracking Apps, Supported by Apple and Google, Begin Showing Up in App Stores,* USA Today, Aug. 25, 2020, *https://www.usatoday.com/story/tech/columnist/2020/08/25/google-and-apple-supported-coronavirus-tracking-apps-land-states/3435214001/* [*https://perma.cc/YH8C-K2F9*] (Aug. 26, 2020) (describing how various states' apps allow contact tracing through anonymized data and can provide information about testing and other COVID–19 safety practices); Chandra Steele, *Does My State Have a COVID–19 Vaccine App,* PCMag, *https://www.pcmag.com/how-to/does-my-state-have-a-covid-19-vaccine-app* [*https://perma.cc/H338-MCWC*] (Feb. 27, 2023).

3. Barriers to Web and Mobile App Accessibility

Millions of individuals in the United States have disabilities that can affect their use of the web and mobile apps.[61] Many of these individuals use assistive technology to enable them to navigate websites or mobile apps or access information contained on those sites or apps. For example, individuals who are unable to use their hands may use speech recognition software to navigate a website or a mobile app, while individuals who are blind may rely on a screen reader to convert the visual information on a website or mobile app into speech. Many websites and mobile apps are coded or presented such that some individuals with disabilities do not have access to all the information or features provided on or available on the website or mobile app.[62] For instance, individuals who are deaf may be unable to access information in web videos and other multimedia presentations that do not have captions. Individuals with low vision may be unable to read websites or mobile apps that do not allow text to be resized or do not provide enough contrast. Individuals with limited manual dexterity or vision disabilities who use assistive technology that enables them to interact with websites may be unable to access sites that do not support keyboard alternatives for mouse commands. These same individuals, along with individuals with cognitive and vision disabilities, often encounter difficulty using portions of websites and mobile apps that require timed responses from users but do not give users the opportunity to indicate that they need more time to respond.

Individuals who are blind or have low vision often confront significant barriers to accessing websites and mobile apps. For example, a study from the University of Washington analyzed approximately 10,000 mobile apps and found that many are highly inaccessible to individuals with disabilities.[63] The study found that 23 percent of the mobile apps reviewed did not provide content descriptions of images for most of their image-based buttons.[64] As a result, the functionality of those buttons is not accessible for people who use screen readers.[65] Additionally, other mobile apps may be inaccessible if they do not allow text resizing, which can provide larger text for people with vision disabilities.[66]

Furthermore, many websites and mobile apps provide information visually, without features that allow screen readers or other assistive technology to retrieve the information so it can be presented in an accessible manner. A common barrier to accessibility is an image or photograph without corresponding text (''alternative text'' or ''alt text'') describing the image. Generally, a screen reader or similar assistive technology cannot ''read'' an image, leaving individuals who are blind with no way of independently knowing what information the image conveys (*e.g.,* a simple icon or a detailed graph). Similarly, if websites lack headings that facilitate navigation using assistive technology, they may be difficult or impossible for someone using assistive technology to navigate.[67] Additionally, websites or mobile apps may fail to present tables in a way that allows the information in the table to be interpreted by someone who is using assistive technology.[68] Web-based forms, which are an essential part of accessing government services, are often inaccessible to individuals with disabilities who use assistive technology. For example, field elements on forms, which are the empty boxes on forms that receive input for specific pieces of information, such as a last name or telephone number, may lack clear labels that can be read by assistive technology. Inaccessible form fields make it difficult for people using assistive technology to fill out online forms, pay fees and fines, or otherwise participate in government services, programs, or activities using a website. Some governmental entities use inaccessible third-party websites and mobile apps to accept online payments, while others request public input through their own inaccessible websites and mobile apps. As commenters have emphasized, these barriers greatly impede the ability of individuals with

[61] See Section 2.2, ''Number of Individuals with Disabilities,'' in the accompanying FRIA for more information on the estimated prevalence of individuals with certain disabilities.

[62] *See* W3C, *Diverse Abilities and Barriers, https://www.w3.org/WAI/people-use-web/abilities-barriers/* [*https://perma.cc/DXJ3-BTFW*] (May 15, 2017).

[63] *See Large-Scale Analysis Finds Many Mobile Apps Are Inaccessible,* Univ. of Washington CREATE (Mar. 1, 2021), *https://create.uw.edu/initiatives/large-scale-analysis-finds-many-mobile-apps-are-inaccessible/* [*https://perma.cc/442K-SBCG*].

[64] *Id.*

[65] *Id.*

[66] *See* Lucia Cerchie, *Text Resizing in iOS and Android,* The A11y Project (Jan. 28, 2021), *https://www.a11yproject.com/posts/text-resizing-in-ios-and-android/* [*https://perma.cc/C29M-N2J6*].

[67] *See, e.g.,* W3C, *WCAG 2.1 Understanding Docs: Understanding SC 1.3.1: Info and Relationships (Level A), https://www.w3.org/WAI/WCAG21/Understanding/info-and-relationships* [*https://perma.cc/9XRQ-HWWW*] (June 20, 2023).

[68] *See, e.g.,* W3C, *Tables Tutorial, https://www.w3.org/WAI/tutorials/tables/* [*https://perma.cc/FMG2-33C4*] (Feb. 16, 2023).

disabilities to access the services, programs, or activities offered by public entities via the web and mobile apps.

In many instances, removing certain web content and mobile app accessibility barriers is neither difficult nor especially costly. For example, the addition of invisible attributes known as alt text or alt tags to an image helps orient an individual using a screen reader and allows them to gain access to the information on the website.[69] Alt text can be added to the coding of a website without any specialized equipment.[70] Similarly, adding headings, which facilitate page navigation for those using screen readers, can often be done easily as well.[71]

Public comments on the NPRM described the lack of independence, and the resulting lack of privacy, that can stem from accessibility barriers. These commenters noted that without full and equal access to digital spaces, individuals with disabilities must constantly rely on support from others to perform tasks they could complete themselves if the online infrastructure enabled accessibility. Commenters noted that when using public entities' inaccessible web content or mobile apps for interactions that involve confidential information, individuals with disabilities must forfeit privacy and independence to seek assistance. Commenters pointed out that constantly needing assistance from others not only impacts self-confidence and perceptions of self-worth, but also imposes a costly and burdensome ''time tax'' because it means that individuals with disabilities must spend more time and effort to gain access than individuals without disabilities.

Commenters also pointed out that accessible digital spaces benefit everyone. Just as the existence of curb cuts benefits people in many different scenarios—such as those using wheelchairs, pushing strollers, and using a trolley to deliver goods—accessible web content and mobile apps are generally more user friendly. For example, captioning is often used by individuals viewing videos in quiet public spaces and sufficient color contrast makes it generally easier to read text.

[69] W3C, *Images Tutorial, https://www.w3.org/WAI/tutorials/images/* [*https://perma.cc/G6TL-W7ZC*] (Feb. 08, 2022).

[70] *Id.*

[71] W3C, *Technique G130: Providing Descriptive Headings, https://www.w3.org/WAI/WCAG21/Techniques/general/G130.html* [*https://perma.cc/XWM5-LL6S*] (June 20, 2023).

4. Inadequacy of Voluntary Compliance With Technical Standards

The web has changed significantly, and its use has become far more prevalent, since Congress enacted the ADA in 1990 and since the Department subsequently promulgated its first ADA regulations. Neither the ADA nor the Department's regulations specifically addressed public entities' use of web content and mobile apps to provide their services, programs, or activities. Congress contemplated, however, that the Department would apply title II, part A of the statute in a manner that would adjust over time with changing circumstances and Congress delegated authority to the Attorney General to promulgate regulations to carry out the ADA's mandate under title II, part A.[72] Consistent with this approach, the Department stated in the preamble to the original 1991 ADA regulations that the regulations should be interpreted to keep pace with developing technologies.[73]

Since 1996, the Department has consistently taken the position that the ADA applies to the web content of State and local government entities. This interpretation comes from title II's application to ''all services, programs, and activities provided or made available by public entities.'' [74] The Department has affirmed the application of the statute to websites in multiple technical assistance documents over the past two decades.[75] Further, the Department has repeatedly enforced this obligation and worked with State and local government entities to make their websites accessible, such as through Project Civic Access, an initiative to promote local governments' compliance with the ADA by eliminating physical and communication barriers impeding full participation by people with disabilities in community life.[76] As State and local government entities have increasingly turned to mobile apps to offer services, programs, or activities, the Department has enforced those entities' title II obligations in that context as well.[77] A variety of voluntary standards and structures have been developed for the web through nonprofit organizations using multinational collaborative efforts. For example, domain names are issued and administered through the Internet Corporation for Assigned Names and Numbers, the Internet Society publishes computer security policies and procedures for websites, and the World Wide Web Consortium (''W3C'') develops a variety of technical standards and guidelines ranging from issues related to mobile devices and privacy to internationalization of technology. In the area of accessibility, the Web Accessibility Initiative (''WAI'') of W3C created the WCAG.

Many organizations, however, have indicated that voluntary compliance with these accessibility guidelines has not resulted in equal access for individuals with disabilities; accordingly, they have urged the Department to take regulatory action to ensure web content and mobile app accessibility.[78] The National Council on Disability, an independent Federal agency that advises the President, Congress, and other agencies about programs, policies, practices, and procedures affecting people with disabilities, has similarly emphasized the need for regulatory action on this issue.[79] The Department has also heard

[72] *See* H.R. Rep. No. 101–485, pt. 2, at 108 (1990); 42 U.S.C. 12134(a).

[73] *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities,* 56 FR 35544, 35566 (July 26, 1991); *see* 28 CFR part 36, appendix B.

[74] *See* 28 CFR 35.102.

[75] U.S. Dep't of Just., *Accessibility of State and Local Government websites to People with Disabilities, ADA.gov* (June 2003), *https://www.ada.gov/websites2.htm* [*https://perma.cc/Z7JT-USAN*]; U.S. Dep't of Just., *ADA Best Practices Tool Kit for State and Local Governments: Chapter 5: website Accessibility Under Title II of the ADA, ADA.gov* (May 7, 2007), *https://www.ada.gov/pcatoolkit/chap5toolkit.htm* [*https://perma.cc/VM3M-AHDJ*]; U.S. Dep't of Just., *Guidance on Web Accessibility and the ADA, ADA.gov* (Mar. 18, 2022), *https://www.ada.gov/resources/web-guidance/* [*https://perma.cc/874V-JK5Z*]; *see also supra* Section III.B of this preamble.

[76] U.S. Dep't of Just., *Project Civic Access, ADA.gov, https://www.ada.gov/civicac.htm* [*https://perma.cc/B6WV-4HLQ*].

[77] *See, e.g.,* Settlement Agreement Between the United States of America and Service Oklahoma (Jan. 22, 2024), *https://www.justice.gov/d9/2024-01/service_oklahoma_fully_executed_agreement.01.22.24.pdf* [*https://perma.cc/MB2A-BKHY*]; Settlement Agreement Between the United States of America and the Champaign-Urbana Mass Transit District (Dec. 14, 2021), *https://www.justice.gov/d9/case-documents/attachments/2021/12/14/champaign-urbana_sa.pdf* [*https://perma.cc/Y3CX-EHCC*].

[78] *See, e.g.,* Letter for U.S. Dep't of Just. from American Council of the Blind et al. (Feb. 28, 2022), *https://acb.org/accessibility-standards-joint-letter-2-28-22* [*https://perma.cc/R77M-VPH9*] (citing research showing persistent barriers in digital accessibility); Letter for U.S. Dep't of Just. from Consortium for Citizens with Disabilities Technology & Telecommunications and Rights Task Force, re: Adopting Regulatory and Subregulatory Initiatives To Advance Accessibility and Usability of websites, Online Systems, Mobile Applications, and Other Forms of Information and Communication Technology Under Titles II and III of the ADA (Mar. 23, 2022), *https://www.c-c-d.org/fichiers/CCD-Web-Accessibility-Letter-to-DOJ-03232022.pdf* [*https://perma.cc/Q7YB-UNKV*].

[79] *See* Nat'l Council on Disability, *The Need for Federal Legislation and Regulation Prohibiting Telecommunications and Information Services Discrimination* (Dec. 19, 2006), *https://www.ncd.gov/assets/uploads/reports/2006/ncd-need-for-regulation-prohibiting-it-discrimination-*

from State and local government entities and businesses asking for clarity on the ADA's requirements for websites through regulatory efforts.[80] Public commenters responding to the NPRM have also emphasized the need for regulatory action on this issue to ensure that public entities' services, programs, and activities offered via the web and mobile apps are accessible, and have expressed that this rule is long overdue.

In light of the long regulatory history and the ADA's current general requirement to make all services, programs, and activities accessible, the Department expects that public entities have made strides to make their web content and mobile apps accessible since the 2010 ANPRM was published. Such strides have been supported by the availability of voluntary web content and mobile app accessibility standards, as well as by the Department's clearly stated position—supported by judicial decisions[81]—that all services, programs, and activities of public entities, including those available on websites, must be accessible. Still, as discussed above, individuals with disabilities continue to struggle to obtain access to the web content and mobile apps of public entities. Many public comments on the NPRM shared anecdotes of instances where individuals were unable to access government services, programs, or activities offered via the web and mobile apps, or had to overcome significant barriers to be able to do so, in spite of public entities' existing obligations under title II.

The Department has brought enforcement actions to address web content and mobile app access, resulting in a significant number of settlement agreements with State and local government entities.[82] Other Federal agencies have also taken enforcement action against public entities regarding the lack of website access for individuals with disabilities. In December 2017, for example, the U.S. Department of Education entered into a resolution agreement with the Alaska Department of Education and Early Development after it found that the public entity had violated Federal statutes, including title II of the ADA, by denying individuals with disabilities an equal opportunity to participate in the public entity's services, programs, or activities due to website inaccessibility.[83] As another example, the U.S. Department of Housing and Urban Development took action against the City of Los Angeles, and its subrecipient housing providers, to ensure that it maintained an accessible website concerning housing opportunities.[84]

The Department believes, and public comments on the NPRM have reinforced, that adopting technical standards for web content and mobile app accessibility provides clarity to public entities regarding how to make accessible the services, programs, and activities that they offer via the web and mobile apps. Commenters have specifically indicated that unambiguous, consistent, and comprehensive standards will help resolve existing confusion around the technical requirements for accessibility on public entities' web content and mobile apps. Adopting specific technical standards for web content and mobile app accessibility also helps to provide individuals with disabilities with consistent and predictable access to the web content and mobile apps of public entities.

IV. Regulatory Process Matters

The Department has examined the likely economic and other effects of this final rule addressing the accessibility of web content and mobile apps, as required under applicable Executive Orders,[85] Federal administrative statutes (*e.g.,* the Regulatory Flexibility Act,[86] Paperwork Reduction Act,[87] and Unfunded Mandates Reform Act[88]), and other regulatory guidance.[89]

As discussed previously, the purpose of this rule is to revise the regulation implementing title II of the ADA in order to ensure that the services, programs, and activities offered by State and local government entities to the public via web content and mobile apps are accessible to individuals with disabilities. The Department is adopting specific technical standards related to the accessibility of the web content and mobile apps of State and local government entities and is specifying

2006.pdf [*https://perma.cc/7HW5-NF7P*] (discussing how competitive market forces have not proven sufficient to provide individuals with disabilities access to telecommunications and information services); *see also, e.g.,* Nat'l Council on Disability, *National Disability Policy: A Progress Report: Executive Summary* (Oct. 7, 2016), *https://files.eric.ed.gov/fulltext/ED571832.pdf* [*https://perma.cc/ZH3P-8LCZ*] (urging the Department to adopt a web accessibility regulation).

[80] *See, e.g.,* Letter for U.S. Dep't of Just. from Nat'l Ass'n of Realtors (Dec. 13, 2017), *https://www.narfocus.com/billdatabase/clientfiles/172/3/3058.pdf* [*https://perma.cc/Z93F-K88P*].

[81] *See, e.g., Meyer* v. *Walthall,* 528 F. Supp. 3d 928, 959 (S.D. Ind. 2021) (''[T]he Court finds that Defendants' websites constitute services or activities within the purview of Title II and section 504, requiring Defendants to provide effective access to qualified individuals with a disability.''); *Price* v. *City of Ocala, Fla.,* 375 F. Supp. 3d 1264, 1271 (M.D. Fla. 2019) (''Title II undoubtedly applies to websites.''); *Payan* v. *Los Angeles Cmty. Coll. Dist.,* No. 2:17–CV–01697–SVW–SK, 2019 WL 9047062, at *12 (C.D. Cal. Apr. 23, 2019) (''[T]he ability to sign up for classes on the website and to view important enrollment information is itself a 'service' warranting protection under Title II and Section 504.''); *Eason* v. *New York State Bd. of Elections,* No. 16–CV–4292 (KBF), 2017 WL 6514837, at *1 (S.D.N.Y. Dec. 20, 2017) (stating, in a case involving a State's website, that ''Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act . . . long ago provided that the disabled are entitled to meaningful access to a public entity's programs and services. Just as buildings have architecture that can prevent meaningful access, so too can software.''); *Hindel* v. *Husted,* No. 2:15–CV–3061, 2017 WL 432839, at *5 (S.D. Ohio Feb. 1, 2017) (''The Court finds that Plaintiffs have sufficiently established that Secretary Husted's website violates Title II of the ADA because it is not formatted in a way that is accessible to all individuals, especially blind individuals like the Individual Plaintiffs whose screen access software cannot be used on the website.'').

[82] *See, e.g.,* Settlement Agreement Between the United States of America and the Champaign-Urbana Mass Transit District (Dec. 14, 2021), *https://www.ada.gov/champaign-urbana_sa.pdf* [*https://perma.cc/VZU2-E6FZ*]; Consent Decree, *United States* v. *The Regents of the Univ. of Cal.* (Nov. 21, 2022), *https://www.justice.gov/opa/press-release/file/1553291/download* [*https://perma.cc/9AMQ-GPP3*]; Consent Decree, *Dudley* v. *Miami Univ.* (Oct. 13, 2016), *https://www.ada.gov/miami_university_cd.html* [*https://perma.cc/T3FX-G7RZ*]; Settlement Agreement Between the United States of America and the City and County of Denver, Colorado Under the Americans with Disabilities Act (Jan. 8, 2018), *https://www.ada.gov/denver_pca/denver_sa.html* [*https://perma.cc/U7VE-MBSG*]; Settlement Agreement Between the United States of America and Nueces County, Texas Under the Americans with Disabilities Act (Jan. 30, 2015), *https://www.ada.gov/nueces_co_tx_pca/nueces_co_tx_sa.html* [*https://perma.cc/TX66-WQY7*]; Settlement Agreement Between the United States of America, Louisiana Tech University, and the Board of Supervisors for the University of Louisiana System Under the Americans with Disabilities Act (July 22, 2013), *https://www.ada.gov/louisiana-tech.htm* [*https://perma.cc/78ES-4FQR*].

[83] U.S. Dep't of Educ., *In re Alaska Dep't of Educ. & Early Dev.,* OCR Reference No. 10161093 (Dec. 11, 2017) (resolution agreement), *https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/10161093-b.pdf* [*https://perma.cc/DUS4-HVZJ*], *superseded by* U.S. Dep't of Educ., *In re Alaska Dep't of Educ. & Early Dev.,* OCR Reference No.10161093 (Mar. 28, 2018) (revised resol. agreement), *https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/10161093-b1.pdf* [*https://perma.cc/BVL6-Y59M*] (U.S. Dep't of Educ. Mar. 28, 2018) (revised resol. agreement).

[84] *See* Voluntary Compliance Agreement Between the U.S. Dep't of Housing & Urban Dev. and the City of Los Angeles, Cal. (Aug. 2, 2019), *https://www.hud.gov/sites/dfiles/Main/documents/HUD-City-of-Los-Angeles-VCA.pdf* [*https://perma.cc/X5RN-AJ5K*].

[85] *See* E.O. 14094, 88 FR 21879 (Apr. 6, 2023); E.O. 13563, 76 FR 3821 (Jan. 18, 2011); E.O. 13272, 67 FR 53461 (Aug. 13, 2002); E.O. 13132, 64 FR 43255 (Aug. 4, 1999); E.O. 12866, 58 FR 51735 (Sept. 30, 1993).

[86] Regulatory Flexibility Act of 1980 (''RFA''), as amended by the Small Bus. Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 *et seq.*

[87] Paperwork Reduction Act (''PRA''), 44 U.S.C. 3501 *et seq.*

[88] Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*

[89] *See* Office of Mgmt. and Budget, *Circular A–4* (Sept. 17, 2003) (superseded by Office of Mgmt. and Budget, *Circular A–4* (of Nov. 9, 2023)).

dates by which such web content and mobile apps must meet those standards. This rule is necessary to help public entities understand how to ensure that individuals with disabilities will have equal access to the services, programs, and activities that public entities provide or make available through their web content and mobile apps.

The Department has carefully crafted this final rule to better ensure the protections of title II of the ADA, while at the same time doing so in an economically efficient manner. After reviewing the Department's assessment of the likely costs of this regulation, the Office of Management and Budget (''OMB'') has determined that it is a significant regulatory action within the meaning of Executive Order 12866, as amended. As such, the Department has undertaken a FRIA pursuant to Executive Order 12866. The Department has also undertaken a FRFA as specified in section 604(a) of the Regulatory Flexibility Act. The results of both of these analyses are summarized below. Lastly, the Department does not believe that this regulation will have any significant impact relevant to the Paperwork Reduction Act, the Unfunded Mandates Reform Act, or the federalism principles outlined in Executive Order 13132.

A. Final Regulatory Impact Analysis Summary

The Department has prepared a FRIA for this rulemaking. This rulemaking also contains a FRFA. The Department contracted with Eastern Research Group Inc. (''ERG'') to prepare this economic assessment. This summary provides an overview of the Department's economic analysis and key findings in the FRIA. The full FRIA will be made available at *https://www.justice.gov/crt/disability-rights-section.*

Requiring State and local government entity web content and mobile apps to conform to WCAG 2.1 Level AA will result in costs for State and local government entities to remediate and maintain their web content and mobile apps to meet this standard. The Department estimates that 109,893 State and local government entity websites and 8,805 State and local government mobile apps will be affected by the rule. These websites and mobile apps provide services on behalf of and are managed by 91,489 State and local government entities that will incur these costs. These costs include one-time costs for familiarization with the requirements of the rule; testing, remediation, and operating and maintenance (''O&M'') costs for websites; testing, remediation, and O&M costs for mobile apps; and school course remediation costs. The remediation costs include both time and software components.

Initial familiarization, testing, and remediation costs of the rule are expected to occur over the first two or three years until compliance is required and are presented in Table 3 (two years for large governments and three years for small governments). Annualized recurring costs after implementation are shown in Table 4. These initial and recurring costs are then combined to show total costs over the 10-year time horizon (Table 5 and Table 6) and annualized costs over the 10-year time horizon (Table 7 and Table 8). Annualized costs over this 10-year period are estimated at $3.3 billion assuming a 3 percent discount rate and $3.5 billion assuming a 7 percent discount rate. This includes $16.9 billion in implementation costs accruing during the first three years (the implementation period), undiscounted, and $2.0 billion in annual O&M costs during the next seven years. All values are presented in 2022 dollars as 2023 data were not yet available.

Benefits will generally accrue to all individuals who access State and local government entity websites and mobile apps, and additional benefits will accrue to individuals with certain types of disabilities. The WCAG 2.1 Level AA standards for web content and mobile app accessibility primarily benefit individuals with vision, hearing, cognitive, and manual dexterity disabilities because accessibility standards are intended to address barriers that often impede access for people with these disability types. Using the U.S. Census Bureau's Survey of Income and Program Participation (''SIPP'') 2022 data, the Department estimates that 5.5 percent of adults in the United States have a vision disability, 7.6 percent have a hearing disability, 11.3 percent have a cognitive disability, and 5.8 percent have a manual dexterity disability.[90] Due to the incidence of multiple disabilities, the total share of people with one or more of these disabilities is 21.3 percent.

The Department monetized benefits for both people with these disabilities and people without disabilities.[91] There are many additional benefits that have not been monetized due to lack of data availability. Benefits that cannot be monetized are discussed qualitatively. These non-quantified benefits are central to this rule's potential impact as they include concepts inherent to any civil rights law—such as equality and dignity. Other impacts to individuals include increased independence, increased flexibility, increased privacy, reduced frustration, decreased reliance on companions, and increased program participation. This rule will also benefit State and local government entities through increased certainty about what constitutes an accessible website, a potential reduction in litigation, and a larger labor market pool (due to increased educational attainment and access to job training).

Annual and annualized monetized benefits of this rule are presented in Table 9, Table 10, and Table 11. Annual benefits, beginning once the rule is fully implemented, total $5.3 billion. Because individuals generally prefer benefits received sooner, future benefits need to be discounted to reflect the lower value due to the wait to receive them. OMB guidance states that annualized benefits and costs should be presented using real discount rates of 3 percent and 7 percent.[92] Benefits annualized over a 10-year period that includes both three years of implementation and seven years post-implementation total $5.2 billion per year, assuming a 3 percent discount rate, and $5.0 billion per year, assuming a 7 percent discount rate.

Comparing annualized costs and benefits, monetized benefits to society outweigh the costs. Net annualized benefits over the first 10 years post publication of this rule total $1.9 billion per year using a 3 percent discount rate and $1.5 billion per year using a 7 percent discount rate (Table 12). Additionally, beyond this 10-year period, benefits are likely to continue to accrue at a greater rate than costs because many of the costs are upfront costs and the benefits tend to have a delay before beginning to accrue.

To consider the relative magnitude of the estimated costs of this regulation, the Department compares the costs to revenues for public entities. Because

[90] *See* U.S. Census Bureau, *2022 SIPP Data, https://www.census.gov/programs-surveys/sipp/data/datasets/2022-data/2022.html* [*https://perma.cc/7HW3-7GHR*] (last visited Mar. 13, 2024). Analysis of this dataset is discussed further in the Department's accompanying FRIA, at section 2.2, Number of Individuals with Disabilities.

[91] Throughout the Department's FRIA, the Department uses the phrases ''individuals without a relevant disability'' or ''individuals without disabilities'' to refer to individuals without vision, hearing, cognitive, or manual dexterity disabilities. These individuals may have other types of disabilities, or they may be individuals without any disabilities at all.

[92] Office of Mgmt. and Budget, *Circular A–4* (Sep 17, 2003), *https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf* [*https://perma.cc/VSR2-UFT8*]. Office of Mgmt. and Budget, *Circular A–4* (Sep 17, 2003), *https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf* [*https://perma.cc/VSR2-UFT8https://perma.cc/VSR2-UFT8*].

calculating this ratio for every public entity would be impractical, the Department used the estimated average annualized cost compared to the average annual revenue by each government entity type. The costs for each government entity type and size are generally estimated to be below 1 percent of revenues (the one exception is small independent community colleges, for which the cost-to-revenue ratio is 1.05 percent and 1.10 percent using a 3 percent discount rate and a 7 percent discount rate, respectively),[93] so the Department does not believe the rule will be unduly burdensome or costly for public entities.[94]

The Department received some comments on the proposed rule's estimated costs and benefits. These comments are discussed throughout the FRIA. One methodological change was made from the analysis performed for the NPRM on the timing of compliance for making password-protected course content accessible by public educational entities, which is discussed further in the FRIA. However, the numbers in the FRIA also differ from the proposed rule because data have been updated to reflect the most recently available data and because monetary values are now reported in 2022 dollars (whereas the analysis performed for the NPRM presented values in 2021 dollars).

TABLE 3—INITIAL FAMILIARIZATION, TESTING, AND REMEDIATION COSTS
[Millions]

Cost	State	County	Municipal	Township	Special district	School district	U.S. territories	Higher ed.	Total
Regulatory familiarization	$0.02	$1.00	$6.42	$5.35	$12.7	$4.03	$0.00	$0.62	$30.1
Websites	253.0	819.9	2,606.6	1,480.7	408.5	2,014.0	7.1	1,417.4	9,007.3
Mobile apps	14.7	56.8	100.0	1.4	0.0	406.3	1.3	68.9	649.2
Postsecondary course remediation	N/A	N/A	N/A	N/A	N/A	N/A	N/A	5,508.5	5,508.5
Primary and secondary course remediation	N/A	50.8	19.8	42.8	N/A	1,134.1	N/A	N/A	1,247.5
Third-party website remediation	7.2	39.4	147.2	85.5	19.6	113.8	0.0	93.6	506.4
Total	275.0	967.8	2,880.1	1,615.8	440.8	3,672.2	8.4	7,089.1	16,949.1

TABLE 4—AVERAGE ANNUAL COST AFTER IMPLEMENTATION
[Millions]

Cost	State	County	Municipal	Township	Special district	School district	U.S. territories	Higher ed.	Total
Websites	$22.0	$71.9	$237.3	$136.9	$43.8	$181.7	$0.6	$123.4	$817.8
Mobile apps	0.01	0.04	0.03	0.00	0.00	0.23	0.00	0.05	0.35
Postsecondary course remediation	N/A	N/A	N/A	N/A	N/A	N/A	N/A	1,001.6	1,001.6
Primary and secondary course remediation	N/A	5.1	2.0	4.3	N/A	113.4	N/A	N/A	124.7
Third-party website remediation	0.6	3.5	13.4	7.9	2.1	10.2	0.0	8.2	45.9
Total	22.6	80.6	252.7	149.1	45.9	305.6	0.6	1,133.2	1,990.3

TABLE 5—PRESENT VALUE OF 10-YEAR TOTAL COST, 3 PERCENT DISCOUNT RATE
[Millions]

Cost	State	County	Municipal	Township	Special district	School district	U.S. territories	Higher ed.	Total
Regulatory familiarization	$0.02	$0.97	$6.23	$5.20	$12.33	$3.91	$0.00	$0.60	$29.26
Websites	366.5	1,190.3	3,812.6	2,174.4	634.1	2,939.6	10.3	2,053.9	13,181.7
Mobile apps	14.1	54.2	95.8	1.3	0.0	385.4	1.2	66.2	618.1
Postsecondary course remediation	N/A	N/A	N/A	N/A	N/A	N/A	N/A	11,890.1	11,890.1
Primary and secondary course remediation	N/A	79.6	31.1	67.1	N/A	1,778.9	N/A	N/A	1,956.8
Third-party website remediation	10.5	57.4	215.3	125.6	30.4	165.8	0.0	135.6	740.7
Total	391.1	1,382.4	4,161.0	2,373.7	676.8	5,273.6	11.5	14,146.5	28,416.7

[93] However, the Department notes that revenue for small independent community colleges was estimated using the 2012 Census of Governments, so revenue for small independent community colleges would likely be underestimated if small independent community colleges had a greater share of total local government revenue in 2022 than in 2012. If this were true, the Department expects that the cost-to-revenue ratio for small independent community colleges would be lower.

[94] As a point of reference, the United States Small Business Administration advises agencies that a potential indicator that the impact of a regulation may be ''significant'' is whether the costs exceed 1 percent of the gross revenues of the entities in a particular sector, although the threshold may vary based on the particular types of entities at issue. *See* U.S. Small Bus. Admin., *A Guide for Government Agencies: How To Comply with the Regulatory Flexibility Act,* at 19 (Aug. 2017), *https://advocacy.sba.gov/wp-content/uploads/2019/07/How-to-Comply-with-the-RFA-WEB.pdf* [*https://perma.cc/PWL9-ZTW6*]; *see also* U.S. Env't Prot. Agency, *EPA's Action Dev. Process: Final Guidance for EPA Rulewriters: Regulatory Flexibility Act,* at 9, 24 (Nov. 2006), *https://www.epa.gov/sites/default/files/2015-06/documents/guidance-regflexact.pdf* [*https://perma.cc/9XFZ-3EVA*] (providing an illustrative example of a hypothetical analysis under the RFA in which, for certain small entities, economic impact of ''[l]ess than 1% for all affected small entities'' may be ''[p]resumed'' to have ''no significant economic impact on a substantial number of small entities'').

TABLE 6—PRESENT VALUE OF 10-YEAR TOTAL COST, 7 PERCENT DISCOUNT RATE
[Millions]

Cost	State	County	Municipal	Township	Special district	School district	U.S. territories	Higher ed.	Total
Regulatory familiarization	$0.02	$0.93	$6.00	$5.00	$11.87	$3.76	$0.00	$0.58	$28.16
Websites	323.3	1,048.5	3,327.8	1,892.9	548.3	2,570.7	9.1	1,811.7	11,532.2
Mobile apps	13.3	50.7	90.5	1.3	0.0	358.5	1.2	62.5	577.9
Postsecondary course remediation	N/A	N/A	N/A	N/A	N/A	N/A	N/A	10,188.1	10,188.1
Primary and secondary course remediation	N/A	69.7	27.2	58.7	N/A	1,557.3	N/A	N/A	1,713.0
Third-party website remediation	9.3	50.5	187.9	109.3	26.3	145.3	0.0	119.6	648.2
Total	345.9	1,220.4	3,639.4	2,067.2	586.5	4,635.5	10.2	12,182.5	24,687.6

TABLE 7—10-YEAR AVERAGE ANNUALIZED COST, 3 PERCENT DISCOUNT RATE
[Millions]

Cost	State	County	Municipal	Township	Special district	School district	U.S. territories	Higher ed.	Total
Regulatory familiarization	$0.00	$0.11	$0.73	$0.61	$1.44	$0.46	$0.00	$0.07	$3.43
Websites	43.0	139.5	446.9	254.9	74.3	344.6	1.2	240.8	1,545.3
Mobile apps	1.7	6.3	11.2	0.2	0.0	45.2	0.1	7.8	72.5
Postsecondary course remediation	N/A	N/A	N/A	N/A	N/A	N/A	N/A	1,393.9	1,393.9
Primary and secondary course remediation	N/A	9.3	3.6	7.9	N/A	208.5	N/A	N/A	229.4
Third-party website remediation	1.2	6.7	25.2	14.7	3.6	19.4	0.0	15.9	86.8
Total	45.8	162.1	487.8	278.3	79.3	618.2	1.4	1,658.4	3,331.3

TABLE 8—10-YEAR AVERAGE ANNUALIZED COST, 7 PERCENT DISCOUNT RATE
[Millions]

Cost	State	County	Municipal	Township	Special district	School district	U.S. territories	Higher ed.	Total
Regulatory familiarization	$0.00	$0.13	$0.85	$0.71	$1.69	$0.54	$0.00	$0.08	$4.01
Websites	46.0	149.3	473.8	269.5	78.1	366.0	1.3	257.9	1,641.9
Mobile apps	1.9	7.2	12.9	0.2	0.0	51.0	0.2	8.9	82.3
Postsecondary course remediation	N/A	N/A	N/A	N/A	N/A	N/A	N/A	1,450.6	1,450.6
Primary and secondary course remediation	N/A	9.9	3.9	8.4	N/A	221.7	N/A	N/A	243.9
Third-party website remediation	1.3	7.2	26.8	15.6	3.7	20.7	0.0	17.0	92.3
Total	49.2	173.8	518.2	294.3	83.5	660.0	1.5	1,734.5	3,515.0

TABLE 9—ANNUAL BENEFIT AFTER FULL IMPLEMENTATION
[Millions]

Benefit type	Visual disability	Other relevant disability [a]	Without relevant disabilities	State and local gov'ts	Total
Time savings—current users	$813.5	$1,022.1	$2,713.9	N/A	$4,549.5
Time savings—mobile apps	76.3	95.9	254.5	N/A	426.7
Educational attainment	10.2	295.8	N/A	N/A	306.0
Total benefits	900.0	1,413.7	2,968.5	0.0	5,282.2

[a] For purposes of this table, hearing, cognitive, and manual dexterity disabilities are referred to as ''other relevant disabilities.''

TABLE 10—10-YEAR AVERAGE ANNUALIZED BENEFITS, 3 PERCENT DISCOUNT RATE
[Millions]

Benefit type	Visual disability	Other relevant disability [a]	Without relevant disabilities	State and local gov'ts	Total
Time savings—current users	$686.3	$862.3	$2,289.6	N/A	$3,838.3
Time savings—mobile apps	64.4	80.9	214.7	N/A	360.0

TABLE 10—10-YEAR AVERAGE ANNUALIZED BENEFITS, 3 PERCENT DISCOUNT RATE—Continued

[Millions]

Benefit type	Visual disability	Other relevant disability [a]	Without relevant disabilities	State and local gov'ts	Total
Educational attainment	34.4	996.9	N/A	N/A	1,031.3
Total benefits	785.1	1,940.0	2,504.4	0.0	5,229.5

[a] For purposes of this table, hearing, cognitive, and manual dexterity disabilities are referred to as ''other relevant disabilities.''

TABLE 11—10-YEAR AVERAGE ANNUALIZED BENEFITS, 7 PERCENT DISCOUNT RATE

[Millions]

Benefit type	Visual disability	Other relevant disability [a]	Without relevant disabilities	State and local gov'ts	Total
Time savings—current users	$668.1	$839.4	$2,229.0	N/A	$3,736.6
Time savings—mobile apps	62.7	78.7	209.0	N/A	350.4
Educational attainment	31.4	910.8	N/A	N/A	942.2
Total benefits	762.2	1,828.9	2,438.0	0.0	5,029.2

[a] For purposes of this table, hearing, cognitive, and manual dexterity disabilities are referred to as ''other relevant disabilities.''

TABLE 12—10-YEAR AVERAGE ANNUALIZED COMPARISON OF COSTS AND BENEFITS

Figure	3% Discount rate	7% Discount rate
Average annualized costs (millions)	$3,331.3	$3,515.0
Average annualized benefits (millions)	$5,229.5	$5,029.2
Net benefits (millions)	$1,898.2	$1,514.2
Cost-to-benefit ratio	0.6	0.7

B. Final Regulatory Flexibility Analysis Summary

The Department has prepared a FRFA to comply with its obligations under the Regulatory Flexibility Act and related laws and Executive Orders requiring executive branch agencies to consider the effects of regulations on small entities.[95] The Department's FRFA includes an explanation of steps that the Department has taken to minimize the impact of this rule on small entities, responses to a comment by the Chief Counsel for Advocacy of the Small Business Administration, a description of impacts of this rule on small entities, alternatives the Department considered related to small entities, and other information required by the RFA. The Department includes a short summary of some monetized cost and benefit findings made in the FRFA below, but the full FRFA will be published along with the Department's FRIA, and it will be made available to the public at *https://www.justice.gov/crt/disability-rights-section*.

The Department calculated both costs and benefits to small government entities as part of its FRFA. The Department also compared costs to revenues for small government entities to evaluate the economic impact to these small government entities. The costs for each small government entity type and size are generally estimated to be below 1 percent of revenues (the one exception is small independent community colleges, for which the cost-to-revenue ratio is 1.05 percent and 1.10 percent using a 3 percent and 7 percent discount rate, respectively),[96] so the Department does not believe the rule will be unduly burdensome or costly for public entities.[97] These costs include one-time costs for familiarization with the requirements of the rule, the purchase of software to assist with remediation of web content or mobile apps, the time spent testing and remediating web content and mobile apps to comply with WCAG 2.1 Level AA, and elementary, secondary, and postsecondary education course content remediation. Annual costs include recurring costs for software licenses and remediation of future content.

Costs to small entities are displayed in Table 13 and Table 14; Table 15 contains the costs and revenues per government type and cost-to-revenue

[95] *See* U.S. Small Bus. Admin., *A Guide for Government Agencies: How To Comply with the Regulatory Flexibility Act,* at 19 (Aug. 2017), *https://advocacy.sba.gov/wp-content/uploads/2019/07/How-to-Comply-with-the-RFA-WEB.pdf* [*https://perma.cc/PWL9-ZTW6*].

[96] However, the Department notes that revenue for small independent community colleges was estimated using the 2012 Census of Governments, so revenue for small independent community colleges would likely be underestimated if small independent community colleges had a greater share of total local government revenue in 2022 than in 2012. If this were true, the Department expects that the cost-to-revenue ratio for small independent community colleges would be lower.

[97] As a point of reference, the United States Small Business Administration advises agencies that a potential indicator that the impact of a regulation may be ''significant'' is whether the costs exceed 1 percent of the gross revenues of the entities in a particular sector, although the threshold may vary based on the particular types of entities at issue. *See* U.S. Small Bus. Admin., *A Guide for Government Agencies: How To Comply with the Regulatory Flexibility Act,* at 19 (Aug. 2017), *https://advocacy.sba.gov/wp-content/uploads/2019/07/How-to-Comply-with-the-RFA-WEB.pdf* [*https://perma.cc/PWL9-ZTW6*]; *see also* U.S. Env't Prot. Agency, EPA's Action Dev. Process: *Final Guidance for EPA Rulewriters: Regulatory Flexibility Act,* at 24 (Nov. 2006), *https://www.epa.gov/sites/default/files/2015-06/documents/guidance-regflexact.pdf* [*https://perma.cc/9XFZ-3EVA*] (providing an illustrative example of a hypothetical analysis under the RFA in which, for certain small entities, economic impact of ''[l]ess than 1% for all affected small entities'' may be ''[p]resumed'' to have ''no significant economic impact on a substantial number of small entities'').

ratios using a 3 percent and 7 percent discount rate. Because the Department's cost estimates take into account different small entity types and sizes, the Department believes the estimates in this analysis are generally representative of what smaller entities of each type should expect to pay. This is because the Department's methodology generally estimated costs based on the sampled baseline accessibility to full accessibility in accordance with this rule, which provides a precise estimate of the costs within each government type and size. While the Department recognizes that there may be variation in costs for differently sized small entity types, the Department's estimates are generally representative given the precision in our methodology within each stratified group. The Department received several comments on its estimates for small government entity costs. A summary of those comments and the Department's responses are included in the accompanying FRFA.

TABLE 13—PRESENT VALUE OF TOTAL 10-YEAR COSTS PER ENTITY, 3% DISCOUNT RATE

Type of government entity	Number of entities	Regulatory familiarization	Website testing and remediation	Mobile app testing and remediation	Postsecondary course remediation	Primary and secondary course remediation	Third-Party website remediation	Total
Special district	38,542	$320	$16,452	$0	N/A	N/A	$790	$17,561
County (small)	2,105	320	52,893	12,022	N/A	$19,949	5,743	90,927
Municipality (small)	18,729	320	161,722	0	N/A	876	8,957	171,875
Township (small)	16,097	320	132,260	0	N/A	2,198	7,695	142,472
School district (small)	11,443	320	168,261	27,634	N/A	81,971	7,648	285,834
U.S. Territory (small)	2	320	1,026,731	68,209	N/A	N/A	6,160	1,101,420
Community College	1,146	320	1,020,862	15,916	$3,617,001	N/A	67,409	4,721,508

TABLE 14—PRESENT VALUE OF TOTAL 10-YEAR COSTS PER ENTITY, 7% DISCOUNT RATE

Type of government entity	Number of entities	Regulatory familiarization	Website testing and remediation	Mobile app testing and remediation	Postsecondary course remediation	Primary and secondary course remediation	Third-Party website remediation	Total
Special district	38,542	$308	$14,226	$0	N/A	N/A	$683	$15,217
County (small)	2,105	308	45,992	11,147	N/A	$17,463	4,993	79,904
Municipality (small)	18,729	308	140,772	0	N/A	767	7,797	149,643
Township (small)	16,097	308	115,101	0	N/A	1,924	6,697	124,029
School district (small)	11,443	308	146,475	25,624	N/A	71,758	6,658	250,822
U.S. Territory (small)	2	308	894,141	63,264	N/A	N/A	5,365	963,078
Community College	1,146	308	900,471	15,031	$3,099,245	N/A	59,460	4,074,515

TABLE 15—NUMBER OF SMALL ENTITIES AND RATIO OF COSTS TO GOVERNMENT REVENUES

Government type	Number of small entities	Average annual cost per entity (3%) [a] [c]	Average annual cost per entity (7%) [a] [c]	Total 10-year average annual costs (3%) (millions)	Total 10-year average annual costs (7%) (millions)	Annual revenue (millions)	Ratio of costs to revenue (3%)	Ratio of costs to revenue (7%)
County	2,105	$10,659.4	$11,376.5	$22.4	$23.9	$69,686.3	0.03	0.03
Municipality	18,729	20,149.0	21,305.8	377.4	399.0	197,708.7	0.19	0.20
Township	16,097	16,666.1	17,616.8	268.3	283.6	59,802.5	0.45	0.47
Special district	38,542	2,058.7	2,166.5	79.3	83.5	298,338.3	0.03	0.03
School district [a]	11,443	36,023.7	38,347.6	412.2	438.8	354,350.5	0.12	0.12
U.S. territory	2	129,120.0	137,120.7	0.3	0.3	992.6	0.03	0.03
CCs [b]	960	553,504.8	580,119.2	531.4	556.9	N/A	N/A	N/A
CCs—independent	231	553,504.8	580,119.2	127.9	134.0	12,149.5	1.05	1.10
Total (includes all CCs)	87,878	19,245.7	20,324.4	1,691.3	1,786.1	N/A	N/A	N/A
Total (only independent CCs)	87,149	14,776.6	15,641.7	1,287.8	1,363.2	993,028.5	0.13	0.14

[a] Excludes community colleges, which are costed separately.
[b] Includes all dependent community college districts and small independent community college districts. Revenue data are not available for the dependent community college districts.
[c] This cost consists of regulatory familiarization costs, government website testing and remediation costs, mobile app testing and remediation costs, postsecondary education course remediation costs, elementary and secondary education course remediation costs, and costs for third-party websites averaged over ten years.

Though not included in the Department's primary benefits analysis due to methodological limitations, the Department estimated time savings for State and local government entities from reduced contacts (*i.e.,* fewer interactions assisting residents). Improved web accessibility will lead some individuals who accessed government services via the phone, mail, or in person to begin using the public entity's website to complete the task. This will generate time savings for government employees. In the Department's FRFA, the Department estimates that this will result in time savings to small governments of $192.6 million per year once full implementation is complete. Assuming lower benefits during the implementation period results in average annualized benefits of $162.5 million and $158.1 million to small governments using a 3 percent and 7 percent discount rate, respectively. The Department notes that these benefits rely on assumptions for which the Department could not find reliable data, and stresses the uncertainty of these estimates given the strong assumptions made.

The Department explains in greater detail its efforts to minimize the economic impact on small entities, as well as estimates of regulatory alternatives that the Department considered to reduce those impacts in

the full FRFA accompanying this rule. The FRFA also includes other information such as the Department's responses to the comment from the Chief Counsel for Advocacy of the Small Business Administration and responses to other comments related to the rule's impact on small entities. Finally, the Department will issue a small entity compliance guide,[98] which should help public entities better understand their obligations under this rule.

C. Executive Order 13132: Federalism

Executive Order 13132 requires executive branch agencies to consider whether a proposed rule will have federalism implications.[99] That is, the rulemaking agency must determine whether the rule is likely to have substantial direct effects on State and local governments, on the relationship between the Federal Government and the States and localities, or on the distribution of power and responsibilities among the different levels of government. If an agency believes that a proposed rule is likely to have federalism implications, it must consult with State and local government entity officials about how to minimize or eliminate the effects.

Title II of the ADA covers State and local government entity services, programs, and activities, and, therefore, has federalism implications. State and local government entities have been subject to the ADA since 1991, and the many State and local government entities that receive Federal financial assistance have also been required to comply with the requirements of section 504 of the Rehabilitation Act. Hence, the ADA and the title II regulation are not novel for State and local government entities.

In crafting this regulation, the Department has been mindful of its obligation to meet the objectives of the ADA while also minimizing conflicts between State law and Federal interests. Since the Department began efforts to issue a web accessibility regulation more than 13 years ago, the Department has received substantial feedback from State and local government entities about the potential impacts of rulemaking on this topic. In the NPRM, the Department solicited comments from State and local officials and their representative national organizations on the rule's effects on State and local government entities, and on whether the rule may have direct effects on the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government. The Department also attended three listening sessions on the NPRM hosted by the SBA's Office of Advocacy, the Association on Higher Education and Disability, and the Great Lakes ADA Center at the University of Illinois at Chicago, in conjunction with the ADA National Network. These sessions were cumulatively attended by more than 500 members of the public, including representatives from public entities, and the Department received feedback during these sessions about the potential impacts of the rule on public entities.

In response to the NPRM, the Department received written comments from members of the public about the relationship between this rule and State and local laws addressing public entities' web content and mobile apps. Some commenters asked questions and made comments about how this rule would interact with State laws providing greater or less protection for the rights of individuals with disabilities. The Department wishes to clarify that, consistent with 42 U.S.C. 12201, this final rule will preempt State laws affecting entities subject to the ADA only to the extent that those laws provide less protection for the rights of individuals with disabilities. This rule does not invalidate or limit the remedies, rights, and procedures of any State laws that provide greater or equal protection for the rights of individuals with disabilities. Moreover, the Department's provision on equivalent facilitation at § 35.203 provides that nothing prevents a public entity from using designs, methods, or techniques as alternatives to those prescribed in this rule, provided that such alternatives result in substantially equivalent or greater accessibility and usability. Accordingly, for example, if a State law requires public entities in that State to conform to WCAG 2.2, nothing in this rule would prevent a public entity from complying with that standard.

The Department also received comments asking how this rule will interact with State or local laws requiring public entities to post certain content online. The Department notes that this rule does not change public entities' obligations under State and local laws governing the types of content that public entities must provide or make available online. Instead, this rule simply requires that when public entities provide or make available web content or mobile apps, they must ensure that that content and those apps comply with the requirements set forth in this rule. This is consistent with the remainder of the title II regulatory framework, under which public entities have been required to ensure that their services, programs, and activities comply with specific accessibility requirements since 1991, even for services, programs, or activities that are otherwise governed by State and local laws.

D. National Technology Transfer and Advancement Act of 1995

The National Technology Transfer and Advancement Act of 1995 (''NTTAA'') directs that, as a general matter, all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, which are private—generally nonprofit—organizations that develop technical standards or specifications using well-defined procedures that require openness, balanced participation among affected interests and groups, fairness and due process, and an opportunity for appeal, as a means to carry out policy objectives or activities.[100] In addition, the NTTAA directs agencies to consult with voluntary, private sector, consensus standards bodies and requires that agencies participate with such bodies in the development of technical standards when such participation is in the public interest and is compatible with agency and departmental missions, authorities, priorities, and budget resources.[101]

The Department is adopting WCAG 2.1 Level AA as the accessibility standard to apply to web content and mobile apps of title II entities. WCAG 2.1 Level AA was developed by W3C, which has been the principal international organization involved in developing protocols and guidelines for the web. W3C develops a variety of technical standards and guidelines, including ones relating to privacy, internationalization of technology, and accessibility. Thus, the Department is complying with the NTTAA in selecting WCAG 2.1 Level AA as the applicable accessibility standard.

E. Plain Language Instructions

The Department makes every effort to promote clarity and transparency in its rulemaking. In any regulation, there is a tension between drafting language that is simple and straightforward and

[98] *See* Public Law 104–121, sec. 212, 110 Stat. 847, 858 (1996) (5 U.S.C. 601 note).

[99] 64 FR 43255 (Aug. 4, 1999).

[100] Public Law 104–113, sec. 12(d)(1) (15 U.S.C. 272 note); *see also* Office of Mgmt. and Budget, Circular A–119 (Jan 27, 2016), *https://www.whitehouse.gov/wp-content/uploads/2020/07/revised_circular_a-119_as_of_1_22.pdf* [*https://perma.cc/A5LP-X3DB*].

[101] Public Law 104–113, sec. 12(d)(2).

drafting language that gives full effect to issues of legal interpretation. The Department operates a toll-free ADA Information Line at (800) 514–0301 (voice); 1–833–610–1264 (TTY) that the public is welcome to call for assistance understanding anything in this rule. In addition, the ADA.gov website strives to provide information in plain language about the law, including this rule. The Department will also issue a small entity compliance guide,[102] which should help public entities better understand their obligations under this rule.

F. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (''PRA''), no person is required to respond to a ''collection of information'' unless the agency has obtained a control number from OMB.[103] This final rule does not contain any collections of information as defined by the PRA.

G. Unfunded Mandates Reform Act

Section 4(2) of the Unfunded Mandates Reform Act of 1995 [104] excludes from coverage under that Act any proposed or final Federal regulation that ''establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.'' Accordingly, this rulemaking is not subject to the provisions of the Unfunded Mandates Reform Act.

H. Incorporation by Reference

As discussed above, through this rule, the Department is adopting the internationally recognized accessibility standard for web access, WCAG 2.1 Level AA, published in June 2018, as the technical standard for web and mobile app accessibility under title II of the ADA. WCAG 2.1 Level AA, published by W3C WAI, specifies success criteria and requirements that make web content more accessible to all users, including individuals with disabilities. The Department incorporates WCAG 2.1 Level AA by reference into this rule, instead of restating all of its requirements verbatim. To the extent there are distinctions between WCAG 2.1 Level AA and the standards articulated in this rule, the standards articulated in this rule prevail.

The Department notes that when W3C publishes new versions of WCAG, those versions will not be automatically incorporated into this rule. Federal agencies do not incorporate by reference into published regulations future versions of standards developed by bodies like W3C. Federal agencies are required to identify the particular version of a standard incorporated by reference in a regulation.[105] When an updated version of a standard is published, an agency must revise its regulation if it seeks to incorporate any of the new material.

WCAG 2.1 Level AA is reasonably available to interested parties. Free copies of WCAG 2.1 Level AA are available online on W3C's website at *https://www.w3.org/TR/2018/REC-WCAG21-20180605/* and *https://perma.cc/UB8A-GG2F.* In addition, a copy of WCAG 2.1 Level AA is also available for inspection by appointment at the Disability Rights Section, Civil Rights Division, U.S. Department of Justice, 150 M St. NE, 9th Floor, Washington, DC 20002.

I. Congressional Review Act

In accordance with the Congressional Review Act, the Department has determined that this rule is a major rule as defined by 5 U.S.C. 804(2). The Department will submit this final rule and other appropriate reports to Congress and the Government Accountability Office for review.

List of Subjects for 28 CFR Part 35

Administrative practice and procedure, Civil rights, Communications, Incorporation by reference, Individuals with disabilities, State and local requirements.

By the authority vested in me as Attorney General by law, including 5 U.S.C. 301; 28 U.S.C. 509, 510; sections 201 and 204 of the of the Americans with Disabilities Act, Public Law 101–336, as amended, and section 506 of the ADA Amendments Act of 2008, Public Law 110–325, and for the reasons set forth in appendix D to 28 CFR part 35, chapter I of title 28 of the Code of Federal Regulations is amended as follows—

PART 35—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES

■ 1. The authority citation for part 35 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12134, 12131, and 12205a.

Subpart A—General

■ 2. Amend § 35.104 by adding definitions for ''Archived web content,'' ''Conventional electronic documents,'' ''Mobile applications (apps),'' ''Special district government,'' ''Total population,'' ''User agent,'' ''WCAG 2.1,'' and ''Web content'' in alphabetical order to read as follows:

§ 35.104 Definitions.

* * * * *

Archived web content means web content that—

(1) Was created before the date the public entity is required to comply with subpart H of this part, reproduces paper documents created before the date the public entity is required to comply with subpart H, or reproduces the contents of other physical media created before the date the public entity is required to comply with subpart H;

(2) Is retained exclusively for reference, research, or recordkeeping;

(3) Is not altered or updated after the date of archiving; and

(4) Is organized and stored in a dedicated area or areas clearly identified as being archived.

* * * * *

Conventional electronic documents means web content or content in mobile apps that is in the following electronic file formats: portable document formats (''PDF''), word processor file formats, presentation file formats, and spreadsheet file formats.

* * * * *

Mobile applications (''apps'') means software applications that are downloaded and designed to run on mobile devices, such as smartphones and tablets.

* * * * *

Special district government means a public entity—other than a county, municipality, township, or independent school district—authorized by State law to provide one function or a limited number of designated functions with sufficient administrative and fiscal autonomy to qualify as a separate government and whose population is not calculated by the United States Census Bureau in the most recent decennial Census or Small Area Income and Poverty Estimates.

* * * * *

Total population means—

(1) If a public entity has a population calculated by the United States Census Bureau in the most recent decennial Census, the population estimate for that public entity as calculated by the United States Census Bureau in the most recent decennial Census; or

[102] *See* Public Law 104–121, sec. 212, 110 Stat. 847, 858 (1996) (5 U.S.C. 601 note).

[103] 44 U.S.C. 3501 *et seq.*

[104] 2 U.S.C. 1503(2).

[105] *See, e.g.,* 1 CFR 51.1(f) (''Incorporation by reference of a publication is limited to the edition of the publication that is approved [by the Office of the Federal Register]. Future amendments or revisions of the publication are not included.'').

(2) If a public entity is an independent school district, or an instrumentality of an independent school district, the population estimate for the independent school district as calculated by the United States Census Bureau in the most recent Small Area Income and Poverty Estimates; or

(3) If a public entity, other than a special district government or an independent school district, does not have a population estimate calculated by the United States Census Bureau in the most recent decennial Census, but is an instrumentality or a commuter authority of one or more State or local governments that do have such a population estimate, the combined decennial Census population estimates for any State or local governments of which the public entity is an instrumentality or commuter authority; or

(4) For the National Railroad Passenger Corporation, the population estimate for the United States as calculated by the United States Census Bureau in the most recent decennial Census.

User agent means any software that retrieves and presents web content for users.

* * * * *

WCAG 2.1 means the Web Content Accessibility Guidelines (''WCAG'') 2.1, W3C Recommendation 05 June 2018, *https://www.w3.org/TR/2018/REC-WCAG21-20180605/* and *https://perma.cc/UB8A–GG2F.* WCAG 2.1 is incorporated by reference elsewhere in this part (see §§ 35.200 and 35.202).

Web content means the information and sensory experience to be communicated to the user by means of a user agent, including code or markup that defines the content's structure, presentation, and interactions. Examples of web content include text, images, sounds, videos, controls, animations, and conventional electronic documents.

■ 3. Add subpart H to read as follows:

Subpart H—Web and Mobile Accessibility

Sec.

§ 35.200 Requirements for web and mobile accessibility.

(a) *General.* A public entity shall ensure that the following are readily accessible to and usable by individuals with disabilities:

(1) Web content that a public entity provides or makes available, directly or through contractual, licensing, or other arrangements; and

(2) Mobile apps that a public entity provides or makes available, directly or through contractual, licensing, or other arrangements.

(b) *Requirements.* (1) Beginning April 24, 2026, a public entity, other than a special district government, with a total population of 50,000 or more shall ensure that the web content and mobile apps that the public entity provides or makes available, directly or through contractual, licensing, or other arrangements, comply with Level A and Level AA success criteria and conformance requirements specified in WCAG 2.1, unless the public entity can demonstrate that compliance with this section would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.

(2) Beginning April 26, 2027, a public entity with a total population of less than 50,000 or any public entity that is a special district government shall ensure that the web content and mobile apps that the public entity provides or makes available, directly or through contractual, licensing, or other arrangements, comply with Level A and Level AA success criteria and conformance requirements specified in WCAG 2.1, unless the public entity can demonstrate that compliance with this section would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.

(3) WCAG 2.1 is incorporated by reference into this section with the approval of the Director of the **Federal Register** under 5 U.S.C. 552(a) and 1 CFR part 51. All material approved for incorporation by reference is available for inspection at the U.S. Department of Justice and at the National Archives and Records Administration (''NARA''). Contact the U.S. Department of Justice at: Disability Rights Section, Civil Rights Division, U.S. Department of Justice, 150 M St. NE, 9th Floor, Washington, DC 20002; ADA Information Line: (800) 514–0301 (voice) or 1–833–610–1264 (TTY); website: *www.ada.gov* [*https://perma.cc/U2V5-78KW*]. For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations.html* [*https://perma.cc/9SJ7-D7XZ*] or email *fr.inspection@nara.gov.* The material may be obtained from the World Wide Web Consortium (''W3C'') Web Accessibility Initiative (''WAI''), 401 Edgewater Place, Suite 600, Wakefield, MA 01880; phone: (339) 273–2711; email: *contact@w3.org;* website: *https://www.w3.org/TR/2018/REC-WCAG21-20180605/* and *https://perma.cc/UB8A-GG2F.*

§ 35.201 Exceptions.

The requirements of § 35.200 do not apply to the following:

(a) *Archived web content.* Archived web content as defined in § 35.104.

(b) *Preexisting conventional electronic documents.* Conventional electronic documents that are available as part of a public entity's web content or mobile apps before the date the public entity is required to comply with this subpart, unless such documents are currently used to apply for, gain access to, or participate in the public entity's services, programs, or activities.

(c) *Content posted by a third party.* Content posted by a third party, unless the third party is posting due to contractual, licensing, or other arrangements with the public entity.

(d) *Individualized, password-protected or otherwise secured conventional electronic documents.* Conventional electronic documents that are:

(1) About a specific individual, their property, or their account; and

(2) Password-protected or otherwise secured.

(e) *Preexisting social media posts.* A public entity's social media posts that were posted before the date the public entity is required to comply with this subpart.

§ 35.202 Conforming alternate versions.

(a) A public entity may use conforming alternate versions of web content, as defined by WCAG 2.1, to comply with § 35.200 only where it is not possible to make web content directly accessible due to technical or legal limitations.

(b) WCAG 2.1 is incorporated by reference into this section with the approval of the Director of the **Federal Register** under 5 U.S.C. 552(a) and 1 CFR part 51. All material approved for incorporation by reference is available for inspection at the U.S. Department of Justice and at NARA. Contact the U.S. Department of Justice at: Disability Rights Section, Civil Rights Division, U.S. Department of Justice, 150 M St. NE, 9th Floor, Washington, DC 20002; ADA Information Line: (800) 514–0301 (voice) or 1–833–610–1264 (TTY); website: *www.ada.gov* [*https://*

perma.cc/U2V5-78KW]. For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations.html* [*https://perma.cc/9SJ7-D7XZ*] or email *fr.inspection@nara.gov.* The material may be obtained from W3C WAI, 401 Edgewater Place, Suite 600, Wakefield, MA 01880; phone: (339) 273–2711; email: *contact@w3.org;* website: *https://www.w3.org/TR/2018/REC-WCAG21-20180605/* and *https://perma.cc/UB8A-GG2F.*

§ 35.203 Equivalent facilitation.

Nothing in this subpart prevents the use of designs, methods, or techniques as alternatives to those prescribed, provided that the alternative designs, methods, or techniques result in substantially equivalent or greater accessibility and usability of the web content or mobile app.

§ 35.204 Duties.

Where a public entity can demonstrate that compliance with the requirements of § 35.200 would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens, compliance with § 35.200 is required to the extent that it does not result in a fundamental alteration or undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with § 35.200 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or their designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity to the maximum extent possible.

§ 35.205 Effect of noncompliance that has a minimal impact on access.

A public entity that is not in full compliance with the requirements of § 35.200(b) will be deemed to have met the requirements of § 35.200 in the limited circumstance in which the public entity can demonstrate that the noncompliance has such a minimal impact on access that it would not affect the ability of individuals with disabilities to use the public entity's web content or mobile app to do any of the following in a manner that provides substantially equivalent timeliness, privacy, independence, and ease of use:

(a) Access the same information as individuals without disabilities;

(b) Engage in the same interactions as individuals without disabilities;

(c) Conduct the same transactions as individuals without disabilities; and

(d) Otherwise participate in or benefit from the same services, programs, and activities as individuals without disabilities.

§§ 35.206–35.209 [Reserved]

■ 4. Add appendix D to part 35 to read as follows:

Appendix D to Part 35—Guidance to Revisions to ADA Title II Regulation on Accessibility of Web Information and Services of State and Local Government Entities

Note: This appendix contains guidance providing a section-by-section analysis of the revisions to this part published on April 24, 2024.

Section-by-Section Analysis and Response to Public Comments

This appendix provides a detailed description of the Department's changes to this part (the title II regulation), the reasoning behind those changes, and responses to public comments received in connection with the rulemaking. The Department made changes to subpart A of this part and added subpart H to this part. The section-by-section analysis addresses the changes in the order they appear in the title II regulation.

Subpart A—General

Section 35.104 Definitions

''**Archived Web Content**''

The Department is including in § 35.104 a definition for ''archived web content.'' ''Archived web content'' is defined as web content that was created before the date the public entity is required to comply with subpart H of this part, reproduces paper documents created before the date the public entity is required to comply with subpart H, or reproduces the contents of other physical media created before the date the public entity is required to comply with subpart H. Second, the web content is retained exclusively for reference, research, or recordkeeping. Third, the web content is not altered or updated after the date of archiving. Fourth, the web content is organized and stored in a dedicated area or areas clearly identified as being archived. The definition is meant to capture historic web content that, while outdated or superfluous, is maintained unaltered in a dedicated archived area for reference, research, or recordkeeping. The term is used in the exception set forth in § 35.201(a). The Department provides a more detailed explanation of the application of the exception in the section-by-section analysis of § 35.201(a).

The Department made several revisions to the definition of ''archived web content'' from the notice of proposed rulemaking (''NPRM''). The Department added a new part to the definition to help clarify the scope of content covered by the definition and associated exception. The new part of the definition, the first part, specifies that archived web content is limited to three types of historic content: web content that was created before the date the public entity is required to comply with subpart H of this part; web content that reproduces paper documents created before the date the public entity is required to comply with subpart H; and web content that reproduces the contents of other physical media created before the date the public entity is required to comply with subpart H.

Web content that was created before the date a public entity is required to comply with subpart H of this part satisfies the first part of the definition. In determining the date web content was created, the Department does not intend to prohibit public entities from making minor adjustments to web content that was initially created before the relevant compliance dates specified in § 35.200(b), such as by redacting personally identifying information from web content as necessary before it is posted to an archive, even if the adjustments are made after the compliance date. In contrast, if a public entity makes substantial changes to web content after the date the public entity is required to comply with subpart H, such as by adding, updating, or rearranging content before it is posted to an archive, the content would likely no longer meet the first part of the definition. If the public entity later alters or updates the content after it is posted in an archive, the content would not meet the third part of the definition of ''archived web content'' and it would generally need to conform to WCAG 2.1 Level AA.

Web content that reproduces paper documents or that reproduces the contents of other physical media would also satisfy the first part of the definition if the paper documents or the contents of the other physical media were created before the date the public entity is required to comply with subpart H of this part. Paper documents include various records that may have been printed, typed, handwritten, drawn, painted, or otherwise marked on paper. Videotapes, audiotapes, film negatives, CD–ROMs, and DVDs are examples of physical media. The Department anticipates that public entities may identify or discover historic paper documents or historic content contained on physical media that they wish to post in an online archive following the time they are required to comply with subpart H. For example, a State agricultural agency might move to a new building after the date it is required to comply with subpart H and discover a box in storage that contains

hundreds of paper files and photo negatives from 1975 related to farms in the state at that time. If the agency reproduced the documents and photos from the film negatives as web content, such as by scanning the documents and film negatives and saving the scans as PDF documents that are made available online, the resulting PDF documents would meet the first part of the definition of ''archived web content'' because the underlying paper documents and photos were created in 1975. The Department reiterates that it does not intend to prohibit public entities from making minor adjustments to web content before posting it to an archive, such as by redacting personally identifying information from paper documents. Therefore, the State agricultural agency could likely redact personally identifying information about farmers from the scanned PDFs as necessary before posting them to its online archive. But, if the agency were to make substantial edits to PDFs, such as by adding, updating, or rearranging content before posting the PDFs to its archive, the PDFs would likely not meet the first part of the definition of ''archived web content'' because, depending on the circumstances, they may no longer be a reproduction of the historic content. In addition, if the agency later altered or updated the PDFs after they were posted in an archive, the content would not meet the third part of the definition of ''archived web content'' and it would generally need to conform to WCAG 2.1 Level AA.

The Department added the first part to the definition of ''archived web content'' after considering all the comments it received. In the NPRM, the Department sought feedback about the archived web content exception, including whether there are alternatives to the exception that the Department should consider or additional limitations that should be placed on the exception.[1] Commenters suggested various ways to add a time-based limitation to the definition or exception. For example, some commenters suggested that archived content should be limited to content created or posted before a certain date, such as the date a public entity is required to comply with subpart H of this part; there should be a certain time period before web content can be archived, such as two years after the content is created or another time frame based on applicable laws related to public records; the exception should expire after a certain period of time; or public entities should have to remediate archived web content over time, prioritizing content that is most important for members of the public. In contrast, another commenter suggested that the exception should apply to archived web content posted after the date the public entity is required to comply with subpart H if the content is of historical value and only minimally altered before posting.

After reviewing the comments, the Department believes the first part of the definition sets an appropriate time-based limitation on the scope of content covered by the definition and exception that is consistent with the Department's stated intent in the NPRM. In the NPRM, the Department explained that the definition of ''archived web content'' and the associated exception were intended to cover historic content that is outdated or superfluous.[2] The definition in § 35.104, which is based on whether the relevant content was created before the date a public entity is required to comply with subpart H of this part, is now more aligned with, and better situated to implement, the Department's intent to cover historic content. The Department believes it is appropriate to include a time-based limitation in the definition, rather than to add new criteria stating that content must be historic, outdated, or superfluous, because it is more straightforward to differentiate content based on the date the content was created. Therefore, there will be greater predictability for individuals with disabilities and public entities as to which content is covered by the exception.

The Department declines to establish time-based limitations for when content may be posted to an archive or to otherwise set an expiration date for the exception. As discussed elsewhere in this appendix, the Department recognizes that many public entities will need to carefully consider the design and structure of their web content before dedicating a certain area or areas for archived content, and that, thereafter, it will take time for public entities to identify all content that meets the definition of ''archived web content'' and post it in the newly created archived area or areas. The archived web content exception thus provides public entities flexibility as to when they will archive web content, so long as the web content was created before the date the public entity was required to comply with subpart H of this part or the web content reproduces paper documents or the contents of other physical media created before the date the public entity was required to comply with subpart H. In addition, the Department does not believe it is necessary to establish a waiting period before newly created web created content can be posted in an archive. New content created after the date a public entity is required to comply with subpart H will generally not meet the first part of the definition of ''archived web content.'' In the limited circumstances in which newly created web content could meet the first part of the definition because it reproduces paper documents or the contents of other physical media created before the date the public entity is required to comply with subpart H, the Department believes the scope of content covered by the exception is sufficiently limited by the second part of the definition: whether the content is retained exclusively for reference, research, or recordkeeping.

In addition to adding a new first part to the definition of ''archived web content,'' the Department made one further change to the definition from the NPRM. In the NPRM, what is now the second part of the definition pertained to web content that is ''maintained'' exclusively for reference, research, or recordkeeping. The word ''maintained'' is now replaced with ''retained.'' The revised language is not intended to change or limit the coverage of the definition. Rather, the Department recognizes that the word ''maintain'' can have multiple relevant meanings. In some circumstances, ''maintain'' may mean ''to continue in possession'' of property, whereas in other circumstances it might mean ''to engage in general repair and upkeep'' of property.[3] The Department uses the word ''maintain'' elsewhere in the title II regulation, at § 35.133(a), consistent with the latter definition. In contrast, the third part of the definition for ''archived web content'' specifies that content must not be altered or updated after the date of archiving. Such alterations or updates could be construed as repair or upkeep, but that is not what the Department intended to convey with its use of the word ''maintained'' in this provision. To avoid confusion about whether a public entity can alter or update web content after it is archived, the Department instead uses the word ''retained,'' which has a definition synonymous with the Department's intended use of ''maintain'' in the NPRM.[4]

Commenters raised concerns about several aspects of the definition of ''archived web content.'' With respect to the second part of the definition, commenters stated that the definition does not clearly articulate when content is retained exclusively for reference, research, or recordkeeping. Commenters stated that the definition could be interpreted inconsistently, and it could be understood to cover important information that should be accessible. For example, commenters were concerned that web content containing public entities' past meeting minutes where key decisions were made would qualify as archived content, as well as web content containing laws, regulations, court decisions, or prior legal interpretations that are still relevant. Therefore, commenters suggested that the definition should not cover recordkeeping documents, agendas, meeting minutes, and other related documents at all. One commenter recommended adding to the definition to clarify that it does not apply to content a public entity uses to offer a current service, program, or activity, and another commenter suggested that content should be archived depending on how frequently members of the public seek to access the content. One commenter also stated that the Department is left with the responsibility to determine whether web content is appropriately designated as archived when enforcing subpart H of this part in the future, and the commenter believed that this enforcement may be insufficient to avoid public entities evading their responsibilities under subpart H. Another commenter recommended that the Department should conduct random audits to determine if public entities are properly designating archived web content.

The Department's revised definition of ''archived web content,'' and specifically the new first part of the definition, make clear that the definition only pertains to content created before the date the public entity is

[1] 88 FR 51967.

[2] 88 FR 51966.

[3] *Maintain,* Black's Law Dictionary (11th ed. 2019).

[4] *See Retain,* Black's Law Dictionary (11th ed. 2019) (''To hold in possession or under control; to keep and not lose, part with, or dismiss.'').

required to comply with subpart H of this part. Therefore, new content such as agendas, meeting minutes, and other documents related to meetings that take place after the public entity is required to comply with subpart H would likely not meet all parts of the definition of ''archived web content.'' This revision to the regulatory text is responsive to comments raising the concern that current and newly created content might be erroneously labeled as archived based on perceived ambiguity surrounding when content is being retained solely for ''reference, research, or recordkeeping.'' Given the wide variety of web content that public entities provide or make available, the Department does not believe it is advisable to add additional, more specific language in the definition about what types of content are covered. The Department also believes it would be difficult to create a more specific and workable definition for ''archived web content'' based on how frequently members of the public seek to view certain content given the wide variation in the types and sizes of public entities and the volume of their web traffic. Whether web content is retained exclusively for reference, research, or recordkeeping will depend on the facts of the particular situation. Based on some of the examples of web content that commenters discussed in connection with the definition, the Department notes that if a public entity posts web content that identifies the current policies or procedures of the public entity, or posts web content containing or interpreting applicable laws or regulations related to the public entity, that web content is unlikely to be covered by the exception. This is because the content is notifying members of the public about their ongoing rights and responsibilities. It therefore is not, as the definition requires, being used exclusively for reference, research, or recordkeeping.

Commenters also raised concerns about the fourth part of the definition of ''archived web content,'' which requires archived web content to be stored in a dedicated area or areas clearly identified as being archived. Some commenters did not believe public entities should be required to place archived web content in a dedicated area or areas clearly identified as being archived in order to be covered by the exception at § 35.201(a). Commenters stated that public entities should retain flexibility in organizing and storing files according to how their web content is designed and structured, and it might not be clear to members of the public to look for content in an archive depending on the overall makeup of the web content. Commenters also stated that it would be burdensome to create an archive area, identify web content for the archive, and move the content into the archive. One commenter stated that public entities might remove content rather than move it to a dedicated archive. Commenters instead suggested that the web content itself could be individually marked as archived regardless of where it is posted. One commenter also requested the Department clarify that the term ''area'' includes ''websites'' and ''repositories'' where archived web content is stored.

After carefully weighing these comments, the Department has decided not to change the fourth part of the definition for ''archived web content.'' The Department believes storing archived web content in a dedicated area or areas clearly identified as being archived will result in the greatest predictability for individuals with disabilities about which web content they can expect to conform to WCAG 2.1 Level AA. However, the Department notes that it did not identify specific requirements about the structure of an archived area, or how to clearly identify an area as being archived, in order to provide public entities greater flexibility when complying with subpart H of this part. For example, in some circumstances a public entity may wish to create separate web pages or websites to store archived web content. In other circumstances, a public entity may wish to clearly identify that a specific section on a specific web page contains archived web content, even if the web page also contains non-archived content in other separate sections. However public entities ultimately decide to store archived web content, the Department reiterates that predictability for individuals with disabilities is paramount. To this end, the label or other identification for a dedicated archived area or areas must be clear so that individuals with disabilities are able to detect when there is content they may not be able to access. Whether a particular dedicated area is clearly identified as being archived will, of course, depend on the facts of the particular situation. The Department also emphasizes that the existence of a dedicated area or areas for archived content must not interfere with the accessibility of other web content that is not archived.

Some commenters also recommended an alternative definition of ''archived web content'' that does not include the second or fourth parts of the definition. Commenters proposed that archived web content should be defined as web content that (1) was provided or made available prior to the effective date of the final rule and (2) is not altered or updated after the effective date of the final rule. While the Department agrees that a time-based distinction is appropriate and has therefore added the first part to the definition, the Department does not believe the commenters' approach suggested here is advisable because it has the potential to cause a significant accessibility gap for individuals with disabilities if public entities rely on web content that is not regularly updated or changed. Under the commenters' proposed definition, the exception for archived web content might cover important web content used for reasons other than reference, research, or recordkeeping if the content has not been updated or altered. As discussed in more detail in the section-by-section analysis of § 35.201(a), the purpose of the exception for archived web content is to help public entities focus their resources on making accessible the most important materials that people use most widely and consistently, rather than historic or outdated web content that is only used for reference, research, or recordkeeping. Furthermore, as discussed in the preceding paragraph, the Department believes the fourth part of the definition is necessary to ensure the greatest predictability for individuals with disabilities about which web content they can expect to conform to WCAG 2.1 Level AA.

Commenters made other suggestions related to the definition of and exception for ''archived web content.'' The Department has addressed these comments in the discussion of the § 35.201(a) archived web content exception in the section-by-section analysis.

''**Conventional Electronic Documents**''

The Department is including in § 35.104 a definition for ''conventional electronic documents.'' ''Conventional electronic documents'' are defined as web content or content in mobile apps that is in the following electronic file formats: portable document formats, word processor file formats, presentation file formats, and spreadsheet file formats. The definition thus provides an exhaustive list of electronic file formats that constitute conventional electronic documents. Examples of conventional electronic documents include: Adobe PDF files (*i.e.,* portable document formats), Microsoft Word files (*i.e.,* word processor files), Apple Keynote or Microsoft PowerPoint files (*i.e.,* presentation files), and Microsoft Excel files (*i.e.,* spreadsheet files). The term ''conventional electronic documents'' is used in § 35.201(b) to provide an exception for certain such documents that are available as part of a public entity's web content or mobile apps before the compliance date of subpart H of this part, unless such documents are currently used to apply for, gain access to, or participate in the public entity's services, programs, or activities. The term is also used in § 35.201(d) to provide an exception for certain individualized, password-protected or otherwise secured conventional electronic documents, and is addressed in more detail in the discussion in the section-by-section analysis of § 35.201(b) and (d). The definition of ''conventional electronic documents'' covers documents created or saved as electronic files that are commonly available in an electronic form on public entities' web content and mobile apps and that would have been traditionally available as physical printed output.

In the NPRM, the Department asked whether it should craft a more flexible definition of ''conventional electronic documents'' instead of a definition based on an exhaustive list of file formats.[5] In response, the Department heard a range of views from commenters. Some commenters favored a broader and more generalized definition instead of an exhaustive list of file formats. For example, commenters suggested that the Department could describe the properties of conventional electronic documents and provide a non-exhaustive list of examples of such documents, or the definition could focus on the importance of the content contained in a document rather than the file format. Some commenters favoring a broader definition reasoned that technology evolves rapidly, and the exhaustive list of file formats the Department

[5] 88 FR 51958, 51968.

identified might not keep pace with technological advancements.

Other commenters preferred the Department's approach of identifying an exhaustive list of file formats. Some commenters noted that an exhaustive list provides greater clarity and predictability, which assists public entities in identifying their obligations under subpart H of this part. Some commenters suggested that the Department could provide greater clarity by identifying specific file types in the regulatory text rather than listing file formats (*e.g.,* the Department might specify the Microsoft Word ''.docx'' file type rather than ''word processor file formats'').

After considering all the comments, the Department declines to change its approach to defining conventional electronic documents. The Department expects that a more flexible definition would result in less predictability for both public entities and individuals with disabilities, especially because the Department does not currently have sufficient information about how technology will develop in the future. The Department seeks to avoid such uncertainty because the definition of ''conventional electronic documents'' sets the scope of two exceptions, § 35.201(b) and (d). The Department carefully balanced benefits for individuals with disabilities with the challenges public entities face in making their web content and mobile apps accessible in compliance with subpart H of this part when crafting these exceptions, and the Department does not want to inadvertently expand or narrow the exceptions with a less predictable definition of ''conventional electronic documents.''

Unlike in the NPRM, the definition of ''conventional electronic documents'' does not include database file formats. In the NPRM, the Department solicited comments about whether it should add any file formats to, or remove any file formats from, the definition of ''conventional electronic documents.'' While some commenters supported keeping the list of file formats in the proposed definition as is, the Department also heard a range of views from other commenters. Some commenters, including public entities and trade groups representing public accommodations, urged the Department to add additional file formats to the definition of ''conventional electronic documents.'' For example, commenters recommended adding image files, video files, audio files, and electronic books such as EPUB (electronic publications) or DAISY (Digital Accessible Information System) files. Commenters noted that files in such other formats are commonly made available by public entities and they can be burdensome to remediate. Commenters questioned whether there is a basis for distinguishing between the file formats included in the definition and other file formats not included in the definition.

Other commenters believed the list of file formats included in the proposed definition of ''conventional electronic documents'' was too broad. A number of disability advocacy groups stated that certain document formats included in the definition are generally easily made accessible. Therefore, commenters did not believe such documents should generally fall within the associated exceptions under § 35.201(b) and (d). Some commenters also stated that there could be confusion about accessibility requirements for database files because database files and some spreadsheet files may include data that are not primarily intended to be human-readable. The commenters stated that in many cases such content is instead intended to be opened and analyzed with other special software tools. The commenters pointed out that data that is not primarily intended to be human-readable is equally accessible for individuals with disabilities and individuals without disabilities, and they recommended clarifying that the accessibility requirements do not apply to such data.

Some commenters suggested that certain file formats not included in the definition of ''conventional electronic documents,'' such as images or videos, may warrant different treatment altogether. For example, one public entity stated that it would be better to place images and multimedia in a separate and distinct category with a separate definition and relevant technical standards where needed to improve clarity. In addition, a disability advocacy organization stated that images do not need to be included in the definition and covered by the associated exceptions because public entities can already uniquely exempt this content in some circumstances by marking it as decorative, and it is straightforward for public entities to add meaningful alternative text to important images and photos that are not decorative.

After considering all the comments, the Department agrees that database file formats should not be included in the definition of ''conventional electronic documents.'' The Department now understands that database files may be less commonly available through public entities' web content and mobile apps than other types of documents. To the extent such files are provided or made available by public entities, the Department understands that they would not be readable by either individuals with disabilities or individuals without disabilities if they only contain data that are not primarily intended to be human-readable. Therefore, there would be limited accessibility concerns, if any, that fall within the scope of subpart H of this part associated with documents that contain data that are not primarily intended to be human-readable. Accordingly, the Department believes it could be confusing to include database file formats in the definition. However, the Department notes that while there may be limited accessibility concerns, if any, related to database files containing data that are not primarily intended to be human-readable, public entities may utilize these data to create outputs for web content or mobile apps, such as tables, charts, or graphs posted on a web page, and those outputs would be covered by subpart H unless they fall into another exception.

The Department declines to make additional changes to the list of file formats included in the definition of ''conventional electronic documents.'' After reviewing the range of different views expressed by commenters, the Department believes the current list strikes the appropriate balance between ensuring access for individuals with disabilities and feasibility for public entities so that they can comply with subpart H of this part. The list included in the definition is also aligned with the Department's intention to cover documents that public entities commonly make available in either an electronic form or that would have been traditionally available as physical printed output. If public entities provide and make available files in formats not included in the definition, the Department notes that those other files may qualify for the exception in § 35.201(a) if they meet the definition for ''archived web content,'' or the exception in § 35.201(e) for certain preexisting social media posts if they are covered by that exception's description. To the extent those other files are not covered by one of the exceptions in § 35.201, the Department also notes that public entities would not be required to make changes to those files that would result in a fundamental alteration in the nature of a service, program, or activity, or impose undue financial and administrative burdens, as discussed in the section-by-section analysis of § 35.204.

With respect to the comment suggesting that it would be better to place images and multimedia in a separate and distinct category with a separate definition and relevant technical standards where needed to improve clarity, the Department notes that the WCAG standards were designed to be ''technology neutral.'' [6] This means that they are designed to be broadly applicable to current and future web technologies.[7] Accordingly, the Department believes WCAG 2.1 Level AA is the appropriate standard for other file formats not included in the definition of ''conventional electronic documents'' because WCAG 2.1 was crafted to address those other file formats as well.

The Department also recognizes that, as some commenters pointed out, this part treats conventional electronic documents differently than WCAG 2.1, in that conventional electronic documents are included in the definition of ''web content'' in § 35.104, while WCAG 2.1 does not include those documents in its definition of ''web content.'' The Department addresses these comments in its analysis of the definition of ''web content.''

As discussed in the preceding paragraphs, the scope of the associated exception for preexisting conventional electronic documents, at § 35.201(b), is based on the definition of ''conventional electronic documents.'' The definition applies to conventional electronic documents that are part of a public entity's web content or mobile apps. The exception also applies to ''conventional electronic documents'' that are part of a public entity's web content or mobile apps, but only if the documents were provided or made available before the date

[6] W3C, *Introduction to Understanding WCAG, https://www.w3.org/WAI/WCAG21/Understanding/intro* [*https://perma.cc/XB3Y-QKVU*] (June 20, 2023).

[7] See W3C, *Understanding Techniques for WCAG Success Criteria, https://www.w3.org/WAI/WCAG21/Understanding/understanding-techniques* [*https://perma.cc/AMT4-XAAL*] (June 20, 2023).

the public entity is required to comply with subpart H of this part. The Department received a comment indicating there may not be a logical connection between conventional electronic documents and mobile apps; therefore, according to the comment, the exception should not apply to conventional electronic documents that appear in mobile apps. However, the Department also received comments from disability advocacy organizations and public entities confirming the connection between the two technologies and stating that some mobile apps allow users to access conventional electronic documents. The Department will retain its approach of including ''content in mobile apps'' in the definition of ''conventional electronic documents'' given that the Department agrees that some mobile apps already use conventional electronic documents.

''**Mobile Applications ('apps')**''

Section 35.104 defines ''mobile apps'' as software applications that are downloaded and designed to run on mobile devices, such as smartphones and tablets. For purposes of this part, mobile apps include, for example, native apps built for a particular platform (*e.g.,* Apple iOS, Google Android) or device and hybrid apps using web components inside native apps. This part will retain the definition of ''mobile apps'' from the NPRM without revision.

The Department received very few comments on this definition. One commenter noted that the Department does not appear to consider other technologies that may use mobile apps such as wearable technology. The Department notes that the definition's examples of devices that use mobile apps (*i.e.,* smartphones and tablets) is a non-exhaustive list. Subpart H of this part applies to all mobile apps that a public entity provides or makes available, regardless of the devices on which the apps are used. The definition therefore may include mobile apps used on wearable technology. Accordingly, the proposed rule's definition of ''mobile apps'' will remain unchanged in this part.

''**Special District Government**''

The Department has added a definition for ''special district government.'' The term ''special district government'' is used in § 35.200(b) and is defined in § 35.104 to mean a public entity—other than a county, municipality, township, or independent school district—authorized by State law to provide one function or a limited number of designated functions with sufficient administrative and fiscal autonomy to qualify as a separate government and whose population is not calculated by the United States Census Bureau in the most recent decennial Census or Small Area Income and Poverty Estimates. Because special district governments do not have populations calculated by the United States Census Bureau and are not necessarily affiliated with public entities that do have such populations, their population sizes are unknown. A special district government may include, for example, a mosquito abatement district, utility district, transit authority, water and sewer board, zoning district, or other similar governmental entity that may operate with administrative and fiscal independence. This definition is drawn in part from the U.S. Census Bureau definition [8] for purposes of setting a compliance time frame for a subset of public entities. It is not meant to alter the existing definition of ''public entity'' in § 35.104 in any way. The Department made one grammatical correction in this part to remove an extra ''or'' from the definition as proposed in the NPRM.[9] However, the substance of the definition is unchanged from the Department's proposal in the NPRM.

''**Total Population**''

Section 35.200 provides the dates by which public entities must begin complying with the technical standard. The compliance dates are generally based on a public entity's total population, as defined in this part. The Department has added a definition for ''total population'' in § 35.104. If a public entity has a population calculated by the United States Census Bureau in the most recent decennial Census, the public entity's total population as defined in this part is the population estimate for that public entity as calculated by the United States Census Bureau in the most recent decennial Census. If a public entity is an independent school district, or an instrumentality of an independent school district, the entity's total population as defined in this part is the population estimate for the independent school district as calculated by the United States Census Bureau in the most recent Small Area Income and Poverty Estimates. If a public entity, other than a special district government or an independent school district, does not have a population estimate calculated by the United States Census Bureau in the most recent decennial Census, but is an instrumentality or a commuter authority of one or more State or local governments that do have such a population estimate, the entity's total population as defined in this part is the combined decennial Census population estimates for any State or local governments of which the public entity is an instrumentality or commuter authority. The total population for the National Railroad Passenger Corporation as defined in this part is the population estimate for the United States as calculated by the United States Census Bureau in the most recent decennial Census. The terminology used in the definition of ''total population'' draws from the terminology used in the definition of ''public entity'' in title II of the ADA [10] and the existing title II regulation,[11] and all public entities covered under title II of the ADA are covered by subpart H of this part. This part does not provide a method for calculating the total population of special district governments, because § 35.200 provides that all special district governments have three years following the publication of the final rule to begin complying with the technical standard, without reference to their population.

The regulatory text of this definition has been revised from the NPRM for clarity. The regulatory text of this definition previously provided that ''total population'' generally meant the population estimate for a public entity as calculated by the United States Census Bureau in the most recent decennial Census. Because the decennial Census does not include population estimates for public entities that are independent school districts, the regulatory text in the NPRM made clear that for independent school districts, ''total population'' would be calculated by reference to the population estimates as calculated by the United States Census Bureau in the most recent Small Area Income and Poverty Estimates. In recognition of the fact that some public entities do not have population estimates calculated by the United States Census Bureau, the preamble to the NPRM stated that if a public entity does not have a specific Census-defined population, but belongs to another jurisdiction that does, the population of the entity is determined by the population of the jurisdiction to which the entity belongs.[12] Although the preamble included this clarification, the Department received feedback that the regulatory text of this definition did not make clear how to calculate total population for public entities that do not have populations calculated by the United States Census Bureau. Accordingly, the Department has revised the regulatory text of the definition for clarity.

The revised regulatory text of this definition retains the language from the definition in the NPRM with respect to public entities that have populations calculated in the decennial Census and independent school districts that have populations calculated in the Small Area Income and Poverty Estimates. However, the revised regulatory text of this definition incorporates the approach described in the preamble of the NPRM with respect to how public entities that do not have populations calculated by the United States Census Bureau in the most recent decennial Census can determine their total populations as defined in this part. As the revised definition states, if a public entity, other than a special district government or independent school district, does not have a population estimate calculated by the United States Census Bureau in the most recent decennial Census, but is an instrumentality or a commuter authority of one or more State or local governments that do have such a population estimate, the total population for the public entity is determined by reference to the combined decennial Census population estimates for any State or local governments of which the public entity is an instrumentality or commuter authority. For example, the total population of a county library is the population of the county of which the library is an instrumentality. The revised definition also makes clear that if a public entity is an instrumentality of an independent school district, the instrumentality's population is determined

[8] *See* U.S. Census Bureau, *Special District Governments, https://www.census.gov/glossary/?term=Special+district+governments* [*https://perma.cc/8V43-KKL9*] (last visited Feb. 26, 2024).

[9] 88 FR 52018.

[10] 42 U.S.C. 12131(1).

[11] Section 35.104.

[12] 88 FR 51948, 51949, 51958 (Aug. 4, 2023).

by reference to the population estimate for the independent school district as calculated in the most recent Small Area Income and Poverty Estimates. The revised definition also states that the total population of the National Railroad Passenger Corporation is determined by reference to the population estimate for the United States as calculated by the United States Census Bureau in the most recent decennial Census. The revisions to the definition do not change the scope of this part or the time frames that public entities have to comply with subpart H of this part; they simply provide additional clarity for public entities on how to determine which compliance time frame applies. The Department expects that these changes will help public entities better understand the time frame in which they must begin complying with the technical standard. Further discussion of this topic, including discussion of comments, can be found in the section-by-section analysis of § 35.200, under the heading ''Requirements by Entity Size.''

''**User Agent**''

The Department has added a definition for ''user agent.'' The definition exactly matches the definition of ''user agent'' in WCAG 2.1.[13] WCAG 2.1 includes an accompanying illustration, which clarifies that the definition of ''user agent'' means web browsers, media players, plug-ins, and other programs—including assistive technologies—that help in retrieving, rendering, and interacting with web content.[14]

The Department added this definition to this part to ensure clarity of the term ''user agent,'' now that the term appears in the definition of ''web content.'' As the Department explains further in discussing the definition of ''web content'' in this section-by-section analysis, the Department has more closely aligned the definition of ''web content'' in this part with the definition in WCAG 2.1. Because this change introduced the term ''user agent'' into the title II regulation, and the Department does not believe this is a commonly understood term, the Department has added the definition of ''user agent'' provided in WCAG 2.1 to this part. One commenter suggested that the Department add this definition in this part, and the Department also believes that adding this definition in this part is consistent with the suggestions of many commenters who proposed aligning the definition of ''web content'' with the definition in WCAG 2.1, as explained further in the following section.

''**WCAG 2.1**''

The Department is including a definition of ''WCAG 2.1.'' The term ''WCAG 2.1'' refers to the 2018 version of the voluntary guidelines for web accessibility, known as the Web Content Accessibility Guidelines 2.1 (''WCAG 2.1''). W3C, the principal international organization involved in developing standards for the web, published WCAG 2.1 in June 2018, and it is available at *https://www.w3.org/TR/2018/REC-WCAG21-20180605/* and *https://perma.cc/UB8A-GG2F*. WCAG 2.1 is discussed in more detail in the section-by-section analysis of § 35.200.

''**Web Content**''

Section 35.104 defines ''web content'' as the information and sensory experience to be communicated to the user by means of a user agent, including code or markup that defines the content's structure, presentation, and interactions. Examples of web content include text, images, sounds, videos, controls, animations, and conventional electronic documents. The first sentence of the Department's definition of ''web content'' is aligned with the definition of ''web content'' in WCAG 2.1.[15] The second sentence of the definition gives examples of some of the different types of information and experiences available on the web. However, these examples are intended to illustrate the definition and not be exhaustive. The Department also notes that subpart H of this part covers the accessibility of public entities' web content regardless of whether the web content is viewed on desktop computers, laptops, smartphones, or elsewhere.

The Department slightly revised its definition from the proposed definition in the NPRM, which was based on the WCAG 2.1 definition but was slightly less technical and intended to be more easily understood by the public generally. The Department's proposed rule defined ''web content'' as information or sensory experience—including the encoding that defines the content's structure, presentation, and interactions—that is communicated to the user by a web browser or other software. Examples of web content include text, images, sounds, videos, controls, animations, and conventional electronic documents.[16] In this part, the first sentence of this definition is revised to provide that web content is the information and sensory experience to be communicated to the user by means of a user agent, including code or markup that defines the content's structure, presentation, and interactions. The sentence is now aligned with the WCAG 2.1 definition of web content (sometimes referred to as ''content'' by WCAG).[17] The Department has also added a definition of ''user agent'' in this part, as explained in the section-by-section analysis.

The Department decided to more closely align the definition of ''web content'' in this part with the definition in WCAG 2.1 to avoid confusion, to ensure consistency in the application of WCAG 2.1, and to assist technical experts in implementing subpart H of this part. Consistent with the suggestion of several commenters, the Department believes this approach minimizes possible inadvertent conflicts between the type of content covered by the Department's regulatory text and the content covered by WCAG 2.1. Further, the Department believes it is prudent to more closely align these definitions because the task of identifying relevant content to be made accessible will often fall on technical experts. The Department believes technical experts will be familiar with the definition of ''web content'' in WCAG 2.1, and creating a modified definition will unnecessarily increase effort by requiring technical experts to familiarize themselves with a modified definition. The Department also understands that there are likely publicly available accessibility guidance documents and toolkits on the WCAG 2.1 definition that could be useful to public entities, and using a different definition of ''web content'' could call into question public entities' ability to rely on those tools, which would create unnecessary work for public entities. To incorporate this change, the Department removed language from the proposed rule addressing the encoding that defines the web content's structure, presentation, and interactions, because the Department believed the more prudent approach was to more closely align this definition with the definition in WCAG 2.1. However, the Department maintained in its final definition an additional sentence providing examples of web content to aid in the public's understanding of this definition. This may be particularly useful for members of the public without a technical background.

The Department received many comments supporting the Department's proposed definition of ''web content'' from public entities, disability advocates, individuals, and technical and other organizations. Many of these commenters indicated that the Department's definition was sufficiently generic and familiar to the public. The Department believes that the definition in this part aligns with these comments, since it is intended to mirror the definition in WCAG 2.1 and cover the same types of content.

Some commenters raised concerns that the scope of the definition should be broader, arguing that the definition should be extended to include ''closed'' systems such as kiosks, printers, and point-of-sale devices. Another organization mistakenly believed that the examples listed in the definition of ''web content'' were meant to be exhaustive. The Department wishes to clarify that this list is not intended to be exhaustive. The Department declines to broaden the definition of ''web content'' beyond the definition in this part because the Department seeks in its rulemaking to be responsive to calls from the public for the Department to provide certainty by adopting a technical standard State and local government entities must adhere to for their web content and mobile apps. The Department thus is limiting its rulemaking

[13] *See* W3C, *Web Content Accessibility Guidelines (WCAG) 2.1* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/* and *https://perma.cc/UB8A-GG2F*.

[14] *Id.*

[15] *See* W3C, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/and https://perma.cc/UB8A-GG2F* (see definition of ''content (Web content)''). WCAG 2.1 defines ''user agent'' as ''any software that retrieves and presents Web content for users,'' such as web browsers, media players, plug-ins, and assistive technologies. *See* W3C, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/* and *https://perma.cc/UB8A-GG2F* (see definition of ''user agent'').

[16] 88 FR 52018.

[17] *See* W3C, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/* and *https://perma.cc/UB8A-GG2F*.

effort to web content and mobile apps. However, the Department notes that State and local government entities have existing accessibility obligations with respect to services, programs, or activities offered through other types of technology under title II of the Americans with Disabilities Act (''ADA'') or other laws.[18] For example, ''closed'' systems [19] may need to be made accessible in accordance with the existing title II regulation, as public entities have ongoing responsibilities to ensure effective communication, among other requirements.

Some commenters also suggested that the Department narrow the definition of ''web content.'' A few of these comments came from trade groups representing public accommodations, and they argued that the scope of the proposed definition would extend to content the public entity cannot control or is unable to make accessible due to other challenges. These commenters also argued that the costs of making content accessible would be extremely high for the range of content covered by the definition of ''web content.'' The Department believes the framework in this part appropriately balances the considerations implicated by this definition. Public entities can avail themselves of several exceptions that are intended to reduce the costs of making content accessible in some cases (such as the preexisting social media posts exception in § 35.201(e)), and to address instances where public entities truly do not have control over content (such as the third-party-posted content exception in § 35.201(c)). Further, public entities will be able to rely on the fundamental alteration and undue burdens limitations set out in § 35.204 where they can satisfy the requirements of those limitations, and public entities may also be able to use conforming alternate versions under § 35.202 where it is not possible to make web content directly accessible due to technical or legal limitations. The Department believes this approach appropriately balances the costs of compliance with the significant benefits to individuals with disabilities of being able to access the services, programs, and activities of their State and local government entities.

Some disability advocacy groups suggested that the Department modify the definition slightly, such as by providing for ''information, sensory or otherwise'' in lieu of ''information and sensory experience.'' The Department believes the prudent approach is to closely mirror the definition of ''web content'' in WCAG 2.1 to avoid confusion that could ensue from other differences between the two definitions. While the Department appreciates that there may be questions about the application of the definition to specific factual contexts, the Department believes the definition in WCAG 2.1 is sufficiently clear. The Department can provide further guidance on the application of this definition as needed.

Some commenters argued that the non-exhaustive list of examples of web content in this part would include web content that would not be considered web content under WCAG 2.1. In particular, some commenters noted that conventional electronic documents are not web content under WCAG 2.1 because they are not opened or presented through a user agent. Those commenters said that the Department's definition of ''web content'' should not include files such as word processor documents, presentation documents, and spreadsheets, even if they are downloaded from the web. The commenters further suggested that this part should split consideration of electronic document files from web content, similar to the approach they stated is used in the section 508 standards.[20] The Department also reviewed suggestions from commenters that the Department rely on WCAG guidance explaining how to apply WCAG to non-web information and communications technologies [21] and the ISO 14289–1 (''PDF/UA–1'') [22] standard related to PDF files. However, other commenters argued that when electronic documents are viewed in the browser window, they generally are considered web content and should thus be held to the same standard as other types of web content. Those commenters agreed with the Department's decision to include conventional electronic documents within the definition of ''web content,'' particularly when the version posted is not open for editing by the public.

The Department has considered commenters' views and determined that conventional electronic documents should still be considered web content for purposes of this part. The Department has found that public entities frequently provide their services, programs, or activities using conventional electronic documents, and the Department believes this approach will enhance those documents' accessibility, improving access for individuals with disabilities. The Department understands commenters' concerns to mean that, in applying WCAG 2.1 to conventional electronic documents, not all success criteria may be applicable directly as written. Although the Department understands that some WCAG 2.1 Level AA success criteria may not apply as written to conventional electronic documents,[23] when public entities provide or make available web content and content in mobile apps, public entities generally must ensure conformance to the WCAG 2.1 Level AA success criteria to the extent those criteria can be applied. In determining how to make conventional electronic documents conform to WCAG 2.1 Level AA, public entities may find it helpful to consult W3C's guidance on non-web information and communications technology, which explains how the WCAG success criteria can be applied to conventional electronic documents. The Department believes the compliance dates discussed in § 35.200(b) will provide public entities sufficient time to understand how WCAG 2.1 Level AA applies to their conventional electronic documents. The Department will continue to monitor developments in the accessibility of conventional electronic documents and issue further guidance as appropriate.

Finally, several commenters asked whether this definition would cover internal, non-public applications, such as web content used solely by employees. The Department reiterates that subpart H of this part includes requirements for the web content and mobile apps provided or made available by public entities within the scope of title II. While subpart H is not promulgated under title I of the ADA, it is important to note that compliance with subpart H will not relieve title II entities of their distinct employment-related obligations under title I of the ADA, which could include, for example, accommodations for a web developer with a disability working for a public entity.

Subpart H—Web and Mobile Accessibility

The Department is creating a new subpart in its title II regulation. Subpart H of this part addresses the accessibility of public entities' web content and mobile apps.

Section 35.200 Requirements for Web and Mobile Accessibility

General

Section 35.200 sets forth specific requirements for the accessibility of web content and mobile apps of public entities. Section 35.200(a) requires a public entity to ensure that the following are readily accessible to and usable by individuals with disabilities: (1) web content that a public entity provides or makes available, directly

[18] *See* §§ 35.130(b)(1)(ii) and (b)(7) and 35.160.

[19] A closed system, or ''closed functionality,'' means that users cannot attach assistive technology to the system to make the content accessible, such as with a travel kiosk. *See* W3C, *WCAG2ICT Overview, https://www.w3.org/WAI/standards-guidelines/wcag/non-web-ict/* [*https://perma.cc/XRL6-6Q9Y*] (Feb. 2, 2024).

[20] *See* 29 U.S.C. 794d. A discussion of the section 508 standards is included later in the section-by-section analysis, in ''WCAG 2.0 and Section 508 of the Rehabilitation Act.''

[21] W3C, *WCAG2ICT Overview, https://www.w3.org/WAI/standards-guidelines/wcag/non-web-ict/* [*https://perma.cc/XRL6-6Q9Y*] (Feb. 2, 2024).

[22] International Organization for Standardization, *ISO 14289–1:2014; Document management applications; Electronic document file format enhancement for accessibility; Part 1: Use of ISO 32000–1 (PDF/UA–1)* (Dec. 2014), *https://www.iso.org/standard/64599.html* [*https://perma.cc/S53A-Q3Y2*]. One commenter also referred to PDF/UA–2; however, the Department's understanding is that PDF/UA–2 is still under development. International Organization for Standardization, *ISO 14289–2; Document management applications; Electronic document file format enhancement for accessibility; Part 2: Use of ISO 32000–2 (PDF/UA–2), https://www.iso.org/standard/82278.html* [*https://perma.cc/3W5L-UJ7J*].

[23] W3C explains in its guidance on non-web information and communications technology that ''[w]hile WCAG 2.2 was designed to be technology-neutral, it assumes the presence of a 'user agent' such as a browser, media player, or assistive technology as a means to access web content. Therefore, the application of WCAG 2.2 to documents and software in non-web contexts require[s] some interpretation in order to determine how the intent of each WCAG 2.2 success criterion could be met in these different contexts of use.'' W3C, *Guidance on Applying WCAG 2.2 to Non-Web Information and Communications Technologies (WCAG2ICT): Group Draft Note* (Aug. 15, 2023), *https://www.w3.org/TR/wcag2ict-22/* [*https://perma.cc/2PYA-4RFH*]. While this quotation addresses WCAG 2.2, the beginning of the guidance notes that ''the current draft includes guidance for WCAG 2.1 success criteria.'' *Id.*

or through contractual, licensing, or other arrangements; and (2) mobile apps that a public entity provides or makes available, directly or through contractual, licensing, or other arrangements. As detailed in this section, the remainder of § 35.200 sets forth the specific standards that public entities are required to meet to make their web content and mobile apps accessible and the timelines for compliance.

Web Content and Mobile Apps That Public Entities Provide or Make Available

Section 35.200(a) identifies the scope of content covered by subpart H of this part. Section 35.200(a)(1) and (2) applies to web content and mobile apps that a public entity provides or makes available. The Department intends the scope of § 35.200 to be consistent with the ''Application'' section of the existing title II regulation at § 35.102, which states that this part applies to all services, programs, and activities provided or made available by public entities. The Department therefore made minor changes to the language of § 35.200(a)(1) and (2) to make the section more consistent with § 35.102. In the NPRM, § 35.200(a)(1) and (2) applied to web content and mobile apps that a public entity makes available to members of the public or uses to offer services, programs, or activities to members of the public.[24] The Department revised § 35.200(a)(1) and (2) to apply to web content and mobile apps that a public entity provides or makes available. The Department also made corresponding revisions to the language of § 35.200(b)(1) and (2). The Department expects that public entities will be familiar with the revised language used in § 35.200(a) because it is similar to the language used in § 35.102, and that such familiarity and consistency will result in less confusion and more predictable access for individuals with disabilities to the web content and mobile apps of public entities. The Department notes that the revised language does not change or limit the coverage of subpart H as compared to the NPRM. Both the revised language and the NPRM are consistent with the broad coverage of § 35.102.

Contractual, Licensing, and Other Arrangements

The general requirements in subpart H of this part apply to web content or mobile apps that a public entity provides or makes available directly, as well as those the public entity provides or makes available ''through contractual, licensing, or other arrangements.'' The Department expects that the phrase ''directly or through contractual, licensing, or other arrangements'' will be familiar to public entities because it comes from existing regulatory language in title II of the ADA. The section on general prohibitions against discrimination in the existing title II regulation says that a public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability engage in various forms of discrimination.[25] The Department intentionally used the same phrasing in subpart H because here too, where public entities act through third parties using contractual, licensing, or other arrangements, they are not relieved of their obligations under subpart H. For example, when public educational institutions arrange for third parties to post educational content on their behalf, public entities will still be responsible for the accessibility of that content under the ADA.

Further, the Department emphasizes that the phrase ''provides or makes available'' in § 35.200 is not intended to mean that § 35.200 only applies when the public entity creates or owns the web content or mobile app. The plain meaning of ''make available'' includes situations where a public entity relies on a third party to operate or furnish content. Section 35.200 means that public entities provide or make available web content and mobile apps even where public entities do not design or own the web content or mobile app, if there is a contractual, licensing, or other arrangement through which the public entity uses the web content or mobile app to provide a service, program, or activity. For example, even when a city does not design, create, or own a mobile app allowing the public to pay for public parking, when a contractual, licensing, or other arrangement exists between the city and the mobile app enabling the public to use the mobile app to pay for parking in the city, the mobile app is covered under § 35.200. This is because the public entity has contracted with the mobile app to provide access to the public entity's service, program, or activity (*i.e.,* public parking) using a mobile app. The Department believes this approach will be familiar to public entities, as it is consistent with the existing framework in title II of the ADA.[26]

The Department received many public comments in response to the NPRM expressing confusion about the extent to which content created by third parties on behalf of public entities must be made accessible. Many commenters pointed out that public entities frequently enter into contracts with vendors or other third parties to produce web content and mobile apps, such as for websites and apps used to pay fines and parking fees. Commenters were particularly concerned because the NPRM contained exceptions for third-party content, which they thought could indicate that the Department did not intend to cover any content created by third parties even when it was created on behalf of public entities. Commenters urged the Department to make clear in regulatory text that content created or provided by third-party entities is still covered by this part where those third parties are acting on behalf of a public entity.

The Department agrees with these commenters' concerns, so the Department has modified the language in subpart H of this part to make clear that the general requirements for web content and mobile app accessibility apply when the public entity provides or makes available web content or mobile apps directly or through contractual, licensing, or other arrangements. The Department inserted this language in § 35.200(a)(1) and (2) and (b)(1) and (2). The Department notes that this modification does not change the coverage of § 35.200 from the NPRM. The Department clarified in the NPRM that throughout the proposal, a public entity's ''website'' is intended to include not only the websites hosted by the public entity, but also websites operated on behalf of a public entity by a third party. For example, public entities sometimes use vendors to create and host their web content. The Department clarified that such content would also be covered by the proposed rule.[27] The language the Department added to the general requirements provisions in § 35.200(a)(1) and (2) and (b)(1) and (2) does not change the meaning of the provisions, but rather ensures clarity about public entities' obligations when they are acting through a third party, such as when they contract with a vendor.

Many commenters stated their concern that public entities lack control over third-party content, even where they contract with third parties to provide that content. These commenters, generally from public entities and trade groups representing public accommodations, argued that seeking to obtain accessible third-party content provided on behalf of public entities would be challenging. Some of these commenters said that in theory this type of content could be controlled by procurement, but that this has not been realized in practice. While the Department is sympathetic to these concerns, the Department also received many comments from disability advocates and individuals with disabilities pointing out the crucial nature of services provided by third parties on behalf of public entities. For example, some disability advocates argued that State and local government entities increasingly rely on third parties to provide services such as the mapping of zoning areas and city council districts, fine payment systems, applications for reserving and paying for public parking, websites to search for available public housing, and many other examples. The Department believes individuals with disabilities should not be excluded from these government services because the services are inaccessible and are being provided by third parties on behalf of a public entity, rather than being provided directly by the public entity. Indeed, public entities have a responsibility to comply with their ADA obligations even when their services, programs, or activities are being offered through contractors. Further, while the Department understands the concerns raised by commenters that current market options make it challenging for public entities to procure accessible services, the Department expects that options for accessible third-party services will grow in response to subpart H of this part. The Department believes that more accessible options will be readily available by the time public entities are required to comply with subpart H, which will make it less difficult for public entities to procure accessible

[24] 88 FR 52018.

[25] Section 35.130(b)(1) and (3). *See also* § 35.152(a) (describing requirements for jails, detention and correctional facilities, and community correctional facilities).

[26] *See* § 35.130(b)(1) and (3).

[27] 88 FR 51957.

services from contractors. The Department also notes that public entities will be able to rely on the fundamental alteration and undue burdens limitations in this part in § 35.204 where they can satisfy the requirements of that provision.

Further, the Department believes that when public entities engage in contractual, licensing, or other arrangements with third parties to provide or make available web content and mobile apps, public entities can choose to work with providers who can ensure accessibility, and public entities can also include contract stipulations that ensure accessibility in third-party services. This is consistent with the existing obligations public entities face in other title II contexts where they choose to contract, license, or otherwise arrange with third parties to provide services, programs, or activities. The Department acknowledges that some commenters argued that they face limited existing options in procurement for accessible third-party services. However, where such circumstances warrant, public entities can rely on the undue burdens provision when they can satisfy its requirements. In addition, the Department expects that options for procuring accessible third-party services will grow in response to its rulemaking.

Background on WCAG

Since 1994, W3C has been the principal international organization involved in developing protocols and guidelines for the web.[28] W3C develops a variety of voluntary technical standards and guidelines, including ones relating to privacy, internationalization of technology, and—relevant here—accessibility. W3C's Web Accessibility Initiative (''WAI'') has developed voluntary guidelines for web accessibility, known as WCAG, to help web developers create web content that is accessible to individuals with disabilities.[29]

The first version of WCAG, WCAG 1.0, was published in 1999. WCAG 2.0 was published in December 2008, and is available at *http://www.w3.org/TR/2008/REC-WCAG20-20081211/* [*https://perma.cc/L2NH-VLCR*]. WCAG 2.0 was approved as an international standard by the International Organization for Standardization (''ISO'') and the International Electrotechnical Commission (''IEC'') in October 2012.[30] WCAG 2.1 was published in June 2018, and is available at *https://www.w3.org/TR/2018/REC-WCAG21-20180605/* and *https://perma.cc/UB8A-GG2F*.[31] WCAG 2.1 is built on and is backwards compatible with WCAG 2.0.[32] In fact, 38 of the 50 Level A and AA success criteria in WCAG 2.1 are also included in WCAG 2.0.[33]

WCAG 2.1 contains four principles that provide the foundation for web accessibility: the web content must be perceivable, operable, understandable, and robust.[34] Testable success criteria (*i.e.,* requirements for web accessibility that are measurable) are provided ''to be used where requirements and conformance testing are necessary such as in design specification, purchasing, *regulation* and contractual agreements.'' [35] Thus, WCAG 2.1 contemplates establishing testable success criteria that could be used in regulatory efforts such as this one.

Technical Standard—WCAG 2.1 Level AA

Section 35.200 requires that public entities' web content and mobile apps conform to WCAG 2.1 Level AA unless compliance would result in a fundamental alteration or undue financial and administrative burdens. As previously mentioned, WCAG 2.1 was published in June 2018 and is available at *https://www.w3.org/TR/2018/REC-WCAG21-20180605/* and *https://perma.cc/UB8A-GG2F*. To the extent there are differences between WCAG 2.1 Level AA and the standards articulated in this part, the standards articulated in this part prevail. WCAG 2.1 Level AA is not restated in full in this part but is instead incorporated by reference.

In the NPRM, the Department solicited feedback on the appropriate technical standard for accessibility for public entities' web content and mobile apps. The Department received many public comments from a variety of interested parties in response. After consideration of the public comments and after its independent assessment, the Department determined that WCAG 2.1 Level AA is the appropriate technical standard for accessibility to adopt in subpart H of this part. WCAG 2.1 Level AA includes success criteria that are especially helpful for people with disabilities using mobile devices, people with low vision, and people with cognitive or learning disabilities.[36] Support for WCAG 2.1 Level AA as the appropriate technical standard came from a variety of commenters. Commenters supporting the adoption of WCAG 2.1 Level AA noted that is a widely used and accepted industry standard. At least one such commenter noted that requiring conformance to WCAG 2.1 Level AA would result in a significant step forward in ensuring access for individuals with disabilities to State and local government entities' web content and mobile apps. Commenters noted that WCAG 2.1 Level AA has been implemented, tested, and shown to be a sound and comprehensive threshold for public agencies. In addition, because WCAG 2.1 Level AA was published in 2018, web developers and public entities have had time to familiarize themselves with it. The WCAG standards were designed to be ''technology neutral.'' [37] This means that they are designed to be broadly applicable to current and future web technologies.[38] Thus, WCAG 2.1 also allows web and mobile app developers flexibility and potential for innovation.

The Department expects that adopting WCAG 2.1 Level AA as the technical standard will have benefits that are important to ensuring access for individuals with disabilities to public entities' services, programs, and activities. For example, WCAG 2.1 Level AA requires that text be formatted so that it is easier to read when magnified.[39] This is important, for example, for people with low vision who use magnifying tools. Without the formatting that WCAG 2.1 Level AA requires, a person magnifying the text might find reading the text disorienting because they might have to scroll horizontally on every line.[40]

WCAG 2.1 Level AA also includes success criteria addressing the accessibility of mobile apps or web content viewed on a mobile device. For example, WCAG 2.1 Level AA Success Criterion 1.3.4 requires that page orientation (*i.e.,* portrait or landscape) not be restricted to just one orientation, unless a specific display orientation is essential.[41]

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[28] W3C, *About Us, https://www.w3.org/about/* [*https://perma.cc/TQ2W-T377*].

[29] The Department received one comment arguing that the process by which WCAG is developed is not equitable or inclusive of members of the disability community. The Department received another comment commending the Department for adopting WCAG as the technical standard and noting that WCAG is developed through an open, transparent, multi-stakeholder consensus process. The Department carefully considered these comments and concluded that it is appropriate to adopt a consensus standard promulgated by W3C with input from various stakeholders, which is also consistent with the NTTAA. Information from W3C about its process for developing standards is available at W3C, Web Accessibility Initiative, *How WAI Develops Accessibility Standards Through the W3C Process: Milestones and Opportunities To Contribute* (Sept. 2006), *https://www.w3.org/WAI/standards-guidelines/w3c-process/* [*https://perma.cc/3BED-RCJP*] (Nov. 2, 2020).

[30] W3C, *Web Content Accessibility Guidelines 2.0 Approved as ISO/IEC International Standard* (Oct. 15, 2012), *https://www.w3.org/press-releases/2012/wcag2pas/* [*https://perma.cc/JQ39-HGKQ*].

[31] The WAI also published some revisions to WCAG 2.1 on September 21, 2023. W3C, *Web Content Accessibility Guidelines (WCAG) 2.1* (Sept. 21, 2023), *https://www.w3.org/TR/WCAG21/* [*https://perma.cc/4VF7-NF5F*]; *see infra* note 47. The WAI also published a working draft of WCAG 3.0 in December 2021. W3C, *W3C Accessibility Guidelines (WCAG) 3.0, https://www.w3.org/TR/wcag-3.0/* (July 24, 2023) [*https://perma.cc/7FPQ-EEJ7*].

[32] W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, 0.5 Comparison with WCAG 2.0* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/#comparison-with-wcag-2-0* [*https://perma.cc/H76F-6L27*].

[33] *See id.*

[34] *See* W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, WCAG 2 Layers of Guidance* (Sept. 21, 2023), *https://www.w3.org/TR/WCAG21/#wcag-2-layers-of-guidance* [*https://perma.cc/5PDG-ZTJE*].

[35] *Id.* (emphasis added).

[36] W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, 0.5 Comparison with WCAG 2.0* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/#comparison-with-wcag-2-0* [*https://perma.cc/H76F-6L27*].

[37] W3C, *Introduction to Understanding WCAG, https://www.w3.org/WAI/WCAG21/Understanding/intro* [*https://perma.cc/XB3Y-QKVU*] (June 20, 2023).

[38] *See* W3C, *Understanding Techniques for WCAG Success Criteria, https://www.w3.org/WAI/WCAG21/Understanding/understanding-techniques* [*https://perma.cc/AMT4-XAAL*] (June 20, 2023).

[39] *See* W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, Success Criterion 1.4.10 Reflow* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/#reflow* [*https://perma.cc/TU9U-C8K2*].

[40] *See id.*

[41] *See* W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, Success Criterion 1.3.4 Orientation* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/#orientation* [*https://perma.cc/M2YG-LB9V*].

This feature is important, for example, for someone who uses a wheelchair with a tablet attached to it such that the tablet cannot be rotated.[42] If web content or mobile apps only work in one orientation, they will not always work for this individual depending on how the tablet is oriented, which could render that content or app unusable for the person.[43] Another WCAG 2.1 success criterion requires, in part, that if a function in an app can be operated by motion—for example, shaking the device to undo typing—that there be an option to turn off that motion sensitivity.[44] This could be important, for example, for someone who has tremors, so that they do not accidentally undo their typing.[45]

Such accessibility features are critical for individuals with disabilities to have equal access to their State or local government entity's services, programs, and activities. This is particularly true given that using mobile devices to access government services is commonplace. For example, one source notes that mobile traffic generally accounts for 58.21 percent of all internet usage.[46] In addition, WCAG 2.1 Level AA's incorporation of mobile-related criteria is important because of public entities' increasing use of mobile apps in offering their services, programs, or activities. Public entities are using mobile apps to offer a range of critical government services—from providing traffic information, to scheduling trash pickup, to making vaccination appointments.

The Department also understands that public entities are likely already familiar with WCAG 2.1 Level AA or will be able to become familiar quickly. This is because WCAG 2.1 Level AA has been available since 2018,[47] and it builds upon WCAG 2.0, which has been in existence since 2008 and has been established for years as a benchmark for accessibility. According to the Department's research, WCAG 2.1 is already being increasingly used by members of the public and State and local government entities. At least ten States now use, or aim to use, WCAG 2.1 as a standard for their websites, indicating increased familiarity with and use of the standard. In fact, as commenters also noted, the Department recently included WCAG 2.1 in several settlement agreements with covered entities addressing inaccessible websites.[48]

The Department expects, and heard in public comments, that web developers and professionals who work for or with public entities are likely to be familiar with WCAG 2.1 Level AA. And the Department believes that if public entities and associated web developers are not already familiar with WCAG 2.1 Level AA, they are at least likely to be familiar with WCAG 2.0 and will be able to become acquainted quickly with WCAG 2.1's 12 additional Level A and AA success criteria. The Department also believes that resources, like trainings and checklists, exist to help public entities implement or understand how to implement not only WCAG 2.0 Level AA, but also WCAG 2.1 Level AA.[49] Additionally, public entities will have two or three years, depending on population size, to come into compliance with subpart H of this part. Therefore, public entities and web professionals who are not already familiar with WCAG 2.1 will have time to familiarize themselves and plan to ensure that they will be in compliance with the rule when required.

Alternative Approaches Considered

WCAG 2.2

Commenters suggested that the Department adopt WCAG 2.2 as the technical standard. WCAG 2.2 was published as a candidate recommendation—a prefinalization stage—in May 2023, and was published in final form on October 5, 2023, which was after the NPRM associated with the final rule was published and after the comment period closed.[50] Commenters who supported the adoption of WCAG 2.2 noted that it was likely to be finalized before the final rule would be published. All of the WCAG 2.0 and WCAG 2.1 success criteria except for one are included in WCAG 2.2.[51] WCAG 2.2 also includes six additional Level A and AA success criteria beyond those included in WCAG 2.1.[52] Commenters supporting the adoption of WCAG 2.2 noted that WCAG 2.2's additional success criteria are important for ensuring accessibility; for example, WCAG 2.2 includes additional criteria that are important for people with cognitive disabilities or for those accessing content via mobile apps. Like WCAG 2.1, WCAG 2.2's additional success criteria offer particular benefits for individuals with low vision, limited manual dexterity, and cognitive disabilities. For example, Success Criterion 3.3.8, which is a new criterion under WCAG 2.2, improves access for people with cognitive disabilities by limiting the use of cognitive function tests, like solving puzzles, in authentication processes.[53] Some commenters also suggested that the few additional criteria in WCAG 2.2 would not pose a substantial burden for web developers, who are likely already familiar with WCAG 2.1.

[42] W3C, *What's New in WCAG 2.1, https://www.w3.org/WAI/standards-guidelines/wcag/new-in-21/* [*https://perma.cc/S7VS-J6E4*] (Oct. 5, 2023).

[43] *See id.*

[44] *See* W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, Success Criterion 2.5.4 Motion Actuation* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/#motion-actuation* [*https://perma.cc/D3PS-32NV*].

[45] *See* W3C, *What's New in WCAG 2.1, https://www.w3.org/WAI/standards-guidelines/wcag/new-in-21/* [*https://perma.cc/W8HK-Z5QK*] (Oct. 5, 2023).

[46] Andrew Buck, MobiLoud, *What Percentage of internet Traffic is Mobile?, https://www.mobiloud.com/blog/what-percentage-of-internet-traffic-is-mobile#what-percentage-of-internet-traffic-comes-on-mobile-devices* [*https://perma.cc/2FK6-UDD5*] (Feb. 7, 2024).

[47] The WAI published some revisions to WCAG 2.1 on September 21, 2023. *See* W3C, *Web Content Accessibility Guidelines (WCAG) 2.1* (Sept. 21, 2023), *https://www.w3.org/TR/WCAG21/* [*https://perma.cc/4VF7-NF5F*]. However, for the reasons discussed in this section, subpart H of this part requires conformance to the version of WCAG 2.1 that was published in 2018. W3C, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/* and *https://perma.cc/UB8A-GG2F*. The Department believes that public entities have not had sufficient time to become familiar with the 2023 version. Public entities and others also may not have had an adequate opportunity to comment on whether the Department should adopt the 2023 version, which was published shortly before the comment period on the NPRM closed on October 3, 2023. One recent revision to WCAG 2.1 relates to Success Criterion 4.1.1, which addresses parsing. W3C has described Success Criterion 4.1.1 as ''obsolete'' and stated that it ''is no longer needed for accessibility.'' W3C, *WCAG 2 FAQ, https://www.w3.org/WAI/standards-guidelines/wcag/faq/#parsing411* [*https://perma.cc/24FK-V8LS*] (Oct. 5, 2023). According to the 2023 version of WCAG, Success Criterion 4.1.1 ''should be considered as always satisfied for any content using HTML or XML.'' W3C, *Web Content Accessibility Guidelines (WCAG) 2.1* (Sept. 21, 2023), *https://www.w3.org/TR/WCAG21/* [*https://perma.cc/4VF7-NF5F*]. The Department believes that either adopting this note from the 2023 version of WCAG or not requiring conformance to Success Criterion 4.1.1 is likely to create significant confusion. And although Success Criterion 4.1.1 has been removed from WCAG 2.2, the Department has decided not to adopt WCAG 2.2 for the reasons described herein. W3C, *WCAG 2 FAQ, https://www.w3.org/WAI/standards-guidelines/wcag/faq/#parsing411* [*https://perma.cc/45DS-RRYS*] (Oct. 5, 2023). Therefore, conformance to Success Criterion 4.1.1 is still required by subpart H of this part. Public entities that do not conform to Success Criterion 4.1.1 would nonetheless be able to rely on § 35.205 to satisfy their obligations under § 35.200 if the failure to conform to Success Criterion 4.1.1 would not affect the ability of individuals with disabilities to use the public entity's web content or mobile app in the manner described in that section. The Department expects that this provision will help public entities avoid any unnecessary burden that might be imposed by Success Criterion 4.1.1.

[48] *See, e.g.,* Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and CVS Pharmacy, Inc. (Apr. 11, 2022), *https://www.ada.gov/cvs_sa.pdf* [*https://perma.cc/H5KZ-4VVF*]; Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and Meijer, Inc. (Feb. 2, 2022), *https://www.ada.gov/meijer_sa.pdf* [*https://perma.cc/5FGD-FK42*]; Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and the Kroger Co. (Jan. 28, 2022), *https://www.ada.gov/kroger_co_sa.pdf* [*https://perma.cc/6ASX-U7FQ*]; Settlement Agreement Between the United States of America and the Champaign-Urbana Mass Transit District (Dec. 14, 2021), *https://www.justice.gov/d9/case-documents/attachments/2021/12/14/champaign-urbana_sa.pdf* [*https://perma.cc/66XY-QGA8*]; Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and Hy-Vee, Inc. (Dec. 1, 2021), *https://www.ada.gov/hy-vee_sa.pdf* [*https://perma.cc/GFY6-BJNE*]; Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and Rite Aid Corp. (Nov. 1, 2021), *https://www.ada.gov/rite_aid_sa.pdf* [*https://perma.cc/4HBF-RBK2*].

[49] *See, e.g.,* W3C, *Tutorials, https://www.w3.org/WAI/tutorials/* [*https://perma.cc/SW5E-WWXV*] (Feb. 16, 2023).

[50] W3C, *WCAG 2 Overview, https://www.w3.org/WAI/standards-guidelines/wcag/* [*https://perma.cc/RQS2-P7JC*] (Oct. 5, 2023).

[51] W3C, *What's New in WCAG 2.2, https://www.w3.org/WAI/standards-guidelines/wcag/new-in-22/* [*https://perma.cc/GDM3-A6SE*] (Oct. 5, 2023).

[52] *Id.*

[53] *Id.*

Some commenters suggested that WCAG 2.1 would become outdated once WCAG 2.2 was finalized. And because WCAG 2.2 was adopted more recently than WCAG 2.1, some commenters noted that the adoption of WCAG 2.2 would be more likely to help subpart H of this part keep pace with changes in technology. The Department understands and appreciates the concerns commenters raised.

The Department believes that adopting WCAG 2.1 as the technical standard rather than WCAG 2.2 is the most prudent approach at this time. W3C, while recommending the use of the most recent recommended standard, has made clear that WCAG 2.2 does not ''deprecate or supersede'' WCAG 2.1 and has stated that WCAG 2.1 is still an existing standard.[54] The Department recognizes that WCAG 2.2 is a newer standard, but in crafting subpart H of this part the Department sought to balance benefits for individuals with disabilities with feasibility for public entities making their content accessible in compliance with subpart H. Because WCAG 2.2 has been adopted so recently, web professionals have had less time to become familiar with the additional success criteria that have been incorporated in WCAG 2.2. The Department believes there will be fewer resources and less guidance available to web professionals and public entities on the new success criteria in WCAG 2.2. Additionally, the Department appreciates the concerns expressed by at least one commenter with adopting any standard that was not finalized before the NPRM's comment period—as was the case with WCAG 2.2—because interested parties would not have had an opportunity to understand and comment on the finalized standard.

Given the benefits of WCAG 2.2 highlighted by commenters, some public entities might choose to implement WCAG 2.2 to provide an even more accessible experience for individuals with disabilities and to increase customer service satisfaction. The Department notes that subpart H of this part provides for equivalent facilitation in § 35.203, meaning public entities could choose to comply with subpart H by conforming their web content to WCAG 2.2 Level AA because WCAG 2.2 Level AA provides substantially equivalent or greater accessibility and usability as compared to WCAG 2.1 Level AA. This would be sufficient to meet the standard for equivalent facilitation in § 35.203, which is discussed in more detail later in the section-by-section analysis.

WCAG 2.0 and Section 508 of the Rehabilitation Act

Alternatively, the Department considered adopting WCAG 2.0. This change was suggested by the Small Business Administration, which argued that public entities should not have to comply with a more rigorous standard for online accessibility than the Federal Government, which is required to conform to WCAG 2.0 under section 508 of the Rehabilitation Act. In 2017, when the Architectural and Transportation Barriers Compliance Board (''Access Board'') adopted WCAG 2.0 as the technical standard for the Federal Government's web content under section 508, WCAG 2.1 had not been finalized.[55] And although WCAG 2.0 is the standard adopted by the Department of Transportation in its regulations implementing the Air Carrier Access Act, which covers airlines' websites and kiosks,[56] those regulations—like the section 508 rule—were promulgated before WCAG 2.1 was published.

The Department believes that adopting WCAG 2.1 as the technical standard for subpart H of this part is more appropriate than adopting WCAG 2.0. WCAG 2.1 provides for important accessibility features that are not included in WCAG 2.0, and an increasing number of governmental entities are using WCAG 2.1. A number of countries that have adopted WCAG 2.0 as their standard are now making efforts to move or have moved to WCAG 2.1.[57] In countries that are part of the European Union, public sector websites and mobile apps generally must meet a technical standard that requires conformance to the WCAG 2.1 success criteria.[58] And WCAG 2.0 is likely to become outdated or less relevant more quickly than WCAG 2.1. As discussed previously in this appendix, WCAG 2.2 was recently published and includes even more success criteria for accessibility.

The Department expects that the wide usage of WCAG 2.0 lays a solid foundation for public entities to become familiar with and implement WCAG 2.1's additional Level A and AA criteria. According to the Department's research, dozens of States either use or strive to use WCAG 2.0 or greater—either on their own or by way of implementing the section 508 technical standards—for at least some of their web content. It appears that at least ten States—Alaska, Delaware, Georgia, Louisiana, Massachusetts, Oregon, Pennsylvania, South Dakota, Utah, and Washington—already either use WCAG 2.1 or strive to use WCAG 2.1 for at least some of their web content. Given that WCAG 2.1 is a more recent standard than WCAG 2.0, adds some important criteria for accessibility, and has been in existence for long enough for web developers and public entities to get acquainted with it, the Department views it as more appropriate for adoption in subpart H of this part than WCAG 2.0. In addition, even to the extent public entities are not already acquainted with WCAG 2.1, those entities will have two or three years to come into compliance with subpart H, which should also provide sufficient time to become familiar with and implement WCAG 2.1. The Department also declines to adopt the Access Board's section 508 standards, which are harmonized with WCAG 2.0, for the same reasons it declines to adopt WCAG 2.0.

Effective Communication and Performance Standards

Some commenters suggested that the Department should require public entities to ensure that they are meeting title II's effective communication standard—which requires that public entities ensure that their communications with individuals with disabilities are as effective as their communications with others[59]—rather than requiring compliance with a specific technical standard for accessibility. One such commenter also suggested that the Department rely on conformance to WCAG only as a safe harbor—as a way to show that the entity complies with the effective communication standard. The Department believes that adopting into subpart H of this part the effective communication standard, which is already required under the existing title II regulation,[60] would not meaningfully help ensure access for individuals with disabilities or provide clarity for public entities in terms of what specifically public entities must do to ensure that their web content and mobile apps are accessible. As previously mentioned, WCAG 2.1 Level AA provides specific, testable success criteria. As noted in section III.D.4 of the preamble to the final rule, relying solely on the existing title II obligations and expecting entities to voluntarily comply has proven insufficient. In addition, using the technical standard only as a safe harbor would pose similar issues in terms of clarity and would not result in reliability and predictability for individuals with disabilities seeking to access, for example, critical government services that public entities have as part of their web content and mobile apps.

Commenters also suggested that manual testing by individuals with disabilities be required to ensure that content is accessible to them. Although subpart H of this part does not specifically require manual testing by individuals with disabilities because requiring such testing could pose logistical or other hurdles, the Department recommends that public entities seek and incorporate

[54] W3C, *WCAG 2 Overview, https://www.w3.org/WAI/standards-guidelines/wcag/#:~:text=WCAG%202.0%2C%20WCAG%202.1%2C%20and%20WCAG%202.2%20are%20all%20existing,most%20recent%20version%20of%20WCAG* [*https://perma.cc/V5ZC-BF8Z*] (Oct. 5, 2023).

[55] *See Information and Communication Technology (ICT) Standards and Guidelines,* 82 FR 5790, 5791 (Jan. 18, 2017); W3C, *Web Content Accessibility Guidelines (WCAG) 2.1* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/and https://perma.cc/UB8A-GG2F.*

[56] *See* 14 CFR 382.43(c) through (e) and 382.57.

[57] *See, e.g.,* Austl. Gov't Digital Transformation Agency, *Exploring WCAG 2.1 for Australian Government Services* (Aug. 22, 2018), *https://www.dta.gov.au/blogs/exploring-wcag-21-australian-government-services.* A Perma archive link was unavailable for this citation. *See also* W3C, *Denmark (Danmark), https://www.w3.org/WAI/policies/denmark/#bekendtg%C3%B8relse-om-afgivelse-af-tilg%C3%A6ngelighedserkl%C3%A6ring-for-offentlige-organers-websteder-og-mobilapplikationer* [*https://perma.cc/K8BM-4QN8*] (Mar. 15, 2023); *see also* W3C, *Web Accessibility Laws & Policies, https://www.w3.org/WAI/policies/* [*https://perma.cc/6SU3-3VR3*] (Dec. 2023).

[58] European Comm'n, *Web Accessibility, https://digital-strategy.ec.europa.eu/en/policies/web-accessibility* [*https://perma.cc/LSG9-XW7L*] (Oct. 10, 2023); European Telecomm. Standards Inst., *Accessibility Requirements for ICT Products and Services* 45–51, 64–78 (Mar. 2021), *https://www.etsi.org/deliver/etsi_en/301500_301599/301549/03.02.01_60/en_301549v030201p.pdf* [*https://perma.cc/5TEZ-9GC6*].

[59] Section 35.160.

[60] *Id.*

feedback from individuals with disabilities on their web content and mobile apps. Doing so will help ensure that everyone has access to critical government services.

The Department received some comments recommending that the Department adopt a performance standard instead of a specific technical standard for accessibility of web content and mobile apps. Performance standards establish general expectations or goals for web and mobile app accessibility and allow for compliance via a variety of unspecified methods. As commenters explained, performance standards could provide greater flexibility in ensuring accessibility as web and mobile app technologies change. However, as the Department noted in the NPRM,[61] the Department believes that performance standards are too vague and subjective and could be insufficient to provide consistent and testable requirements for web and mobile app accessibility. Additionally, the Department expects that performance standards would not result in predictability for either public entities or individuals with disabilities in the way that a more specific technical standard would. Further, similar to a performance standard, WCAG has been designed to allow for flexibility and innovation as technology evolves.[62] The Department recognizes the importance of adopting a standard for web and mobile app accessibility that provides not only specific and testable requirements, but also sufficient flexibility to develop accessibility solutions for new technologies. The Department believes that WCAG achieves this balance because it provides flexibility similar to a performance standard, but it also provides more clarity, consistency, predictability, and objectivity. Using WCAG also enables public entities to know precisely what is expected of them under title II, which may be of particular benefit to entities with less technological experience. This will assist public entities in identifying and addressing accessibility errors, which may reduce costs they would incur without clear expectations.

Evolving Standard

Other commenters suggested that the Department take an approach in the final rule whereby public entities would be required to comply with whatever is the most recent version of WCAG at the time. Under that approach, the required technical standard would automatically update as new versions of WCAG are published in the future. These commenters generally argued that such an approach would aid in ''future proofing'' subpart H of this part to help it keep up with changes in technology. Based on several legal considerations, the Department will not adopt such an approach. First, the Department is incorporating WCAG 2.1 Level AA by reference into subpart H and must abide by the Office of the Federal Register's regulation regarding incorporation by reference.[63] The regulation states that incorporation by reference of a publication is limited to the edition of the publication that is approved by the Office of the Federal Register. Future amendments or revisions of the publication are not included.[64] Accordingly, the Department only incorporates a particular version of the technical standard and does not state that future versions of WCAG would be automatically incorporated into subpart H. In addition, the Department has concerns about regulating to a future standard of WCAG that has yet to be created, of which the Department has no knowledge, and for which compatibility with the ADA and covered entities' content is uncertain.

Relatedly, the Department also received comments suggesting that it institute a process for reviewing and revising its regulation every several years to ensure that subpart H of this part is up to date and effective for current technology. Pursuant to Executive Order 13563, the Department is already required to do a periodic retrospective review of its regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.[65] Consideration of the effectiveness of subpart H of this part in the future would fall within Executive Order 13563's purview, such that building a mechanism into subpart H is not necessary at this time.

Alternative Approaches Considered for Mobile Apps and Conventional Electronic Documents

Section 35.200 adopts WCAG 2.1 Level AA as the technical standard for mobile apps. This approach will ensure the accessibility standards for mobile apps in subpart H of this part are consistent with the accessibility standards for web content in subpart H. The NPRM asked for feedback on the appropriate technical standard for mobile apps, including whether the Department should adopt WCAG 2.1 Level AA or other standards like the standards for section 508 of the Rehabilitation Act (''Section 508 Standards''), which apply to the Federal Government's web content and mobile apps.[66] The Department received several comments on the technical standard that should apply to mobile apps. Some commenters supported adopting WCAG 2.1 Level AA, some suggested adopting other technical standards or requirements, and others suggested that some WCAG success criteria may not apply to mobile apps.

Some commenters had concerns about the costs and burdens associated with applying any technical standard to content on mobile apps, including to content in mobile apps that public entities already provide on the web. One commenter requested that the Department apply WCAG 2.0 to the extent that a public entity's mobile app provides different content than is available online.

However, many commenters expressed strong support for applying the same technical standard for mobile apps and web content and shared that web content and mobile apps generally should not be treated differently. These commenters emphasized the importance of mobile app accessibility, explaining that many individuals rely on mobile apps to get information about State or local government services, programs, or activities, including transportation information, emergency alerts or special news bulletins, and government appointments. Some commenters further clarified that adopting different standards for mobile apps than web content could cause confusion. They also stated that adopting the same standard would ensure a uniform experience and expectations for users with disabilities.

Many commenters, including disability advocacy organizations, individuals, and public entities, supported the use of WCAG 2.1 Level AA as the technical standard for mobile apps, in part because WCAG is internationally recognized, often adopted in practice, and technology neutral (*i.e.,* it applies to both web content and mobile apps). Other commenters said that WCAG 2.1 Level AA is an appropriate standard for mobile apps because it includes specific success criteria aimed at addressing the unique challenges of mobile app accessibility.

Some commenters suggested that the Department should adopt WCAG 2.2 as the technical standard for mobile apps. These commenters explained that WCAG 2.2 is more recent and includes newer guidelines based on accessibility issues found in smartphones. Commenters further shared that WCAG 2.2 can better ensure adequate button size and spacing to accommodate users with varying degrees of motor skills in their fingers.

In addition, other commenters recommended that the Department adopt the Section 508 Standards, either independently or together with WCAG 2.1 or WCAG 2.2. Some of these commenters shared their belief that WCAG was developed more for web content than for mobile apps. These commenters stated that while many of WCAG's principles and guidelines can be applied to mobile apps, mobile apps have unique characteristics and interactions that may require additional considerations and depend on the specific requirements and goals of the mobile app in question. For example, commenters indicated that mobile apps may also need to adhere to platform-specific accessibility guidelines for iOS (Apple) and Android (Google). In addition, commenters noted that the Section 508 Standards include additional requirements applicable to mobile apps that are not included in WCAG 2.1 Level AA, such as interoperability requirements to ensure that a mobile app does not disrupt a mobile device's internal assistive technology for individuals with disabilities (*e.g.,* screen readers for people who are blind or have low

[61] 88 FR 51962.

[62] W3C, *Benefits of Web Content Accessibility Guidelines WCAG 2, https://www.w3.org/WAI/presentations/WCAG20_benefits/WCAG20_benefits.html* [*https://perma.cc/3RTN-FLKV*] (Aug. 12, 2010) (''WCAG 2 is adaptable and flexible, for different situations, and developing technologies and techniques. We described earlier how WCAG 2 is flexible to apply to Web technologies now and in the future.'').

[63] *See* 1 CFR 51.1(f).

[64] *Id.*

[65] E.O. 13563, sec. 6, 3 CFR, 2012 Comp., p. 215.

[66] 36 CFR 1194.1; 36 CFR part 1194, appendices A, C, and D.

vision). Some commenters suggested that the Department include these additional requirements from the Section 508 Standards in subpart H of this part.

The Department carefully considered all of these comments and agrees with commenters who stated that the same technical standard for accessibility should apply to both web content and mobile apps. The Department believes that applying the same technical standard to both web content and mobile apps will reduce confusion by ensuring consistent requirements and user experiences across web and mobile platforms.

The Department further agrees with the commenters who stated that WCAG 2.1 Level AA is an appropriate technical standard. As discussed previously in this appendix, many developers and organizations are already familiar with WCAG 2.1 Level AA, and they may be less familiar with WCAG 2.2. The Department thus believes that selecting WCAG 2.1 Level AA as the technical standard for mobile apps will reduce the difficulty of complying with subpart H of this part by adopting a well-recognized standard that is already familiar to developers and organizations, while still ensuring increased accessibility and usability for individuals with disabilities. The Department notes that subpart H allows for equivalent facilitation in § 35.203, meaning that public entities could still choose to apply additional standards or techniques related to mobile apps, to the extent that the standard or technique results in substantially equivalent or greater accessibility and usability.

As commenters noted, WCAG 2.1 is designed to be technology neutral, which will help ensure accessibility for mobile apps. Although the Section 508 Standards include some additional requirements like interoperability that are not required by WCAG,[67] WCAG 2.1 Level AA includes specific success criteria related to mobile app accessibility. These success criteria address challenges such as touch target size, orientation, and motion actuation, among others.[68] Therefore, the Department believes that WCAG 2.1 Level AA is a robust framework for mobile app accessibility.

The Department also received comments indicating that certain requirements under WCAG 2.1 Level AA may not be applicable to mobile apps or conventional electronic documents and subpart H of this part should therefore set forth exceptions for those success criteria. The Access Board faced similar concerns when it promulgated its Section 508 Standards.[69] Accordingly, the Section 508 Standards indicate that ''non-Web documents'' and ''non-Web software,'' which include conventional electronic documents and mobile apps, do not have to comply with the following WCAG 2.0 Success Criteria: 2.4.1 Bypass Blocks, 2.4.5 Multiple Ways, 3.2.3 Consistent Navigation, and 3.2.4 Consistent Identification.[70] W3C has provided guidance on how these and other WCAG success criteria can be applied to non-web information and communications technologies, including conventional electronic documents and mobile apps.[71]

The Department understands that some WCAG 2.1 Level AA success criteria may not apply to conventional electronic documents and mobile apps directly as written, but the Department declines to set forth exceptions to these success criteria in subpart H of this part. As discussed, the Department believes it is important to apply one consistent standard to web content and mobile apps to ensure clarity and reduce confusion. Public entities generally must ensure that the web content and content in mobile apps they provide or make available conform to the WCAG 2.1 Level AA success criteria, to the extent those criteria can be applied. In determining how to make conventional electronic documents and mobile apps conform to WCAG 2.1 Level AA, public entities may wish to consult W3C's guidance on non-web information and communications technology, which explains how the WCAG success criteria can be applied to conventional electronic documents and mobile apps.[72] The Department believes the compliance dates discussed in § 35.200 will provide public entities sufficient time to understand how WCAG 2.1 Level AA applies to their conventional electronic documents and mobile apps, especially because WCAG 2.1 has been in final form since 2018, which has provided time for familiarity and resources to develop. Further, the Department will continue to monitor developments in the accessibility of conventional electronic documents and mobile apps and may issue further guidance as appropriate.

Alternative Approaches Considered for PDF Files and Digital Textbooks

The Department also received a comment suggesting that subpart H of this part reference PDF/UA–1 for standards related to PDF files or W3C's EPUB Accessibility 1.1 standard [73] for digital textbooks. The Department declines to adopt additional technical standards for these specific types of content. As discussed, the WCAG standards were designed to be ''technology neutral'' [74] and are designed to be broadly applicable to current and future web technologies.[75] The Department is concerned that adopting multiple technical standards related to different types of web content and content in mobile apps could lead to confusion. However, the Department notes that subpart H allows for equivalent facilitation in § 35.203, meaning that public entities could still choose to comply with additional standards or guidance related to PDFs or digital textbooks to the extent that the standard or technique used provides substantially equivalent or greater accessibility and usability.

In summary, the Department believes that adopting WCAG 2.1 Level AA as the technical standard strikes the appropriate balance of ensuring access for individuals with disabilities and feasibility of implementation because there is a baseline of familiarity with the standard. In addition, for the reasons discussed previously in this appendix, the Department believes that WCAG 2.1 Level AA is an effective standard that sets forth clear, testable success criteria that will provide important benefits to individuals with disabilities.

WCAG Conformance Level

For web content and mobile apps to conform to WCAG 2.1, they must satisfy the success criteria under one of three levels of conformance: A, AA, or AAA. As previously mentioned, the Department is adopting Level AA as the conformance level under subpart H of this part. In the regulatory text at § 35.200(b)(1) and (2), the Department provides that public entities must comply with Level A and Level AA success criteria and conformance requirements specified in WCAG 2.1. As noted in the NPRM,[76] WCAG 2.1 provides that for Level AA conformance, the web page must satisfy all the Level A and Level AA Success Criteria.[77] However, individual success criteria in WCAG 2.1 are labeled only as Level A or Level AA. Therefore, a person reviewing individual requirements in WCAG 2.1 may not understand that both Level A and Level AA success criteria must be met to attain Level AA conformance. Accordingly, the Department has made explicit in subpart H that both Level A and Level AA success

[67] *See* 36 CFR 1194.1; 36 CFR part 1194, appendix C, ch. 5.

[68] W3C, *Web Content Accessibility Guidelines (WCAG) 2.1* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/* and *https://perma.cc/UB8A-GG2F* (success criteria 2.5.5, 1.3.4, & 2.5.4).

[69] *See Information and Communication Technology (ICT) Standards and Guidelines,* 82 FR 5790, 5798–99 (Jan. 18, 2017).

[70] *Id.* at 5799.

[71] W3C, *WCAG2ICT Overview, https://www.w3.org/WAI/standards-guidelines/wcag/non-web-ict/* [*https://perma.cc/XRL6-6Q9Y*] (Feb. 2, 2024).

[72] *See* W3C, *Guidance on Applying WCAG 2.0 to Non-Web Information and Communications Technologies (WCAG2ICT)* (Sep. 5, 2003), *https://www.w3.org/TR/wcag2ict/* [*https://perma.cc/6HKS-8YZP*]. This guidance may provide assistance in interpreting certain WCAG 2.0 success criteria (also included in WCAG 2.1 Level AA) that do not appear to be directly applicable to non-web information and communications like conventional electronic documents and mobile apps as written, but that can be made applicable with minor revisions. For example, for Success Criterion 1.4.2 (audio control), replacing the words ''on a web page'' with ''in a non-web document or software'' can make this Success Criterion clearly applicable to conventional electronic documents and mobile apps.

[73] W3C, *EPUB Accessibility 1.1* (May 25, 2023), *https://www.w3.org/TR/epub-a11y-11/* [*https://perma.cc/48A5-NC2B*].

[74] W3C, *Introduction to Understanding WCAG* (June 20, 2023), *https://www.w3.org/WAI/WCAG21/Understanding/intro* [*https://perma.cc/XB3Y-QKVU*].

[75] *See* W3C, *Understanding Techniques for WCAG Success Criteria* (June 20, 2023), *https://www.w3.org/WAI/WCAG21/Understanding/understanding-techniques* [*https://perma.cc/AMT4-XAAL*].

[76] 88 FR 51961.

[77] W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, § 5.2 Conformance Requirements* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/#conformance-reqs* [*https://perma.cc/39WD-CHH9*]. WCAG 2.1 also allows a Level AA conforming alternate version to be provided instead. The Department has adopted a slightly different approach to conforming alternate versions, which is discussed in the section-by-section analysis of § 35.202.

criteria and conformance requirements must be met in order to comply with subpart H's requirements.

By way of background, the three levels of conformance indicate a measure of accessibility and feasibility. Level A, which is the minimum level of accessibility, contains criteria that provide basic web accessibility and are the least difficult to achieve for web developers.[78] Level AA, which is the intermediate level of accessibility, includes all of the Level A criteria and also contains other criteria that provide more comprehensive web accessibility, and yet are still achievable for most web developers.[79] Level AAA, which is the highest level of conformance, includes all of the Level A and Level AA criteria and also contains additional criteria that can provide a more enriched user experience, but are the most difficult to achieve for web developers.[80] W3C does not recommend that Level AAA conformance be required as a general policy for entire websites because it is not possible to satisfy all Level AAA criteria for some content.[81]

Based on public feedback and independent research, the Department believes that WCAG 2.1 Level AA is the appropriate conformance level because it includes criteria that provide web and mobile app accessibility to individuals with disabilities—including those with visual, auditory, physical, speech, cognitive, and neurological disabilities—and yet is feasible for public entities' web developers to implement. Commenters who spoke to this issue generally seemed supportive of this approach. As discussed in the NPRM,[82] Level AA conformance is widely used, making it more likely that web developers are already familiar with its requirements. Though many of the entities that conform to Level AA do so under WCAG 2.0, not WCAG 2.1, this still suggests a widespread familiarity with most of the Level AA success criteria, given that 38 of the 50 Level A and AA success criteria in WCAG 2.1 are also included in WCAG 2.0.[83] The Department believes that Level A conformance alone is not appropriate because it does not include criteria for providing web accessibility that the Department understands are critical, such as a minimum level of color contrast so that items like text boxes or icons are easier to see, which is important for individuals with vision disabilities.

Some commenters suggested that certain Level AAA criteria or other unique accessibility requirements be added to the technical standard in subpart H of this part. However, the Department believes it would be confusing and difficult to implement certain Level AAA or other unique criteria when such criteria are not required under WCAG 2.1 Level AA. Adopting WCAG 2.1 Level AA as a whole provides greater predictability and reliability. Also, while Level AAA conformance provides a richer user experience, it is the most difficult to achieve for many entities. Again, W3C does not recommend that Level AAA conformance be required as a general policy for entire websites because it is not possible to satisfy all Level AAA criteria for some content.[84] Adopting a Level AA conformance level makes the requirements of subpart H consistent with a standard that has been accepted internationally.[85] The web content of Federal agencies is also required to conform to WCAG 2.0 Level AA under the Section 508 Standards.[86]

Therefore, the Department believes that adopting the Level AA conformance level strikes the right balance between accessibility for individuals with disabilities and achievability for public entities.

Requirements by Entity Size

In addition to setting forth a technical standard with which public entities must comply, § 35.200(b) also establishes dates by which a public entity must comply. The compliance time frames set forth in § 35.200(b) are generally delineated by the total population of the public entity, as defined in § 35.104. Larger public entities—those with populations of 50,000 or more—will have two years before compliance is first required. For the reasons discussed in the section-by-section analysis of § 35.200(b)(2), small public entities—those with total populations under 50,000—and special district governments will have an additional year, totaling three years, before compliance is first required. The 50,000 population threshold was chosen because it corresponds with the definition of ''small governmental jurisdictions'' as defined in the Regulatory Flexibility Act.[87] After the compliance date, ongoing compliance with subpart H of this part is required.

Commenters expressed a wide range of views about how long public entities should be given to bring their web content and mobile apps into compliance with subpart H of this part. Some commenters expressed concern that public entities would need more time to comply, while others expressed concern that a delayed compliance date would prolong the exclusion of individuals with disabilities from public entities' online services, programs, or activities. Suggestions for the appropriate compliance time frame ranged from six months to six years. There were also some commenters who suggested a phased approach where a public entity would need to periodically meet certain compliance milestones over time by prioritizing certain types of content or implementing certain aspects of the technical standard. Refer to the section of the section-by-section analysis entitled ''Compliance Time Frame Alternatives'' for further discussion of these suggested approaches.

The Department appreciates the various considerations raised by public stakeholders in their comments. After carefully weighing the arguments that the compliance dates should be kept the same, shortened, lengthened, or designed to phase in certain success criteria or focus on certain content, the Department has decided that the compliance dates in subpart H of this part—two years for large public entities and three years for small public entities and special district governments—strike the appropriate balance between the various interests at stake. Shortening the compliance dates would likely result in increased costs and practical difficulties for public entities, especially small public entities. Lengthening the compliance dates would prolong the exclusion of many individuals with disabilities from public entities' web content and mobile apps. The Department believes that the balance struck in the compliance time frame proposed in the NPRM was appropriate, and that there are no overriding reasons to shorten or lengthen these dates given the important and competing considerations involved by stakeholders.

Some commenters said that the Department should not require compliance with technical standards for mobile apps until at least two years after the compliance deadline for web content. These commenters asserted that having different compliance dates for web content and mobile apps would allow entities to learn how to apply accessibility techniques to their web content and then apply that experience to mobile apps. Other commenters argued that the compliance dates for mobile apps should be shortened or kept as proposed.

The Department has considered these comments and subpart H of this part implements the same compliance dates for mobile apps and web content, as proposed in the NPRM. Because users can often access the same information from both web content and mobile apps, it is important that both platforms are subject to the standard at the same times to ensure consistency in accessibility and to reduce confusion. The Department believes these compliance dates strike the appropriate balance between reducing burdens for public entities and ensuring accessibility for individuals with disabilities.

Some commenters stated that it would be helpful to clarify whether subpart H of this part establishes a one-time compliance requirement or instead establishes an ongoing compliance obligation for public entities. The Department wishes to clarify that under subpart H, public entities have an ongoing obligation to ensure that their web content and mobile apps comply with subpart H's requirements, which would include content that is newly added or

[78] W3C, *Web Content Accessibility Guidelines (WCAG) 2 Level A Conformance* (July 13, 2020), *https://www.w3.org/WAI/WCAG2A-Conformance* [*https://perma.cc/KT74-JNHG*].

[79] *Id.*

[80] *Id.*

[81] *See* W3C, *Understanding Conformance, Understanding Requirement 1, https://www.w3.org/WAI/WCAG21/Understanding/conformance* [*https://perma.cc/K94N-Z3TF*].

[82] 88 FR 51961.

[83] W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, 0.5 Comparison with WCAG 2.0* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/#comparison-with-wcag-2-0* [*https://perma.cc/H76F-6L27*].

[84] *See* W3C, *Understanding Conformance, Understanding Requirement 1, https://www.w3.org/WAI/WCAG21/Understanding/conformance* [*https://perma.cc/9ZG9-G5N8*].

[85] *See* W3C, *Web Accessibility Laws & Policies, https://www.w3.org/WAI/policies/* [*https://perma.cc/6SU3-3VR3*] (Dec. 4, 2023).

[86] *See Information and Communication Technology (ICT) Standards and Guidelines,* 82 FR 5790, 5791 (Jan. 18, 2017).

[87] 5 U.S.C. 601(5).

created after the compliance date. The compliance date is the first time that public entities need to be in compliance with subpart H's requirements; it is not the last. Accordingly, after the compliance date, public entities will continue to need to ensure that all web content and mobile apps they provide or make available comply with the technical standard, except to the extent another provision of subpart H permits otherwise. To make this point more clearly, the Department revised § 35.200(b)(1) and (2) to state that a public entity needs to comply with subpart H beginning two or three years after the publication of the final rule. Additionally, some commenters suggested that public entities be required to review their content for accessibility every few years. The Department does not view this as necessary given the ongoing nature of subpart H's requirements. However, public entities might find that conducting such reviews is helpful in ensuring compliance.

Of course, while public entities must begin complying with subpart H of this part on the applicable compliance date, the Department expects that public entities will need to prepare for compliance during the two or three years before the compliance date. In addition, commenters emphasized—and the Department agrees—that public entities still have an obligation to meet all of title II's existing requirements both before and after the date they must initially come into compliance with subpart H. These include the requirements to ensure equal access, ensure effective communication, and make reasonable modifications to avoid discrimination on the basis of disability.[88]

The requirements of § 35.200(b) are generally delineated by the size of the total population of the public entity. If a public entity has a population calculated by the United States Census Bureau in the most recent decennial Census, then the United States Census Bureau's population estimate for that entity in the most recent decennial Census is the entity's total population for purposes of this part. If a public entity is an independent school district, then the district's total population for purposes of this part is determined by reference to the district's population estimate as calculated by the United States Census Bureau in the most recent Small Area Income and Poverty Estimates.

The Department recognizes that some public entities, like libraries or public colleges and universities, do not have population data associated with them in the most recent decennial Census conducted by the United States Census Bureau. As noted in the section-by-section analysis of § 35.104, the Department has inserted a clarification that was previously found in the preamble of the NPRM into the regulatory text of the definition of ''total population'' in this part to make it easier for public entities like these to determine their total population size for purposes of identifying the applicable compliance date. As the definition of ''total population'' makes clear, if a public entity, other than a special district government or an independent school district, does not have a population calculated by the United States Census Bureau in the most recent decennial Census, but is an instrumentality or a commuter authority of one or more State or local governments that do have such a population estimate, the population of the entity is determined by the combined population of any State or local governments of which the public entity is an instrumentality or commuter authority. For example, a county police department that is an instrumentality of a county with a population of 5,000 would be considered a small public entity (*i.e.,* an entity with a total population of less than 50,000) for purposes of this part, while a city police department that is an instrumentality of a city with a population of 200,000 would not be considered a small public entity. Similarly, if a public entity is an instrumentality of an independent school district, the instrumentality's population for purposes of this part is determined by reference to the total population of the independent school district as calculated in the most recent Small Area Income and Poverty Estimates. This part also states that the National Railroad Passenger Corporation's total population for purposes of this part is determined by reference to the population estimate for the United States as calculated by the United States Census Bureau in the most recent decennial Census.

For purposes of this part, the total population of a public entity is not defined by the population that is eligible for or that takes advantage of the specific services of the public entity. For example, an independent school district with a population of 60,000 adults and children, as calculated in the Small Area Income and Poverty Estimates, is not a small public entity regardless of the number of students enrolled or eligible for services. Similarly, individual county schools are also not considered small public entities if they are instrumentalities of a county that has a population over 50,000. Though a specific county school may create and maintain web content or a mobile app, the Department expects that the specific school may benefit from the resources made available or allocated by the county. This also allows the jurisdiction to assess compliance for its services, programs, and activities holistically. As another example, a public State university located in a town of 20,000 within a State with a population of 5 million would be considered a large public entity for the purposes of this part because it is an instrumentality of the State. However, a county community college in the same State where the county has a population of 35,000 would be considered a small public entity for the purposes of this part, because the community college is an instrumentality of the county.

Some commenters provided feedback on this method of calculating a public entity's size for purposes of determining the applicable compliance time frame. Some public educational entities seemed to mistakenly believe that their populations would be calculated based on the size of their student bodies and suggested that it would be difficult for them to calculate their population size under that approach because they have multiple campuses in different locations. As clarified previously in this appendix, population size for educational entities is determined not by the size of those entities' student bodies, but rather by reference to the Census-calculated total population of the jurisdiction of which the educational entity is an instrumentality.

Other commenters suggested that although public entities without a Census-defined population may be instrumentalities of public entities that do have such a population, those entities do not always reliably receive funding from the public entities of which they are instrumentalities. The Department understands that the financial relationships between these entities may vary, but the Department believes that the method of calculating population it has adopted will generally be the clearest and most effective way for public entities to determine the applicable compliance time frame.

Some commenters associated with educational entities suggested that the Department use the Carnegie classification system for purposes of determining when they must first comply with subpart H of this part. The Carnegie classification system takes into account factors that are not relevant to subpart H, such as the nature of the degrees offered (*e.g.,* baccalaureate versus associate's degrees).[89] Subpart H treats educational entities the same as other public entities for purposes of determining the applicable compliance time frame, which promotes consistency and reliability.

Other commenters suggested that factors such as number of employees, budget, number and type of services provided, and web presence be used to determine the appropriate compliance time frame. However, the Department believes that using population as determined by the Census Bureau is the clearest, most predictable, and most reliable factor for determining the compliance time frame. At least one commenter highlighted that population size often relates to the audience of people with disabilities that a public entity serves through its web content and mobile apps. In addition, the Regulatory Flexibility Act uses population size to define what types of governmental jurisdictions qualify as ''small.'' [90] This concept, therefore, should be familiar to public entities. Additionally, using population allows the Department to account for the unique challenges faced by small public entities, as discussed in the section-by-section analysis of § 35.200(b)(2).

The Department also received comments asserting that the threshold for being considered ''small'' should be changed and that the Department should create varying compliance dates based on additional gradations of public entity size. The Department believes it is most appropriate to rely on the 50,000 threshold—which is

[88] Sections 35.130(b)(1)(ii) and (b)(7) and 35.160.

[89] *See* Am. Council on Educ., *Carnegie Classification of Institutions of Higher Education, https://carnegieclassifications.acenet.edu/* [*https://perma.cc/Q9JZ-GQN3*]; Am. Council on Educ., *About the Carnegie Classification, https://carnegieclassifications.acenet.edu/carnegie-classification/* [*https://perma.cc/B6BH-68WM*].

[90] 5 U.S.C. 601(5).

drawn from and consistent with the Regulatory Flexibility Act—to promote consistency and predictability for public entities. Creating additional categories and compliance time frames would likely result in an unnecessary patchwork of obligations that would make it more difficult for public entities to understand their compliance obligations and for individuals with disabilities to understand their rights. The approach in subpart H of this part preserves the balance between public entities' needs to prepare for costs and individuals with disabilities' needs to access online services, programs, and activities. In addition, breaking down the size categories for compliance dates further could lead to an arbitrary selection of the appropriate size cutoff. The Department selected the size cutoff of 50,000 persons in part because the Regulatory Flexibility Act defines ''small governmental jurisdictions'' as those with a population of less than 50,000.[91] Selecting a different size cutoff would require estimating the appropriate size to use, and without further input from the public, it could lead to an arbitrary selection inconsistent with the needs of public entities. Because of this, the Department believes the most prudent approach is to retain the size categories that are consistent with those outlined in the Regulatory Flexibility Act. The Department also believes that retaining two categories of public entities—large and small—strikes the appropriate balance of acknowledging the compliance challenges that small public entities may face while not crafting a system that is unduly complex, unpredictable, or inconsistent across public entities.

Section 35.200(b)(1): Larger Public Entities

Section 35.200(b)(1) sets forth the web content and mobile app accessibility requirements for public entities with a total population of 50,000 or more. The requirements of § 35.200(b)(1) apply to larger public entities—specifically, to those public entities that do not qualify as ''small governmental jurisdictions'' as defined in the Regulatory Flexibility Act.[92] Section 35.200(b)(1) requires that beginning two years after the publication of the final rule, these public entities must ensure that the web content and mobile apps that they provide or make available [93] comply with Level A and Level AA success criteria and conformance requirements specified in WCAG 2.1, unless the entities can demonstrate that compliance would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.[94]

As discussed previously in this appendix, the Department received varied feedback from the public regarding an appropriate time frame for requiring public entities to begin complying with subpart H of this part. Individuals with disabilities and disability advocacy organizations tended to prefer a shorter time frame, often arguing that web accessibility has long been required by the ADA and that extending the deadline for compliance rewards entities that have not made efforts to make their websites accessible. Such commenters also emphasized that a longer compliance time frame would prolong the time that individuals with disabilities would not have access to critical services offered by public entities, which would undermine the purpose of the ADA. Commenters noted that delays in compliance may be particularly problematic in contexts such as voting and education, where delays could be particularly impactful given the time-sensitive nature of these programs. Another commenter who supported shorter time frames pointed out that the Department has entered into settlements with public entities requiring that their websites be made accessible in shorter amounts of time, such as a few months.[95] The Department notes that while such settlement agreements serve as important datapoints, those agreements are tailored to the specific situation and entity involved and are not broadly applicable like a regulation.

State and local government entities have been particularly concerned—now and in the past—about shorter compliance deadlines, often citing budgets and staffing as major limitations. For example, as noted in the NPRM, when WCAG 2.0 was relatively new, many public entities stated that they lacked qualified personnel to implement that standard. They told the Department that in addition to needing time to implement the changes to their websites, they also needed time to train staff or contract with professionals who are proficient in developing accessible websites. Considering all these factors, as well as the fact that over a decade has passed since the Department started receiving such feedback and there is now more available technology to make web content and mobile apps accessible, the Department believes a two-year compliance time frame for public entities with a total population of 50,000 or more is appropriate.

Public entities and the community of web developers have had more than a decade to familiarize themselves with WCAG 2.0, which was published in 2008 and serves as the foundation for WCAG 2.1, and more than five years to familiarize themselves with the additional 12 Level A and AA success criteria of WCAG 2.1.[96] The Department believes these 12 additional success criteria will not significantly increase the time or resources that it will take for a public entity to come into compliance with subpart H of this part beyond what would have already been required to conform to WCAG 2.0. The Department therefore believes that subpart H's approach balances the resource challenges reported by public entities with the interests of individuals with disabilities in accessing the multitude of services, programs, and activities that public entities now offer via the web and mobile apps.

Section 35.200(b)(2): Small Public Entities and Special District Governments

Section 35.200(b)(2) sets forth the web content and mobile app accessibility requirements for public entities with a total population of less than 50,000 and special district governments. As noted in the preceding section, the 50,000 population threshold was chosen because it corresponds with the definition of ''small governmental jurisdictions'' in the Regulatory Flexibility Act.[97] Section 35.200(b)(2) requires that beginning three years after the publication of the final rule, these public entities with a total population of less than 50,000 and special district governments must ensure that the web content and mobile apps that they provide or make available [98] comply with Level A and Level AA success criteria and conformance requirements specified in WCAG 2.1, unless the entities can demonstrate that compliance would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.

Small Public Entities

The Department appreciates that small public entities may sometimes face unique challenges in making their web content and mobile apps accessible, given that small entities may have more limited or inflexible budgets than other entities. The Department is very sensitive to the need to craft a workable approach for small entities and has taken the needs of small public entities into account at every stage in the rulemaking process, consistent with the Regulatory Flexibility Act of 1980 and Executive Order 13272.[99] The NPRM asked a series of

[91] *See id.*

[92] *Id.*

[93] As the regulatory text for § 35.200(a)(1) and (2) and (b)(1) and (2) makes clear, subpart H of this part covers web content and mobile apps that a public entity provides or makes available, whether directly or through contractual, licensing, or other arrangements. This regulatory text is discussed in more detail in this section.

[94] The undue financial and administrative burdens limitation on a public entity's obligation to comply with the requirements of subpart H of this part is discussed in more detail in the section-by-section analysis of § 35.204.

[95] *See, e.g.,* Settlement Agreement Between the United States of America and the City of Cedar Rapids, Iowa Under the Americans with Disabilities Act (Sept. 1, 2015), *https://www.ada.gov/cedar_rapids_pca/cedar_rapids_sa.html* [*https://perma.cc/Z338-B2BU*]; Settlement Agreement Between the United States of America and the City of Fort Morgan, Colo. Under the Americans with Disabilities Act (Aug. 8, 2013), *https://www.ada.gov/fort-morgan-pca/fort-morgan-pca-sa.htm* [*https://perma.cc/JA3E-QYMS*]; Settlement Agreement Between the United States of America and the Town of Poestenkill, N.Y. Under the Americans with Disabilities Act (July 19, 2013), *https://www.ada.gov/poestenkill-pca/poestenkill-sa.html* [*https://perma.cc/DGD5-NNC6*].

[96] W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, 0.5 Comparison with WCAG 2.0* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/#comparison-with-wcag-2-0* [*https://perma.cc/H76F-6L27*].

[97] 5 U.S.C. 601(5).

[98] As the regulatory text for § 35.200(a)(1) and (2) and (b)(1) and (2) makes clear, subpart H of this part covers web content and mobile apps that a public entity provides or makes available, whether directly or through contractual, licensing, or other arrangements. This regulatory text is discussed in more detail in this section.

[99] *See Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations,* 75 FR 43460, 43467 (July 26, 2010); 88 FR 51949, 51961–51966.

questions about the impact of the rulemaking on small public entities, including about the compliance costs and challenges that small entities might face in conforming with the rulemaking, the current level of accessibility of small public entities' web content and mobile apps, and whether it would be appropriate to adopt different technical standards or compliance time frames for small public entities.[100]

The Department has reviewed public comments, including a comment from the Small Business Administration Office of Advocacy,[101] attended a virtual roundtable session hosted by the Small Business Administration at which approximately 200 members of the public were present, and carefully considered this topic. In light of its review and consideration, the Department believes that the most appropriate means of reducing burdens for small public entities is to give small public entities an extra year to comply with subpart H of this part. Accordingly, under § 35.200(b)(2), small public entities, like all other public entities, need to conform to WCAG 2.1 Level AA, but small public entities have three years, instead of the two years provided to larger public entities, to come into compliance. In addition, small public entities (like all public entities) can rely on the five exceptions set forth in § 35.201, in addition to the other mechanisms that are designed to make it feasible for all public entities to comply with subpart H of this part, as set forth in §§ 35.202, 35.203, 35.204 and 35.205.

Many commenters emphasized the challenges that small public entities may face in making their web content and mobile apps accessible. For example, some commenters reported that small public entities often have restricted, inflexible budgets, and might need to divert funds away from other government services in order to comply with subpart H of this part. Some commenters also asserted that the Department underestimated the costs that might be associated with bringing small public entities' web content and mobile apps into compliance. Some commenters noted that small public entities may lack technical expertise and dedicated personnel to work on accessibility issues. Commenters asserted that some small entities' web-based operations are decentralized, and that these entities would therefore need to train a large number of individuals on accessibility to ensure compliance. Commenters also contended that many small public entities may be dependent on third-party vendors to make their content accessible, and that there may be shortages in the number of web developers available to assist with remediation. Some commenters expressed concern that small entities would simply remove their web content rather than make it accessible. Commenters also expressed concern that public entities would need to devote scarce resources to defending against web accessibility lawsuits that might arise as a result of subpart H, which might further exacerbate these entities' budgetary challenges. The Department notes that public entities would not be required to undertake changes that would result in a fundamental alteration in the nature of a service, program, or activity, or impose undue financial and administrative burdens.

As a result of these concerns, some commenters suggested that the Department should create different or more flexible standards for small entities. For example, some commenters suggested that the Department should require small entities to conform to WCAG 2.0 instead of WCAG 2.1, to match the standards that are applicable to the Federal Government under section 508. One commenter suggested that the Department should require small public entities to comply only with WCAG 2.0 Level A, not Level AA. Other commenters advocating for small public entities suggested that those entities should have more time than larger public entities to comply with subpart H of this part, with suggested compliance time frames ranging from three to six years. Some commenters suggested the Department should adopt extended compliance dates for certain requirements of subpart H that may be more onerous. Commenters noted that having additional time to comply would help public entities allocate financial and personnel resources to bring their websites into compliance. A commenter stated that additional compliance time would also allow more web developers to become familiar with accessibility issues and more digital accessibility consultants to emerge, thereby lowering the cost of testing and consulting services. A commenter noted that some rural public entities may need extra time to bring their content into compliance but asserted that the Department should avoid adopting a compliance date so distant that it does not provide sufficient urgency to motivate those entities to address the issue.

Although many commenters expressed concerns about the impact of subpart H of this part on small public entities, many other commenters expressed opposition to creating different standards or compliance time frames for small entities. Commenters emphasized that people in rural areas might need to travel long distances to access in-person services and that such areas may lack public transportation or rideshare services. Given those considerations, commenters suggested that people with disabilities in small jurisdictions need access to web-based local government services just as much as, and sometimes more than, their counterparts in larger jurisdictions. Some commenters noted that people with disabilities may disproportionately reside in small towns or rural areas, and that it is therefore especially critical for those small and rural governments to have accessible web content and mobile apps. One commenter indicated that rural residents are 14.7 percent more likely than their urban counterparts to have a disability.[102] Commenters emphasized the problems that may be associated with imposing different technical standards based on the size of the entity, including a lack of predictability with respect to which government services people can expect to be accessible. Commenters also noted that people with disabilities have a right to equal access to their government's services, regardless of where they live, and stated that setting different standards for small public entities would undermine that right. One commenter stated that, although each small public entity may have only a small population, there are a large number of small public entities, meaning that any lowering of the standards for small public entities would cumulatively affect a large number of people. Some commenters argued that setting different substantive standards for small public entities could make it challenging to enforce subpart H. Some commenters argued that setting different technical standards for small public entities would be inconsistent with title II of the ADA, which does not set different standards based on the size of the entity. One commenter argued that requiring small public entities to comply only with Level A success criteria would be inadequate and inconsistent with international standards.

Commenters also noted that there are many factors that may make it easier for small public entities to comply. For example, some commenters suggested that small entities may have smaller or less complex websites than larger entities. Commenters noted that public entities may be able to make use of free, publicly available resources for checking accessibility and to save money by incorporating accessibility early in the process of content creation, instead of as an afterthought. Commenters also noted that public entities can avoid taking actions that are unduly burdensome by claiming the fundamental alteration or undue burdens limitations where appropriate.

One commenter argued that, because there are a limited number of third-party vendors that provide web content for public entities, a few major third-party vendors shifting towards accessibility as a result of increased demand stemming from subpart H of this part could have a cascading effect. This could make the content of many entities that use those vendors or their templates accessible by default. Commenters also noted that setting different technical standards for small public entities would create confusion for those attempting to implement needed accessibility changes. One commenter also contended that it may benefit small public entities to use a more recent version of WCAG because doing so may provide a better experience for all members of the public.

Some commenters pointed out that the challenges small public entities may face are not necessarily unique, and that many public entities, regardless of size, face budgetary constraints, staffing issues, and a need for training. In addition, some commenters noted that the size of a public entity may not

[100] 88 FR 51961–51966.

[101] A discussion of the comment from the Small Business Administration Office of Advocacy can also be found in the Final Regulatory Flexibility Analysis.

[102] *See* Katrina Crankshaw, U.S. Census Bureau, *Disability Rates Higher in Rural Areas than Urban Areas* (June 26, 2023), *https://www.census.gov/library/stories/2023/06/disability-rates-higher-in-rural-areas-than-urban-areas.html#:~:text=Examining%20disability%20rates%20across%20geography,ACS)%201%2Dyear%20estimates* [*https://perma.cc/NP5Y-CUJS*].

always be a good proxy for the number of people who may need access to an entity's website.

Having carefully considered these comments, the Department believes that subpart H of this part strikes the appropriate balance by requiring small public entities to comply with the same technical standard as larger public entities while giving small public entities additional time to do so. The Department believes this longer compliance time frame is prudent in recognition of the additional challenges that small public entities may face in complying, such as limited budgets, lack of technical expertise, and lack of personnel. The Department believes that providing an extra year for small public entities to comply will give those entities sufficient time to properly allocate their personnel and financial resources to make their web content and mobile apps conform to WCAG 2.1 Level AA, without providing so much additional time that individuals with disabilities have a reduced level of access to their State and local government entities' resources for an extended period.

The Department believes that having provided an additional year for small public entities to comply with subpart H of this part, it is appropriate to require those entities to comply with the same technical standard and conformance level as all other public entities. This approach ensures consistent levels of accessibility for public entities of all sizes in the long term, which will promote predictability and reduce confusion about which standard applies. It will allow for individuals with disabilities to know what they can expect when navigating a public entity's web content; for example, it will be helpful for individuals with disabilities to know that they can expect to be able to navigate any public entity's web content independently using their assistive technology. It also helps to ensure that individuals with disabilities who reside in rural areas have comparable access to their counterparts in urban areas, which is critical given the transportation and other barriers that people in rural areas may face.[103] In addition, for the reasons discussed elsewhere in this appendix, the Department believes that WCAG 2.1 Level AA contains success criteria that are critical to accessing services, programs, or activities of public entities, which may not be included under a lower standard. The Department notes that under appropriate circumstances, small public entities may also rely on the exceptions, flexibilities, and other mechanisms described in the section-by-section analysis of §§ 35.201, 35.202, 35.203, 35.204, and 35.205, which the Department believes should help make compliance feasible for those entities.

Some commenters suggested that the Department should provide additional exceptions or flexibilities to small public entities. For example, the Small Business Administration suggested that the Department explore developing a wholesale exception to subpart H of this part for certain small public entities. The Department does not believe that setting forth a wholesale exception for small public entities would be appropriate for the same reasons that it would not be appropriate to adopt a different technical standard for those entities. Such an exception would mean that an individual with a disability who lives in a small, rural area, might not have the same level of access to their local government's web-based services, programs, and activities as an individual with a disability in a larger, urban area. This would significantly undermine consistency and predictability in web accessibility. It would also be particularly problematic given the interconnected nature of many different websites. Furthermore, an exception for small public entities would reduce the benefits of subpart H of this part for those entities. The Department has heard from public entities seeking clarity about how to comply with their nondiscrimination obligations under title II of the ADA when offering services via the web. Promulgating an exception for small public entities from the technical standard described in subpart H would not only hinder access for individuals with disabilities but would also leave those entities with no clear standard for how to satisfy their existing obligations under the ADA and the title II regulation.

Other commenters made alternative suggestions, such as making WCAG 2.1 Level AA compliance recommended but not required. The Department does not believe this suggestion is workable or appropriate. As discussed in the section entitled, ''Inadequacy of Voluntary Compliance with Technical Standards,'' and as the last few decades have shown, the absence of a mandatory technical standard for web content and mobile apps has not resulted in widespread equal access for people with disabilities. For subpart H of this part to have a meaningful effect, the Department believes it must set forth specific requirements so that both individuals with disabilities and public entities have clarity and predictability in terms of what the law requires. The Department believes that creating a recommended, non-mandatory technical standard would not provide this clarity or predictability and would instead largely maintain the status quo.

Some commenters suggested that the Department should allow small public entities to avoid making their web content and mobile apps accessible by instead offering services to individuals with disabilities via the phone, providing an accessibility disclaimer or statement, or offering services to individuals with disabilities through other alternative methods that are not web-based. As discussed in the section entitled ''History of the Department's Title II Web-Related Interpretation and Guidance'' and in the NPRM,[104] given the way the modern web has developed, the Department no longer believes 24/7 staffed telephone lines can realistically provide equal opportunity to individuals with disabilities in the way that web content and content in mobile apps can. If a public entity provides services, programs, or activities to the public via the web or mobile apps, it generally needs to ensure that those services, programs, or activities are accessible. The Department also does not believe that requirement is met by a public entity merely providing an accessibility disclaimer or statement explaining how members of the public can request accessible web content or mobile apps. If none of a public entity's web content or mobile apps were to conform to the technical standard adopted in subpart H of this part, individuals with disabilities would need to request access each and every time they attempted to interact with the public entity's services, programs, or activities, which would not provide equal opportunity. Similarly, it would not provide equal opportunity to offer services, programs, or activities via the web or mobile apps to individuals without disabilities but require individuals with disabilities to rely exclusively on other methods to access those services.

Many commenters also asked the Department to provide additional resources and guidance to help small entities comply. The Small Business Administration Office of Advocacy also highlighted the need for the Department to produce a small entity compliance guide.[105] The Department plans to issue the required small entity compliance guide. The Department is also issuing a Final Regulatory Flexibility Analysis as part of this rulemaking, which explains the impact of subpart H of this part on small public entities. In addition, although the Department does not currently operate a grant program to assist public entities in complying with the ADA, the Department will consider offering additional technical assistance and guidance in the future to help entities better understand their obligations. The Department also operates a toll-free ADA Information Line at (800) 514–0301 (voice) or 1–833–610–1264 (TTY), which public entities can call to get technical assistance about the ADA, including information about subpart H.

Many commenters also expressed concern about the potential for an increase in litigation for small public entities as a result of subpart H of this part. Some commenters asked the Department to create a safe harbor or other flexibilities to protect small public entities from frivolous litigation. In part to address these concerns, subpart H includes a new section, at § 35.205, which states that a public entity that is not in full compliance with the requirements of § 35.200(b) will be deemed to have met the requirements of § 35.200 in the limited circumstance in which the public entity can demonstrate that the noncompliance has such a minimal impact on access that it would not affect the ability of individuals with disabilities to use the public entity's web content or mobile app in a substantially equivalent manner as individuals without disabilities. As discussed at more length in the section-by-section analysis of § 35.205, the Department

[103] *See, e.g.,* NORC Walsh Ctr. for Rural Health Analysis & Rural Health Info. Hub, *Access to Care for Rural People with Disabilities Toolkit* (Dec. 2016), *https://www.ruralhealthinfo.org/toolkits/disabilities.pdf* [*https://perma.cc/YX4E-QWEE*].

[104] 88 FR 51953.

[105] *See* Contract with America Advancement Act of 1996, Public Law 104–121, sec. 212, 110 Stat. 847, 858 (5 U.S.C. 601 note).

believes this provision will reduce the risk of litigation for public entities while ensuring that individuals with disabilities have substantially equivalent access to public entities' services, programs, and activities. Section 35.205 will allow public entities to avoid falling into noncompliance with § 35.200 if they are not exactly in conformance to WCAG 2.1 Level AA, but the nonconformance would not affect the ability of individuals with disabilities to use the public entity's web content or mobile app with substantially equivalent timeliness, privacy, independence, and ease of use. The Department believes that this will afford more flexibility for all public entities, including small ones, while simultaneously ensuring access for individuals with disabilities.

One commenter asked the Department to state that public entities, including small ones, that are working towards conformance to WCAG 2.1 Level AA before the compliance dates are in compliance with the ADA and not engaging in unlawful discrimination. The Department notes that while the requirement to comply with the technical standard set forth in subpart H of this part is new, the underlying obligation to ensure that all services, programs, and activities, including those provided via the web and mobile apps, are accessible is not.[106] Title II currently requires public entities to, for example, provide equal opportunity to participate in or benefit from services, programs, or activities;[107] make reasonable modifications to policies, practices, or procedures;[108] and ensure that communications with people with disabilities are as effective as communications with others, which includes considerations of timeliness, privacy, and independence.[109] Accordingly, although public entities do not need to comply with subpart H until two or three years after the publication of the final rule, they will continue to have to take steps to ensure accessibility in the meantime, and will generally have to achieve compliance with the technical standard by the date specified in subpart H.

Some commenters asked the Department to provide additional flexibility for small public entities with respect to captioning requirements. A discussion of the approach to captioning in subpart H of this part can be found in the section entitled ''Captions for Live-Audio and Prerecorded Content.'' Some commenters also expressed that it would be helpful for small entities if the Department could provide additional guidance on how the undue burdens limitation operates in practice. Additional information on this issue can be found in the section-by-section analysis of § 35.204, entitled ''Duties.'' Some commenters asked the Department to add a notice-and-cure provision to subpart H to help protect small entities from liability. For the reasons discussed in the section-by-section analysis of § 35.205, entitled ''Effect of noncompliance that has a minimal impact on access,'' the Department does not believe this approach is appropriate.

Special District Governments

In addition to small public entities, § 35.200(b)(2) also covers public entities that are special district governments. As previously noted, special district governments are governments that are authorized to provide a single function or a limited number of functions, such as a zoning or transit authority. As discussed elsewhere in this appendix, § 35.200 proposes different compliance dates according to the size of the Census-defined population of the public entity, or, for public entities without Census-defined populations, the Census-defined population of any State or local governments of which the public entity is an instrumentality or commuter authority. The Department believes applying to special district governments the same compliance date as small public entities (*i.e.,* compliance in three years) is appropriate for two reasons. First, because the Census Bureau does not provide population estimates for special district governments, these limited-purpose public entities might find it difficult to obtain population estimates that are objective and reliable in order to determine their duties under subpart H of this part. Though some special district governments may estimate their total populations, these entities may use varying methodology to calculate population estimations, which may lead to confusion and inconsistency in the application of the compliance dates in § 35.200. Second, although special district governments may sometimes serve a large population, unlike counties, cities, or townships with large populations that provide a wide range of online government services and programs and often have large and varying budgets, special district governments are authorized to provide a single function or a limited number of functions (*e.g.,* to provide mosquito abatement or water and sewer services). They therefore may have more limited or specialized budgets. Therefore, § 35.200(b)(2) extends the deadline for compliance for special district governments to three years, as it does for small public entities.

The Department notes that some commenters opposed giving special district governments three years to comply with subpart H of this part. One commenter asserted that most special district governments are aware of the size of the regions they serve and would be able to determine whether they fall within the threshold for small entities. One commenter noted that some special district governments may serve larger populations and should therefore be treated like large public entities. Another commenter argued that a public entity that has sufficient administrative and fiscal autonomy to qualify as a separate government should have the means to comply with subpart H in a timely manner. However, as noted in the preceding paragraph, the Department is concerned that, because these special district governments do not have a population calculated by the Census Bureau and may not be instrumentalities of a public entity that does have a Census-calculated population, it is not clear that there is a straightforward way for these governments to calculate their precise population. The Department also understands that these governments have limited functions and may have particularly limited or constrained budgets in some cases. The Department therefore continues to believe it is appropriate to give these governments three years to comply.

Compliance Time Frame Alternatives

In addition to asking that the compliance time frames be lengthened or shortened, commenters also suggested a variety of other alternatives and models regarding how § 35.200's compliance time frames could be structured. Commenters proposed that existing content be treated differently than new content by, for example, requiring that new content be made accessible first and setting delayed or deferred compliance time frames for existing content. Other commenters suggested that the Department use a ''runway'' or ''phase in'' model. Under this model, commenters suggested, the Department could require conformance to some WCAG success criteria sooner than others. Commenters also suggested a phase-in model where public entities would be required to prioritize certain types of content, such as making all frequently used content conform to WCAG 2.1 Level AA first.

Because § 35.200 gives public entities two or three years to come into compliance depending on entity size, public entities have the flexibility to structure their compliance efforts in the manner that works best for them. This means that if public entities want to prioritize certain success criteria or content during the two or three years before the compliance date—while still complying with their existing obligations under title II—they have the flexibility to do so. The Department believes that this flexibility appropriately acknowledges that different public entities might have unique needs based on the type of content they provide, users that they serve, and resources that they have or procure. The Department, therefore, is not specifying certain criteria or types of content that should be prioritized. Public entities have the flexibility to determine how to make sure they comply with § 35.200 in the two- or three-year period before which compliance with § 35.200 is first required. After the compliance date, ongoing compliance is required.

In addition, the Department believes that requiring only new content to be accessible or using another method for prioritization could lead to a significant accessibility gap for individuals with disabilities if public entities rely on content that is not regularly updated or changed. The Department notes that unless otherwise covered by an exception, subpart H of this part requires that new and existing content be made accessible within the meaning of § 35.200 after the date initial compliance is required. Because some exceptions in § 35.201 only apply to preexisting content, the Department believes it is likely that public entities' own newly created or added content will largely need to comply with § 35.200 because such content may not qualify for exceptions. For more information about how the exceptions under

[106] *See, e.g.,* §§ 35.130 and 35.160.

[107] Sections 35.130(b)(1)(ii) and 35.160(b)(1).

[108] Section 35.130(b)(7)(i).

[109] Section 35.160.

§ 35.201 function and how they will likely apply to existing and new content, please review the analysis of § 35.201 in this section-by-section analysis.

Commenters also suggested that public entities be required to create transition plans like those discussed in the existing title II regulation at §§ 35.105 and 35.150(d). The Department does not believe it is appropriate to require transition plans as part of subpart H of this part for several reasons. Public entities are already required to ensure that their services, programs, and activities, including those provided via the web or mobile apps, meet the requirements of the ADA. The Department expects that many entities already engage in accessibility planning and self-evaluation to ensure compliance with title II. By not being prescriptive about the type of planning required, the Department will allow public entities flexibility to build on existing systems and processes or develop new ones in ways that work for each entity. Moreover, the Department has not adopted new self-evaluation and transition plan requirements in other sections in this part in which it adopted additional technical requirements, such as in the 2010 ADA Standards for Accessible Design.[110] Finally, the Department believes that public entities' resources may be better spent making their web content and mobile apps accessible under § 35.200, instead of drafting required self-evaluation and transition plans. The Department notes that public entities can still engage in self-evaluation and create transition plans, and would likely find it helpful, but they are not required to do so under § 35.200.

Fundamental Alteration or Undue Financial and Administrative Burdens

As discussed at greater length in the section-by-section analysis of § 35.204, subpart H of this part provides that where a public entity can demonstrate that compliance with the requirements of § 35.200 would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens, compliance with § 35.200 is only required to the extent that it does not result in a fundamental alteration or undue financial and administrative burdens. For example, where it would impose undue financial and administrative burdens to conform to WCAG 2.1 Level AA (or part of WCAG 2.1 Level AA), public entities would not be required to remove their web content and mobile apps, forfeit their web presence, or otherwise undertake changes that would be unduly financially and administratively burdensome. These limitations on a public entity's duty to comply with the regulatory provisions in subpart H of this part mirror the fundamental alteration or undue burdens limitations currently provided in the title II regulation in §§ 35.150(a)(3) (existing facilities) and 35.164 (effective communication) and the fundamental alteration limitation currently provided in the title II regulation in § 35.130(b)(7) (reasonable modifications in policies, practices, or procedures).

If a public entity believes that a proposed action would fundamentally alter a service, program, or activity or would result in undue financial and administrative burdens, the public entity has the burden of proving that compliance would result in such an alteration or such burdens. The decision that compliance would result in such an alteration or such burdens must be made by the head of the public entity or their designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. As set forth in § 35.200(b)(1) and (2), if an action required to comply with the accessibility standard in subpart H of this part would result in such an alteration or such burdens, a public entity must take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity. Section 35.204, entitled ''Duties,'' lays out the circumstances in which an alteration or such burdens can be claimed. For more information, see the discussion regarding limitations on obligations in the section-by-section analysis of § 35.204.

Requirements for Selected Types of Content

In the NPRM, the Department asked questions about the standards that should apply to two particular types of content: social media platforms and captions for live-audio content.[111] In this section, the Department includes information about the standards that subpart H of this part applies to these types of content and responds to the comments received on these topics.

Public Entities' Use of Social Media Platforms

Public entities are increasingly using social media platforms to provide information and communicate with the public about their services, programs, or activities in lieu of or in addition to engaging the public on the public entities' own websites. Consistent with the NPRM, the Department is using the term ''social media platforms'' to refer to websites or mobile apps of third parties whose primary purpose is to enable users to create and share content in order to participate in social networking (*i.e.,* the creation and maintenance of personal and business relationships online through websites and mobile apps like Facebook, Instagram, X (formerly Twitter), and LinkedIn).

Subpart H of this part requires that web content and mobile apps that public entities provide or make available, directly or through contractual, licensing, or other arrangements, be made accessible within the meaning of § 35.200. This requirement applies regardless of whether that content is located on the public entity's own website or mobile app or elsewhere on the web or in mobile apps. The requirement therefore covers web content or content in a mobile app that a public entity makes available via a social media platform. With respect to social media posts that are posted before the compliance date, however, the Department has decided to add an exception, which is explained more in the section-by-section analysis of § 35.201(e), ''Preexisting Social Media Posts''.

Many social media platforms that are widely used by members of the public are available to members of the public separate and apart from any arrangements with public entities to provide a service, program, or activity. As a result, subpart H of this part does not require public entities to ensure that such platforms themselves conform to WCAG 2.1 Level AA. However, because the posts that public entities disseminate through those platforms are provided or made available by the public entities, the posts generally must conform to WCAG 2.1 Level AA. The Department understands that social media platforms often make available certain accessibility features like the ability to add captions or alt text. It is the public entity's responsibility to use these features when it makes web content available on social media platforms.[112] For example, if a public entity posts an image to a social media platform that allows users to include alt text, the public entity needs to ensure that appropriate alt text accompanies that image so that screen-reader users can access the information.

The Department received many comments explaining the importance of social media to accessing public entities' services, programs, or activities. Both public entities and disability advocates shared many examples of public entities using social media to transmit time-sensitive and emergency information, among other information, to the public. The vast majority of these commenters supported covering social media posts in subpart H of this part. Commenters specifically pointed to examples of communications designed to help the public understand what actions to take during and after public emergencies, and commenters noted that these types of communications need to be accessible to individuals with disabilities. Commenters from public entities and trade groups representing public accommodations opposed the coverage of social media posts in subpart H, arguing that social media is more like advertising. These commenters also said it is difficult to make social media content accessible because the platforms sometimes do not enable accessibility features.

The Department agrees with the many commenters who opined that social media posts should be covered by subpart H of this part. The Department believes public entities should not be relieved from their duty under subpart H to provide accessible content to the public simply because that content is being provided through a social media platform. The Department was particularly persuaded by the many examples that commenters shared of emergency and time-sensitive communications that public entities share

[110] Section 35.151.

[111] 88 FR 51958, 51962–51963, 51965–51966.

[112] *See* U.S. Gen. Servs. Admin., *Federal Social Media Accessibility Toolkit Hackpad, https://digital.gov/resources/federal-social-media-accessibility-toolkit-hackpad/* [*https://perma.cc/DJ8X-UCHA*] (last visited Mar. 13, 2024).

through social media platforms, including emergency information about toxic spills and wildfire smoke, for example. The Department believes that this information must also be accessible to individuals with disabilities. The fact that public entities use social media platforms to disseminate this type of crucial information also belies any analogy to advertising. And even to the extent that information does not rise to the level of an emergency, if an entity believes information is worth posting on social media for members of the public without disabilities, it is no less important for that information to reach members of the public with disabilities. Therefore, the entity cannot deny individuals with disabilities equal access to that content, even if it is not about an emergency.

The Department received several comments explaining that social media platforms sometimes have limited accessibility features, which can be out of public entities' control. Some of these commenters suggested that the Department should prohibit or otherwise limit a public entity's use of inaccessible social media platforms when the public entity cannot ensure accessibility of the platform. Other commenters shared that even where there are accessibility features available, public entities frequently do not use them. The most common example of this issue was public entities failing to use alt text, and some commenters also shared that public entities frequently use inaccessible links. Several commenters also suggested that the Department should provide that where the same information is available on a public entity's own accessible website, public entities should be considered in compliance with this part even if their content on social media platforms cannot be made entirely accessible.

The Department declines to modify subpart H of this part in response to these commenters, because the Department believes the framework in subpart H balances the appropriate considerations to ensure equal access to public entities' postings to social media. Public entities must use available accessibility features on social media platforms to ensure that their social media posts comply with subpart H. However, where public entities do not provide social media platforms as part of their services, programs, or activities, they do not need to ensure the accessibility of the platform as a whole. Finally, the Department is declining to adopt the alternative suggested by some commenters that where the same information is available on a public entity's own accessible website, the public entity should be considered in compliance with subpart H. The Department heard concerns from many commenters about allowing alternative accessible versions when the original content itself can be made accessible. Disability advocates and individuals with disabilities shared that this approach has historically resulted in inconsistent and dated information on the accessible version and that this approach also creates unnecessary segregation between the content available for individuals with disabilities and the original content. The Department agrees with these concerns and therefore declines to adopt this approach. Social media posts enable effective outreach from public entities to the public, and in some cases social media posts may reach many more people than a public entity's own website. The Department sees no acceptable reason why individuals with disabilities should be excluded from this outreach.

The Department received a few other comments related to social media, suggesting for example that the Department adopt guidance on making social media accessible instead of covering social media in subpart H of this part, and suggesting that the Department require inclusion of a disclaimer with contact information on social media platforms so that the public can notify a public entity about inaccessible content. The Department believes that these proposals would be difficult to implement in a way that would ensure content is proactively made accessible, rather than reactively corrected after it is discovered to be inaccessible, and thus the Department declines to adopt these proposals.

Captions for Live-Audio and Prerecorded Content

WCAG 2.1 Level AA Success Criterion 1.2.4 requires captions for live-audio content in synchronized media.[113] The intent of this success criterion is to ''enable people who are deaf or hard of hearing to watch *real-time* presentations. Captions provide the part of the content available via the audio track. Captions not only include dialogue, but also identify who is speaking and notate sound effects and other significant audio.'' [114] Modern live captioning often can be created with the assistance of technology, such as by assigning captioners through Zoom or other conferencing software, which integrates captioning with live meetings.

As proposed in the NPRM,[115] subpart H of this part applies the same compliance dates (determined primarily by size of public entity) to all of the WCAG 2.1 Level AA success criteria, including live-audio captioning requirements. As stated in § 35.200(b), this provides three years after publication of the final rule for small public entities and special district governments to comply, and two years for large public entities. Subpart H takes this approach for several reasons. First, the Department understands that live-audio captioning technology has developed in recent years and continues to develop. In addition, the COVID–19 pandemic moved a significant number of formerly in-person meetings, activities, and other gatherings to online settings, many of which incorporated live-audio captioning. As a result of these developments, live-audio captioning has become even more critical for individuals with certain types of disabilities to participate fully in civic life. Further, the Department believes that requiring conformance to all success criteria by the same date (according to entity size) will address the need for both clarity for public entities and predictability for individuals with disabilities. As with any other success criterion, public entities would not be required to satisfy Success Criterion 1.2.4 if they can demonstrate that doing so would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.

The Department solicited comments to inform this approach, seeking input on the proposed compliance timeline, the type of live-audio content that entities make available through the web or mobile apps, and the cost of providing captioning for live-audio content for entities of all sizes.[116] Commenters expressed strong support for requiring captions as a general matter, noting that they benefit people with a variety of disabilities, including those who are deaf, deafblind, or neurodivergent, or have auditory processing disabilities. No commenters argued for an outright exception to the captioning requirement. The vast majority of commenters who responded to these questions, including disability advocates, public entities, and accessible technology industry members, agreed with the Department's proposal to require compliance with requirements for captioning live-audio content on the same timeline as all other WCAG 2.1 Level AA success criteria. Such commenters noted that a different compliance timeline for live-audio captioning would unfairly burden people who are deaf or have hearing loss and would limit their access to a wide swath of content. One commenter who had worked in higher education, for instance, noted challenges of providing live-audio captioning, including the limited number of captioners available and resulting need for lead time to reserve one, but nonetheless stated that entities should strive for the same compliance date.

A smaller number of commenters urged the Department to adopt a longer compliance time frame in order to allow live-captioning technology to develop further. Some of these commenters supported a longer time frame for smaller entities in particular, which may have fewer resources or budgetary flexibility to comply. Others supported a longer time frame for larger entities because they are likely to have more content to caption. Commenters also noted the difficulty that public entities sometimes encounter in the availability of quality professional live captioners and the lead time necessary to reserve those services, but at the same time noted that public entities do not necessarily want to rely on automatically generated captioning in all scenarios because it may be insufficient for an individual's needs.

Commenters shared that public entities make many types of live-audio content available, including town hall meetings, board meetings, and other public engagement meetings; emergency-related and public-service announcements or information; special events like graduations, conferences, or symposia; online courses; and press conferences. Commenters also posed questions about whether Success Criterion

[113] W3C, *Understanding WCAG 2.0: Captions (Live), Understanding SC 1.2.4* (2023), *http://www.w3.org/TR/UNDERSTANDING-WCAG20/media-equiv-real-time-captions.html* [*https://perma.cc/NV74-U77R*].

[114] *Id.* (emphasis in original).

[115] 88 FR 51965–51966.

[116] 88 FR 51965–51966.

1.2.4 would apply to particular situations and types of media. The Department suggests referring to the explanation and definitions of the terms in Success Criterion 1.2.4 in WCAG 2.1 to determine the live-audio web content and content in mobile apps that must have captions.

Success Criterion 1.2.4 is crucial for individuals with disabilities to access State and local government entities' live services, programs, or activities. The Department believes that setting a different compliance date would only delay this essential access and leave people who are deaf or have hearing disabilities at a particular disadvantage in accessing these critical services. It also would hinder access for people with a variety of other disabilities, including cognitive disabilities.[117]

The Department believes that the compliance dates set forth in subpart H of this part will give public entities sufficient time to locate captioning resources and implement or enhance processes to ensure they can get captioning services when needed. Captioning services are also likely to continue to expand. Given the quick acceleration in the availability of captioning technology during the COVID–19 pandemic, the Department believes that public entities' capacity as well as the technology and personnel on which they rely will be able to continue to develop quickly.

The Department declines to establish a different compliance time frame for Success Criterion 1.2.4 for other reasons as well. This success criterion in WCAG 2.1 was also part of WCAG 2.0, which was finalized in 2008. As a result, the Department expects that public entities and associated web developers will be able to become familiar with it quickly, if they are not already familiar. Additionally, setting a separate compliance date for one success criterion could result in confusion and additional difficulty, as covered entities would need to separately keep track of when they need to meet the live-audio captioning success criterion and bifurcate their compliance planning. The Department also does not see a sufficient reason to distinguish this success criterion from others as meriting a separate timeline, particularly when this criterion has existed since 2008 and is so essential for individuals who are deaf or have hearing disabilities. For these reasons, and because of the need for individuals with disabilities to access State and local government entities' live programs, services, and activities, subpart H of this part establishes a uniform compliance date for all success criteria in subpart H.

Commenters also expressed a range of opinions about whether using automatically generated captions instead of professional live-captioning services would be sufficient to comply with Success Criterion 1.2.4. These commenters noted that automatic captions are a widely available option that is low cost for public entities and will likely continue to improve, perhaps eventually surpassing the quality of professional live-captioning services. However, commenters also pointed out that automatic captions may not be sufficient in many contexts such as virtual classrooms or courtrooms, where mistakes in identifying a speaker, word, or punctuation can significantly change the meaning and the participant with a disability needs to be able to respond in real time. Commenters also argued, though, that requiring human captioners in all circumstances may lead to public entities making fewer meetings, hearings, courses, and other live-audio content available online due to cost and availability of captioners, which could have a detrimental effect on overall access to these services for people with mobility and other disabilities. Public entities noted that automatic captioning as part of services like Zoom does not cost them anything beyond the Zoom license, but public entities and the Small Business Administration reported that costs can be much higher for human-generated captions for different types of content over the course of a year.

To balance these competing concerns, commenters supported requiring captions in general, but proposed a variety of tiered approaches such as: a default of human-generated captions with automatic captions as a last resort; automatic captions as a default with human-generated captions when an individual with a disability requests them; or human-generated captions as a default for events with a wide audience like graduations, but automatic captions as a default for private meetings and courses, unless human-generated captions are requested. An accessible technology industry member urged the Department to just require captions that provide ''equivalent access'' to live-audio content, rather than mandate a particular type of captioning.

After consideration of commenters' concerns and its independent assessment, the Department does not believe it is prudent to prescribe captioning requirements beyond the WCAG 2.1 Level AA requirements, whether by specifying a numerical accuracy standard, a method of captioning that public entities must use to satisfy this success criterion, or other measures. The Department recognizes commenters' concerns that automatic captions are currently not sufficiently accurate in many contexts, including contexts involving technical or complex issues. The Department also notes that informal guidance from W3C provides that automatic captions are not sufficient on their own unless they are confirmed to be fully accurate, and that they generally require editing to reach the requisite level of accuracy.[118] On the other hand, the Department recognizes the significant costs and supply challenges that can accompany use of professional live-captioning services, and the pragmatic concern that a requirement to use these services for all events all the time could discourage public entities from conducting services, programs, or activities online, which could have unintended detrimental consequences for people with and without disabilities who benefit from online offerings. Further, it is the Department's understanding, supported by comments, that captioning technology is rapidly evolving and any additional specifications regarding how to meet WCAG 2.1's live-audio captioning requirements could quickly become outdated.

Rather than specify a particular accuracy level or method of satisfying Success Criterion 1.2.4 at this time, subpart H of this part provides public entities with the flexibility to determine the best way to comply with this success criterion based on current technology. The Department further encourages public entities to make use of W3C's and others' guidance documents available on captioning, including the informal guidance mentioned in the preceding paragraph.[119] In response to commenters' concerns that captioning requirements could lead to fewer online events, the Department reminds public entities that, under § 35.204, they are not required to take any action that would result in a fundamental alteration to their services, programs, or activities or undue financial and administrative burdens; but even in those circumstances, public entities must comply with § 35.200 to the maximum extent possible. The Department believes the approach in subpart H strikes the appropriate balance of increasing access for individuals with disabilities, keeping pace with evolving technology, and providing a workable standard for public entities.

Some commenters expressed similar concerns related to captioning requirements for prerecorded (*i.e.,* non-live) content under Success Criterion 1.2.2, including concerns that public entities may choose to remove recordings of past events such as public hearings and local government sessions rather than comply with captioning requirements in the required time frames. The Department recommends that public entities consider other options that may alleviate costs, such as evaluating whether any exceptions apply, depending on the particular circumstances. And as with live-audio captioning, public entities can rely on the fundamental alteration or undue burdens provisions in § 35.204 where they can satisfy the requirements of those provisions. Even where a public entity can demonstrate that conformance to Success Criterion 1.2.2 would result in a fundamental alteration or undue financial and administrative burdens, the Department believes public entities may often be able to take other actions that do not result in such an alteration or such burdens; if they can, § 35.204 requires them to do so.

The same reasoning discussed regarding Success Criterion 1.2.4 also applies to

[117] *See* W3C, Web Accessibility Initiative, *Video Captions, https://www.w3.org/WAI/perspective-videos/captions/* [*https://perma.cc/QW6X-5SPG*] (Jan. 23, 2019) (explaining that captions benefit ''people with cognitive and learning disabilities who need to see and hear the content to better understand it'').

[118] W3C, Web Accessibility Initiative, *Captions/Subtitles, https://www.w3.org/WAI/media/av/captions* [*https://perma.cc/D73P-RBZA*] (July 14, 2022).

[119] *E.g.,* W3C, Web Accessibility Initiative, *Captions/Subtitles, https://www.w3.org/WAI/media/av/captions* [*https://perma.cc/D73P-RBZA*] (July 14, 2022); W3C, *WCAG 2.2 Understanding Docs: Understanding SC 1.2.4: Captions (Live) (Level AA), https://www.w3.org/WAI/WCAG22/Understanding/captions-live.html* [*https://perma.cc/R8SZ-JA6Z*] (Mar. 7, 2024).

Success Criterion 1.2.2. The Department declines to adopt a separate timeline for this success criterion or to prescribe captioning requirements beyond those in WCAG 2.1 due to rapidly evolving technology, the importance of these success criteria, and the other factors already noted. After full consideration of all the comments received, subpart H of this part requires conformance to WCAG 2.1 Level AA as a whole on the same compliance time frame, for all of the reasons stated in this section.

Section 35.201 Exceptions

Section 35.200 requires public entities to make their web content and mobile apps accessible by complying with a technical standard for accessibility—WCAG 2.1 Level AA. However, some types of content do not have to comply with the technical standard in certain situations. The Department's aim in setting forth exceptions was to make sure that individuals with disabilities have ready access to public entities' web content and mobile apps, especially those that are current, commonly used, or otherwise widely needed, while also ensuring that practical compliance with subpart H of this part is feasible and sustainable for public entities. The exceptions help to ensure that compliance with subpart H is feasible by enabling public entities to focus their resources on making frequently used or high impact content WCAG 2.1 Level AA compliant first.

Under § 35.201, the following types of content generally do not need to comply with the technical standard for accessibility—WCAG 2.1 Level AA: (1) archived web content; (2) preexisting conventional electronic documents, unless they are currently used to apply for, gain access to, or participate in the public entity's services, programs, or activities; (3) content posted by a third party; (4) individualized, password-protected or otherwise secured conventional electronic documents; and (5) preexisting social media posts. The Department notes that if web content or content in mobile apps is covered by one exception, the content does not need to conform to WCAG 2.1 Level AA to comply with subpart H of this part, even if the content fails to qualify for another exception.

However, as discussed in more detail later in this section-by-section analysis, there may be situations in which the content otherwise covered by an exception must still be made accessible to meet the needs of an individual with a disability under existing title II requirements.[120] Because these exceptions are specifically tailored to address what the Department understands to be existing areas where compliance might be particularly difficult based on current content types and technologies, the Department also expects that these exceptions may become less relevant over time as new content is added and technology changes.

The previously listed exceptions are those included in § 35.201. They differ in some respects from those exceptions proposed in the NPRM. The Department made changes to the proposed exceptions identified in the NPRM after consideration of the public comments and its own independent assessment. Notably, § 35.201 does not include exceptions for password-protected course content in elementary, secondary, and postsecondary schools, which had been proposed in the NPRM.[121] As will be discussed in more detail, it also does not include an exception for linked third-party content because that proposed exception would have been redundant and could have caused confusion. In the NPRM, the Department discussed the possibility of including an exception for public entities' preexisting social media posts.[122] After consideration of public feedback, § 35.201 includes such an exception. In addition, the Department made some technical tweaks and clarifications to the exceptions.[123]

The Department heard a range of views from public commenters on the exceptions proposed in the NPRM. The Department heard from some commenters that exceptions are necessary to avoid substantial burdens on public entities and would help public entities determine how to allocate their limited resources in terms of which content to make accessible more quickly, especially when initially determining how best to ensure they can start complying with § 35.200 by the compliance date. The Department heard that public entities often have large volumes of content that are archived, or documents or social media posts that existed before subpart H of this part was promulgated. The Department also heard that although making this content available online is important for transparency and ease of access, this content is typically not frequently used and is likely to be of interest only to a discrete population. Such commenters also emphasized that making such content, like old PDFs, accessible by the compliance date would be quite difficult and time consuming. Some commenters also expressed that the exceptions may help public entities avoid uncertainty about whether they need to ensure accessibility in situations where it might be extremely difficult—such as for large quantities of archived materials retained only for research purposes or where they have little control over content posted to their website by unaffiliated third parties. Another commenter noted that public entities may have individualized documents that apply only to individual members of the public and that in most cases do not need to be accessed by a person with a disability.

On the other hand, the Department has also heard from commenters who objected to the inclusion of exceptions. Many commenters who objected to the inclusion of exceptions cited the need for all of public entities' web content and mobile apps to be accessible to better ensure predictability and access for individuals with disabilities to critical government services. Some commenters who opposed including exceptions also asserted that a title II regulation need not include any exceptions to its specific requirements because the compliance limitation for undue financial and administrative burdens would suffice to protect public entities from any overly burdensome requirements. Some commenters argued that the exceptions would create loopholes that would result in public entities not providing sufficient access for individuals with disabilities, which could undermine the purpose of subpart H of this part.

Commenters also contended that the proposed exceptions create confusion about what is covered and needs to conform to WCAG 2.1, which creates difficulties with compliance for public entities and barriers for individuals with disabilities seeking to access public entities' web content or mobile apps. Some commenters also noted that there are already tools that can help public entities make web content and mobile apps accessible, such that setting forth exceptions for certain content is not necessary to help public entities comply.

After consideration of the various public comments and after its independent assessment, the Department is including, with some refinements, five exceptions in § 35.201. As noted in the preceding paragraphs and as will be discussed in greater detail, the Department is not including in the final regulations three of the exceptions that were proposed in the NPRM, but the Department is also adding an exception for preexisting social media posts that it previewed in the NPRM. The five particular exceptions included in § 35.201 were crafted with careful consideration of which discrete types of content would promote as much clarity and certainty as possible for individuals with disabilities as well as for public entities when determining which content must conform to WCAG 2.1 Level AA, while also still promoting accessibility of web content and mobile apps overall. The limitations for actions that would require fundamental alterations or result in undue burdens would not provide, on their own, the same level of clarity and certainty. The rationales with respect to each individual exception are discussed in more detail in the section-by-section analysis of each exception. The Department believes that including these five exceptions, and clarifying situations in which content covered by an exception might still need to be made accessible, strikes the appropriate balance between ensuring access for individuals with disabilities and feasibility for public entities so that they can comply with § 35.200, which will ensure greater accessibility moving forward.

The Department was mindful of the pragmatic concern that, should subpart H of this part require actions that are likely to result in fundamental alterations or undue burdens for large numbers of public entities or large swaths of their content, subpart H could in practice lead to fewer impactful improvements for accessibility across the board as public entities encountered these limitations. The Department believes that such a rule could result in public entities' prioritizing accessibility of content that is ''easy'' to make accessible, rather than content that is essential, despite the spirit and letter of the rule. The Department agrees with commenters that clarifying that public

[120] *See* §§ 35.130(b)(1)(ii) and (b)(7) and 35.160.

[121] 88 FR 52019.

[122] *Id.* at 51962–51963.

[123] *Id.* at 52019–52020.

entities do not need to focus resources on certain content helps ensure that public entities can focus their resources on the large volume of content not covered by exceptions, as that content is likely more frequently used or up to date. In the sections that follow, the Department provides explanations for why the Department has included each specific exception and how the exceptions might apply.

The Department understands and appreciates that including exceptions for certain types of content reduces the content that would be accessible at the outset to individuals with disabilities. The Department aimed to craft the exceptions with an eye towards providing exceptions for content that would be less commonly used by members of the public and would be particularly difficult for public entities to make accessible quickly. And the Department reiterates that subpart H of this part is adding specificity into the existing title II regulatory framework when it comes to web content and mobile apps. The Department emphasizes that, even if certain content does not have to conform to the technical standard, public entities still need to ensure that their services, programs, and activities offered using web content and mobile apps are accessible to individuals with disabilities on a case-by-case basis in accordance with their existing obligations under title II of the ADA. These obligations include making reasonable modifications to avoid discrimination on the basis of disability, ensuring that communications with people with disabilities are as effective as communications with people without disabilities, and providing people with disabilities an equal opportunity to participate in or benefit from the entity's services, programs, and activities.[124] For example, a public entity might need to provide a large print version or a version of an archived document that implements some WCAG criteria—such as a document explaining park shelter options and rental prices from 2013—to a person with vision loss who requests it, even though this content would fall within the archived web content exception. Thus, § 35.201's exceptions for certain categories of content are layering specificity onto title II's regulatory requirements. They do not function as permanent or blanket exceptions to the ADA's nondiscrimination mandate. They also do not add burdens on individuals with disabilities that did not already exist as part of the existing title II regulatory framework. As explained further, nothing in this part prohibits an entity from going beyond § 35.200's requirements to make content covered by the exceptions fully or partially compliant with WCAG 2.1 Level AA.

The following discussion provides information on each of the exceptions, including a discussion of public comments.

[124] *See* §§ 35.130(b)(1)(ii) and (b)(7) and 35.160. For more information about public entities' existing obligation to ensure that communications with individuals with disabilities are as effective as communications with others, see U.S. Dep't of Just., *ADA Requirements: Effective Communication, ada.gov* (Feb 28, 2020), *https://www.ada.gov/resources/effective-communication/* [*https://perma.cc/CLT7-5PNQ*].

Archived Web Content

Public entities may retain a significant amount of archived content, which may contain information that is outdated, superfluous, or replicated elsewhere. The Department's understanding is that, generally, this historic information is of interest to only a small segment of the general population. The Department is aware and concerned, however, that based on current technologies, public entities would need to expend considerable resources to retroactively make accessible the large quantity of historic or otherwise outdated information that public entities created in the past and that they may need or want to make available on their websites. Thus, § 35.201(a) provides an exception from the requirements of § 35.200 for web content that meets the definition of ''archived web content'' in § 35.104.[125] As mentioned previously, the definition of ''archived web content'' in § 35.104 has four parts. First, the web content was created before the date the public entity is required to comply with subpart H of this part, reproduces paper documents created before the date the public entity is required to comply with subpart H, or reproduces the contents of other physical media created before the date the public entity is required to comply with subpart H. Second, the web content is retained exclusively for reference, research, or recordkeeping. Third, the web content is not altered or updated after the date of archiving. Fourth, the web content is organized and stored in a dedicated area or areas clearly identified as being archived. The archived web content exception allows public entities to retain historic web content, while utilizing their resources to make accessible the most widely and consistently used content that people need to access public services or to participate in civic life.

The Department anticipates that public entities may retain various types of web content consistent with the exception for archived web content. For example, a town might create a web page for its annual parade. In addition to providing current information about the time and place of the parade, the web page might contain a separate archived section with several photos or videos from the parade in past years. The images and videos would likely be covered by the exception if they were created before the date the public entity is required to comply with subpart H of this part, are reproductions of paper documents created before the date the public entity is required to comply with subpart H, or are reproductions of the contents of other physical media created before the date the public entity is required to comply with subpart H; they are only used for reference, research, or recordkeeping; they are not altered or updated after they are posted in the archived section of the web page; and the archived section of the web page is clearly identified. Similarly, a municipal court may have a web page that includes links to download PDF documents that contain a photo and short biography of past judges who are retired. If the PDF documents were created before the date the public entity is required to comply with subpart H, are reproductions of paper documents created before the date the public entity is required to comply with subpart H, or are reproductions of the contents of other physical media created before the date the public entity is required to comply with subpart H; they are only used for reference, research, or recordkeeping; they are not altered or updated after they are posted; and the web page with the links to download the documents is clearly identified as being an archive, the documents would likely be covered by the exception. The Department reiterates that these examples are meant to be illustrative and that the analysis of whether a given piece of web content meets the definition of ''archived web content'' depends on the specific circumstances.

The Department recognizes, and commenters emphasized, that archived information may be of interest to some members of the public, including some individuals with disabilities, who are conducting research or are otherwise interested in these historic documents. Furthermore, some commenters expressed concerns that public entities would begin (or already are in some circumstances) improperly moving content into an archive. The Department emphasizes that under this exception, public entities may not circumvent their accessibility obligations by merely labeling their web content as ''archived'' or by refusing to make accessible any content that is old. The exception focuses narrowly on content that satisfies all four of the criteria necessary to qualify as ''archived web content,'' namely web content that was created before the date the public entity is required to comply with subpart H of this part, reproduces paper documents created before the date the public entity is required to comply with subpart H, or reproduces the contents of other physical media created before the date the public entity is required to comply with subpart H; is retained exclusively for reference, research, or recordkeeping; is not altered or updated after the date of archiving; and is organized and stored in a dedicated area or areas clearly identified as being archived. If any one of those criteria is not met, the content does not qualify as ''archived web content.'' For example, if an entity maintains content for any purpose other than reference, research, or recordkeeping, then that content would not fall within the exception regardless of the date it was created, even if an entity labeled it as ''archived'' or stored it in an area clearly identified as being archived. Similarly, an entity would not be able to circumvent its accessibility obligations by moving web content containing meeting minutes or agendas related to meetings that take place after the date the public entity is required to comply with subpart H from a non-archived section of its website to an archived section, because such newly created content would likely not satisfy the first part of the definition based on the date it was created. Instead, such

[125] In the NPRM, § 35.201(a) referred to archived web content as defined in § 35.104 ''of this chapter.'' 88 FR 52019. The Department has removed the language ''of this chapter'' because it was unnecessary.

newly created documents would generally need to conform to WCAG 2.1 Level AA for their initial intended purpose related to the meetings, and they would need to remain accessible if they were later added to an area clearly identified as being archived.

The Department received comments both supporting and opposing the exception. In support of the exception, commenters highlighted various benefits. For example, commenters noted that remediating archived web content can be very burdensome, and the exception allows public entities to retain content they might otherwise remove if they had to make the content conform to WCAG 2.1 Level AA. Some commenters also agreed that public entities should prioritize making current and future web content accessible.

In opposition to the exception, commenters highlighted various concerns. For example, some commenters stated that the exception perpetuates unequal access to information for individuals with disabilities, and it continues to inappropriately place the burden on individuals with disabilities to identify themselves to public entities, request access to content covered by the exception, and wait for the request to be processed. Some commenters also noted that the exception is not necessary because the compliance limitations for fundamental alteration and undue financial and administrative burdens would protect public entities from any unrealistic requirements under subpart H of this part.[126] Commenters also stated that the proposed exception is not timebound; it does not account for technology that exists, or might develop in the future, that may allow for easy and reliable wide-scale remediation of archived web content; it might deter development of technology that could reliably remediate archived web content; and it does not include a time frame for the Department to reassess whether the exception is necessary based on technological developments.[127] In addition, commenters stated that the exception covers HTML content, which is easier to make accessible than other types of web content; and it might cover archived web content posted by public entities in accordance with other laws. As previously discussed with respect to the definition of ''archived web content,'' some commenters also stated that it is not clear when web content is retained exclusively for reference, research, or recordkeeping, and public entities may therefore improperly designate important web content as archived.

The Department has decided to keep the exception in § 35.201. After reviewing the range of different views expressed by commenters, the Department continues to believe that the exception appropriately encourages public entities to utilize their resources to make accessible the critical up-to-date materials that are most consistently used to access public entities' services, programs, or activities. The Department believes the exception provides a measure of clarity and certainty for public entities about what is required of archived web content. Therefore, resources that might otherwise be spent making accessible large quantities of historic or otherwise outdated information available on some public entities' websites are freed up to focus on important current and future web content that is widely and frequently used by members of the public. However, the Department emphasizes that the exception is not without bounds. As discussed in the preceding paragraphs, archived web content must meet all four parts of the archived web content definition in order to qualify for the exception. Content must meet the time-based criteria specified in the first part of the definition. The Department believes the addition of the first part of the definition will lead to greater predictability about the application of the exception for individuals with disabilities and public entities. In addition, web content that is used for something other than reference, research, or recordkeeping is not covered by the exception.

The Department understands the concerns raised by commenters about the burdens that individuals with disabilities may face because archived web content is not required to conform to WCAG 2.1 Level AA. The Department emphasizes that even if certain content does not have to conform to the technical standard, public entities still need to ensure that their services, programs, and activities offered using web content are accessible to individuals with disabilities on a case-by-case basis in accordance with their existing obligations under title II. These obligations include making reasonable modifications to avoid discrimination on the basis of disability, ensuring that communications with people with disabilities are as effective as communications with people without disabilities, and providing people with disabilities an equal opportunity to participate in or benefit from the entity's services, programs, or activities.[128] Some commenters suggested that the Department should also specify that if a public entity makes archived web content conform to WCAG 2.1 Level AA in response to a request from an individual with a disability, such as by remediating a PDF stored in an archived area on the public entity's website, the public entity should replace the inaccessible version in the archive with the updated accessible version that was sent to the individual. The Department agrees that this is a best practice public entities could implement, but did not add this to the text of this part because of the importance of providing public entities flexibility to meet the needs of individuals with disabilities on a case-by-case basis.

Some commenters suggested that the Department should require public entities to adopt procedures and timelines for how individuals with disabilities could request access to inaccessible archived web content covered by the exception. The Department declines to make specific changes to the exception in response to these comments. The Department reiterates that, even if content is covered by this exception, public entities still need to ensure that their services, programs, and activities offered using web content are accessible to individuals with disabilities on a case-by-case basis in accordance with their existing obligations under title II.[129] The Department notes that it is helpful to provide individuals with disabilities with information about how to obtain the reasonable modifications or auxiliary aids and services they may need. Public entities can help to facilitate effective communication by providing notice to the public on how an individual who cannot access archived web content covered by the exception because of a disability can request other means of effective communication or reasonable modifications in order to access the public entity's services, programs, or activities with respect to the archived content. Public entities can also help to facilitate effective communication by providing an accessibility statement that tells the public how to bring web content or mobile app accessibility problems to the public entities' attention, and developing and implementing a procedure for reviewing and addressing any such issues raised. For example, a public entity could help to facilitate effective communication by providing an email address, accessible link, accessible web page, or other accessible means of contacting the public entity to provide information about issues that individuals with disabilities may encounter accessing web content or mobile apps or to request assistance. Providing this information will help public entities to ensure that they are satisfying their obligations to provide equal access, effective communication, and reasonable modifications.

Some commenters suggested that this part should require a way for users to search through archived web content, or information about the contents of the archive should otherwise be provided, so individuals with disabilities can identify what content is contained in an archive. Some other commenters noted that searching through an archive is inherently imprecise and involves sifting through many documents, but the exception places the burden on individuals with disabilities to know exactly which archived documents to request in accessible formats. After carefully considering these comments, the Department decided not to change the text of this part. The Department emphasizes that web content that is not archived, but instead notifies users about the existence of archived web content and provides users access to archived web content, generally must still conform to WCAG 2.1 Level AA. Therefore, the Department anticipates that members of the public will have information about what content is contained in an archive. For example, a public entity's archive may include a list of links to download archived documents. Under WCAG 2.1 Success Criterion 2.4.4, a public entity would generally have to provide sufficient information in the text of the link alone, or

[126] A discussion of the relationship between these limitations and the exceptions in § 35.201 is also provided in the general explanation at the beginning of the discussion of § 35.201 in the section-by-section analysis.

[127] The section-by-section analysis of § 35.200 includes a discussion of the Department's obligation to do a periodic retrospective review of its regulations pursuant to Executive Order 13563.

[128] *See* §§ 35.130(b)(1)(ii) and (b)(7) and 35.160.

[129] *Id.*

in the text of the link together with the link's programmatically determined link context, so users could understand the purpose of each link and determine whether they want to access a given document in the archive.[130]

Some commenters suggested that public entities should ensure that the systems they use to retain and store archived web content do not convert the content into an inaccessible format. The Department does not believe it is necessary to make updates to this part in response to these comments. Content that does not meet the definition of ''archived web content'' must generally conform to WCAG 2.1 Level AA, unless it qualifies for another exception, so public entities would not be in compliance with subpart H of this part if they stored such content using a system that converts accessible web content into an inaccessible format. The Department anticipates that public entities will still move certain newly created web content into an archive alongside historic content after the date they are required to comply with subpart H, even though the newly created content will generally not meet the definition of ''archived web content.'' For example, after the time a city is required to comply with subpart H, the city might post a PDF flyer on its website identifying changes to the dates its sanitation department will pick up recycling around a holiday. After the date of the holiday passes, the city might move the flyer to an archive along with other similar historic flyers. Because the newly created flyer would not meet the first part of the definition of ''archived web content,'' it would generally need to conform to WCAG 2.1 Level AA even after it is moved into an archive. Therefore, the city would need to ensure its system for retaining and storing archived web content does not convert the flyer into an inaccessible format.

Some commenters also suggested that the exception should not apply to public entities whose primary function is to provide or make available what commenters perceived as archived web content, such as some libraries, museums, scientific research organizations, or state or local government agencies that provide birth or death records. Commenters expressed concern that the exception could be interpreted to cover the entirety of such entities' web content. The Department reiterates that whether archived web content is retained exclusively for reference, research, or recordkeeping depends on the particular circumstances. For example, a city's research library may have both archived and non-archived web content related to a city park. If the library's collection included a current map of the park that was created by the city, that map would likely not be retained exclusively for reference, research, or recordkeeping, as it is a current part of the city's program of providing and maintaining a park. Furthermore, if the map was newly created after the date the public entity was required to comply with subpart H of this part, and it does not reproduce paper documents or the contents of other physical media created before the date the public entity was required to comply with subpart H, the map would likely not meet the first part of the definition of ''archived web content.'' In addition, the library may decide to curate and host an exhibition on its website about the history of the park, which refers to and analyzes historic web content pertaining to the park that otherwise meets the definition of ''archived web content.'' All content used to deliver the online exhibition likely would not be used exclusively for reference, research, or recordkeeping, as the library is using the materials to create and provide a new educational program for the members of the public. The Department believes the exception, including the definition of ''archived web content,'' provides a workable framework for determining whether all types of public entities properly designate web content as archived.

In the NPRM, the Department asked commenters about the relationship between the content covered by the archived web content exception and the exception for preexisting conventional electronic documents set forth in § 35.201(b).[131] In response, some commenters sought clarification about the connection between the exceptions or recommended that there should only be one exception. The Department believes both exceptions are warranted because they play different roles in freeing up public entities' personnel and financial resources to make accessible the most significant content that they provide or make available. As discussed in the preceding paragraphs, the archived web content exception provides a framework for public entities to prioritize their resources on making accessible the up-to-date materials that people use most widely and consistently, rather than historic or outdated web content. However, public entities cannot disregard such content entirely. Instead, historic or outdated web content that entities intend to treat as archived web content must be located and added to an area or areas clearly designated as being archived. The Department recognizes that creating an archive area or areas and moving content into the archive will take time and resources. As discussed in the section-by-section analysis of § 35.201(b), the preexisting conventional electronic documents exception provides an important measure of clarity and certainty for public entities as they initially consider how to address all the various conventional electronic documents available through their web content and mobile apps. Public entities will not have to immediately focus their time and resources on remediating or archiving less significant preexisting documents that are covered by the exception. Instead, public entities can focus their time and resources elsewhere and attend to preexisting documents covered by the preexisting conventional electronic documents exception in the future as their resources permit, such as by adding them to an archive.

The Department recognizes that there may be some overlap between the content covered by the archived web content exception and the exception for preexisting conventional electronic documents set forth in § 35.201(b). The Department notes that if web content is covered by the archived web content exception, it does not need to conform to WCAG 2.1 Level AA to comply with subpart H of this part, even if the content fails to qualify for another exception, such as the preexisting conventional electronic document exception. For example, after the date a public university is required to comply with subpart H, its athletics website may still include PDF documents containing the schedules for sports teams from academic year 2017–2018 that were posted in non-archived areas of the website in the summer of 2017. Those PDFs may be covered by the preexisting conventional electronic documents exception because they were available on the university's athletics website prior to the date it was required to comply with subpart H, unless they are currently used to apply for, gain access to, or participate in a public entity's services, programs, or activities, in which case, as discussed in more detail in the section-by-section analysis of § 35.201(b), they would generally need to conform to WCAG 2.1 Level AA. However, if the university moved the PDFs to an archived area of its athletics site and the PDFs satisfied all parts of the definition of ''archived web content,'' the documents would not need to conform to WCAG 2.1 Level AA, regardless of how the preexisting conventional electronic document exception might otherwise have applied, because the content would fall within the archived web content exception.

Some commenters also made suggestions about public entities' practices and procedures related to archived web content, but these suggestions fall outside the scope of this part. For example, some commenters stated that public entities' websites should not contain archived materials, or that all individuals should have to submit request forms to access archived materials. The Department did not make any changes to this part in response to these comments because this part is not intended to control whether public entities can choose to retain archived material in the first instance, or whether members of the public must follow certain steps to access archived web content.

Preexisting Conventional Electronic Documents

Section 35.201(b) provides that conventional electronic documents that are available as part of a public entity's web content or mobile apps before the date the public entity is required to comply with subpart H of this part do not have to comply with the accessibility requirements of § 35.200, unless such documents are currently used to apply for, gain access to, or participate in a public entity's services, programs, or activities. As discussed in the section-by-section analysis of § 35.104, the term ''conventional electronic documents'' is defined in § 35.104 to mean web content or content in mobile apps that is in the following electronic file formats: portable document formats, word processor file formats, presentation file formats, and spreadsheet file formats. This list of

[130] *See* W3C, *Understanding SC 2.4.4.: Link Purpose (In Context)* (June 20, 2023), *https://www.w3.org/WAI/WCAG21/Understanding/link-purpose-in-context.html* [*https://perma.cc/RE3T-J9PN*].

[131] 88 FR 51968.

conventional electronic documents is an exhaustive list of file formats, rather than an open-ended list. The Department understands that many websites of public entities contain a significant number of conventional electronic documents that may contain text, images, charts, graphs, and maps, such as comprehensive reports on water quality. The Department also understands that many of these conventional electronic documents are in PDF format, but many conventional electronic documents may also be formatted as word processor files (*e.g.,* Microsoft Word files), presentation files (*e.g.,* Apple Keynote or Microsoft PowerPoint files), and spreadsheet files (*e.g.,* Microsoft Excel files).

Because of the substantial number of conventional electronic documents that public entities make available through their web content and mobile apps, and because of the personnel and financial resources that would be required for public entities to remediate all preexisting conventional electronic documents to make them accessible after the fact, the Department believes public entities should generally focus their personnel and financial resources on developing new conventional electronic documents that are accessible and remediating existing conventional electronic documents that are currently used to access the public entity's services, programs, or activities. For example, if before the date a public entity is required to comply with subpart H of this part the entity's website contains a series of out-of-date PDF reports on local COVID–19 statistics, those reports generally need not conform to WCAG 2.1 Level AA. Similarly, if a public entity maintains decades' worth of water quality reports in conventional electronic documents on the same web page as its current water quality report, the old reports that were posted before the date the entity was required to comply with subpart H generally do not need to conform to WCAG 2.1 Level AA. As the public entity posts new reports going forward, however, those reports generally must conform to WCAG 2.1 Level AA.

The Department modified the language of this exception from the NPRM. In the NPRM, the Department specified that the exception applied to conventional electronic documents ''created by or for a public entity'' that are available ''on a public entity's website or mobile app.'' The Department believes the language ''created by or for a public entity'' is no longer necessary in the regulatory text of the exception itself because the Department updated the language of § 35.200 to clarify the overall scope of content generally covered by subpart H of this part. In particular, the text of § 35.200(a)(1) and (2) now states that subpart H applies to all web content and mobile apps that a public entity provides or makes available either directly or through contractual, licensing, or other arrangements. Section 35.201(b), which is an exception to the requirements of § 35.200, is therefore limited by the new language added to the general section. In addition, the Department changed the language ''that are available on a public entity's website or mobile app'' to ''that are available as part of a public entity's web content or mobile apps'' to ensure consistency with other parts of the regulatory text by referring to ''web content'' rather than ''websites.'' Finally, the Department removed the phrase ''members of the public'' from the language of the exception in the proposed rule for consistency with the edits to § 35.200 aligning the scope of subpart H with the scope of title II of the ADA, as described in the explanation of § 35.200 in the section-by-section analysis.

Some commenters sought clarification about how to determine whether a conventional electronic document is ''preexisting.'' They pointed out that the date a public entity posted or last modified a document may not necessarily reflect the actual date the document was first made available to members of the public. For example, a commenter noted that a public entity may copy its existing documents unchanged into a new content management system after the date the public entity is required to comply with subpart H of this part, in which case the date stamp of the documents will reflect the date they were copied rather than the date they were first made available to the public. Another commenter recommended that the exception should refer to the date a document was ''originally'' posted to account for circumstances in which there is an interruption to the time the document is provided or made available to members of the public, such as when a document is temporarily not available due to technical glitches or server problems.

The Department believes the exception is sufficiently clear. Conventional electronic documents are preexisting if a public entity provides them or makes them available prior to the date the public entity is required to comply with subpart H of this part. While one commenter recommended that the exception should not apply to documents provided or made available during the two- or three-year compliance timelines specified in § 35.200(b), the Department believes the timelines specified in that section are the appropriate time frames for assessing whether a document is preexisting and requiring compliance with subpart H. If a public entity changes or revises a preexisting document following the date it is required to comply with subpart H, the document would no longer be ''preexisting'' for the purposes of the exception. Whether documents would still be preexisting if a public entity generally modifies or updates the entirety of its web content or mobile apps after the date it is required to comply with subpart H would depend on the particular facts and circumstances. For example, if a public entity moved all of its web content, including preexisting conventional electronic documents, to a new content management system, but did not change or revise any of the preexisting documents when doing so, the documents would likely still be covered by the exception. In contrast, if the public entity decided to edit the content of certain preexisting documents in the process of moving them to the new content management system, such as by updating the header of a benefits application form to reflect the public entity's new mailing address, the updated documents would no longer be preexisting for the purposes of the exception. The Department emphasizes that the purpose of the exception is to free up public entities' resources that would otherwise be spent focusing directly on preexisting documents covered by the exception.

Because the exception only applies to preexisting conventional electronic documents, it would not cover documents that are open for editing if they are changed or revised after the date a public entity is required to comply with subpart H of this part. For example, a town may maintain an editable word processing file, such as a Google Docs file, that lists the dates on which the town held town hall meetings. The town may post a link to the document on its website so members of the public can view the document online in a web browser, and it may update the contents of the document over time after additional meetings take place. If the document was posted to the town's website prior to the date it was required to comply with subpart H, it would be a preexisting conventional electronic document unless the town added new dates to the document after the date it was required to comply with subpart H. If the town made such additions to the document, the document would no longer be preexisting. Nevertheless, there are some circumstances where conventional electronic documents may be covered by the exception even if copies of the documents can be edited after the date the public entity is required to comply with subpart H. For example, a public entity may post a Microsoft Word version of a flyer on its website prior to the date it is required to comply with subpart H. A member of the public could technically download and edit that Word document after the date the public entity is required to comply with subpart H, but their edits would not impact the ''official'' posted version. Therefore, the official version would still qualify as preexisting under the exception. Similarly, PDF files that include fillable form fields (*e.g.,* areas for a user to input their name and address) may also be covered by the exception so long as members of the public do not edit the content contained in the official posted version of the document. However, as discussed in the following paragraph, the exception does not apply to documents that are currently used to apply for, gain access to, or participate in the public entity's services, programs, or activities. The Department notes that whether a PDF document is fillable may be relevant in considering whether the document is currently used to apply for, gain access to, or participate in a public entity's services, programs, or activities. For example, a PDF form that must be filled out and submitted when renewing a driver's license is currently used to apply for, gain access to, or participate in a public entity's services, programs, or activities, and therefore would not be subject to the exception under § 35.201(b) for preexisting conventional electronic documents. One commenter recommended that the Department clarify in the text of the regulation that conventional electronic documents include only those documents that are not open for editing by

the public. The Department believes this point is adequately captured by the requirement that conventional electronic documents must be preexisting to qualify for the exception.

This exception is not without bounds: it does not apply to any preexisting documents that are currently used to apply for, gain access to, or participate in the public entity's services, programs, or activities. In referencing ''documents that are currently used,'' the Department intends to cover documents that are used at any given point in the future, not just at the moment in time when the final rule is published. For example, a public entity generally must make a preexisting PDF application for a business license conform to WCAG 2.1 Level AA if the document is still currently used. The Department notes that preexisting documents are also not covered by the exception if they provide instructions or guidance related to other documents that are directly used to apply for, gain access to, or participate in the public entity's services, programs, or activities. Therefore, in addition to making the aforementioned preexisting PDF application for a business license conform to WCAG 2.1 Level AA, public entities generally must also make other preexisting documents conform to WCAG 2.1 Level AA if they may be needed to obtain the license, complete the application, understand the process, or otherwise take part in the program, such as business license application instructions, manuals, sample knowledge tests, and guides, such as ''Questions and Answers'' documents.

Various commenters sought additional clarification about what it means for conventional electronic documents to be ''used'' in accordance with the limited scope of the exception. In particular, commenters questioned whether informational documents are used by members of the public to apply for, gain access to, or participate in a public entity's services, programs, or activities. Some commenters expressed concern that the scope of the exception would be interpreted inconsistently, including with respect to documents posted by public entities in accordance with other laws. Some commenters also urged the Department to add additional language to the exception, such as specifying that documents would not be covered by the exception if they are used by members of the public to ''enable or assist'' them to apply for, gain access to, or participate in a public entity's services, programs, or activities, or the documents ''provide information about or describe'' a public entity's services, programs, or activities.

Whether a document is currently used to apply for, gain access to, or participate in a public entity's services, programs, or activities is a fact-specific analysis. For example, one commenter questioned whether a document containing a city's description of a public park and its accessibility provisions would be covered by the exception if the document did not otherwise discuss a particular event or program. The Department anticipates that the exception would likely not cover such a document. One of the city's services, programs, or activities is providing and maintaining a public park and its accessibility features. An individual with a disability who accesses the document before visiting the park to understand the park's accessibility features would be currently using the document to gain access to the park.

One commenter suggested that if a public entity cannot change preexisting conventional electronic documents due to legal limitations or other similar restrictions, then the public entity should not have to make those documents accessible under subpart H of this part, even if they are currently used by members of the public to apply for, gain access to, or participate in a public entity's services, programs, or activities. The Department did not make changes to the exception because subpart H already includes a provision that addresses such circumstances in § 35.202. Namely, public entities are permitted to use conforming alternate versions of web content where it is not possible to make web content directly accessible due to technical or legal limitations. Therefore, a public entity could provide an individual with a disability a conforming alternate version of a preexisting conventional electronic document currently used to apply for, gain access to, or participate in the public entity's services, programs, or activities if the document could not be made accessible for the individual due to legal limitations.

One commenter expressed concern that public entities might convert large volumes of web content to formats covered by the exception ahead of the compliance dates in subpart H of this part. In contrast, a public entity stated that there is limited incentive to rush to post inaccessible documents prior to the compliance dates because documents are frequently updated, and it would be easier for the public entity to create accessible documents in the first place than to try to remediate inaccessible documents in the future. The Department emphasizes that a public entity may not rely on the exception to circumvent its accessibility obligations under subpart H by, for example, converting all of its web content to conventional electronic document formats and posting those documents before the date the entity must comply with subpart H. Even if a public entity did convert various web content to preexisting conventional electronic documents before the date it was required to comply with subpart H, the date the documents were posted is only one part of the analysis under the exception. If any of the converted documents are currently used to apply for, gain access to, or participate in the public entity's services, programs, or activities, they would not be covered by the exception and would generally need to conform to WCAG 2.1 Level AA, even if those documents were posted before the date the entity was required to comply with subpart H. And if a public entity revises a conventional electronic document after the date the entity must comply with subpart H, that document would no longer qualify as ''preexisting'' and would thus need to be made accessible as defined in § 35.200.

The Department received comments both supporting and opposing the exception. In support of the exception, commenters highlighted various benefits. For example, commenters noted that the exception would help public entities preserve resources because remediating preexisting documents is time consuming and expensive. Commenters also noted that the exception would focus public entities' resources on current and future content rather than preexisting documents that may be old, rarely accessed, or of little benefit. Commenters stated that in the absence of this exception public entities might remove preexisting documents from their websites.

In opposition to the exception, commenters highlighted various concerns. For example, commenters argued that the exception is inconsistent with the ADA's goal of equal access for individuals with disabilities because it perpetuates unequal access to information available through public entities' web content and mobile apps, and it is unnecessary because the compliance limitations for fundamental alteration and undue financial and administrative burdens would protect public entities from any unrealistic requirements under subpart H of this part. Commenters also asserted that the exception excludes relevant and important content from becoming accessible, and it inappropriately continues to place the burden on individuals with disabilities to identify themselves to public entities, request access to the content covered by the exception, and wait for the request to be processed. In addition, commenters argued that the exception covers file formats that do not need to be covered by an exception because they can generally be remediated easily; it is not timebound; it does not account for technology that exists, or might develop in the future, that may allow for easy and reliable wide-scale remediation of conventional electronic documents; and it might deter development of technology to reliably remediate conventional electronic documents. Commenters also stated that the exception is confusing because, as described elsewhere in this appendix, it may not be clear when documents are ''preexisting'' or ''used'' to apply for, gain access to, or participate in a public entity's services, programs, or activities, and confusion or a lack of predictability would make advocacy efforts more difficult.

After reviewing the comments, the Department has decided to keep the exception in § 35.201. The Department continues to believe that the exception provides an important measure of clarity and certainty for public entities as they initially consider how to address all the various conventional electronic documents provided and made available through their web content and mobile apps. The exception will allow public entities to primarily focus their resources on developing new conventional electronic documents that are accessible as defined under subpart H of this part and remediating preexisting conventional electronic documents that are currently used to apply for, gain access to, or participate in their services, programs, or activities. In contrast, public entities will not have to expend their resources on identifying, cataloguing, and remediating preexisting

conventional electronic documents that are not currently used to apply for, gain access to, or participate in the public entity's services, programs, or activities. Based on the exception, public entities may thereby make more efficient use of the resources available to them to ensure equal access to their services, programs, or activities for all individuals with disabilities.

The Department understands the concerns raised by commenters about the potential burdens that individuals with disabilities may face because some conventional electronic documents covered by the exception are not accessible. The Department emphasizes that even if certain content does not have to conform to the technical standard, public entities still need to ensure that their services, programs, and activities offered using web content and mobile apps are accessible to individuals with disabilities on a case-by-case basis in accordance with their existing obligations under title II of the ADA. These obligations include making reasonable modifications to avoid discrimination on the basis of disability, ensuring that communications with people with disabilities are as effective as communications with people without disabilities, and providing people with disabilities an equal opportunity to participate in or benefit from the entity's services, programs, or activities.[132]

Some commenters suggested that the Department should require public entities to adopt procedures and timelines for how individuals with disabilities could request access to inaccessible conventional electronic documents covered by the exception. One commenter also suggested that subpart H of this part should require the ongoing provision of accessible materials to an individual with a disability if a public entity is on notice that the individual needs access to preexisting conventional electronic documents covered by the exception in accessible formats. The Department declines to make specific changes to the exception in response to these comments and reiterates that public entities must determine on a case-by-case basis how best to meet the needs of those individuals who cannot access the content contained in documents that are covered by the exception. It is helpful to provide individuals with disabilities with information about how to obtain the modifications or auxiliary aids and services they may need. Public entities can help to facilitate effective communication by providing notice to the public on how an individual who cannot access preexisting conventional electronic documents covered by the exception because of a disability can request other means of effective communication or reasonable modifications in order to access the public entity's services, programs, or activities with respect to the documents. Public entities can also facilitate effective communication by providing an accessibility statement that tells the public how to bring web content or mobile app accessibility problems to the public entities' attention and developing and implementing a procedure for reviewing and addressing any such issues raised. For example, a public entity could facilitate effective communication by providing an email address, accessible link, accessible web page, or other accessible means of contacting the public entity to provide information about issues that individuals with disabilities may encounter accessing web content or mobile apps or to request assistance. Providing this information will help public entities to ensure that they are satisfying their obligations to provide equal access, effective communication, and reasonable modifications.

Commenters also suggested other possible revisions to the exception. Commenters recommended various changes that would cause conventional electronic documents covered by the exception to become accessible over time. For example, commenters suggested that if a public entity makes a copy of a preexisting conventional electronic document covered by the exception conform to WCAG 2.1 Level AA in response to a request from an individual with a disability, the public entity should replace the inaccessible version posted on its web content or mobile app with the updated accessible version that was sent to the individual; the exception should ultimately expire after a certain amount of time; public entities should be required to remediate preexisting documents over time, initially prioritizing documents that are most important and frequently accessed; or public entities should be required to convert certain documents to HTML format according to the same schedule that other HTML content is made accessible.

The Department already expects the impact of the exception will diminish over time for various reasons. For example, public entities may update the documents covered by the exception, in which case they are no longer ''preexisting.'' In addition, the Department notes that there is nothing in subpart H of this part that would prevent public entities from taking steps, such as those identified by commenters, to make preexisting conventional electronic documents conform to WCAG 2.1 Level AA. In fact, public entities might find it beneficial to do so.

One commenter recommended that the exception should apply to all preexisting conventional electronic documents regardless of how they are used by members of the public. The Department does not believe this approach is advisable because it has the potential to cause a significant accessibility gap for individuals with disabilities if public entities rely on conventional electronic documents that are not regularly updated or changed. This could result in inconsistent access to web content and mobile apps and therefore less predictability for people with disabilities in terms of what to expect when accessing public entities' web content and mobile apps.

One public entity recommended that the exception should also apply to preexisting documents posted on a public entity's web content or mobile apps after the date the public entity is required to comply with subpart H of this part if the documents are of historical value and were only minimally altered before posting. One goal of the exception is to assist public entities in focusing their personnel and financial resources on developing new web content and mobile apps that are accessible as defined under subpart H. Therefore, the exception neither applies to content that is newly added to a public entity's web content or mobile app after the date the public entity is required to comply with subpart H nor to preexisting content that is updated after that date. The Department notes that if a public entity wishes to post archival documents, such as the types of documents described by the commenter, after the date the public entity is required to comply with subpart H, the public entity should assess whether the documents can be archived under § 35.201(a), depending on the facts. In particular, the definition of ''archived web content'' in § 35.104 includes web content posted to an archive after the date a public entity is required to comply with subpart H only if the web content was created before the date the public entity is required to comply with subpart H, reproduces paper documents created before the date the public entity is required to comply with subpart H, or reproduces the contents of other physical media created before the date the public entity is required to comply with subpart H.

Several commenters also requested clarification about how the exception applies to preexisting conventional electronic documents that are created by a third party on behalf of a public entity or hosted on a third party's web content or mobile apps on behalf of a public entity. As previously discussed, the Department made general changes to § 35.200 that address public entities' contractual, licensing, or other arrangements with third parties. The Department clarified that the general requirements for web content and mobile app accessibility apply when a public entity provides or makes available web content or mobile apps, directly or through contractual, licensing, or other arrangements. The same is also true for the application of this exception. Therefore, preexisting conventional electronic documents that a public entity provides or makes available, directly or through contractual, licensing, or other arrangements, would be subject to subpart H of this part, and the documents would be covered by this exception unless they are currently used to apply for, gain access to, or participate in the public entity's services, programs, or activities.

Third-Party Content

Public entities' web content or mobile apps can include or link to many different types of content created by someone other than the public entity, some of which is posted by or on behalf of public entities and some of which is not. For example, many public entities' websites contain content created by third parties, like scheduling tools, reservations systems, or payment systems. Web content or content in mobile apps created by third parties may also be posted by members of the public on a public entity's online message board or other sections of the public entity's content that allow public comment. In addition to content created by third parties that is posted on the public

[132] *See* §§ 35.130(b)(1)(ii) and (b)(7) and 35.160.

entity's own web content or content in mobile apps, public entities frequently provide links to third-party content (*i.e.,* links on the public entity's website to content that has been posted on another website that does not belong to the public entity), including links to outside resources and information.

Subpart H of this part requires web content and mobile apps created by third parties to comply with § 35.200 if the web content and mobile apps are provided or made available due to contractual, licensing, or other arrangements with the public entity. In other words, web content and mobile apps that are created or posted on behalf of a public entity fall within the scope of § 35.200. Where a public entity links to third-party content but the third-party content is truly unaffiliated with the public entity and not provided on behalf of the public entity due to contractual, licensing, or other arrangements, the linked content falls outside the scope of § 35.200. Additionally, due to the exception in § 35.201(c), content posted by a third party on an entity's web content or mobile app falls outside the scope of § 35.200, unless the third party is posting due to contractual, licensing, or other arrangements with the public entity.

The Department has heard a variety of views regarding whether public entities should be responsible for ensuring that third-party content on their websites and linked third-party content are accessible as defined by § 35.200. Some maintain that public entities cannot be held accountable for third-party content on their websites, and without such an exception, public entities may have to remove the content altogether. Others have suggested that public entities should not be responsible for third-party content and linked content unless that content is necessary for individuals to access public entities' services, programs, or activities. The Department has also heard the view, however, that public entities should be responsible for third-party content because a public entity's reliance on inaccessible third-party content can prevent people with disabilities from having equal access to the public entity's own services, programs, or activities. Furthermore, boundaries between web content generated by a public entity and by a third party are often difficult to discern.

In anticipation of these concerns, the Department originally proposed two limited exceptions related to third-party content in the NPRM. After review of the public's comments to those exceptions and the comments related to third-party content generally, the Department is proceeding with one of those exceptions in subpart H of this part, as described in the following paragraph. As further explained elsewhere in this appendix, the Department notes that it eliminates redundancy to omit the previously proposed exception for third-party content linked from a public entity's website, but it does not change the scope of content that is required to be made accessible under subpart H.

Content Posted by a Third Party

Section 35.201(c) provides an exception to the web and mobile app accessibility requirements of § 35.200 for content posted by a third party, unless the third party is posting due to contractual, licensing, or other arrangements with the public entity. Section 35.201 includes this exception in recognition of the fact that individuals other than a public entity's agents sometimes post content on a public entity's web content and mobile apps. For example, members of the public may sometimes post on a public entity's online message boards, wikis, social media, or other web forums, many of which are unmonitored, interactive spaces designed to promote the sharing of information and ideas. Members of the public may post frequently, at all hours of the day or night, and a public entity may have little or no control over the content posted. In some cases, a public entity's website may include posts from third parties dating back many years, which are likely of limited, if any, relevance today. Because public entities often lack control over this third-party content, it may be challenging (or impossible) for them to make it accessible. Moreover, because this third-party content may be outdated or less frequently accessed than other content, there may be only limited benefit to requiring public entities to make this content accessible. Accordingly, the Department believes an exception for this content is appropriate. However, while this exception applies to web content or content in mobile apps posted by third parties, it does not apply to the tools or platforms the public uses to post third-party content on a public entity's web content or content in mobile apps, such as message boards—these tools and platforms generally must conform to the technical standard in subpart H of this part.

This exception applies to, among other third-party content, documents filed by independent third parties in administrative, judicial, and other legal proceedings that are available on a public entity's web content or mobile apps. This example helps to illustrate why the Department believes this exception is necessary. Many public entities have either implemented or are developing an automated process for electronic filing of documents in administrative, judicial, or legal proceedings in order to improve efficiency in the collection and management of these documents. Courts and other public entities receive high volumes of filings in these sorts of proceedings each year. Documents are often submitted by third parties—such as a private attorney in a legal case or other members of the public—and those documents often include appendices, exhibits, or other similar supplementary materials that may be difficult to make accessible.

However, the Department notes that public entities have existing obligations under title II of the ADA to ensure the accessibility of their services, programs, or activities.[133] Accordingly, for example, if a person with a disability is a party to a case and requests access to inaccessible filings submitted by a third party in a judicial proceeding that are available on a State court's website, the court generally must timely provide those filings in an accessible format. Similarly, public entities generally must provide reasonable modifications to ensure that individuals with disabilities have access to the public entities' services, programs, or activities. For example, if a hearing had been scheduled in the proceeding referenced in this paragraph, the court might need to postpone the hearing if the person with a disability was not provided filings in an accessible format before the scheduled hearing.

Sometimes a public entity itself chooses to post content created by a third party on its website. The exception in § 35.201(c) does not apply to content posted by the public entity itself, or posted on behalf of the public entity due to contractual, licensing, or other arrangements, even if the content was originally created by a third party. For example, many public entities post third-party content on their websites, such as calendars, scheduling tools, maps, reservations systems, and payment systems that were developed by an outside technology company. Sometimes a third party might even build a public entity's website template on the public entity's behalf. To the extent a public entity chooses to rely on third-party content on its website in these ways, it must select third-party content that meets the requirements of § 35.200. This is because a public entity may not delegate away its obligations under the ADA.[134] If a public entity relies on a contractor or another third party to post content on the public entity's behalf, the public entity retains responsibility for ensuring the accessibility of that content. To provide another example, if a public housing authority relies on a third-party contractor to collect online applications on the third-party contractor's website for placement on a waitlist for housing, the public housing authority must ensure that this content is accessible.

The Department has added language to the third-party posted exception in § 35.201(c) to make clear that the exception does not apply where a third party is posting on behalf of the public entity. The language in § 35.201(c) provides that the exception does not apply if the third party is posting due to contractual, licensing, or other arrangements with the public entity. The Department received many comments expressing concern with how this exception as originally proposed could have applied in the context of third-party vendors and other entities acting on behalf of the public entity. The Department added language to make clear that the exception only applies where the third-party posted content is independent from the actions of the public entity—that is, where there is no arrangement under which the third party is acting on behalf of the public entity. If such an arrangement exists, the third-party content is not covered by the exception and must be made accessible in accordance with subpart H of this part. This point is also made clear in language the Department added to the general requirements of § 35.200, which provides that public entities shall ensure web

[133] *See, e.g.,* §§ 35.130(b)(1)(ii) and (b)(7) and 35.160.

[134] *See* § 35.130(b)(1)(ii) (prohibiting discrimination through a contractual, licensing, or other arrangement that would provide an aid, benefit, or service to a qualified individual with a disability that is not equal to that afforded others).

content and mobile apps that the public entities provide or make available, directly or through contractual, licensing, or other arrangements, are readily accessible to and usable by individuals with disabilities.[135] The Department decided to add the same clarification to the exception for third-party posted content because this is the only exception in § 35.201 that applies solely based upon the identity of the poster (whereas the other exceptions identify the type of content at issue), and the Department believes clarity about the meaning of ''third party'' in the context of this exception is critical to avoid the exception being interpreted overly broadly. The Department believes this clarification is justified by the concerns raised by commenters.

On another point, some commenters expressed confusion about when authoring tools and other embedded content that enables third-party postings would need to be made accessible. The Department wishes to clarify that while the exception for third-party posted content applies to that content which is posted by an independent third party, the exception does not apply to the authoring tools and embedded content provided by the public entity, directly or through contractual, licensing, or other arrangements. Because of this, authoring tools, embedded content, and other similar functions provided by the public entity that facilitate third-party postings are not covered by this exception and must be made accessible in accordance with subpart H of this part. Further, public entities should consider the ways in which they can facilitate accessible output of third-party content through authoring tools and guidance. Some commenters suggested that the Department should add regulatory text requiring public entities to use authoring tools that generate compliant third-party posted content. The Department declines to adopt this approach at this time because the technical standard adopted by subpart H is WCAG 2.1 Level AA, and the Department believes the commenters' proposed approach would go beyond that standard. The Department believes going beyond the requirements of WCAG 2.1 Level AA in this way would undermine the purpose of relying on an existing technical standard that web developers are already familiar with, and for which guidance is readily available, which could prove confusing for public entities.

The Department received many comments either supporting or opposing the exception for content posted by a third party. Public entities and trade groups representing public accommodations generally supported the exception, and disability advocates generally opposed the exception. Commenters supporting the exception argued that the content covered by this exception would not be possible for public entities to remediate since they lack control over unaffiliated third-party content. Commenters in support of the exception also shared that requiring public entities to remediate this content would stifle engagement between public entities and members of the public, because requiring review and updating of third-party postings would take time. Further, public entities shared that requiring unaffiliated third-party web content to be made accessible would in many cases either be impossible or require the public entity to make changes to the third party's content in a way that could be problematic.

Commenters opposing the exception argued that unaffiliated third-party content should be accessible so that individuals with disabilities can engage with their State or local government entities, and commenters shared examples of legal proceedings, development plans posted by third parties for public feedback, and discussions of community grievances or planning. Some of the commenters writing in opposition to the exception expressed concern that content provided by vendors and posted by third parties on behalf of the public entity would also be covered by this exception. The Department emphasizes in response to these commenters that this exception does not apply where a third party such as a vendor is acting on behalf of a public entity, through contractual, licensing, or other arrangements. The Department added language to ensure this point is clear in regulatory text, as explained previously.

After reviewing the comments, the Department emphasizes at the outset the narrowness of this exception—any third-party content that is posted due to contractual, licensing, or other arrangements with the public entity would not be covered by this exception. The Department sometimes refers to the content covered by this exception as ''independent'' or ''unaffiliated'' content to emphasize that this exception only applies to content that the public entity has not contracted, licensed, or otherwise arranged with the third party to post. This exception would generally apply, for example, where the public entity enables comments from members of the public on its social media page and third-party individuals independently comment on that post, or where a public entity allows for legal filings through an online portal and a third-party attorney independently submits a legal filing on behalf of their private client (which is then available on the public entity's web content or mobile apps).

The Department has determined that maintaining this exception is appropriate because of the unique considerations relevant to this type of content. The Department takes seriously public entities' concerns that they will often be unable to ensure independent third-party content is accessible because it is outside of their control, and that if they were to attempt to control this content it could stifle communication between the public and State or local government entities. The Department further believes there are unique considerations that could prove problematic with public entities editing or requiring third parties to edit their postings. For example, if public entities were required to add alt text to images or maps in third parties' legal or other filings, it could require the public entity to make decisions about how to describe images or maps in a way that could be problematic from the perspective of the third-party filer. Alternatively, if the public entity were to place this burden on the third-party filer, it could lead to different problematic outcomes. For example, if a public entity rejects a posting from an unaffiliated third party (someone who does not have obligations under subpart H of this part) and requires the third party to update it, the result could be a delay of an emergency or time-sensitive filing or even impeding access to the forum if the third party is unable or does not have the resources to remediate the filing.

The Department understands the concerns raised by the commenters who oppose this exception, and the Department appreciates that the inclusion of this exception means web content posted by third parties may not consistently be accessible by default. The Department emphasizes that even if certain content does not have to conform to the technical standard, public entities still need to ensure that their services, programs, and activities offered using web content and mobile apps are accessible to individuals with disabilities on a case-by-case basis in accordance with their existing obligations under title II of the ADA. These obligations include making reasonable modifications to avoid discrimination on the basis of disability, ensuring that communications with people with disabilities are as effective as communications with people without disabilities, and providing people with disabilities an equal opportunity to participate in or benefit from the entity's services, programs, or activities.[136]

The Department believes the balance this exception strikes thus ensures accessibility to the extent feasible without requiring public entities to take actions that may be impossible or lead to problematic outcomes as described previously. These problematic outcomes include public entities needing to characterize independent third-party content by adding image descriptions, for example, and stifling engagement between public entities and the public due to public entities' need to review and potentially update independent third-party posts, which could lead to delay in posting. Independent third-party content should still be made accessible upon request when required under the existing obligations within title II of the ADA. However, public entities are not required to ensure the accessibility at the outset of independent third-party content. The Department believes, consistent with commenters' suggestions, that reliance solely on the fundamental alteration or undue burdens provisions discussed in the ''Duties'' section of the section-by-section analysis of § 35.204 would not avoid these problematic outcomes. This is because, for example, even where the public entity may have the resources to make the third-party content accessible (such as by making changes to the postings or blocking posting until the third party makes changes), and even where the public entity does not believe modifying the postings would result in a fundamental alteration in the nature of the service, program, or activity at issue, the problematic outcomes described previously would likely persist. The Department thus believes that

[135] *See supra* section-by-section analysis of § 35.200(a)(1) and (2) and (b)(1) and (2).

[136] *See* §§ 35.130(b)(1)(ii) and (b)(7) and 35.160.

this exception appropriately balances the relevant considerations while ensuring access for individuals with disabilities.

Some commenters suggested alternative formulations that would narrow or expand the exception. For example, commenters suggested that the Department limit the exception to advertising and marketing or activities not used to access government services, programs, or activities; mandate that third-party postings providing official comment on government actions still be required to be made accessible; provide alternative means of access as permissible ways of achieving compliance; consider more content as third-party created content; provide for no liability for third-party sourced content; require that emergency information posted by third parties still be accessible; and require that public entities post guidance on making third-party postings accessible. The Department has considered these alternative formulations, and with each proposed alternative the Department found that the proposal would not avoid the problematic outcomes described previously, would result in practical difficulties to implement and define, or would be too expansive of an exception in that too much content would be inaccessible to individuals with disabilities.

Commenters also suggested that the Department include a definition of ''third party.'' The Department is declining to add this definition because the critical factor in determining whether this exception applies is whether the third party is posting due to contractual, licensing, or other arrangements with the public entity, and the Department believes the changes to the regulatory text provide the clarity commenters sought. For example, the Department has included language making clear that public entities are responsible for the content of third parties acting on behalf of State or local government entities through the addition of the ''contractual, licensing, or other arrangements'' clauses in the general requirements and in this exception. One commenter also suggested that subpart H of this part should cover third-party creators of digital apps and content regardless of whether the apps and content are used by public entities. Independent third-party providers unaffiliated with public entities are not covered by the scope of subpart H, as they are not title II entities.

Finally, the Department made a change to the exception for third-party posted content from the NPRM to make the exception more technology neutral. The NPRM provided that the exception applies only to ''web content'' posted by a third party.[137] The Department received a comment suggesting that third-party posted content be covered by the exception regardless of whether the content is posted on web content or mobile apps, and several commenters indicated that subpart H of this part should apply the same exceptions across these platforms to ensure consistency in user experience and reduce confusion. For example, if a third party posts information on a public entity's social media page, that information would be available on both the web and on a mobile app. However, without a technology-neutral exception for third-party posted content, that same information would be subject to different requirements on different platforms, which could create perverse incentives for public entities to only make certain content available on certain platforms. To address these concerns, § 35.201(c) includes a revised exception for third-party posted content to make it more technology neutral by clarifying that the exception applies to ''content'' posted by a third party. The Department believes this will ensure consistent application of the exception whether the third-party content is posted on web content or mobile apps.

Previously Proposed Exception for Third-Party Content Linked From a Public Entity's Website

In the NPRM, the Department proposed an exception for third-party content linked from a public entity's website. After reviewing public comments on this proposed exception, the Department has decided not to include it in subpart H of this part. The Department agrees with commenters who shared that the exception is unnecessary and would only create confusion. Further, the Department believes that the way the exception was framed in the NPRM is consistent with the way subpart H would operate in the absence of this exception (with some clarifications to the regulatory text), so the fact that this exception is not included in subpart H will not change what content is covered by subpart H. Under subpart H, consistent with the approach in the NPRM, public entities are not responsible for making linked third-party content accessible where they do not provide or make available that content, directly or through contractual, licensing, or other arrangements.

Exception Proposed in the NPRM

The exception for third-party-linked content that was proposed in the NPRM provided that a public entity would not be responsible for the accessibility of third-party web content linked from the public entity's website unless the public entity uses the third-party web content to allow members of the public to participate in or benefit from the public entity's services, programs, or activities. Many public entities' websites include links to other websites that contain information or resources in the community offered by third parties that are not affiliated with the public entity. Clicking on one of these links will take an individual away from the public entity's website to the website of a third party. Often, the public entity has no control over or responsibility for a third party's web content or the operation of the third party's website. Accordingly, the proposed regulatory text in the NPRM provided that the public entity would have no obligation to make the content on a third party's website accessible.[138] This exception was originally provided to make clear that public entities can continue to provide links to independent third-party web content without making the public entity responsible for the accessibility of the third party's web content.

However, in the NPRM, the Department provided that if the public entity uses the linked third-party web content to allow members of the public to participate in or benefit from the public entity's services, programs, or activities, then the public entity must ensure it only links to third-party web content that complies with the web accessibility requirements of § 35.200. The Department clarified that this approach is consistent with public entities' obligation to make all of their services, programs, and activities accessible to the public, including those that public entities provide through third parties.[139]

Most commenters opining on this subject opposed the exception for third-party content linked from a public entity's website, including disability advocates and individuals with disabilities. Commenters raised many concerns with the exception as drafted. Principally, commenters shared that the exception could lead to confusion about when third-party content is covered by subpart H, and that it could result in critical third-party content being interpreted to be excluded from the requirements of § 35.200. Although the Department proposed a limitation to the exception (*i.e.,* a scenario under which the proposed exception would not apply) that would have required linked third-party content to be made accessible when it is used to participate in or benefit from the public entity's services, programs, or activities, commenters pointed out that this limitation would be difficult to apply to third-party content, and that many public entities would interpret the exception to allow them to keep services, programs, and activities inaccessible. Many commenters, including public entities, even demonstrated this confusion through their comments. For example, commenters believed that web content like fine payment websites, zoning maps, and other services provided by third-party vendors on behalf of public entities would be allowed to be inaccessible under this exception. This misinterprets the proposed exception as originally drafted because third-party web content that is used to participate in or benefit from the public entity's services, programs, or activities would have still been required to be accessible as defined under proposed § 35.201 due to the limitation to the exception. But the Department noted that many commenters from disability advocacy groups, public entities, and trade groups representing public accommodations either expressed concern with or confusion about the exception, or demonstrated confusion through inaccurate statements about what content would fall into this exception to the requirements in subpart H of this part.

Further, commenters also expressed concern with relieving public entities of the responsibility to ensure that the links they provide lead to accessible content.

[137] 88 FR 52019.

[138] 88 FR 52019; *see also id.* at 51969 (preamble text).

[139] 88 FR 51969; *see also* § 35.130(b)(1)(ii) (prohibiting discrimination through a contractual, licensing, or other arrangement that would provide an aid, benefit, or service to a qualified individual with a disability that is not equal to that afforded others).

Commenters stated that when public entities provide links, they are engaging in activities that would be covered by subpart H of this part. In addition, commenters said that public entities might provide links to places where people can get vaccinations or collect information for tourists, and that these constitute the activities of the public entity. Also, commenters opined that when public entities engage in these activities, they should not be absolved of the responsibility to provide information presented in a non-discriminatory manner. Commenters said that public entities have control over which links they use when they organize these pages, and that public entities can and should take care to only provide information leading to accessible web content. Commenters stated that in many cases public entities benefit from providing these links, as do the linked websites, and that public entities should thus be responsible for ensuring the accessibility of the linked content. Some commenters added that this exception would have implied that title III entities are permitted to discriminate by keeping their web content inaccessible, though the Department emphasizes in response to these commenters that subpart H does not alter the responsibilities title III entities have with regard to the goods, services, privileges, or activities offered by public accommodations on the web.[140] Commenters universally expressed their concern that the content at issue is often inaccessible, accentuating this problem.

Some commenters supported the exception, generally including individuals, public entities, and trade groups representing public accommodations. These commenters contended that the content at issue in this exception should properly be considered ''fluff,'' and that it would be unrealistic to expect tourist or small business promotion to exist through only accessible websites. The Department also received some examples from commenters who supported the exception of web content the commenters inaccurately believed would be covered by the exception, such as highway toll management account websites. The Department would have likely considered that type of content to be required to comply with § 35.200, even with the exception, due to the limitation to the third-party-linked exception as proposed in the NPRM. Many of the comments the Department received on this proposed exception demonstrated confusion with how the third-party-linked exception and its limitation as proposed in the NPRM would apply in practice, which would lead to misconceptions in terms of when public entities must ensure conformance to WCAG 2.1 and what kinds of content individuals with disabilities can expect to be accessible.

Approach to Linked Third-Party Content in Subpart H of This Part

After reviewing public comments, the Department believes that inclusion of this exception is unnecessary, would result in confusion, and that removing the exception more consistently aligns with the language of title II of the ADA and the Department's intent in proposing the exception in the NPRM.

Consistent with what many commenters opined, the Department believes that the proper analysis is whether an entity has directly, or through contractual, licensing, or other arrangements, provided or made available the third-party content. This means that, for example, when a public entity posts links to third-party web content on the public entity's website, the links located on the public entity's website and the organization of the public entity's website must comply with § 35.200. Further, when a public entity links to third-party web content that is provided by the public entity, directly or through contractual, licensing, or other arrangements, the public entity is also responsible for ensuring the accessibility of that linked content. However, when public entities link to third-party websites, unless the public entity has a contractual, licensing, or other arrangement with the website to provide or make available content, those third-party websites are not covered by title II of the ADA, because they are not services, programs, or activities provided or made available by public entities, and thus public entities are not responsible for the accessibility of that content.

Rather than conduct a separate analysis under the proposed exception in the NPRM, the Department believes the simpler and more legally consistent approach is for public entities to assess whether the linked third-party content reflects content that is covered under subpart H of this part to determine their responsibility to ensure the accessibility of that content. If that content is covered, it must be made accessible in accordance with the requirements of § 35.200. For example, if a public entity allows the public to pay for highway tolls using a third-party website, that website would be a service that the public entity provides through arrangements with a third party, and the toll payment website would need to be made accessible consistent with subpart H. However, if the content is not provided or made available by a public entity, directly or through contractual, licensing, or other arrangements, even though the public entity linked to that content, the public entity would not be responsible for making that content accessible. The public entity would still need to ensure the links themselves are accessible, but not the unaffiliated linked third-party content. For example, if a public entity has a tourist information website that provides a link to a private hotel's website, then the public entity would need to ensure the link to that hotel is accessible, because the link is part of the web content of the public entity. The public entity would, for example, need to ensure that the link does not violate the minimum color contrast ratio by being too light of a color blue against a light background, which would make it inaccessible to certain individuals with disabilities.[141] However, because the hotel website itself is private and is not being provided on behalf of the public entity due to a contractual, licensing, or other arrangement, the public entity would not be responsible for ensuring the hotel website's ADA compliance.[142]

The Department believes that this approach is consistent with what the Department sought to achieve by including the exception in the NPRM, so this modification to subpart H of this part from the proposal in the NPRM does not change the web content that is ultimately covered by subpart H. Rather, the Department believes that removing the exception will alleviate the confusion expressed by many commenters and allow public entities to make a more straightforward assessment of the coverage of the web content they provide to the public under subpart H. For example, a public entity that links to online payment processing websites offered by third parties to accept the payment of fees, parking tickets, or taxes must ensure that the third-party web content it links to in order for members of the public to pay for the public entity's services, programs, or activities complies with the web accessibility requirements of § 35.200. Similarly, if a public entity links to a third-party website that processes applications for benefits or requests to sign up for classes or programs the public entity offers, the public entity is using the third party's linked web content as part of the public entity's services, programs, or activities, and the public entity must thus ensure that it links to only third-party web content that complies with the requirements of § 35.200.

The Department considered addressing commenters' confusion by providing more guidance on the proposed exception, rather than removing the exception. However, the Department believes that the concept of an exception for this type of content, when that content would not be covered by title II in the first place, would make the exception especially prone to confusion, such that including it in subpart H of this part even with further explanation would be insufficient to avoid confusion. The Department believes that because the content at issue would generally not be covered by title II in the first place, including this exception could inadvertently cause public entities to assume that the exception is broader than it is, which could result in the inaccessibility of content that is critical to accessing public entities' services, programs, or activities.

The Department also reviewed proposals by commenters to both narrow and expand the language of the exception proposed in the NPRM. Commenters suggested narrowing the exception by revising the limitation to cover information that ''enables or assists'' members of the public to participate in or

[140] *See* U.S. Dep't of Just., *Guidance on Web Accessibility and the ADA, ADA.gov* (Mar. 18, 2022), *https://www.ada.gov/resources/web-guidance/* [*https://perma.cc/WH9E-VTCY*].

[141] *See* W3C, *Web Content Accessibility Guidelines 2.1, Contrast (Minimum)* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/#contrast-minimum* [*https://perma.cc/VAA3-TYN9*].

[142] The Department reminds the public, however, that the hotel would still have obligations under title III of the ADA. *See* U.S. Dep't of Just., *Guidance on Web Accessibility and the ADA, ADA.gov* (Mar. 18, 2022), *https://www.ada.gov/resources/web-guidance/* [*https://perma.cc/WH9E-VTCY*].

benefit from services, programs, or activities. Commenters also proposed expanding the exception by allowing third-party web content to remain inaccessible if there is no feasible manner for the content to be made compliant with the requirements of § 35.200 or by removing the limitation. Several commenters made additional alternative proposals to both narrow and expand the language of the exception. The Department has reviewed these alternatives and is still persuaded that the most prudent approach is removing the exception altogether, for the reasons described previously.

External Mobile Apps

Many public entities use mobile apps that are developed, owned, and operated by third parties, such as private companies, to allow the public to access the public entity's services, programs, or activities. This part of the section-by-section analysis refers to mobile apps that are developed, owned, and operated by third parties as ''external mobile apps.'' [143] For example, members of the public use external mobile apps to pay for parking in a city (*e.g.,* ''ParkMobile'' app [144]) or to submit non-emergency service requests such as fixing a pothole or a streetlight (*e.g.,* ''SeeClickFix'' app [145]). In subpart H of this part, external mobile apps are subject to § 35.200 in the same way as mobile apps that are developed, owned, and operated by a public entity. The Department is taking this approach because such external apps are generally made available through contractual, licensing, or other means, and this approach ensures consistency with existing ADA requirements that apply to other services, programs, and activities that a public entity provides in this manner. Consistent with these principles, if a public entity, directly or through contractual, licensing, or other arrangements, provides or makes available an external mobile app, that mobile app must comply with § 35.200 unless it is subject to one of the exceptions outlined in § 35.201.

The Department requested feedback on the external mobile apps that public entities use to offer their services, programs, or activities and received comments on its approach to external mobile apps. Commenters pointed out that external mobile apps are used for a variety of purposes by public entities, including for public information, updates on road conditions, transportation purposes, information on recreation, class information, map-based tools for finding specific information like air quality, and emergency planning, among other things.

Commenters overwhelmingly supported the Department's position to not include a wholesale exception for every external mobile app, given how often these apps are used in public entities' services, programs, and activities. As commenters noted, the public's reliance on mobile devices makes access to external apps critical, and commenters shared their belief that the usage of mobile devices, like smartphones, will increase in the coming years. For example, some commenters indicated that many individuals with disabilities, especially those with vision disabilities, primarily rely on smartphones rather than computers, and if mobile apps are not accessible, then people who are blind or have low vision would need to rely on others to use apps that include sensitive data like bank account information. Accordingly, commenters argued there should be little, if any, difference between the information and accessibility provided using a mobile app and a conventional web browser, and if the Department were to provide an exception for external mobile apps, commenters said that there would be a large loophole for accessibility because so many members of the public rely on external mobile apps to access a public entity's services, programs, or activities.

Some commenters sought clarity on the scope of external mobile apps that might be covered by subpart H of this part, such as whether apps used to vote in an election held by a public entity would be covered. Under subpart H, external mobile apps that public entities provide or make available, including apps used in a public entity's election, would be covered by subpart H. As discussed in the section-by-section analysis of § 35.200, subpart H applies to a mobile app even if the public entity does not create or own the mobile app, if there is a contractual, licensing, or other arrangement through which the public entity provides or makes the mobile app available to the public.

Some commenters raised concerns with applying accessibility standards to external mobile apps that a public entity provides or makes available, directly or through contractual, licensing, or other arrangements. Specifically, commenters indicated there may be challenges related to costs, burdens, and cybersecurity with making these apps accessible and, because external mobile apps are created by third-party vendors, public entities may have challenges in ensuring that these apps are accessible. Accordingly, some commenters indicated the Department should set forth an exception for external mobile apps. Another commenter suggested that the Department should delay the compliance date of subpart H of this part to ensure there is sufficient time for external mobile apps subject to § 35.200 to come into compliance with the requirements in subpart H.

While the Department understands these concerns, the Department believes that the public relies on many public entities' external mobile apps to access public entities' services, programs, or activities, and setting forth an exception for these apps would keep public entities' services, programs, or activities inaccessible in practice for many individuals with disabilities. The Department believes that individuals with disabilities should not be excluded from these government services because the external mobile apps on which public entities rely are inaccessible. In addition, this approach of applying ADA requirements to services, programs, or activities that a public entity provides through a contractual, licensing, or other arrangement with a third party is consistent with the existing framework in title II of the ADA.[146] Under this framework, public entities have obligations in other title II contexts where they choose to contract, license, or otherwise arrange with third parties to provide services, programs, or activities.[147]

With respect to concerns about an appropriate compliance date, the section-by-section analysis of § 35.200 addresses this issue. The Department believes the compliance dates in subpart H of this part will provide sufficient time for public entities to ensure they are in compliance with the requirements of subpart H. Further lengthening the compliance dates would only further extend the time that individuals with disabilities remain excluded from the same level of access to public entities' services, programs, and activities through mobile apps.

Previously Proposed Exceptions for Password-Protected Class or Course Content of Public Educational Institutions

In the NPRM, the Department proposed exceptions to the requirements of § 35.200 for certain password-protected class or course content of public elementary, secondary, and postsecondary institutions.[148] For the reasons discussed in this section, the Department has decided not to include these exceptions in subpart H of this part.[149] Accordingly, under subpart H, password-protected course content will be treated like any other content and public educational institutions will generally need to ensure that that content complies with WCAG 2.1 Level AA starting two or three years after the publication of the final rule, depending on whether the public educational institution is covered by § 35.200(b)(1) or (2).

[143] The Department does not use the term ''third-party'' to describe mobile apps in this section to avoid confusion. It is the Department's understanding that the term ''third-party mobile app'' may have a different meaning in the technology industry, and some understand ''a third-party app'' as an application that is provided by a vendor other than the manufacturer of the device or operating system provider. *See* Alice Musyoka, *Third-Party Apps, Webopedia* (Aug. 4, 2022), *https://www.webopedia.com/definitions/third-party-apps/* [*https://perma.cc/SBW3-RRGN*].

[144] *See ParkMobile Parking App, https://parkmobile.io* [*https://perma.cc/G7GY-MDFE*].

[145] *See Using Mobile Apps in Government,* IBM Ctr. for the Bus. of Gov't, at 32–33 (2015), *https://www.businessofgovernment.org/sites/default/files/Using%20Mobile%20Apps%20in%20Government.pdf* [*https://perma.cc/248X-8A6C*].

[146] *See* § 35.130(b)(1) and (3).

[147] For example, under title II, a State is required to make sure that the services, programs, or activities offered by a State park inn that is operated by a private entity under contract with the State comply with title II. *See* 56 FR 35694, 35696 (July 26, 1991).

[148] *See* 88 FR 52019.

[149] Some commenters asked for clarification about how the proposed course content exceptions would operate in practice. For example, one commenter asked for clarification about what it would mean for a public educational institution to be ''on notice'' about the need to make course content accessible for a particular student, one of the limitations proposed in the NPRM. Because the Department is eliminating the course content exceptions from subpart H of this part, these questions about how the exceptions would have operated are moot and are not addressed in subpart H.

Course Content Exceptions Proposed in the NPRM

The NPRM included two proposed exceptions for password-protected class or course content of public educational institutions. The first proposed exception, which was included in the NPRM as proposed § 35.201(e),[150] stated that the requirements of § 35.200 would not apply to course content available on a public entity's password-protected or otherwise secured website for admitted students enrolled in a specific course offered by a public postsecondary institution.[151] Although the proposed exception applied to password-protected course content, it did not apply to the Learning Management System platforms on which public educational institutions make content available.[152]

This proposed exception was cabined by two proposed limitations, which are scenarios under which the proposed exception would not apply. The first such limitation provided that the proposed exception would not apply if a public entity is on notice that an admitted student with a disability is pre-registered in a specific course offered by a public postsecondary institution and that the student, because of a disability, would be unable to access the content available on the public entity's password-protected or otherwise secured website for the specific course.[153] In those circumstances, the NPRM proposed, all content available on the public entity's password-protected or otherwise secured website for the specific course must comply with the requirements of § 35.200 by the date the academic term begins for that course offering, and new content added throughout the term for the course must also comply with the requirements of § 35.200 at the time it is added to the website.[154]

The second limitation to the proposed exception for public postsecondary institutions' course content provided that the exception would not apply once a public entity is on notice that an admitted student with a disability is enrolled in a specific course offered by a public postsecondary institution after the start of the academic term and that the student, because of a disability, would be unable to access the content available on the public entity's password-protected or otherwise secured website for the specific course.[155] In those circumstances, the NPRM proposed, all content available on the public entity's password-protected or otherwise secured website for the specific course must comply with the requirements of § 35.200 within five business days of such notice, and new content added throughout the term for the course must also comply with the requirements of § 35.200 at the time it is added to the website.[156]

The second proposed course content exception, which was included in the NPRM as § 35.201(f), proposed the same exception as proposed § 35.201(e), but for public elementary and secondary schools. The proposed exception also contained the same limitations and timing requirements as the proposed exception for public postsecondary schools, but the limitations to the exception would have applied not only when there was an admitted student with a disability enrolled in the course whose disability made them unable to access the course content, but also when there was a parent with a disability whose child was enrolled in the course and whose disability made them unable to access the course content.[157]

The Department proposed these exceptions in the NPRM based on its initial assessment that it might be too burdensome to require public educational institutions to make accessible all of the course content that is available on password-protected websites, particularly given that content can be voluminous and that some courses in particular terms may not include any students with disabilities or students whose parents have disabilities. However, the Department recognized in the NPRM that it is critical for students with disabilities to have access to course content for the courses in which they are enrolled; the same is true for parents with disabilities in the context of public elementary and secondary schools. The Department therefore proposed procedures that a public educational institution would have to follow to make course content accessible on an individualized basis once the institution was on notice that there was a student or parent who needed accessible course content because of a disability. Because of the need to ensure prompt access to course content, the Department proposed to require public educational institutions to act quickly upon being on notice of the need for accessible content; public entities would have been required to provide accessible course content either by the start of the term if the institution was on notice before the date the term began, or within five business days if the institution was on notice after the start of the term.

The Department stated in the NPRM that it believed the proposed exceptions for password-protected course content struck the proper balance between meeting the needs of students and parents with disabilities while crafting a workable standard for public entities, but it welcomed public feedback on whether alternative approaches might strike a more appropriate balance.[158] The Department also asked a series of questions about whether these exceptions were necessary or appropriate.[159] For example, the Department asked how difficult it would be for public educational institutions to comply with subpart H of this part in the absence of these exceptions, what the impact of the exceptions would be on individuals with disabilities, how long it takes to make course content accessible, and whether the Department should consider an alternative approach.[160]

Public Comments on Proposed Course Content Exceptions

The overwhelming majority of comments on this topic expressed opposition to the course content exceptions as proposed in the NPRM. Many commenters suggested that the Department should take an alternative approach on this issue; namely, the exceptions should not be included in subpart H of this part. Having reviewed the public comments and given careful additional consideration to this issue, the Department has decided not to include these exceptions in subpart H. The public comments supported the conclusion that the exceptions would exacerbate existing educational inequities for students and parents with disabilities without serving their intended purpose of meaningfully alleviating burdens for public educational institutions.

Infeasibility for Public Educational Institutions

Many commenters, including some commenters affiliated with public educational institutions, asserted that the course content exceptions and limitations as proposed in the NPRM would not be workable for schools, and would almost inevitably result in delays in access to course content for students and parents with disabilities. Commenters provided varying reasons for these conclusions.

Some commenters argued that because making course content accessible often takes time and intentionality to implement, it is more efficient and effective for public educational institutions to create policies and procedures to make course content accessible proactively, without waiting for a student with a disability (or student with a parent with a disability) to enroll and then making content accessible reactively.[161] Some commenters pointed out that although the Department proposed the course content exceptions in an effort to make it easier for public educational institutions to comply with subpart H of this part, the exceptions would in fact likely result in more work for entities struggling to remediate content on the back end.

Commenters noted that in many cases, public educational institutions do not generate course content themselves, but instead procure such content through third-party vendors. As a result, some commenters stated, public educational institutions may be dependent on vendors to make their course content accessible, many of which are unable or unwilling to respond to ad hoc requests for accessibility within the expedited time frames that would be required to comply with the limitations to the proposed exceptions. Some commenters argued that it is more efficient and effective to incentivize third-party vendors to make course content produced for public educational institutions accessible on the front end. Otherwise, some commenters contended, it may fall to

[150] Section 35.201(e) no longer refers to a course content exception, but now refers to a different exception for preexisting social media posts, as discussed in this section.

[151] 88 FR 52019.

[152] *Id.* at 51970.

[153] *Id.* at 52019.

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.* at 51973, 51976.

[159] *Id.* at 51973, 51974, 51976.

[160] *Id.* at 51973, 51974, 51976.

[161] Many comments on this topic indicated that they were drawing from the philosophy of ''universal design.'' *See, e.g.,* 29 U.S.C. 3002(19).

individual instructors to scramble to make course content accessible at the last minute, regardless of those instructors' background or training on making content accessible, and despite the fact that many instructors already have limited time to devote to teaching and preparing for class. One commenter noted that public educational institutions can leverage their contracting power to choose only to work with third-party vendors that can offer accessible content. This commenter noted that there is precedent for this approach, as many universities and college stores already leverage their contracting power to limit participation in certain student discount programs to third-party publishers that satisfy accessibility requirements. Some commenters suggested that rulemaking in this area will spur vendors, publishers, and creators to improve the accessibility of their offerings.

Some commenters also observed that even if public educational institutions might be able to make a subset of content accessible within the compressed time frames provided under the proposed exceptions, it could be close to impossible for institutions to do so for all course content for all courses, given the wide variation in the size and type of course content. Some commenters noted that content for science, technology, engineering, and mathematics courses may be especially difficult to remediate under the expedited time frames provided under the proposed exceptions. Some commenters indicated that it is more effective for public educational institutions to conduct preparations in advance to make all materials accessible from the start. One commenter asserted that remediating materials takes, on average, twice as long as developing materials that are accessible from the start. Some commenters also pointed out that it might be confusing for public educational institutions to have two separate standards for the accessibility of course content depending on whether there is a student (or student with a parent) with a disability in a particular course.

Many commenters took particular issue with the five-day remediation time frame for course content when a school becomes on notice after the start of the term that there is a student or parent with a disability who needs accessible course content. Some commenters argued that this time frame was too short for public entities to ensure the accessibility of all course content for a particular course, while simultaneously being too long to avoid students with disabilities falling behind. Some commenters noted that the five-day time frame would be particularly problematic for short courses that occur during truncated academic terms, which may last only a small number of days or weeks.

Some commenters also argued that the course content exceptions would create a series of perverse incentives for public educational institutions and the third-party vendors with whom they work, such as incentivizing institutions to neglect accessibility until the last minute and attempt to rely on the fundamental alteration or undue burdens limitations more frequently when they are unable to comply as quickly as required under subpart H of this part. Some commenters also contended that the course content exceptions would undermine public educational institutions' settled expectations about what level of accessibility is required for course content and would cause the institutions that already think about accessibility proactively to regress to a more reactive model. Some commenters asserted that because the course content exceptions would cover only password-protected or otherwise secured content, the exceptions would also incentivize public educational institutions to place course content behind a password-protected wall, thereby making less content available to the public as a whole.

Some commenters asserted that if the exceptions were not included in subpart H of this part, the existing fundamental alteration and undue burdens limitations would provide sufficient protection for public educational institutions. One commenter also suggested that making all course content accessible would offer benefits to public educational institutions, as accessible content often requires less maintenance than inaccessible content and can more readily be transferred between different platforms or accessed using different tools. This commenter contended that by relying on accessible content, public educational institutions would be able to offer better services to all students, because accessible content is more user friendly and provides value for all users.

Some commenters pointed out that there are other factors that will ease the burden on public educational institutions of complying with subpart H of this part without the course content exceptions proposed in the NPRM. For example, one commenter reported that elementary and secondary curriculum materials are generally procured at the district level. Thus, course content is generally the same for all schools in a given district. This commenter argued that school districts could therefore address the accessibility of most course materials for all schools in their district at once by making digital accessibility an evaluation criterion in their procurement process.

Impact on Individuals With Disabilities

As noted elsewhere in this appendix, many commenters asserted that the course content exceptions proposed in the NPRM could result in an untenable situation in which public educational institutions would likely be unable to fully respond to individualized requests for accessible materials, potentially leading to widespread noncompliance with the technical standard and delays in access to course content for students and parents with disabilities. Many commenters emphasized the negative impact that this situation would have on individuals with disabilities.

Some commenters highlighted the pervasive discrimination that has affected generations of students with disabilities and prevented them from obtaining equal access to education, despite existing statutory and regulatory obligations. As one recent example, some commenters cited studies conducted during the COVID–19 pandemic that demonstrated inequities in access to education for students with disabilities, particularly in the use of web-based educational materials.[162] Commenters stated that due to accessibility issues, students with disabilities have sometimes been unable to complete required assignments, needed continuous support from others to complete their work, and as a result have felt frustrated, discouraged, and excluded. Some commenters also reported that some students with disabilities have dropped a class, taken an incomplete, or left their academic program altogether because of the inaccessibility of their coursework. Some commenters argued that the proposed course content exceptions would exacerbate this discouraging issue and would continue to exclude students with disabilities from equally accessing an education and segregate them from their classmates.

Some commenters contended that the proposed exceptions would perpetuate the status quo by inappropriately putting the onus on students (or parents) with disabilities to request accessible materials on an individualized basis. Some commenters asserted that this can be problematic because some individuals may not recognize that they have an accessibility need that their school could accommodate and because requesting accessible materials is sometimes burdensome and results in unfair stigma or invasions of privacy. Some commenters noted that this may result in students or parents with disabilities not requesting accessible materials. Some commenters also argued that because these proposed exceptions would put public educational institutions in a reactionary posture and place burdens on already-overburdened instructors, some instructors and institutions might view requesting students as an inconvenience, in spite of their obligations not to discriminate against those students. One commenter noted that constantly having to advocate for accessibility for years on end can be exhausting for students with disabilities and damaging to their self-esteem, sense of belonging, and ability to engage in academic exploration.

Some commenters also noted that the structure of the proposed exceptions would be in significant tension with the typical structure of a public educational institution's academic term. For example, some

[162] Arielle M. Silverman et al., *Access and Engagement III: Reflecting on the Impacts of the COVID–19 Pandemic on the Education of Children Who Are Blind or Have Low Vision,* Am. Found. for the Blind (June 2022), *https://afb.org/sites/default/files/2022-06/AFB_AccessEngagement_III_Report_Accessible_FINAL.pdf* (A Perma archive link was unavailable for this citation.); L. Penny Rosenblum et al., *Access and Engagement II: An Examination of How the COVID–19 Pandemic Continued to Impact Students with Visual Impairments, Their Families, and Professionals Nine Months Later,* Am. Found. for the Blind (May 2021), *https://static.afb.org/legacy/media/AFB_AccessEngagement_II_Accessible_F2.pdf?_ga=2.176468773.1214767753* [*https://perma.cc/H5P4-JZAB*]; *see also* L. Penny Rosenblum et al., *Access and Engagement: Examining the Impact of COVID–19 on Students Birth–21 with Visual Impairments, Their Families, and Professionals in the United States and Canada,* Am. Found. for the Blind (Oct. 2020), *https://afb.org/sites/default/files/2022-03/AFB_Access_Engagement_Report_Revised-03-2022.pdf* [*https://perma.cc/T3AY-ULAQ*].

commenters noted that students, particularly students at public postsecondary institutions, often have the opportunity to electronically review course syllabi and materials and ''shop'' the first sessions(s) of a particular course to determine whether they wish to enroll, enroll in a course late, or drop a course. Commenters stated that because these processes typically unfold quickly and early in the academic term, the proposed course content exceptions would make it hard or impossible for students with disabilities to take advantage of these options that are available to other students. Commenters also noted that the course content exceptions could interfere with students' ability to transfer to a new school in the middle of a term.

Some commenters also stated many other ways in which the delays in access to course content likely resulting from these exceptions could disadvantage students with disabilities. Some commenters noted that even if public educational institutions were able to turn around accessible materials within the compressed time frames provided under the proposed exceptions—an unlikely result, for the reasons noted elsewhere in this appendix—students with disabilities still might be unable to access course materials as quickly as would be needed to fully participate in their courses. For example, some commenters stated that because students are often expected to complete reading assignments before the first day of class, it is problematic that the proposed exceptions did not require public educational institutions to make course content accessible before the first day of class for students who preregister. Some commenters also observed that because some students with disabilities do not file accessibility requests until after the start of the academic term, it would be impossible to avoid delays in access to course materials under the exceptions. Some commenters also noted that students are often expected to collaborate on assignments, and even a brief delay in access to course material could make it challenging or impossible for students with disabilities to participate in that collaborative process.

Some commenters argued that in the likely outcome that schools are unable to provide accessible course content as quickly as the proposed limitations to the exceptions would require, the resulting delays could cause students with disabilities to fall behind in course readings and assignments, sometimes forcing them to withdraw from or fail the course. Some commenters noted that even if students were able to rely on others to assist them in reviewing inaccessible course materials, doing so is often slower and less effective, and can have a negative emotional effect on students, undermining their senses of independence and self-sufficiency.

Some commenters took particular issue with the proposed exception for postsecondary course content. For example, some commenters asserted that it is often more onerous and complicated for students with disabilities to obtain accessible materials upon request in the postsecondary context, given that public postsecondary schools are not subject to the same obligations as public elementary and secondary institutions to identify students with disabilities under other laws addressing disability rights in the educational context. Accordingly, those commenters argued, the proposed exceptions might be especially harmful for postsecondary students with disabilities.

Other commenters argued that the proposed exception for elementary and secondary course content was especially problematic because it would affect virtually every child with a disability in the country. Some commenters contended that this exception would undermine the requirements of other laws addressing disability rights in the educational context. Some commenters also noted that in the elementary and secondary school context, password-protected course sites often enable parents to communicate with their children's teachers, understand what their children are learning, keep track of any potential issues related to their child's performance, review time-sensitive materials like permission slips, and obtain information about important health and safety issues affecting their children. Some commenters opined that the proposed course content exceptions could make it hard or impossible for parents with disabilities to be involved in their children's education in these ways.

Some commenters contended that the proposed course content exceptions would be problematic in the wake of the COVID–19 pandemic, which has led to a rise in purely online courses. One commenter pointed out that students with disabilities may be more likely to enroll in purely online courses for a variety of reasons, including that digital content tends to be more flexible and operable with assistive devices, and it is therefore especially important to ensure that online courses are fully accessible. At least one commenter also stated that the proposed course content exceptions would have treated students—some of whom pay tuition—less favorably than the general public with respect to accessible materials.

Although the Department anticipated that the limitations to the proposed course content exceptions would naturally result in course materials becoming accessible over time, some commenters took issue with that prediction. Some commenters argued that because there is significant turnover in instructors and course content, and because the proposed limitations to the exceptions did not require content to remain accessible once a student with a disability was no longer in a particular course, the limitations to the exceptions as drafted in the NPRM would not be likely to ensure a fully accessible future in this area.

Limited Support for Course Content Exceptions

Although many commenters expressed opposition to the course content exceptions, some commenters, including some commenters affiliated with public educational institutions, expressed support for some form of exception for course content. Some commenters argued that it would be very challenging or infeasible for public educational institutions to comply with subpart H of this part in the absence of an exception, particularly when much of the content is controlled by third-party vendors. Some commenters also noted that public educational institutions may be short-staffed and have limited resources to devote towards accessibility. Some commenters stated that frequent turnover in faculty may make it challenging to ensure that faculty members are trained on accessibility issues. One commenter pointed out that requiring schools to make all course content accessible may present challenges for professors, some of whom are accustomed to being able to select course content without regard to its accessibility. Notably, however, even among those commenters who supported the concept of an exception, many did not support the exceptions as drafted in the NPRM, in part because they did not believe the proposed remediation time frames were realistic.

Approach to Course Content in Subpart H of This Part

Having reviewed the public comments, the Department believes it is appropriate to, as many commenters suggested, not include the previously proposed course content exceptions in subpart H of this part. For many of the reasons noted by commenters, the Department has concluded that the proposed exceptions would not meaningfully ease the burden on public educational institutions and would significantly exacerbate educational inequities for students with disabilities. The Department has concluded that the proposed exceptions would have led to an unsustainable and infeasible framework for public entities to make course content accessible, which would not have resulted in reliable access to course content for students with disabilities. As many commenters noted, it would have been extremely burdensome and sometimes even impossible for public educational institutions to comply consistently with the rapid remediation time frames set forth in the limitations to the proposed exceptions in the NPRM, which would likely have led to widespread delays in access to course content for students with disabilities. While extending the remediation time frames might have made it more feasible for public educational institutions to comply under some circumstances, this extension would have commensurately delayed access for students with disabilities, which would have been harmful for the many reasons noted by commenters. The Department believes that it is more efficient and effective for public educational institutions to use the two- or three-year compliance time frame to prepare to make course content accessible proactively, instead of having to scramble to remediate content reactively.

Accordingly, under subpart H of this part, password-protected course content will be treated like any other content and will generally need to conform to WCAG 2.1 Level AA. To the extent that it is burdensome for public educational institutions to make all of their content, including course content, accessible, the Department believes subpart H contains a series of mechanisms that are designed to make it feasible for these institutions to comply, including the delayed compliance dates discussed in § 35.200, the

other exceptions discussed in § 35.201, the provisions relating to conforming alternate versions and equivalent facilitation discussed in §§ 35.202 and 35.203, the fundamental alteration and undue burdens limitations discussed in § 35.204, and the approach to measuring compliance with § 35.200 discussed in § 35.205.

Alternative Approaches Considered

There were some commenters that supported retaining the proposed course content exceptions with revisions. Commenters suggested a wide range of specific revisions, examples of which are discussed in this section. The Department appreciates the variety of thoughtful approaches that commenters proposed in trying to address the concerns that would arise under the previously proposed course content exceptions. However, for the reasons noted in this section, the Department does not believe that the commenters' proposed alternatives would avoid the issues associated with the exceptions proposed in the NPRM. In addition, although many commenters suggested requiring public entities to follow specific procedures to comply with subpart H of this part, the sheer variety of proposals the Department received from commenters indicates the harm from being overly prescriptive in how public educational institutions comply with subpart H. Subpart H provides educational institutions with the flexibility to determine how best to bring their content into compliance within the two or three years they have to begin complying with subpart H.

Many commenters suggested that the Department should require all new course content to be made accessible more quickly, while providing a longer time period for public entities to remediate existing course content. There were a wide range of proposals from commenters about how this could be implemented. Some commenters suggested that the Department could set up a prioritization structure for existing content, requiring public educational institutions to prioritize the accessibility of, for example, entry-level course content; content for required courses; content for high-enrollment courses; content for courses with high rates of droppage, withdrawal, and failing grades; content for the first few weeks of all courses; or, in the postsecondary context, content in academic departments in which students with disabilities have decided to major.

The Department does not believe this approach would be feasible. Treating new course content differently than existing course content could result in particular courses being partially accessible and partially inaccessible, which could be confusing for both educational institutions and students, and make it challenging for students with disabilities to have full and timely access to their courses. Moreover, even under this hybrid approach, the Department would presumably need to retain remediation time frames for entities to meet upon receiving a request to make existing course content accessible. For the reasons discussed in this section, it would be virtually impossible to set forth a remediation time frame that would provide public educational institutions sufficient time to make content accessible without putting students with disabilities too far behind their peers. In addition, given the wide variation in types of courses and public educational institution structures, it would be difficult to set a prioritization structure for existing content that would be workable across all such institutions.

Some commenters suggested that the Department should set an expiration date for the course content exceptions. The Department does not believe this would be a desirable solution because the problems associated with the proposed exceptions—namely the harm to individuals with disabilities stemming from delayed access to course content and the likely infeasibility of complying with the expedited time frames set forth in the limitations to the exceptions—would likely persist during the lifetime of the exceptions.

Some commenters suggested that the Department could retain the exceptions and accompanying limitations but revise their scope. For example, commenters suggested that the Department could revise the limitations to the exceptions to require public educational institutions to comply only with the WCAG 2.1 success criteria relevant to the particular student requesting accessible materials. Although this might make it easier for public educational institutions to comply in the short term, this approach would still leave public entities in the reactionary posture that so many other commenters criticized in this context and would dramatically reduce the speed at which course content would become accessible to all students. As another example, some commenters recommended that instead of creating exceptions for all password-protected course content, the Department could create exceptions from complying with particular WCAG 2.1 success criteria that may be especially onerous. The Department does not believe this piecemeal approach is advisable, because it would result in course content being only partially accessible, which would reduce predictability for individuals with disabilities. This approach could also make it confusing for public entities to determine the applicable technical standard. Some commenters suggested that the Department should require public entities to prioritize certain types of content that are simpler to remediate. Others suggested that the Department could require certain introductory course documents, like syllabi, to be accessible across the board. One commenter suggested that the Department require public educational institutions to make 20 percent of their course materials accessible each semester. The Department believes that these types of approaches would present similar issues as those discussed in this paragraph and would result in courses being only partially accessible, which would reduce predictability for individuals with disabilities and clarity for public entities. These approaches would also limit the flexibility that public entities have to bring their content into compliance in the order that works best for them during the two or three years they have to begin complying with subpart H of this part.

Some commenters suggested that the Department should revise the remediation timelines in the limitations to the course content exceptions. For example, one commenter suggested that the five-day remediation time frame should be reduced to three days. Another commenter suggested the five-day remediation time frame could be expanded to 10 to 15 days. Some commenters suggested that the time frame should be fact-dependent and should vary depending on factors such as how often the class meets and the type of content. Others recommended that the Department not adopt a specific required remediation time frame, but instead provide that a 10-business-day remediation time frame would be presumptively permissible.

The conflicting comments on this issue illustrate the challenges associated with setting remediation time frames in this context. If the Department were to shorten the remediation time frames, it would make it even harder for public educational institutions to comply, and commenters have already indicated that the previously proposed remediation time frames would not be workable for those institutions. If the Department were to lengthen the remediation time frames, it would further exacerbate the inequities for students with disabilities that were articulated by commenters. The Department believes the better approach is to not include the course content exceptions in subpart H of this part to avoid the need for public educational institutions to make content accessible on an expedited time frame on the back end, and to instead require public entities to treat course content like any other content covered by subpart H.

Some commenters suggested that the Department should take measures to ensure that once course content is accessible, it stays accessible, including by requiring institutions to regularly conduct course accessibility checks. Without the course content exceptions proposed in the NPRM, the Department believes these commenters' concerns are addressed because course content will be treated like all other content under § 35.200, which requires public entities to ensure on an ongoing basis that the web content and mobile apps they provide or make available are readily accessible to and usable by individuals with disabilities.

Some commenters suggested that the Department should give public educational institutions additional time to comply with subpart H of this part beyond the compliance time frames specified in § 35.200(b). The Department does not believe this would be appropriate. Although the requirement for public educational institutions to provide accessible course content and comply with title II is not new, this requirement has not resulted in widespread equal access for individuals with disabilities to public entities' web content and mobile apps. Giving public educational institutions additional time beyond the two- to three-year compliance time frames set forth in § 35.200(b) would potentially prolong the exclusion of individuals with disabilities from certain educational programs, which would be especially problematic given that some of those programs last only a few years

in total, meaning that individuals with disabilities might, for example, be unable to access their public university's web content and mobile apps for the entire duration of their postsecondary career. While access to public entities' web content and mobile apps is important for individuals with disabilities in all contexts, it is uniquely critical to the public educational experience for students with disabilities, because exclusion from that content and those apps would make it challenging or impossible for those individuals to keep up with their peers and participate in their courses, which could have lifelong effects on career outcomes. In addition, the Department received feedback indicating that the course content offered by many public educational institutions is frequently changing. The Department is therefore not convinced that giving public educational institutions additional time to comply with subpart H would provide meaningful relief to those entities. Public educational institutions will continually need to make new or changed course content accessible after the compliance date. Extending the compliance date would, therefore, provide limited relief while having a significant negative impact on individuals with disabilities. Moreover, regardless of the compliance date of subpart H, public educational institutions have an ongoing obligation to ensure that their services, programs, and activities offered using web content and mobile apps are accessible to individuals with disabilities on a case-by-case basis in accordance with their existing obligations under title II of the ADA.[163] Accordingly, even if the Department were to further delay the compliance time frames for public educational institutions, those institutions would not be able to simply defer all accessibility efforts in this area. The Department also believes it is appropriate to treat public educational institutions the same as other public entities with respect to compliance time frames, which will promote consistency and predictability for individuals with disabilities. Under this approach, some public educational institutions will qualify as small public entities and will be entitled to an extra year to comply, while other public educational institutions in larger jurisdictions will need to comply within two years.

Some commenters recommended that the Department give public educational institutions more flexibility with respect to their compliance with subpart H of this part. For example, some commenters suggested that the Department should give public educational institutions additional time to conduct an assessment of their web content and mobile apps and develop a plan for achieving compliance. Some commenters suggested the Department should give public educational institutions flexibility to stagger their compliance as they see fit and to focus on the accessibility of those materials that they consider most important. The Department does not believe such deference is appropriate. As history has demonstrated, requiring entities to comply with their nondiscrimination obligations without setting clear and predictable standards for when content must be made accessible has not resulted in widespread web and mobile app accessibility. The Department therefore believes it is critical to establish clear and consistent requirements for public entities to follow in making their web content and mobile apps accessible.

As noted in the preceding paragraph, although the Department believes it is important to set clear and consistent requirements for public educational institutions, the Department does not believe it is appropriate to be overly prescriptive with respect to the procedures that those institutions must follow to comply with subpart H of this part. Some commenters suggested that the Department should require public educational institutions to take particular steps to comply with subpart H, such as by holding certain trainings for faculty and staff and dedicating staff positions and funding to accessibility. The Department believes it is appropriate to allow public educational institutions to determine how best to allocate their resources, so long as they satisfy the requirements of subpart H.

Some commenters suggested that the Department should adopt a more permissive approach to conforming alternate versions for public educational institutions. Commenters also suggested that the Department allow public educational institutions to provide an equally effective method of alternative access in lieu of directly accessible, WCAG 2.1 Level AA-conforming versions of materials. For the reasons noted in the discussion of § 35.202 in this appendix, the Department believes that permitting public entities to rely exclusively on conforming alternate versions when doing so is not necessary for technical or legal reasons could result in segregation of people with disabilities, which would be inconsistent with the ADA's core principles of inclusion and integration.[164] The same rationale would apply to public educational institutions that wish to provide an equally effective method of alternative access to individuals with disabilities.

Some commenters argued that the Department should provide additional resources, funding, and guidance to public educational institutions to help them comply with subpart H of this part. The Department notes that it will issue a small entity compliance guide,[165] which should help public educational institutions better understand their obligations under subpart H. The Department also notes that there are free and low-cost training materials available that would help public entities to produce content compliant with WCAG 2.1 Level AA. In addition, although the Department does not currently operate a grant program to assist public entities in complying with the ADA, the Department will consider offering additional technical assistance and guidance in the future to help entities better understand their obligations.

One commenter suggested that the Department should create a list of approved third-party vendors for public educational institutions to use to obtain accessible content. Any such specific list that the Department could provide is unlikely to be helpful given the rapid pace at which software and contractors' availability changes. Public entities may find it useful to consult other publicly available resources that can assist in selecting accessibility evaluation tools and experts.[166] Public entities do not need to wait for the Department's guidance before consulting with technical experts and using resources that already exist.

One commenter suggested that the Department should require public educational institutions to offer mandatory courses on accessibility to students pursuing degrees in certain fields, such as computer science, information technology, or computer information systems. This commenter argued that this approach would increase the number of information technology professionals in the future who have the skills to make content accessible. The Department believes this suggestion is outside of the scope of subpart H of this part, which focuses on web and mobile app accessibility under title II. The Department notes that public educational institutions are free to offer such courses if they so choose.

One commenter suggested that if the course content exceptions were retained, the Department should explicitly require public educational institutions to provide clear notice to students with disabilities on whether a particular piece of course content is accessible and how to request accessible materials. The Department believes these concerns are addressed by the decision not to include the course content exceptions in subpart H of this part, which should generally obviate the need for students with disabilities to make individualized requests for course content that complies with WCAG 2.1 Level AA.

Many commenters expressed concern about the extent to which public educational institutions are dependent on third parties to ensure the accessibility of course content, and some commenters suggested that instead of or in addition to regulating public educational institutions, the Department should also regulate the third parties with which those institutions contract to provide course materials. Because subpart H of this part is issued under title II of the ADA, it does not apply to private third parties, and the ultimate responsibility for complying with subpart H rests with public entities. However, the Department appreciates the concerns expressed by commenters that public educational institutions may have limited power to require third-party vendors to make content accessible on an expedited,

[163] *See* §§ 35.130(b)(1)(ii) and (7) and 35.160.

[164] *See, e.g.,* 42 U.S.C. 12101(a)(2) (finding that society has tended to isolate and segregate individuals with disabilities); § 35.130(b)(1)(iv) (stating that public entities generally may not provide different or separate aids, benefits, or services to individuals with disabilities than is provided to others unless such action is necessary); *id.* § 35.130(d) (requiring that public entities administer services, programs, and activities in the most integrated setting appropriate).

[165] *See* Public Law 104–121, sec. 212, 110 Stat. at 858.

[166] *See, e.g.,* W3C, *Evaluating Web Accessibility Overview, https://www.w3.org/WAI/test-evaluate/* [*https://perma.cc/6RDS-X6AR*] (Aug. 1, 2023).

last-minute basis. The Department believes that not including the course content exceptions in subpart H—coupled with the delayed compliance dates in subpart H—will put public educational institutions in a better position to establish contracts with third-party vendors with sufficient lead time to enable the production of materials that are accessible upon being created. One commenter pointed out that, currently, much of the digital content for courses for public educational institutions is created by a small number of digital publishers. Accordingly, if the rulemaking incentivizes those publishers to produce accessible content, that decision may enable hundreds of public educational institutions to obtain accessible content. The Department also expects that as a result of the rulemaking, there will be an increase in demand for accessible content from third-party vendors, and therefore a likely increase in the number of third-party vendors that are equipped to provide accessible content.

Some commenters also expressed views about whether public educational institutions should be required to make posts by third parties on password-protected course websites accessible. The Department wishes to clarify that, because content on password-protected course websites will be treated like any other content under subpart H of this part, posts by third parties on course websites may be covered by the exception for content posted by a third party. However, that exception only applies where the third party is not posting due to contractual, licensing, or other arrangements with the public entity. Accordingly, if the third party is acting on behalf of the public entity, the third-party posted content exception would not apply. The Department believes that whether particular third-party content qualifies for this exception will involve a fact-specific inquiry.

Other Issues Pertaining to Public Educational Entities and Public Libraries

In connection with the proposed exceptions for password-protected course content, the Department also asked if there were any particular issues the Department should consider regarding digital books, textbooks, or libraries. The Department received a variety of comments that addressed these topics.

Some commenters raised issues pertaining to intellectual property law. In particular, commenters expressed different views about whether public entities can alter or change inaccessible electronic books created by third-party vendors to make them accessible for individuals with disabilities. Several commenters requested that the Department clarify how intellectual property law applies to subpart H of this part. Subpart H is not intended to interpret or clarify issues related to intellectual property law. Accordingly, the Department declines to make changes to subpart H in response to commenters or otherwise opine about public entities' obligations with respect to intellectual property law. However, as discussed with respect to § 35.202, ''Conforming Alternate Versions,'' there may be some instances in which a public entity is permitted to make a conforming alternate version of web content where it is not possible to make the content directly accessible due to legal limitations.

Some commenters also discussed the EPUB file format. EPUB is a widely adopted format for digital books.[167] Commenters noted that EPUBs are commonly used by public entities and that they should be accessible. Commenters also stated that the exceptions for archived web content and preexisting conventional electronic documents at § 35.201(a) and (b), should specifically address EPUBs, or that EPUBs should fall within the meaning of the PDF file format with respect to the definition of ''conventional electronic documents'' at § 35.104. Commenters also suggested that other requirements should apply to EPUBs, including W3C's EPUB Accessibility 1.1 standard[168] and Editor's Draft on EPUB Fixed Layout Accessibility.[169]

As discussed with respect to § 35.104, the Department did not change the definition of ''conventional electronic documents'' because it believes the current exhaustive list strikes the appropriate balance between ensuring access for individuals with disabilities and feasibility for public entities so that they can comply with subpart H of this part. The Department also declines to adopt additional technical standards or guidance specifically related to EPUBs. The WCAG standards were designed to be ''technology neutral.'' [170] This means that they are designed to be broadly applicable to current and future web technologies.[171] The Department is concerned that adopting multiple technical standards related to various different types of web content could lead to confusion. However, the Department notes that subpart H allows for equivalent facilitation in § 35.203, meaning that public entities could still choose to apply additional standards specifically related to EPUBs to the extent that the additional standards provide substantially equivalent or greater accessibility and usability as compared to WCAG 2.1 Level AA.

Some commenters also addressed public educational entities' use of digital textbooks in general. Commenters stated that many educational courses use digital materials, including digital textbooks, created by third-party vendors. Consistent with many commenters' emphasis that all educational course materials must be accessible under subpart H of this part, commenters also stated that digital textbooks need to be accessible under subpart H. Commenters stated that third-party vendors that create digital textbooks are in the best position to make that content accessible, and it is costly and burdensome for public entities to remediate inaccessible digital textbooks. While one commenter stated that there are currently many examples of accessible digital textbooks, other commenters stated that many digital textbooks are not currently accessible. A commenter also pointed out that certain aspects of digital books and textbooks cannot be made accessible where the layout and properties of the content cannot be changed without changing the meaning of the content, and they recommended that the Department create exceptions for certain aspects of digital books.

After weighing all the comments, the Department believes the most prudent approach is to treat digital textbooks, including EPUBs, the same as all other educational course materials. The Department believes that treating digital textbooks, including EPUBs, in any other way would lead to the same problems commenters identified with respect to the proposed exceptions for password-protected class or course content. For example, if the Department created a similar exception for digital textbooks, it could result in courses being partially accessible and partially inaccessible for certain time periods while books are remediated to meet the needs of an individual with a disability, which could be confusing for both educational institutions and students with disabilities. Furthermore, as discussed elsewhere in this appendix, it would be virtually impossible to set forth a remediation time frame that would provide public educational institutions sufficient time to make digital textbooks accessible without putting students with disabilities too far behind their peers. Accordingly, the Department did not make any changes to subpart H of this part to specifically address digital textbooks. The Department notes that if there are circumstances where certain aspects of digital textbooks cannot conform to WCAG 2.1 Level AA without changing the meaning of the content, public entities may assess whether the fundamental alteration or undue financial or administrative burdens limitations apply, as discussed in § 35.204. As noted elsewhere in this appendix, the Department also expects that as a result of the rulemaking, there will be an increase in demand for accessible content from third-party vendors, and therefore a likely increase in the number of third-party vendors that are equipped to provide accessible digital textbooks.

Some commenters also discussed circumstances in which public entities seek to modify particular web content to meet the specific needs of individuals with disabilities. One commenter suggested that the Department should provide public entities flexibility to focus on meeting the individual needs of students, rather than simply focusing on satisfying the requirements of WCAG 2.1 Level AA. The Department believes that the title II regulation provides public entities sufficient

[167] *See* W3C, *EPUB 3.3: Recommendation, § 1.1 Overview* (May 25, 2023), *https://www.w3.org/TR/epub-33/* [*https://perma.cc/G2WZ-3M9S*].

[168] W3C, *EPUB Accessibility 1.1: Recommendation* (May 25, 2023), *https://www.w3.org/TR/epub-a11y-11/* [*https://perma.cc/48A5-NC2B*].

[169] W3C, *EPUB Fixed Layout Accessibility: Editor's Draft* (Dec. 8, 2024), *https://w3c.github.io/epub-specs/epub33/fxl-a11y/* [*https://perma.cc/5SP7-VUHJ*].

[170] W3C, *Introduction to Understanding WCAG* (June 20, 2023), *https://www.w3.org/WAI/WCAG21/Understanding/intro* [*https://perma.cc/XB3Y-QKVU*].

[171] *See* W3C, *Understanding Techniques for WCAG Success Criteria* (June 20, 2023), *https://www.w3.org/WAI/WCAG21/Understanding/understanding-techniques* [*https://perma.cc/AMT4-XAAL*].

flexibility to meet the needs of all individuals with disabilities.

The Department also recognizes that IDEA established the National Instructional Materials Access Center (''NIMAC'') in 2004, to assist State educational agencies and local educational agencies with producing accessible instructional materials to meet the specific needs of certain eligible students with disabilities.[172] The NIMAC maintains a catalog of source files for K–12 instructional materials saved in the National Instructional Materials Accessibility Standard (''NIMAS'') format, and certain authorized users and accessible media producers may download the NIMAS files and produce accessible instructional materials that are distributed to eligible students with disabilities through State systems and other organizations.[173] The Department believes subpart H of this part is complementary to the NIMAC framework. In particular, if a public entity provides or makes available digital textbooks or other course content that conforms to WCAG 2.1 Level AA, but an individual with a disability still does not have equal access to the digital textbooks or other course content, the public entity may wish to assess on a case-by-case basis whether materials derived from NIMAS files can be used to best meet the needs of the individual. Alternatively, a public entity may wish to use materials derived from NIMAS files as a conforming alternate version where it is not possible to make the digital textbook or other course content directly accessible due to technical or legal limitations, consistent with § 35.202.

Some commenters also raised issues relating to public libraries. Commenters stated that libraries have varying levels of resources. Some commenters noted that libraries need additional accessibility training. One commenter requested that the Department identify appropriate accessibility resources and training, and another commenter recommended that the Department should consider allowing variations in compliance time frames for libraries and educational institutions based on their individual needs and circumstances. Commenters noted that digital content available through libraries is often hosted, controlled, or provided by third-party vendors, and libraries purchase subscriptions or licenses to use the material. Commenters stated that it is costly and burdensome for public libraries to remediate inaccessible third-party vendor content. However, one commenter highlighted a number of examples in which libraries at public educational institutions successfully negotiated licensing agreements with third-party vendors that included requirements related to accessibility. Several commenters pointed out that some public libraries also produce content themselves. For example, some libraries participate in the open educational resource movement, which promotes open and free digital educational materials, and some libraries either operate publishing programs or have a relationship with university presses.

After weighing all the comments, the Department believes the most appropriate approach is to treat public libraries the same as other public entities in subpart H of this part. The Department is concerned that treating public libraries in any other way would lead to similar problems commenters identified with respect to the proposed exceptions for password-protected class or course content, especially because some public libraries are connected with public educational entities. With respect to comments about the resources available to libraries and the time frame for libraries to comply with subpart H, the Department also emphasizes that it is sensitive to the need to set a workable standard for all different types of public entities. The Department recognizes that public libraries can vary as much as any other group of public entities covered by subpart H, from small town libraries to large research libraries that are part of public educational institutions. Under § 35.200(b)(2), as under the NPRM, some public libraries will qualify as small public entities and will have an extra year to comply. Subpart H also includes exceptions that are intended to help ensure feasibility for public entities so that they can comply with subpart H and, as discussed in § 35.204, public entities are not required to undertake actions that would represent a fundamental alteration in the nature of a service, program, or activity or impose undue financial and administrative burdens. The Department also notes there that there are free and low-cost training materials available that would help public entities to produce content compliant with WCAG 2.1 Level AA. Accordingly, the Department has not made any changes to subpart H to specifically address public libraries.

Some commenters also noted that public libraries may have collections of materials that are archival in nature, and discussed whether such materials should be covered by an exception. Subpart H of this part contains an exception for archived web content that (1) was created before the date the public entity is required to comply with subpart H, reproduces paper documents created before the date the public entity is required to comply with subpart H, or reproduces the contents of other physical media created before the date the public entity is required to comply with subpart H; (2) is retained exclusively for reference, research, or recordkeeping; (3) is not altered or updated after the date of archiving; and (4) is organized and stored in a dedicated area or areas clearly identified as being archived. In addition, subpart H contains an exception for preexisting conventional electronic documents, unless such documents are currently used to apply for, gain access to, or participate in a public entity's services, programs, or activities. The Department addressed these exceptions in more detail in the section-by-section analysis of § 35.104, containing the definitions of ''archived web content'' and ''conventional electronic documents''; § 35.201(a), the exception for archived web content; and § 35.201(b), the exception for preexisting conventional electronic documents.

Individualized, Password-Protected or Otherwise Secured Conventional Electronic Documents

In § 35.201(d), the Department has set forth an exception to the requirements of § 35.200 for conventional electronic documents that are: (1) about a specific individual, their property, or their account; and (2) password-protected or otherwise secured.

Many public entities use web content and mobile apps to provide access to conventional electronic documents for their customers and other members of the public. For example, some public utility companies provide a website where customers can log in and view a PDF version of their latest bill. Similarly, many public hospitals offer a virtual platform where healthcare providers can send conventional electronic document versions of test results and scanned medical records to their patients. Unlike many other types of content covered by subpart H of this part, these documents are relevant only to an individual member of the public, and in many instances, the individuals who are entitled to view a particular individualized conventional electronic document will not need an accessible version.

While public entities, of course, have existing title II obligations to provide accessible versions of individualized, password-protected or otherwise secured conventional electronic documents in a timely manner when those documents pertain to individuals with disabilities, or otherwise provide the information contained in the documents to the relevant individual,[174] the Department recognizes that it may be too burdensome for some public entities to make all such documents conform to WCAG 2.1 Level AA, regardless of whether the individual to whom the document pertains needs such access. The goal of this exception is to give public entities flexibility to provide such documents, or the information contained within such documents, to the individuals with disabilities to whom they pertain in the manner that the entities determine will be most efficient. Many public entities may retain and produce a large number of individualized, password-protected or otherwise secured conventional electronic documents, and may find that remediating these documents—particularly ones that have been scanned from paper copies—involves a more time- and resource-intensive process than remediating other types of web content. In that scenario, the Department believes that it would be most impactful for public entities to focus their resources on making versions that are accessible to those individuals who need them. However, some public entities may conclude that it is most efficient or effective to make all individualized, password-protected or otherwise secured conventional electronic documents accessible by using, for example, an accessible template to generate such documents, and subpart H of this part preserves flexibility for public entities that

[172] Assistance to States for the Education of Children With Disabilities, 85 FR 31374 (May 26, 2020).

[173] Nat'l Instructional Materials Access Center, *About NIMAC, https://www.nimac.us/about-nimac/* [*https://perma.cc/9PQ2-GLQM*] (last visited Feb. 2, 2024).

[174] *See* §§ 35.130(b)(1)(ii) and (b)(7) and 35.160.

wish to take that approach. This approach is consistent with the broader title II regulatory framework. For example, public utility companies are not required to affirmatively mail accessible bills to all customers. Instead, the companies need only provide accessible bills to those customers who need them because of a disability.

This exception is limited to ''conventional electronic documents'' as defined in § 35.104. This exception would, therefore, not apply in a case where a public entity makes individualized information available in formats other than a conventional electronic document. For example, if a public medical provider makes individualized medical records available on a password-protected web platform as HTML content (rather than a PDF), that content would not be subject to this exception. Those HTML records, therefore, would need to be made accessible in accordance with § 35.200. On the other hand, if a public entity makes individualized records available on a password-protected web platform as PDF documents, those documents would fall under this exception. In addition, although the exception would apply to individualized, password-protected or otherwise secured conventional electronic documents, the exception would not apply to the platform on which the public entity makes those documents available. The public entity would need to ensure that that platform complies with § 35.200. Further, web content and content in mobile apps that does not take the form of individualized, password-protected or otherwise secured conventional electronic documents but instead notifies users about the existence of such documents must still conform to WCAG 2.1 Level AA unless it is covered by another exception. For example, a public hospital's health records portal may include a list of links to download individualized, password-protected PDF medical records. Under WCAG 2.1 Success Criterion 2.4.4, a public entity would generally have to provide sufficient information in the text of the link alone, or in the text of the link together with the link's programmatically determined link context, so that a user could understand the purpose of each link and determine whether they want to access a given document.[175]

This exception also only applies when the content is individualized for a specific person or their property or account. Examples of individualized documents include medical records or notes about a specific patient, receipts for purchases (like a parent's receipt for signing a child up for a recreational sports league), utility bills concerning a specific residence, or Department of Motor Vehicles records for a specific person or vehicle. Content that is broadly applicable or otherwise for the general public (*i.e.,* not individualized) is not subject to this exception. For instance, a PDF notice that explains an upcoming rate increase for all utility customers and does not address a specific customer's particular circumstances would not be subject to this exception. Such a general notice would not be subject to this exception even if it were attached to or sent with an individualized letter, like a bill, that does address a specific customer's circumstances.

This exception applies only to password-protected or otherwise secured content. Content may be otherwise secured if it requires a member of the public to use some process of authentication or login to access the content. Unless subject to another exception, conventional electronic documents that are on a public entity's general, public web platform would not be covered by the exception.

The Department recognizes that there may be some overlap between the content covered by this exception and the exception for certain preexisting conventional electronic documents, § 35.201(b). The Department notes that if web content is covered by the exception for individualized, password-protected or otherwise secured conventional electronic documents, it does not need to conform to WCAG 2.1 Level AA to comply with subpart H of this part, even if the content fails to qualify for another exception, such as the preexisting conventional electronic document exception. For example, a public entity might retain on its website an individualized, password-protected unpaid water bill in a PDF format that was posted before the date the entity was required to comply with subpart H. Because the PDF would fall within the exception for individualized, password-protected or otherwise secured conventional electronic documents, the documents would not need to conform to WCAG 2.1 Level AA, regardless of how the preexisting conventional electronic documents exception might otherwise have applied.

As noted elsewhere in this appendix, while the exception is meant to alleviate the potential burden on public entities of making all individualized, password-protected or otherwise secured conventional electronic documents generally accessible, individuals with disabilities must still be able to access information from documents that pertain to them.[176] The Department emphasizes that even if certain content does not have to conform to the technical standard, public entities still need to ensure that their services, programs, and activities offered using web content and mobile apps are accessible to individuals with disabilities on a case-by-case basis in accordance with their existing obligations under title II of the ADA. These obligations include making reasonable modifications to avoid discrimination on the basis of disability, ensuring that communications with people with disabilities are as effective as communications with people without disabilities, and providing people with disabilities an equal opportunity to participate in or benefit from the entity's services, programs, or activities.[177]

The Department received comments expressing both support for and opposition to this exception. A supporter of the exception observed that, because many individualized, password-protected or otherwise secured conventional electronic documents do not pertain to a person with a disability and would never be accessed by a person with a disability, it is unnecessary to require public entities to devote resources to making all of those documents accessible at the outset. Some commenters suggested that it could be burdensome for public entities to make all of these documents accessible, regardless of whether they pertain to a person with a disability. Some commenters noted that even if some public entities might find it more efficient to make all individualized, password-protected or otherwise secured conventional electronic documents accessible from the outset, this exception is valuable because it gives entities flexibility to select the most efficient option to meet the needs of individuals with disabilities.

The Department also received many comments opposing this exception. Commenters pointed out that it is often critical for individuals, including individuals with disabilities, to have timely access to individualized, password-protected or otherwise secured conventional electronic documents, because those documents may contain sensitive, private, and urgently needed information, such as medical test results, educational transcripts, or tax documents. Commenters emphasized the negative consequences that could result from an individual being unable to access these documents in a timely fashion, from missed bill payments to delayed or missed medical treatments. Commenters expressed concern that this exception could exacerbate existing inequities in access to government services for people with disabilities. Commenters argued that it is ineffective and inappropriate to continue to put the burden on individuals with disabilities to request accessible versions of individualized documents, particularly given that many individuals with disabilities may have repeated interactions with different public entities that generate a large number of individualized, password-protected or otherwise secured conventional electronic documents. One commenter contended that the inclusion of this exception is in tension with other statutes and Federal initiatives that are designed to make it easier for individuals to access electronic health information and other digital resources. Commenters contended that public entities often do not have robust, effective procedures under which people can make such requests and obtain accessible versions quickly without incurring invasions of privacy. Commenters argued that it can be cheaper and easier to make individualized conventional electronic documents accessible at the time they are created, instead of on a case-by-case basis, particularly given that many such documents are generated from templates, which can be made accessible relatively easily. Commenters argued that many public entities already make these sorts of documents accessible, pursuant to their longstanding ADA obligations, so introducing this exception might lead some entities to regress toward less overall accessibility. Some commenters suggested that if the exception is retained in subpart H of this part, the

[175] *See* W3C, *Understanding SC 2.4.4.: Link Purpose (In Context)* (June 20, 2023), *https://www.w3.org/WAI/WCAG21/Understanding/link-purpose-in-context.html* [*https://perma.cc/RE3T-J9PN*].

[176] *See* §§ 35.130(b)(1)(ii) and (b)(7) and 35.160.

[177] *See id.*

Department should set forth specific procedures for public entities to follow when they are on notice of the need to make individualized documents accessible for a particular individual with a disability.

After reviewing the comments, the Department has decided to retain this exception in subpart H of this part.[178] The Department continues to believe that public entities often provide or make available a large volume of individualized, password-protected or otherwise secured conventional electronic documents, many of which do not pertain to individuals with disabilities, and it may be difficult to make all such documents accessible. Therefore, the Department believes it is sensible to permit entities to focus their resources on ensuring accessibility for the specific individuals who need accessible versions of those documents. If, as many commenters suggested, it is in fact more efficient and less expensive for some public entities to make all such documents accessible by using a template, there is nothing in subpart H that prevents public entities from taking that approach.

The Department understands the concerns raised by commenters about the potential burdens that individuals with disabilities may face if individualized password-protected or otherwise secured documents are not all made accessible at the time they are created and about the potential negative consequences for individuals with disabilities who do not have timely access to the documents that pertain to them. The Department reiterates that, even when documents are covered by this exception, the existing title II obligations require public entities to furnish appropriate auxiliary aids and services where necessary to ensure an individual with a disability has, for example, an equal opportunity to enjoy the benefits of a service.[179] Such auxiliary aids and services could include, for example, providing PDFs that are accessible. In order for such an auxiliary aid or service to ensure effective communication, it must be provided ''in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.'' [180] Whether a particular solution provides effective communication depends on circumstances in the interaction, including the nature, length, complexity, and context of the communication.[181] For example, the presence of an emergency situation or a situation in which information is otherwise urgently needed would impact what it would mean for a public entity to ensure it is meeting its effective communication obligations. Public entities can help to facilitate effective communication by providing individuals with disabilities with notice about how to request accessible versions of their individualized documents. The Department also notes that where, for example, a public entity is on notice that an individual with a disability needs accessible versions of an individualized, password-protected PDF water bill, that public entity is generally required to continue to provide information from that water bill in an accessible format in the future, and the public entity generally may not require the individual with a disability to make repeated requests for accessibility. Moreover, while individualized, password-protected or otherwise secured conventional electronic documents are subject to this exception, any public-facing, web- or mobile app-based system or platform that a public entity uses to provide or make available those documents, or to allow the public to make accessibility requests, must itself be accessible under § 35.200 if it is not covered by another exception.

The Department also reiterates that a public entity might also need to make reasonable modifications to ensure that a person with a disability has equal access to its services, programs, or activities.[182] For example, if a public medical provider has a policy under which administrative support staff are in charge of uploading PDF versions of X-ray images into patients' individualized accounts after medical appointments, but the provider knows that a particular patient is blind, the provider may need to modify its policy to ensure that a staffer with the necessary expertise provides an accessible version of the information the patient needs from the X-ray.

Some commenters suggested that the Department should require public entities to adopt specific procedures when they are on notice of an individual's need for accessible individualized, password-protected or otherwise secured conventional electronic documents. For example, some commenters suggested that public entities should be required to establish a specific process through which individuals with disabilities can ''opt in'' to receiving accessible documents; to display instructions for how to request accessible versions of documents in specific, prominent places on their websites; to make documents accessible within a specified time frame after being on notice of the need for accessibility (suggested time frames ranged from 5 to 30 business days); or to remediate all documents that are based on a particular template upon receiving a request for remediation of an individualized document based on that template. Although the Department appreciates the need to ensure that individuals with disabilities can obtain easily accessible versions of individualized, password-protected or otherwise secured conventional electronic documents, the Department believes it is appropriate to provide flexibility for a public entity in how it reaches that particular goal on a case-by-case basis, so long as the entity's process satisfies the requirements of title II.[183] Moreover, because the content and quantity of individualized, password-protected documents or otherwise secured may vary widely, from a one-page utility bill to thousands of pages of medical records, the Department does not believe it is workable to prescribe a set number of days under which a public entity must make these documents accessible. The wide range of possible time frames that commenters suggested, coupled with the comments the Department received on the remediation time frames that were associated with the previously proposed course content exceptions, helps to illustrate the challenges associated with selecting a specific number of days for public entities to remediate content.

Some commenters suggested other revisions to the exception. For example, some commenters suggested that the Department could limit the exception to existing individualized, password-protected or otherwise secured conventional electronic documents, while requiring newly created documents to be automatically accessible. The Department does not believe it is advisable to adopt this revision. A central rationale of this exception—the fact that many individuals to whom individualized documents pertain do not need those documents in an accessible format—remains regardless of whether the documents at issue are existing or newly created.

One commenter suggested the Department could create an expiration date for the exception. The Department does not believe this would be workable, because the challenges that public entities might face in making all individualized, password-protected or otherwise secured conventional electronic documents accessible across the board would likely persist even after any expiration date. One commenter suggested that the exception should not apply to large public entities, such as States. The Department believes that the rationales underlying this exception would apply to both large and small public entities. The Department also believes that the inconsistent application of this exception could create unpredictability for individuals with disabilities. Other commenters suggested additional revisions, such as limiting the exception to documents that are not based on templates; requiring public entities to remove inaccessible documents from systems of records once accessible versions of those documents have been created; and requiring public entities to use HTML pages, which may be easier to make accessible than conventional electronic documents, to deliver individualized information in the future. The Department believes it is more appropriate to give public entities flexibility in how they provide or make available individualized, password-protected or otherwise secured documents to the public, so long as those entities ensure that individuals with disabilities have timely access to the information contained in those documents in an accessible format that protects the privacy and independence of the individual with a disability.

Some commenters asked the Department for additional clarification about how the exception would operate in practice. One commenter asked for clarification about how

[178] The Department made a non-substantive change to the header of the exception to match the text of the exception.

[179] *See* § 35.160(b)(1). For more information about public entities' existing obligation to ensure that communications with individuals with disabilities are as effective as communications with others, *see* U.S. Dep't of Just., *ADA Requirements: Effective Communication, ada.gov* (Feb 28, 2020), *https://www.ada.gov/resources/effective-communication/* [*https://perma.cc/CLT7-5PNQ*].

[180] *See* § 35.160(b)(2).

[181] *Id.*

[182] *See* § 35.130(b)(7).

[183] *See* §§ 35.130(b)(1)(ii) and (b)(7) and 35.160(b)(2).

this exception would apply to public hospitals and healthcare clinics, and whether the exception would apply when a patient uses a patient portal to schedule an appointment with their provider. The Department wishes to clarify that this exception is not intended to apply to all content or functionality that a public entity offers that is password-protected. Instead, this exception is intended to narrowly apply to individualized, password-protected or otherwise secured conventional electronic documents, which are limited to the following electronic file formats: PDFs, word processor file formats, presentation file formats, and spreadsheet file formats. Content that is provided in any other format is not subject to this exception. In addition, while individualized, password-protected or otherwise secured conventional electronic documents would be subject to the exception, the platform on which those documents are provided would not be subject to the exception and would need to conform to WCAG 2.1 Level AA. Accordingly, in the scenario raised by the commenter, the exception would not apply unless the public hospital or healthcare clinic used an individualized, password-protected or otherwise secured document in one of the file types listed in this paragraph for scheduling appointments.

The Department also received some comments that suggested that the Department take actions outside the scope of subpart H of this part to make it easier for certain people with disabilities to access platforms that provide individualized, password-protected or otherwise secured documents. For example, the Department received a comment asking the Department to require public entities to offer ''lower tech'' platforms that are generally simpler to navigate. While the Department recognizes that these are important issues, they are outside the scope of subpart H, and they are therefore not addressed in detail in subpart H.

Preexisting Social Media Posts

Subpart H of this part includes an exception in § 35.201(e) for preexisting social media posts, which provides that the requirements of § 35.200 will not apply to a public entity's social media posts that were posted before the date the public entity is required to comply with subpart H. This means that public entities will need to ensure that their social media posts going forward are compliant with the requirements in subpart H beginning on the compliance date outlined in § 35.200(b), but not before that date. The Department includes guidance on public entities' use of social media platforms going forward in the section entitled ''Public Entities' Use of Social Media Platforms'' in the section-by-section analysis of § 35.200.

The Department is including this exception in subpart H of this part because making preexisting social media posts accessible may be impossible or result in a significant burden. Commenters told the Department that many public entities have posted on social media platforms for several years, often numbering thousands of posts, which may not all be compliant with WCAG 2.1 Level AA. The benefits of making all preexisting social media posts accessible will likely be limited as these posts are generally intended to provide then-current updates on platforms that are frequently refreshed with new information. The Department believes public entities' limited resources are better spent ensuring that current web content and content in mobile apps are accessible, rather than reviewing all preexisting social media posts for compliance or possibly deleting public entities' previous posts if remediation is impossible.

In the NPRM, the Department did not propose any regulatory text specific to the web content and content in mobile apps that public entities make available via social media platforms. However, the Department asked for the public's feedback on adding an exception from coverage under subpart H of this part for a public entity's social media posts if they were posted before the effective date of subpart H.[184] After reviewing public comment on this proposed exception, the Department has decided to include an exception in subpart H, which will apply to preexisting social media posts posted before the compliance date of subpart H.

The Department emphasizes that even if preexisting social media posts do not have to conform to the technical standard, public entities still need to ensure that their services, programs, and activities offered using web content and mobile apps are accessible to people with disabilities on a case-by-case basis in accordance with their existing obligations under title II of the ADA. These obligations include making reasonable modifications to avoid discrimination on the basis of disability, ensuring that communications with people with disabilities are as effective as communications with people without disabilities, and providing people with disabilities an equal opportunity to participate in or benefit from the entity's services, programs, and activities.[185]

Most commenters supported an exception for preexisting social media posts, including commenters representing public entities and disability advocates. Commenters shared that making preexisting social media posts accessible would require a massive allocation of resources, and that in many cases these posts would be difficult or impossible to remediate. Commenters shared that in practice, public entities may need to delete preexisting social media posts to comply with subpart H of this part in the absence of this exception, which could result in a loss of historical information about public entities' activities.

A few commenters shared alternative approaches to this exception. One commenter suggested that highlighted or so-called ''pinned'' posts (*e.g.,* social media posts saved at the top of a page) be required to be made accessible regardless of the posting date. Other commenters suggested that the exception should be limited so as not to cover emergency information or information pertinent to accessing core functions, expressing concern that these postings would continue to be inaccessible between publication of the final rule and the date that public entities are required to be in compliance with subpart H of this part.

The Department agrees with the majority of commenters who supported the exception as described in the NPRM, for the reasons shared previously. The Department understands some commenters' concerns with respect to pinned posts as well as concerns with inaccessible postings made after publication of the final rule but before the compliance date. However, the Department believes that the approach provided in subpart H of this part appropriately balances a variety of competing concerns. In particular, the Department is concerned that it would be difficult to define pinned posts given the varied and evolving ways in which different social media platforms allow users to highlight and organize content, such that it could result in confusion. Further, the Department believes that the risk that preexisting pinned posts will stay pinned indefinitely is low, because public entities will likely still want to regularly update their pinned content. Also, requiring these pinned posts to be made accessible risks some of the remediation concerns raised earlier, as public entities may need to delete pinned posts where remediation is infeasible. The Department also has concerns with delineating what content should be considered ''core'' or ''emergency'' content.

For these reasons, the Department believes the appropriate approach is to set forth, as it does in § 35.201(e), an exception from the requirements of § 35.200 for all social media posts that were posted prior to the compliance date for subpart H of this part. The Department emphasizes, however, that after the compliance date, public entities must ensure all of their social media posts moving forward comply with subpart H.

In the NPRM, the Department asked for the public's feedback on whether public entities' preexisting videos posted to social media platforms should be covered by an exception due to these same concerns or whether these platforms should otherwise be treated differently. After reviewing public comments with respect to social media, the Department does not believe it is prudent to single out any individual social media platform or subset of content on those platforms for unique treatment under subpart H of this part, as that could lead to confusion and be difficult to implement, especially as social media platforms continually evolve. The Department thus maintains that social media posts must be made accessible under § 35.200 if they are posted after the compliance date of subpart H. The Department recognizes that due to the continually evolving nature of social media platforms, there may be questions about which content is covered by the exception to subpart H. While the Department is choosing not to single out platforms or subsets of platforms in subpart H for unique treatment, the Department encourages public entities to err on the side of ensuring accessibility where there are doubts about coverage, to maximize access for people with disabilities.

Commenters also suggested other ways to address social media, such as providing that

[184] 88 FR 51962–51963.

[185] Sections 35.130(b)(1)(ii) and (b)(7) and 35.160.

public entities must create a timeline to incorporate accessibility features into their social media or providing that public entities can use separate accessible pages with all of their social media posts. The Department believes the balance struck with this exception in subpart H of this part is appropriate and gives public entities sufficient time to prepare to make all of their new social media posts accessible in accordance with subpart H after the compliance date, consistent with the other content covered by subpart H. One commenter also requested clarification on when social media posts with links to third-party content would be covered by subpart H. The Department notes that social media posts posted after the compliance date are treated consistent with all other web content and content in mobile apps, and the relevant exceptions may apply depending on the content at issue.

Section 35.202—Conforming Alternate Versions

Section 35.202 sets forth the approach to ''conforming alternate versions.'' Under WCAG, a ''conforming alternate version'' is a separate web page that, among other things, is accessible, up to date, contains the same information and functionality as the inaccessible web page, and can be reached via a conforming page or an accessibility-supported mechanism.[186] Conforming alternate versions are allowable under WCAG. For reasons explained in the following paragraphs, the Department believes it is important to put guardrails on when public entities may use conforming alternate versions under subpart H of this part. Section 35.202, therefore, specifies that the use of conforming alternate versions is permitted only in limited, defined circumstances, which represents a slight departure from WCAG 2.1. Section 35.202(a) states that a public entity may use conforming alternate versions of web content to comply with § 35.200 only where it is not possible to make web content directly accessible due to technical or legal limitations.

Generally, to conform to WCAG 2.1, a web page must be directly accessible in that it satisfies the success criteria for one of the defined levels of conformance—in the case of subpart H of this part, Level AA.[187] However, as noted in the preceding paragraph, WCAG 2.1 also allows for the creation of a ''conforming alternate version.'' The purpose of a ''conforming alternate version'' is to provide individuals with relevant disabilities access to the information and functionality provided to individuals without relevant disabilities, albeit via a separate vehicle. The Department believes that having direct access to accessible web content provides the best user experience for many individuals with disabilities, and it may be difficult to reliably maintain conforming alternate versions, which must be kept up to date. W3C explains that providing a conforming alternate version is intended to be a ''fallback option for conformance to WCAG and the preferred method of conformance is to make all content directly accessible.'' [188] However, WCAG 2.1 does not explicitly limit the circumstances under which an entity may choose to create a conforming alternate version of a web page instead of making the web page directly accessible.

The Department is concerned that WCAG 2.1 can be interpreted to permit the development of two separate versions of a public entity's web content—one for individuals with relevant disabilities and another for individuals without relevant disabilities—even when doing so is unnecessary and when users with disabilities would have a better experience using the main web content that is accessible. Such an approach would result in segregated access for individuals with disabilities and be inconsistent with how the ADA's core principles of inclusion and integration have historically been interpreted.[189] The Department is also concerned that the frequent or unbounded creation of separate web content for individuals with disabilities may, in practice, result in unequal access to information and functionality. For example, and as discussed later in this section, the Department is concerned that an inaccessible conforming alternate version may provide information that is outdated or conflicting due to the maintenance burden of keeping the information updated and consistent with the main web content. As another example, use of a conforming alternate version may provide a fragmented, separate, or less interactive experience for people with disabilities because public entities may assume that interactive features are not financially worthwhile or otherwise necessary to incorporate in conforming alternate versions. Ultimately, as discussed later in this section, the Department believes there are particular risks associated with permitting the creation of conforming alternate versions where not necessitated by the presence of technical or legal limitations.

Due to the concerns about user experience, segregation of users with disabilities, unequal access to information, and maintenance burdens mentioned in the preceding paragraph, the Department is adopting a slightly different approach to conforming alternate versions than that provided under WCAG 2.1. Instead of permitting entities to adopt conforming alternate versions whenever they believe it is appropriate, § 35.202(a) states that a public entity may use conforming alternate versions of web content to comply with § 35.200 only where it is not possible to make web content directly accessible due to technical limitations (*e.g.,* technology is not yet capable of being made accessible) or legal limitations (*e.g.,* web content that cannot be changed due to legal reasons). The Department believes conforming alternate versions should be used rarely—when it is truly not possible to make the content accessible for reasons beyond the public entity's control. However, § 35.202 does not prohibit public entities from providing alternate versions of web pages in addition to their WCAG 2.1 Level AA compliant main web page to possibly provide users with certain types of disabilities a better experience.

The Department slightly revised the text that was proposed in the NPRM for this provision.[190] To ensure consistency with other provisions of subpart H of this part, the previously proposed text for § 35.202 was revised to refer to ''web content'' instead of ''websites and web content.'' W3C's discussion of conforming alternate versions generally refers to ''web pages'' and ''content.'' [191] Other provisions of subpart H also refer to ''web content.'' Introducing the concept of ''websites'' in this section when the term is not used elsewhere in subpart H could cause unnecessary confusion, so the Department revised this language for consistency. This change is non-substantive, as ''web content'' encompasses ''websites.''

In the NPRM, the Department requested comments on its approach to conforming alternate versions. In response, the Department received comments from a variety of commenters. Several commenters supported the Department's proposed approach of permitting the use of conforming alternative versions only when there are technical or legal limitations. Commenters believed these limitations would prevent public entities from using conforming alternate versions frequently and for reasons that do not seem appropriate, such as creating a conforming alternate version for a web page that is less accessible because of the public entity's aesthetic preferences.

Some commenters suggested that the Department should permit conforming alternate versions under a broader range of circumstances. For example, some commenters indicated that a conforming alternate version could provide an equal or superior version of web content for people with disabilities. Other commenters noted that some private companies can provide manual alternate versions that look the same as the original web page but that have invisible coding and are accessible. One commenter stated that the transition from a

[186] *See* W3C, *Web Content Accessibility Guidelines (WCAG) 2.1: Recommendation, Conforming Alternate Version* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/#dfn-conforming-alternate-version* [*https://perma.cc/GWT6-AMAN*]. WCAG 2.1 provides three options for how a conforming alternate version can be reached—the Department does not modify those options with respect to conforming alternative versions under subpart H of this part.

[187] *See id.*

[188] *See* W3C, *Understanding Conformance, https://www.w3.org/WAI/WCAG21/Understanding/conformance* [*https://perma.cc/QSG6-QCBL*] (June 20, 2023).

[189] *See* § 35.130(b)(1)(iv) (stating that public entities generally may not provide different or separate aids, benefits, or services to individuals with disabilities than is provided to others unless such action is necessary); § 35.130(d) (requiring that public entities administer services, programs, and activities in the most integrated setting appropriate); *cf.* 42 U.S.C. 12101(a)(2) (finding that society has tended to isolate and segregate individuals with disabilities).

[190] 88 FR 52020.

[191] *See* W3C, *Web Content Accessibility Guidelines (WCAG) 2.1: Recommendation, Conforming Alternate Version* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/#dfn-conforming-alternate-version* [*https://perma.cc/GWT6-AMAN*].

public entity's original website to an accessible version can be made seamless. Another commenter noted that WCAG 2.1 permits entities to adopt conforming alternate versions under broader circumstances and argued that the Department should adopt this approach rather than permitting conforming alternate versions only where there are technical or legal limitations. One commenter argued that it could be challenging for public entities that already offer conforming alternate versions more broadly to adjust their approach to comply with subpart H of this part. Some commenters gave examples of scenarios in which they found it helpful or necessary to provide conforming alternate versions.

A few commenters expressed serious concerns about the use of conforming alternate versions. These commenters stated that conforming alternate versions often result in two separate and unequal websites. Commenters indicated that some entities' conforming alternate versions neither conform to WCAG standards nor contain the same functionality and content and therefore provide fragmented, separate experiences that are less useful for people with disabilities. Other commenters shared that these alternate versions are designed in a way that assumes users are people who are blind and thus do not want visual presentation, when other people with disabilities rely on visual presentations to access the web content. Further, one group shared that many people with disabilities may be skeptical of conforming alternative versions because historically they have not been updated, have been unequal in quality, or have separated users by disability. Another commenter argued that unlimited use of conforming alternate versions could lead to errors and conflicting information because there are two versions of the same content. One commenter suggested prohibiting conforming alternate versions when interaction is a part of the online user experience. Another commenter suggested permitting conforming alternate versions only when a legal limitation makes it impossible to make web content directly accessible, but not when a technical limitation makes it impossible to do so.

Having reviewed public comments and considered this issue carefully, the Department believes subpart H of this part strikes the right balance to permit conforming alternate versions, but only where it is not possible to make web content directly accessible due to technical or legal limitations. The Department believes that this approach ensures that generally, people with disabilities will have direct access to the same web content that is accessed by people without disabilities, but it also preserves flexibility for public entities in situations where, due to a technical or legal limitation, it is impossible to make web content directly accessible. The Department also believes that this approach will help avoid the concerns noted in the preceding paragraphs with respect to segregation of people with disabilities by defining only specific scenarios when the use of conforming alternate versions is appropriate.

Some commenters emphasized the importance of ensuring that under the limited circumstances in which conforming alternate versions are permissible, those versions provide a truly equal experience. Commenters also expressed concern that it might be hard for people with disabilities to find links to conforming alternate versions. The Department notes that under WCAG 2.1, a conforming alternate version is defined, in part, as a version that ''conforms at the designated level''; ''provides all of the same information and functionality in the same human language''; and ''is as up to date as the non-conforming content.'' [192] Accordingly, even where it is permissible for a public entity to offer a conforming alternate version under subpart H of this part, the public entity must still ensure that the conforming alternate version provides equal information and functionality and is up to date. WCAG 2.1 also requires that ''the conforming version can be reached from the non-conforming page via an accessibility-supported mechanism,'' or ''the non-conforming version can only be reached from the conforming version,'' or ''the non-conforming version can only be reached from a conforming page that also provides a mechanism to reach the conforming version.'' [193] The Department believes these requirements will help to ensure that where a conforming alternate version is permissible, people with disabilities will be able to locate that page.

Some commenters recommended that the Department provide additional guidance and examples of when conforming alternate versions would be permissible, or asked the Department to clarify whether conforming alternate versions would be permissible under particular circumstances. The determination of when conforming alternate versions are needed or permitted varies depending on the facts. For example, a conforming alternate version would not be permissible just because a town's web developer lacked the knowledge or training needed to make content accessible; that would not be a technical limitation within the meaning of § 35.202. By contrast, the town could use a conforming alternate version if its web content included a new type of technology that it is not yet possible to make accessible, such as a specific kind of immersive virtual reality environment. Similarly, a town would not be permitted to claim a legal limitation because its general counsel failed to approve contracts for a web developer with accessibility experience. Instead, a legal limitation would apply when the inaccessible content itself could not be modified for legal reasons specific to that content. The Department believes this approach is appropriate because it ensures that, whenever possible, people with disabilities have access to the same web content that is available to people without disabilities.

One commenter stated that school districts and public postsecondary institutions currently provide accessible alternative content to students with disabilities that is equivalent to the content provided to students without disabilities and that is responsive to the individual student's needs. The commenter argued that public educational institutions should continue to be able to provide these alternative resources to students with disabilities. The Department reiterates that although public educational institutions, like all other public entities, will only be able to provide conforming alternate versions in lieu of directly accessible versions of web content under the circumstances specified in § 35.202, nothing prevents a public educational institution from providing a conforming alternate version in addition to the accessible main version of its web content.

Other commenters requested that the Department impose deadlines or time restrictions on how long a public entity can use a conforming alternate version. However, the Department believes that doing so would conflict with the rationale for permitting conforming alternate versions. Where the technical limitations and legal limitations are truly outside the public entity's control, the Department believes it would be unreasonable to require the public entity to surmount those limitations after a certain period of time, even if they are still in place. However, once a technical or legal limitation no longer exists, a public entity must ensure their web content is directly accessible in accordance with subpart H of this part.

A few commenters also sought clarification on, or broader language to account for, the interaction between the allowance of conforming alternate versions under § 35.202 and the general limitations provided in § 35.204. These two provisions are applicable in separate circumstances. If there is a technical or legal limitation that prevents an entity from complying with § 35.200 for certain content, § 35.202 is applicable. The entity can create a conforming alternate version for that content and, under § 35.202, that entity will be in compliance with subpart H of this part. Separately, if a fundamental alteration or undue financial and administrative burdens prevent a public entity from complying with § 35.200 for certain content, § 35.204 is applicable. As set forth in § 35.204, the public entity must still take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity to the maximum extent possible. A public entity's legitimate claim of fundamental alteration or undue burdens does not constitute a legal limitation under § 35.202 for which a conforming alternate version automatically suffices to comply with subpart H. Rather, the public entity must ensure access ''to the maximum extent possible'' under the specific facts and circumstances of the situation. Under the specific facts a public entity is facing, the public entity's best option to ensure maximum access may be an alternate version of its content, but the public entity also may be required to do something more or something different. Because the language of § 35.204 already allows for alternate versions if appropriate for the facts of public entity's fundamental alteration or undue burdens, the Department does not see a need to expand the language of § 35.202 to address commenters' concerns.

[192] *See id.*

[193] *Id.*

The Department also wishes to clarify the relationship between §§ 35.202 and 35.205, which are analyzed independently of each other. Section 35.202 provides that a public entity may use conforming alternate versions of web content, as defined by WCAG 2.1, to comply with § 35.200 only where it is not possible to make web content directly accessible due to technical or legal limitations. Accordingly, if a public entity does not make its web content directly accessible and instead provides a conforming alternate version when not required by technical or legal limitations, the public entity may not use that conforming alternate version to comply with its obligations under subpart H of this part, either by relying on § 35.202 or by invoking § 35.205.

Section 35.203 Equivalent Facilitation

Section 35.203 provides that nothing prevents a public entity from using designs, methods, or techniques as alternatives to those prescribed in the regulation, provided that such alternatives result in substantially equivalent or greater accessibility and usability. The 1991 and 2010 ADA Standards for Accessible Design both contain an equivalent facilitation provision.[194] The reason for allowing for equivalent facilitation in subpart H of this part is to encourage flexibility and innovation by public entities while still ensuring equal or greater access to web content and mobile apps. Especially in light of the rapid pace at which technology changes, this provision is intended to clarify that public entities can use methods or techniques that provide equal or greater accessibility than subpart H would require. For example, if a public entity wanted to conform its web content or mobile app to a future web content and mobile app accessibility standard that expands accessibility requirements beyond WCAG 2.1 Level AA, this provision makes clear that the public entity would be in compliance with subpart H. Public entities could also choose to comply with subpart H by conforming their web content to WCAG 2.2 Level AA [195] because WCAG 2.2 Level AA provides substantially equivalent or greater accessibility and usability to WCAG 2.1 Level AA; in particular, WCAG 2.2 Level AA includes additional success criteria not found in WCAG 2.1 Level AA and every success criterion in WCAG 2.1 Level AA, with the exception of one success criterion that is obsolete.[196] Similarly, a public entity could comply with subpart H by conforming its web content and mobile apps to WCAG 2.1 Level AAA,[197] which is the same version of WCAG and includes all the WCAG 2.1 Level AA requirements, but includes additional requirements not found in WCAG 2.1 Level AA for even greater accessibility. For example, WCAG 2.1 Level AAA includes Success Criterion 2.4.10 [198] for section headings used to organize content and Success Criterion 3.1.4 [199] that includes a mechanism for identifying the expanded form or meaning of abbreviations, among others. The Department believes that this provision offers needed flexibility for entities to provide usability and accessibility that meet or exceed what subpart H of this part would require as technology continues to develop. The responsibility for demonstrating equivalent facilitation rests with the public entity. Subpart H adopts the approach as proposed in the NPRM,[200] but the Department edited the regulatory text to fix a grammatical error by adding a comma in the original sentence in the provision.

The Department received a comment arguing that providing phone support in lieu of a WCAG 2.1-compliant website should constitute equivalent facilitation. As discussed in the section entitled ''History of the Department's Title II Web-Related Interpretation and Guidance,'' the Department no longer believes telephone lines can realistically provide equal access to people with disabilities. Websites—and often mobile apps—allow members of the public to get information or request a service within just a few minutes, and often to do so independently. Getting the same information or requesting the same service using a staffed telephone line takes more steps and may result in wait times or difficulty getting the information.

For example, State and local government entities' web content and mobile apps may allow members of the public to quickly review large quantities of information, like information about how to register for government services, information on pending government ordinances, or instructions about how to apply for a government benefit. Members of the public can then use government web content or mobile apps to promptly act on that information by, for example, registering for programs or activities, submitting comments on pending government ordinances, or filling out an application for a government benefit. A member of the public could not realistically accomplish these tasks efficiently over the phone.

Additionally, a person with a disability who cannot use an inaccessible online tax form might have to call to request assistance with filling out either online or mailed forms, which could involve significant delay, added costs, and could require providing private information such as banking details or Social Security numbers over the phone without the benefit of certain security features available for online transactions. A staffed telephone line also may not be accessible to someone who is deafblind, or who may have combinations of other disabilities, such as a coordination issue impacting typing, and an audio processing disability impacting comprehension over the phone. However, such individuals may be able to use web content and mobile apps that are accessible.

Finally, calling a staffed telephone line lacks the privacy of looking up information on a public entity's web content or mobile app. A caller needing public safety resources, for example, might be unable to access a private location to ask for help on the phone, whereas accessible web content or mobile apps would allow users to privately locate resources. For these reasons, the Department does not now believe that a staffed telephone line—even if it is offered 24/7—provides equal opportunity in the way that accessible web content or mobile apps would.

Section 35.204 Duties

Section 35.204 sets forth the general limitations on the obligations under subpart H of this part. Section 35.204 provides that in meeting the accessibility requirements set out in subpart H, a public entity is not required to take any action that would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens. These limitations on a public entity's duty to comply with the regulatory provisions mirror the fundamental alteration and undue burdens compliance limitations currently provided in the title II regulation in §§ 35.150(a)(3) (existing facilities) and 35.164 (effective communication), and the fundamental alteration compliance limitation currently provided in the title II regulation in § 35.130(b)(7) (reasonable modifications in policies, practices, or procedures). These limitations are thus familiar to public entities.

The word ''full'' was removed in § 35.204 so that the text reads ''compliance'' rather than ''full compliance.'' The Department made this change because § 35.200(b)(1) and (2) clarifies that compliance with subpart H of this part includes complying with the success criteria and conformance requirements under Level A and Level AA specified in WCAG 2.1. This minor revision does not affect the meaning of § 35.204, but rather removes an extraneous word to avoid redundancy and confusion.

In determining whether an action would result in undue financial and administrative burdens, all of a public entity's resources available for use in the funding and operation of the service, program, or activity should be considered. The burden of proving that compliance with the requirements of § 35.200 would fundamentally alter the nature of a service, program, or activity, or would result in undue financial and administrative burdens, rests with the public entity. As the Department has consistently maintained since promulgation of the title II regulation

[194] *See* 28 CFR part 36, appendix D, at 1000 (2022) (1991 ADA Standards); 36 CFR part 1191, appendix B, at 329 (2022) (2010 ADA Standards).

[195] W3C, *WCAG 2 Overview, https://www.w3.org/WAI/standards-guidelines/wcag/* [*https://perma.cc/RQS2-P7JC*] (Oct. 5, 2023).

[196] W3C, *What's New in WCAG 2.2 Draft, https://www.w3.org/WAI/standards-guidelines/wcag/new-in-22/* [*https://perma.cc/GDM3-A6SE*] (Oct. 5, 2023).

[197] W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, § 5.2 Conformance Requirements* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/#conformance-reqs* [*https://perma.cc/XV2E-ESM8*].

[198] *See* W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, Success Criterion 2.4.10 Section Headings* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/#conformance-reqs:~:text=Success%20Criterion%202.4.10,Criterion%204.1.2* [*https://perma.cc/9BNS-8LWK*].

[199] *See* W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, Success Criterion 3.1.4 Abbreviations* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/#conformance-reqs:~:text=Success%20Criterion%203.1.4,abbreviations%20is%20available* [*https://perma.cc/ZK6C-9RHD*].

[200] 88 FR 52020.

in 1991, the decision that compliance would result in a fundamental alteration or impose undue burdens must be made by the head of the public entity or their designee, and must be memorialized with a written statement of the reasons for reaching that conclusion.[201] The Department has recognized the difficulty public entities have in identifying the official responsible for this determination, given the variety of organizational structures within public entities and their components.[202] The Department has made clear that the determination must be made by a high level official, no lower than a Department head, having budgetary authority and responsibility for making spending decisions.[203]

The Department believes, in general, it would not constitute a fundamental alteration of a public entity's services, programs, or activities to modify web content or mobile apps to make them accessible within the meaning of subpart H of this part. However, this is a fact-specific inquiry, and the Department provides some examples later in this section of when a public entity may be able to claim a fundamental alteration. Moreover, like the fundamental alteration or undue burdens limitations in the title II regulation referenced in the preceding paragraphs, § 35.204 does not relieve a public entity of all obligations to individuals with disabilities. Although a public entity under this part is not required to take actions that would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens, it nevertheless must comply with the requirements of subpart H of this part to the extent that compliance does not result in a fundamental alteration or undue financial and administrative burdens. For instance, a public entity might determine that complying with all of the success criteria under WCAG 2.1 Level AA would result in a fundamental alteration or undue financial and administrative burdens. However, the public entity must then determine whether it can take any other action that would not result in such an alteration or such burdens, but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity to the maximum extent possible. To the extent that the public entity can, it must do so. This may include the public entity's bringing its web content into conformance to some of the WCAG 2.1 Level A or Level AA success criteria.

It is the Department's view that most entities that choose to assert a claim that complying with all of the requirements under WCAG 2.1 Level AA would result in undue financial and administrative burdens will be able to attain at least partial compliance in many circumstances. The Department believes that there are many steps a public entity can take to conform to WCAG 2.1 Level AA that should not result in undue financial and administrative burdens, depending on the particular circumstances.

Complying with the web and mobile app accessibility requirements set forth in subpart H means that a public entity is not required by title II of the ADA to make any further modifications to the web content or content in mobile apps that it makes available to the public. However, it is important to note that compliance with subpart H of this part will not relieve title II entities of their distinct employment-related obligations under title I of the ADA. The Department realizes that the regulations in subpart H are not going to meet the needs of and provide access to every individual with a disability, but believes that setting a consistent and enforceable web accessibility standard that meets the needs of a majority of individuals with disabilities will provide greater predictability for public entities, as well as added assurance of accessibility for individuals with disabilities. This approach is consistent with the approach the Department has taken in the context of physical accessibility under title II. In that context, a public entity is not required to exceed the applicable design requirements of the ADA Standards even if certain wheelchairs or other power-driven mobility devices require a greater degree of accessibility than the ADA Standards provide.[204] The entity may still be required, however, to make other modifications to how it provides a program, service, or activity, where necessary to provide access for a specific individual. For example, where an individual with a disability cannot physically access a program provided in a building that complies with the ADA Standards, the public entity does not need to make physical alterations to the building but may need to take other steps to ensure that the individual has an equal opportunity to participate in and benefit from that program.

Similarly, just because an entity is in compliance with the web content or mobile app accessibility standard in subpart H of this part does not mean it has met all of its obligations under the ADA or other applicable laws—it means only that it is not required to make further changes to the web content or content in mobile apps that it makes available. If an individual with a disability, on the basis of disability, cannot access or does not have equal access to a service, program, or activity through a public entity's web content or mobile app that conforms to WCAG 2.1 Level AA, the public entity is still obligated under § 35.200(a) to provide the individual an alternative method of access to that service, program, or activity unless the public entity can demonstrate that alternative methods of access would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.[205] The entity also must still satisfy its general obligations to provide effective communication, reasonable modifications, and an equal opportunity to participate in or benefit from the entity's services, programs, or activities.[206]

The public entity must determine on a case-by-case basis how best to meet the needs of those individuals who cannot access a service, program, or activity that the public entity provides through web content or mobile apps that comply with all of the requirements under WCAG 2.1 Level AA. A public entity should refer to § 35.130(b)(1)(ii) to determine its obligations to provide individuals with disabilities an equal opportunity to participate in and enjoy the benefits of the public entity's services, programs, or activities. A public entity should refer to § 35.160 (effective communication) to determine its obligations to provide individuals with disabilities with the appropriate auxiliary aids and services necessary to afford them an equal opportunity to participate in, and enjoy the benefits of, the public entity's services, programs, or activities. A public entity should refer to § 35.130(b)(7) (reasonable modifications) to determine its obligations to provide reasonable modifications in policies, practices, or procedures to avoid discrimination on the basis of disability. It is helpful to provide individuals with disabilities with information about how to obtain the modifications or auxiliary aids and services they may need. For example, while not required in subpart H of this part, a public entity is encouraged to provide an email address, accessible link, accessible web page, or other accessible means of contacting the public entity to provide information about issues individuals with disabilities may encounter accessing web content or mobile apps or to request assistance.[207] Providing this information will help public entities ensure that they are satisfying their obligations to provide equal access, effective communication, and reasonable modifications.

The Department also clarifies that a public entity's requirement to comply with existing ADA obligations remains true for content that fits under one of the exceptions under § 35.201. For example, in the appropriate circumstances, an entity may be obligated to add captions to a video that falls within the archived content exception and provide the captioned video file to the individual with a disability who needs access to the video, or edit an individualized password-protected PDF to be usable with a screen reader and provide it via a secure method to the individual with a disability. Of course, an entity may also choose to further modify the web content or content in mobile apps it makes available to make that content more accessible or usable than subpart H of this part requires. In the context of the preceding examples, for instance, the Department believes it will often be most economical and logical for an entity to post the captioned video, once modified, as part of web content made available to the public, or to modify the individualized PDF template so that it is used for all members of the public going forward.

The Department received comments indicating that the fundamental alteration or undue burdens limitations as discussed in

[201] Section 35.150(a)(3) and 35.164.

[202] 28 CFR part 35, appendix B, at 708 (2022).

[203] *Id.*

[204] *See* 28 CFR part 35, appendix A, at 626 (2022).

[205] *See, e.g.,* §§ 35.130(b)(1)(ii) and (b)(7) and 35.160.

[206] *See id.*

[207] *See* W3C, *Developing an Accessibility Statement, https://www.w3.org/WAI/planning/statements/* [*https://perma.cc/85WU-JTJ6*] (Mar. 11, 2021).

the ''Duties'' section of the NPRM [208] are appropriate and align with the framework of the ADA. The Department also received comments expressing concern that there are no objective standards to help public entities understand when the fundamental alteration and undue burdens limitations will apply. Accordingly, some commenters asked the Department to make clearer when public entities can and cannot raise these limitations. Some of these commenters said that the lack of clarity about these limitations could result in higher litigation costs or frivolous lawsuits. The Department acknowledges these concerns and notes that fundamental alteration and undue burdens are longstanding limitations under the ADA,[209] and therefore the public should already be familiar with these limitations in other contexts. The Department has provided guidance that addresses the fundamental alteration and undue burdens limitations and will consider providing additional guidance in the future.[210]

The Department received some comments suggesting that the Department should state whether certain examples amount to a fundamental alteration or undue burdens or amend the regulation to address the examples. For example, one commenter indicated that some digital content cannot be made accessible and therefore technical infeasibility should be considered an undue burden. Another commenter asserted that it may be an undue burden to require large documents that are 300 pages or more to be accessible under the final regulations; therefore, the final regulations should include a rebuttable presumption that public entities do not have to make these larger documents accessible. In addition, one commenter said they believe that testing the accessibility of web content and mobile apps imposes an undue burden. However, another commenter opined that improving web code is unlikely to pose a fundamental alteration in most cases.

Whether the undue burdens limitation applies is a fact-specific assessment that involves considering a variety of factors. For example, some small towns have minimal operating budgets measured in the thousands or tens of thousands of dollars. If such a town had an archive section of its website with a large volume of material gathered by the town's historical society (such as old photographs and handwritten journal entries from town elders), the town would have an obligation under the existing title II regulation to ensure that its services, programs, and activities offered using web content and mobile apps are accessible to individuals with disabilities. However, it might be an undue burden for the town to make all those materials fully accessible in a short period of time in response to a request by an individual with a disability.[211] Whether the undue burdens limitation applies, however, would depend, among other things, on how large the town's operating budget is and how much it would cost to make the materials in question accessible. Whether the limitation applies will also vary over time. Increases in town budget, or changes in technology that reduce the cost of making the historical materials accessible, may make the limitation inapplicable. Lastly, even where it would impose an undue burden on the town to make its historical materials accessible within a certain time frame, the town would still need to take any other action that would not result in such a burden but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the town to the maximum extent possible.

Application of the fundamental alteration limitation is similarly fact specific. For example, a county library might hold an art contest in which elementary school students submit alternative covers for their favorite books and library goers view and vote on the submissions on the library website. It would likely be a fundamental alteration to require the library to modify each piece of artwork so that any text drawn on the alternative covers, such as the title of the book or the author's name, satisfies the color contrast requirements in the technical standard. Even so, the library would still be required to take any other action that would not result in such an alteration but would nevertheless ensure that individuals with disabilities could participate in the contest to the maximum extent possible.

Because each assessment of whether the fundamental alteration or undue burdens limitations applies will vary depending on the entity, the time of the assessment, and various other facts and circumstances, the Department declines to adopt any rebuttable presumptions about when the fundamental alteration or undue burdens limitations would apply.

One commenter proposed that the final regulations should specify factors that should be considered with respect to the undue burdens limitation, such as the number of website requirements that public entities must comply with and the budget, staff, and other resources needed to achieve compliance with these requirements. The Department declines to make changes to the regulatory text because the Department does not believe listing specific factors would be appropriate, particularly given that these limitations apply in other contexts in title II. Also, as noted earlier, the Department believes that generally, it would not constitute a fundamental alteration of a public entity's services, programs, or activities to modify web content or mobile apps to make them accessible in compliance with subpart H of this part.

The Department received a comment suggesting that the regulatory text should require a public entity claiming the undue burdens limitation to identify the inaccessible content at issue, set a reliable point of contact for people with disabilities seeking to access the inaccessible content, and develop a plan and timeline for remediating the inaccessible content. The Department declines to take this suggested approach because it would be a departure from how the limitation generally applies in other contexts covered by title II of the ADA.[212] In these other contexts, if an action would result in a fundamental alteration or undue burdens, a public entity must still take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity to the maximum extent possible.[213] The Department believes it is important to apply these longstanding limitations in the same way to web content and mobile apps to ensure clarity for public entities and consistent enforcement of the ADA. In addition, implementing the commenter's suggested approach would create additional costs for public entities. The Department nevertheless encourages public entities to engage in practices that would improve accessibility and ensure transparency when public entities seek to invoke the fundamental alteration or undue burdens limitations. For example, a public entity can provide an accessibility statement that informs the public how to bring web content or mobile app accessibility problems to the public entity's attention, and it can also develop and implement a procedure for reviewing and addressing any such issues raised.

Some commenters raised concerns about the requirement in § 35.204 that the decision that compliance with subpart H of this part would result in a fundamental alteration or in undue financial or administrative burdens must be made by the head of a public entity or their designee. These commenters wanted more clarity about who is the head of a public entity. They also expressed concern that this requirement may be onerous for public entities. The Department notes in response to these commenters that this approach is consistent with the existing title II framework in §§ 35.150(a)(3) (service, program, or activity accessibility) and 35.164 (effective communication). With respect to the commenters' concern about who is the head of a public entity or their designee, the Department recognizes the difficulty of identifying the official responsible for this determination given the variety of organizational forms of public entities and their components. The Department has made clear that ''the determination must be made by a high level official, no lower than a Department head, having budgetary authority and responsibility for making spending decisions.'' [214] The Department reiterates that this is an existing concept in title II of the ADA, so public entities should be familiar with this requirement. The appropriate relevant official may vary depending on the public entity.

Section 35.205 Effect of Noncompliance That Has a Minimal Impact on Access

Section 35.205 sets forth when a public entity will be deemed to have complied with

[208] 88 FR 51978–51980.

[209] *See* §§ 35.130(b)(7)(i), 35.150(a)(3), and 35.164. These regulatory provisions were also in the Department's 1991 regulations at 28 CFR 35.130(b)(7), 35.150(a)(3), and 35.164, respectively.

[210] *See, e.g.,* U.S. Dep't of Just., *ADA Update: A Primer for State and Local Governments, https://www.ada.gov/resources/title-ii-primer/* [*https://perma.cc/ZV66-EFWU*] (Feb. 28, 2020).

[211] *See* §§ 35.130(b)(1)(ii) and (b)(7) and 35.160.

[212] *See* §§ 35.150(a)(3) and 35.164.

[213] *See id.*

[214] 28 CFR part 35, appendix B, at 708 (2022).

§ 35.200 despite limited nonconformance to the technical standard. This provision adopts one of the possible approaches to compliance discussed in the NPRM.[215] As discussed in this section, public comments indicated that the final rule needed to account for the increased risk of instances of nonconformance to the technical standard, due to the unique and particular challenges to achieving perfect, uninterrupted conformance in the digital space. The Department believes that § 35.205 meets this need, ensuring the full and equal access to which individuals with disabilities are entitled while allowing some flexibility for public entities if nonconformance to WCAG 2.1 Level AA is so minimal as to not affect use of the public entity's web content or mobile app.

Discussion of Regulatory Text

Section 35.205 describes a particular, limited circumstance in which a public entity will be deemed to have met the requirements of § 35.200 even though the public entity's web content or mobile app does not perfectly conform to the technical standard set forth in § 35.200(b). Section 35.205 will apply if the entity can demonstrate that, although it was technically out of conformance to WCAG 2.1 Level AA (*i.e.,* fails to exactly satisfy a success criterion or conformance requirement), the nonconformance has a minimal impact on access for individuals with disabilities, as defined in the regulatory text. If a public entity can make this showing, it will be deemed to have met its obligations under § 35.200 despite its nonconformance to WCAG 2.1 Level AA.

Section 35.205 does not alter a public entity's general obligations under subpart H of this part nor is it intended as a blanket justification for a public entity to avoid conforming with WCAG 2.1 Level AA from the outset. Rather, § 35.205 is intended to apply in rare circumstances and will require a detailed analysis of the specific facts surrounding the impact of each alleged instance of nonconformance. The Department does not expect or intend that § 35.205 will excuse most nonconformance to the technical standard. Under § 35.200(b), a public entity must typically ensure that the web content and mobile apps it provides or makes available, directly or through contractual, licensing, or other arrangements, comply with Level A and Level AA success criteria and conformance requirements specified in WCAG 2.1. This remains generally true. However, § 35.205 allows for some minor deviations from WCAG 2.1 Level AA if specific conditions are met. This will provide a public entity that discovers that it is out of compliance with the requirements of § 35.200(b) with another means to avoid the potential liability that could result. Public entities that maintain conformance to WCAG 2.1 Level AA will not have to rely on § 35.205 to be deemed compliant with § 35.200, and full conformance to WCAG 2.1 Level AA is the only definitive way to guarantee that outcome. However, if a public entity falls out of conformance in a minimal way or such nonconformance is alleged, a public entity may be able to use § 35.205 to demonstrate that it has satisfied its legal obligations. Section 35.205 also does not alter existing ADA enforcement mechanisms. Individuals can file complaints, and agencies can conduct investigations and compliance reviews, related to subpart H of this part the same way they would for any other requirement under title II.[216]

As the text of the provision indicates, the burden of demonstrating applicability of § 35.205 is on the public entity. The provision will only apply in the limited circumstance in which the public entity can demonstrate that all of the criteria described in § 35.205 are satisfied. This section requires the public entity to show that its nonconformance to WCAG 2.1 Level AA has such a minimal impact on access that it would not affect the ability of individuals with disabilities to use the public entity's web content or mobile app as defined in the remainder of the section. If the nonconformance has affected an individual in the ways outlined in § 35.205 (further described in the subsequent paragraphs), the public entity will not be able to rely on this provision. Further, as ''demonstrate'' indicates, the public entity must provide evidence that all of the criteria described in § 35.205 are satisfied in order to substantiate its reliance on this provision. While § 35.205 does not require a particular type of evidence, a public entity needs to show that, as the text states, its nonconformance ''would not affect'' the experience of individuals with disabilities as outlined in subsequent paragraphs. Therefore, it would not be sufficient for a public entity to show only that it has not received any complaints regarding the nonconformance; nor would it likely be enough if the public entity only pointed to a few particular individuals with disabilities who were unaffected by the nonconformance. The public entity must show that the nonconformance is of a nature that would not affect people whose disabilities are pertinent to the nonconformance at issue, just as the analysis under other parts of the title II regulation depends on the barrier at issue and the access needs of individuals with disabilities pertinent to that barrier.[217] For example, people with hearing or auditory processing disabilities, among others, have disabilities pertinent to captioning requirements.

With respect to the particular criteria that a public entity must satisfy, § 35.205 describes both what people with disabilities must be able to use the public entity's web content or mobile apps to do and the manner in which people with disabilities must be able to do it. As to manner of use, § 35.205 provides that nonconformance to WCAG 2.1 Level AA must not affect the ability of individuals with disabilities to use the public entity's web content or mobile app in a manner that provides substantially equivalent timeliness, privacy, independence, and ease of use compared to individuals without disabilities. Timeliness, privacy, and independence are underscored throughout the ADA framework as key components of ensuring equal opportunity for individuals with disabilities to participate in or benefit from a public entity's services, programs, and activities, as explained further later in the discussion of this provision, and ''ease of use'' is intended to broadly encompass other aspects of a user's experience with web content or mobile apps. To successfully rely on § 35.205, it would not be sufficient for a public entity to demonstrate merely that its nonconformance would not completely block people with disabilities from using web content or a mobile app as described in § 35.205(a) through (d). That is, the term ''would not affect'' should not be read in isolation from the rest of § 35.205 to suggest that a public entity only needs to show that a particular objective can be achieved. Rather, a public entity must also demonstrate that, even though the web content or mobile app does not conform to the technical standard, the user experience for individuals with disabilities is substantially equivalent to the experience of individuals without disabilities.

For example, if a State's online renewal form does not conform to WCAG 2.1 Level AA, a person with a manual dexterity disability may need to spend significantly more time to renew their professional license online than someone without a disability. This person might also need to seek assistance from someone who does not have a disability, provide personal information to someone else, or endure a much more cumbersome and frustrating process than a user without a disability. Even if this person with a disability was ultimately able to renew their license online, § 35.205 would not apply because, under these circumstances, their ability to use the web content in a manner that provides substantially equivalent timeliness, privacy, independence, and ease of use would be affected. Analysis under this provision is likely to be a fact-intensive analysis. Of course, a public entity is not responsible for every factor that might make a task more time-consuming or difficult for a person with a disability. However, a public entity is responsible for the impact of its nonconformance to the technical standard set forth in subpart H of this part. The public entity must show that its nonconformance would not affect the ability of individuals with pertinent disabilities to use the web content or mobile app in a manner that provides substantially equivalent timeliness, privacy, independence, and ease of use.

Paragraphs (a) through (d) of § 35.205 describe what people with disabilities must be able to use the public entity's web content or mobile apps to do in a manner that is substantially equivalent as to timeliness, privacy, independence, and ease of use. First, under § 35.205(a), individuals with disabilities must be able to access the same information as individuals without disabilities. This means that people with disabilities can access all the same information using the web content or mobile app that users without disabilities are able to access. For example, § 35.205(a) would not be

[215] 88 FR 51983.

[216] *See* §§ 35.170 through 35.190.

[217] *Cf., e.g.,* §§ 35.130(b)(1)(iv) and (b)(8) and 35.160.

satisfied if certain web content could not be accessed using a keyboard because the content was coded in a way that caused the keyboard to skip over some content. In this example, an individual who relies on a screen reader would not be able to access the same information as an individual without a disability because all of the information could not be selected with their keyboard so that it would be read aloud by their screen reader. However, § 35.205(a) might be satisfied if the color contrast ratio for some sections of text is 4.45:1 instead of 4.5:1 as required by WCAG 2.1 Success Criterion 1.4.3.[218] Similarly, this provision might apply if the spacing between words is only 0.15 times the font size instead of 0.16 times as required by WCAG 2.1 Success Criterion 1.4.12.[219] Such slight deviations from the specified requirements are unlikely to affect the ability of, for example, most people with vision disabilities to access information that they would be able to access if the content fully conformed with the technical standard. However, the entity must always demonstrate that this element is met with respect to the specific facts of the nonconformance at issue.

Second, § 35.205(b) states that individuals with disabilities must be able to engage in the same interactions as individuals without disabilities. This means that people with disabilities can interact with the web content or mobile app in all of the same ways that people without disabilities can. For example, § 35.205(b) would not be satisfied if people with disabilities could not interact with all of the different components of the web content or mobile app, such as chat functionality, messaging, calculators, calendars, and search functions. However, § 35.205(b) might be satisfied if the time limit for an interaction, such as a chat response, expires at exactly 20 hours, even though Success Criterion 2.2.1,[220] which generally requires certain safeguards to prevent time limits from expiring, has an exception that only applies if the time limit is longer than 20 hours. People with certain types of disabilities, such as cognitive disabilities, may need more time than people without disabilities to engage in interactions. A slight deviation in timing, especially when the time limit is long and the intended interaction is brief, is unlikely to affect the ability of people with these types of disabilities to engage in interactions. Still, the public entity must always demonstrate that this element is met with respect to the specific facts of the nonconformance at issue.

Third, pursuant to § 35.205(c), individuals with disabilities must be able to conduct the same transactions as individuals without disabilities. This means that people with disabilities can complete all of the same transactions on the web content or mobile app that people without disabilities can. For example, § 35.205(c) would not be satisfied if people with disabilities could not submit a form or process their payment. However, § 35.205(c) would likely be satisfied if web content does not conform to Success Criterion 4.1.1 about parsing. This Success Criterion requires that information is coded properly so that technology like browsers and screen readers can accurately interpret the content and, for instance, deliver that content to a user correctly so that they can complete a transaction, or avoid crashing in the middle of the transaction.[221] However, according to W3C, this Success Criterion is no longer needed to ensure accessibility because of improvements in browsers and assistive technology.[222] Thus, although conformance to this Success Criterion is required by WCAG 2.1 Level AA, a failure to conform to this Success Criterion is unlikely to affect the ability of people with disabilities to conduct transactions. However, the entity must always demonstrate that this element is met with respect to the specific facts of the nonconformance at issue.

Fourth, § 35.205(d) requires that individuals with disabilities must be able to otherwise participate in or benefit from the same services, programs, and activities as individuals without disabilities. Section 35.205(d) is intended to address anything else within the scope of title II (*i.e.,* any service, program, or activity that cannot fairly be characterized as accessing information, engaging in an interaction, or conducting a transaction) for which someone who does not have a disability could use the public entity's web content or mobile app. Section 35.205(d) should be construed broadly to ensure that the ability of individuals with disabilities to use any part of the public entity's web content or mobile app that individuals without disabilities are able to use is not affected by nonconformance to the technical standard.

Explanation of Changes From Language Discussed in the NPRM

The regulatory language codified in § 35.205 is very similar to language discussed in the NPRM's preamble.[223] However, the Department believes it is helpful to explain differences between that discussion in the NPRM and the final rule. The Department has only made three substantive changes to the NPRM's relevant language.

First, though the NPRM discussed excusing noncompliance that ''does not prevent'' equal access, § 35.205 excuses noncompliance that ''would not affect'' such access. The Department was concerned that the use of ''does not'' could have been incorrectly read to require a showing that a specific individual did not have substantially equivalent access to the web content or mobile app. In changing the language to ''would not,'' the Department clarifies that the threshold requirements for bringing a challenge to compliance under subpart H of this part are the same as under any other provision of the ADA. Except as otherwise required by existing law, a rebuttal of a public entity's invocation of this provision would not need to show that a specific individual did not have substantially equivalent access to the web content or mobile app. Rather, the issue would be whether the nonconformance is the type of barrier that would affect the ability of individuals with pertinent disabilities to access the web content or mobile app in a substantially equivalent manner. The same principles would apply to informal dispute resolution or agency investigations resolved outside of court, for example. Certainly, the revised standard would encompass a barrier that actually does affect a specific individual's access, so this revision does not narrow the provision.

Second, the Department originally proposed considering whether nonconformance ''prevent[s] a person with a disability'' from using the web content or mobile app, but § 35.205 instead considers whether nonconformance would ''affect the ability of individuals with disabilities'' to use the web content or mobile app. This revision is intended to clarify what a public entity seeking to invoke this provision needs to demonstrate. The Department explained in the NPRM that the purpose of this approach was to provide equal access to people with disabilities, and limit violations to those that affect access.[224] But even when not entirely prevented from using web content or mobile app, an individual with disabilities can still be denied equal access by impediments falling short of that standard. The language now used in this provision more accurately reflects this reality and achieves the objective proposed in the NPRM. As explained earlier in the discussion of § 35.205, under the language in this provision, it would not be sufficient for a public entity to show that nonconformance would not completely block people with disabilities from using the public entity's web content or a mobile app as described in § 35.205(a) through (d). In other words, someone would not need to be entirely prevented from using the web content or mobile app before an entity could be considered out of compliance. Instead, the effect of the nonconformance must be considered. This does not mean that any effect on usability, however slight, is sufficient to prove a violation. Only nonconformance that would affect the ability of individuals with disabilities to do the activities in § 35.205(a) through (d) in a way that provides substantially equivalent timeliness, privacy, independence, and ease of use would prevent a public entity from relying on this provision.

Third, the language proposed in the NPRM considered whether a person with a disability would have substantially

[218] *See* W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, Success Criterion 1.4.3 Contrast (Minimum)* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/#contrast-minimum* [*https://perma.cc/4XS3-AX7W*].

[219] *See* W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, Success Criterion 1.4.12 Text Spacing* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/#text-spacing* [*https://perma.cc/B4A5-843F*].

[220] *See* W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, Success Criterion 2.2.1 Timing Adjustable* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/#timing-adjustable* [*https://perma.cc/V3XZ-KJDG*].

[221] W3C, *Understanding SC 4.1.1: Parsing (Level A), https://www.w3.org/WAI/WCAG21/Understanding/parsing.html* [*https://perma.cc/5Z8Q-GW5E*] (June 20, 2023).

[222] W3C, *WCAG 2 FAQ, How and why is success criteria 4.1.1 Parsing obsolete?, https://www.w3.org/WAI/standards-guidelines/wcag/faq/#parsing411* [*https://perma.cc/7Q9H-JVSZ*] (Oct. 5, 2023).

[223] 88 FR 51983.

[224] *Id.*

equivalent ''ease of use.'' The Department believed that timeliness, privacy, and independence were all components that affected whether ease of use was substantially equivalent. Because several commenters proposed explicitly specifying these factors in addition to ''ease of use,'' the Department is persuaded that these factors warrant separate inclusion and emphasis as aspects of user experience that must be substantially equivalent. This specificity ensures clarity for public entities, individuals with disabilities, Federal agencies, and courts about how to analyze an entity's invocation of this provision.

Therefore, the Department has added additional language to clarify that timeliness, privacy, and independence are all important concepts to consider when evaluating whether this provision applies. If a person with a disability would need to take significantly more time to successfully navigate web content or a mobile app that does not conform to the technical standard because of the content or app's nonconformance, that person is not being provided with a substantially equivalent experience to that of people without disabilities. Requiring a person with a disability to spend substantially more time to do something is placing an additional burden on them that is not imposed on others. Privacy and independence are also crucial components that can affect whether a person with a disability would be prevented from having a substantially equivalent experience. Adding this language to § 35.205 ensures consistency with the effective communication provision of the ADA.[225] The Department has included timeliness, privacy, and independence in this provision for clarity and to avoid unintentionally narrowing what should be a fact-intensive analysis. However, ''ease of use'' may also encompass other aspects of a user's experience that are not expressly specified in the regulatory text, such as safety risks incurred by people with disabilities as a result of nonconformance.[226] This language should be construed broadly to allow for consideration of other ways in which nonconformance would make the experience of users with disabilities more difficult or burdensome than the experience of users without disabilities in specific scenarios.

Justification for This Provision

After carefully considering the various public comments received, the Department believes that a tailored approach is needed for measuring compliance with a technical standard in the digital space. The Department also believes that the compliance framework adopted in § 35.205 is preferable to any available alternatives because it strikes the most appropriate balance between equal access for individuals with disabilities and feasibility for public entities.

The Need To Tailor a Compliance Approach for the Digital Space

Most of the commenters who addressed the question of what approach subpart H of this part should take to assessing compliance provided information that supported the Department's decision to tailor an approach for measuring compliance that is specific to the digital space (*i.e.,* an approach that differs from the approach that the Department has taken for physical access). Only a few commenters believed that the Department should require 100 percent conformance to WCAG 2.1 Level AA, as is generally required for newly constructed facilities.[227] Commenters generally discussed two reasons why a different approach was appropriate: differences between the physical and digital space and increased litigation risk.

First, many commenters, including commenters from State and local government entities and trade groups representing public accommodations, emphasized how the built environment differs from the digital environment. These commenters agreed with the Department's suggestion in the NPRM that the dynamic and interconnected nature of web content and mobile apps could present unique challenges for compliance.[228]

Digital content changes much more frequently than buildings do. Every modification to web content or a mobile app could lead to some risk of falling out of perfect conformance to WCAG 2.1 Level AA. Public entities will need to address this risk much more frequently under subpart H of this part than they do under the ADA's physical access requirements, because web content and mobile apps are updated much more often than buildings are. By their very nature, web content and mobile apps can easily be updated often, while most buildings are designed to last for years, if not decades, without extensive updates.

As such, State and local government entities trying to comply with their obligations under subpart H of this part will need to evaluate their compliance more frequently than they evaluate the accessibility of their buildings. But regular consideration of how any change that they make to their web content or mobile app will affect conformance to WCAG 2.1 Level AA and the resulting iterative updates may still allow minor nonconformances to escape notice. Given these realities attending web content and mobile apps, the Department believes that it is likely to be more difficult for State and local government entities to maintain perfect conformance to the technical standard set forth in subpart H than it is to comply with the ADA Standards. Commenters agreed that maintaining perfect conformance to the technical standard would be difficult.

Web content and content in mobile apps are also more likely to be interconnected, such that updates to some content may affect the conformance of other content in unexpected ways, including in ways that may lead to technical nonconformance without affecting the user experience for individuals with disabilities. Thus, to maintain perfect conformance, it would not necessarily be sufficient for public entities to confirm the conformance of their new content; they would also need to ensure that any updates do not affect the conformance of existing content. The same kind of challenge is unlikely to occur in physical spaces.

Second, many commenters raised concerns about the litigation risk that requiring perfect conformance to WCAG 2.1 Level AA would pose. Commenters feared being subjected to a flood of legal claims based on any failure to conform to the technical standard, however minor, and regardless of the impact—or lack thereof—the nonconformance has on accessibility. Commenters agreed with the Department's suggestion that due to the dynamic, complex, and interconnected nature of web content and mobile apps, a public entity's web content and mobile apps may be more likely to be out of conformance to WCAG 2.1 Level AA than its buildings are to be out of compliance with the ADA Standards, leading to increased legal risk. Some commenters even stated that 100 percent conformance to WCAG 2.1 Level AA would be unattainable or impossible to maintain. Commenters also agreed with the Department's understanding that the prevalence of automated web accessibility testing could enable any individual to find evidence of nonconformance to WCAG 2.1 Level AA even where that individual has not experienced any impact on access and the nonconformance would not affect others' access, with the result that identifying instances of merely technical nonconformance to WCAG 2.1 Level AA is likely much easier than identifying merely technical noncompliance with the ADA Standards.

Based on the comments it received, the Department believes that if it does not implement a tailored approach to compliance under subpart H of this part, the burden of litigation under subpart H could become particularly challenging for public entities, enforcement agencies, and the courts. Though many comments about litigation risk came from public entities, commenters from some disability advocacy organizations agreed that subpart H should not encourage litigation about issues that do not affect a person with a disability's ability to equally use and benefit from a website or mobile app, and that liability should be limited. After considering the information commenters provided, the Department is persuaded that measuring compliance as strictly 100 percent conformance to WCAG 2.1 Level AA would not be the most prudent approach, and that an entity's compliance obligations can be limited under some narrow circumstances without undermining the objective of ensuring equal access to web content and mobile apps in subpart H.

Reasons for Adopting This Compliance Approach

The Department has carefully considered many different approaches to defining when a State or local government entity has met its obligations under subpart H of this part. Of all the approaches considered—including those discussed in the NPRM as well as those

[225] Section 35.160(b)(2).

[226] *See, e.g.,* W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, Success Criterion 2.3.1. Three Flashes or Below Threshold* (June 5, 2018), *https://www.w3.org/TR/2018/REC-WCAG21-20180605/#three-flashes-or-below-threshold* [*https://perma.cc/A7P9-WCQY*] (addressing aspects of content design that could trigger seizures or other physical reactions).

[227] Section 35.151(a) and (c).

[228] 88 FR 51981.

proposed by commenters—the Department believes the compliance approach set forth in § 35.205 strikes the most appropriate balance between providing equal access for people with disabilities and ensuring feasibility for public entities, courts, and Federal agencies. The Department believes that the approach set forth in subpart H is preferable to all other approaches because it emphasizes actual access, is consistent with existing legal frameworks, and was supported by a wide range of commenters.

Primarily, the Department has selected this approach because it appropriately focuses on the experience of individuals with disabilities who are trying to use public entities' web content or mobile apps. By looking at the effect of any nonconformance to the technical standard, this approach will most successfully implement the ADA's goals of ''equality of opportunity'' and ''full participation.'' [229] It will also be consistent with public entities' existing regulatory obligations to provide individuals with disabilities with an equal opportunity to participate in and benefit from their services, obtain the same result, and gain the same benefit.[230] This approach ensures that nonconformance to the technical standard can be addressed when it affects these core promises of equal access.

The Department heard strong support from the public for ensuring that people with disabilities have equal access to the same services, programs, and activities as people without disabilities, with equivalent timeliness, privacy, independence, and ease of use. Similarly, many commenters from disability advocacy organizations stated that the goal of subpart H of this part should be to provide access to people with disabilities that is functionally equivalent to the access experienced by people without disabilities. Other disability advocates stressed that technical compliance should not be prioritized over effective communication. Section 35.205 will help to achieve these goals.

The Department believes that this approach will not have a detrimental impact on the experience of people with disabilities who are trying to use web content or mobile apps. By its own terms, § 35.205 would require a public entity to demonstrate that any nonconformance would not affect the ability of individuals with disabilities to use the public entity's web content or mobile app in a manner that provides substantially equivalent timeliness, privacy, independence, and ease of use. As discussed earlier in the analysis of § 35.205, it is likely that this will be a high hurdle to clear. If nonconformance to the technical standard would affect people with disabilities' ability to use the web content or mobile app in this manner, this provision will not apply, and a public entity will not have met its obligations under subpart H of this part. As noted earlier in this discussion, full conformance to WCAG 2.1 Level AA is the only definitive way for a public entity to avoid reliance on § 35.205.

This provision would nonetheless provide public entities who have failed to conform to WCAG 2.1 Level AA with a way to avoid the prospect of liability for an error that is purely technical in nature and would not affect accessibility in practice. This will help to curtail the specter of potential liability for every minor technical error, no matter how insignificant. However, § 35.205 is intended to apply in rare circumstances and will require a detailed analysis of the specific facts surrounding the impact of each alleged instance of nonconformance. As noted earlier, the Department does not expect or intend that § 35.205 will excuse most nonconformance to the technical standard.

The Department also believes this approach is preferable to the other approaches considered because it is likely to be familiar to people with disabilities and public entities, and this general consistency with title II's regulatory framework (notwithstanding some necessary differences from the physical context as noted earlier in this discussion) has important benefits. The existing regulatory framework similarly requires public entities to provide equal opportunity to participate in or benefit from services, programs, or activities; [231] equal opportunity to obtain the same result; [232] full and equal enjoyment of services, programs, and activities; [233] and communications with people with disabilities that are as effective as communications with others, which includes consideration of timeliness, privacy, and independence.[234] The 1991 and 2010 ADA Standards also allow designs or technologies that result in substantially equivalent accessibility and usability.[235] Because of the consistency between § 35.205 and existing law, the Department does not anticipate that the requirements for bringing challenges to compliance with subpart H of this part will be radically different than the framework that currently exists. Subpart H adds certainty by establishing that conformance to WCAG 2.1 Level AA is generally sufficient for a public entity to meet its obligations to ensure accessibility of web content and mobile apps. However, in the absence of perfect conformance to WCAG 2.1 Level AA, the compliance approach established by § 35.205 keeps the focus on equal access, as it is under current law. Section 35.205 provides a limited degree of flexibility to public entities without displacing this part's guarantee of equal access for individuals with disabilities or upsetting the existing legal framework.

Finally, this approach to compliance is preferable to the other approaches the Department considered because there was a notable consensus among public commenters supporting it. A wide range of commenters, including disability advocacy organizations, trade groups representing public accommodations, accessibility experts, and State and local government entities submitted supportive comments. Even some of the commenters who opposed this approach noted that it would be helpful if it was combined with a clear technical standard, which the Department has done. Commenters representing a broad spectrum of interests seem to agree with this approach, with several commenters proposing very similar regulatory language. After considering the relative consensus among commenters, together with the other factors discussed herein, the Department has decided to adopt the approach to defining compliance that is set forth in § 35.205.

Alternative Approaches Considered

In addition to the approach set forth in § 35.205, the Department also considered compliance approaches that would have allowed isolated or temporary interruptions to conformance; required a numerical percentage of conformance to the technical standard; or allowed public entities to demonstrate compliance either by establishing and following certain specified accessibility policies and practices or by showing organizational maturity (*i.e.,* that the entity has a sufficiently robust accessibility program to consistently produce accessible web content and mobile apps). The Department also considered the approaches that other States, Federal agencies, and countries have taken, and other approaches suggested by commenters. After carefully weighing all of these alternatives, the Department believes the compliance approach adopted in § 35.205 is the most appropriate framework for determining whether a State or local government entity has met its obligations under § 35.200.

Isolated or Temporary Interruptions

As the Department noted in the NPRM,[236] the current title II regulation does not prohibit isolated or temporary interruptions in service or access to facilities due to maintenance or repairs.[237] In response to the Department's question about whether it should add a similar provision in subpart H of this part, commenters generally supported including an analogous provision in subpart H. They noted that some technical difficulties are inevitable, especially when updating web content or mobile apps. Some commenters elaborated that noncompliance with the technical standard should be excused if it is an isolated incident, as in one page out of many; temporary, as in an issue with an update that is promptly fixed; or through other approaches to measuring compliance addressed in this section. A few commenters stated that due to the continuously evolving nature of web content and mobile apps, there is even more need to include a provision regarding isolated or temporary interruptions than there is in the physical space. Another commenter suggested that entities should prioritize emergency-related information by making sure they have alternative methods of communication in place in anticipation of isolated or temporary interruptions that prevent access to this content.

The Department has considered all of the comments it received on this issue and,

[229] 42 U.S.C. 12101(a)(7).

[230] *See* § 35.130(b)(1)(ii) and (iii).

[231] *Id.* §§ 35.130(b)(1)(ii) and 35.160(b)(1).

[232] *Id.* § 35.130(b)(1)(iii).

[233] *Id.* § 35.130(b)(8).

[234] *Id.* § 35.160(a)(1) and (b).

[235] 28 CFR part 36, appendix D, at 1000 (2022) (1991 ADA Standards); 36 CFR part 1191, appendix B, at 329 (2022) (2010 ADA Standards).

[236] 88 FR 51981.

[237] *See* § 35.133(b).

based on those comments and its own independent assessment, decided not to separately excuse an entity's isolated or temporary noncompliance with § 35.200(b) due to maintenance or repairs in subpart H of this part. Rather, as stated in § 35.205, an entity's legal responsibility for an isolated or temporary instance of nonconformance to WCAG 2.1 Level AA will depend on whether the isolated or temporary instance of nonconformance—as with any other nonconformance—would affect the ability of individuals with disabilities to use the public entity's web content or mobile app in a substantially equivalent way.

The Department believes it is likely that the approach set forth in § 35.205 reduces the need for a provision that would explicitly allow for instances of isolated or temporary noncompliance due to maintenance or repairs, while simultaneously limiting the negative impact of such a provision on individuals with disabilities. The Department believes this is true for two reasons.

First, to the extent isolated or temporary noncompliance due to maintenance or repairs occur that affect web content or mobile apps, it logically follows from the requirements in subpart H of this part that these interruptions should generally result in the same impact on individuals with and without disabilities after the compliance date because, in most cases, all users would be relying on the same content, and so interruptions to that content would impact all users. From the compliance date onward, accessible web content and mobile apps and the web content and mobile apps used by people without disabilities should be one and the same (with the rare exception of conforming alternate versions provided for in § 35.202). Therefore, the Department expects that isolated or temporary noncompliance due to maintenance or repairs generally will affect the ability of people with disabilities to use web content or mobile apps to the same extent it will affect the experience of people without disabilities. For example, if a website is undergoing overnight maintenance and so an online form is temporarily unavailable, the form would already conform to WCAG 2.1 Level AA, and so there would be no separate feature or form for individuals with disabilities that would be affected while a form for people without disabilities is functioning. In such a scenario, individuals with and without disabilities would both be unable to access web content, such that there would be no violation of subpart H of this part.

Thus, the Department believes that a specific provision regarding isolated or temporary noncompliance due to maintenance or repairs is less necessary than it is for physical access. When there is maintenance to a feature that provides physical access, such as a broken elevator, access for people with disabilities is particularly impacted. In contrast, when there is maintenance to web content or mobile apps, people with and without disabilities will generally both be denied access, such that no one is denied access on the basis of disability.

Second, even to the extent isolated or temporary noncompliance due to maintenance or repairs affects only an accessibility feature, that noncompliance may fit the parameters laid out in § 35.205 such that an entity will be deemed to have complied with its obligations under § 35.200. Section 35.205 does not provide a blanket limitation that would excuse all isolated or temporary noncompliance due to maintenance or repairs, however. The provision's applicability would depend on the particular circumstances of the interruption and its impact on people with disabilities. It is possible that an interruption that only affects an accessibility feature will not satisfy the elements of § 35.205 and an entity will not be deemed in compliance with § 35.200. Even one temporary or isolated instance of nonconformance could affect the ability of individuals with disabilities to use the web content with substantially equivalent ease of use, depending on the circumstances. As discussed in this section, this will necessarily be a fact-specific analysis.

In addition to being less necessary than in the physical access context, the Department also believes a specific provision regarding isolated or temporary interruptions due to maintenance or repairs would have more detrimental incentives in the digital space by discouraging public entities from adopting practices that would reduce or avert the disruptions caused by maintenance and repair that affect accessibility. Isolated or temporary noncompliance due to maintenance or repairs of features that provide physical access would be necessary regardless of what practices public entities put in place,[238] and the repairs and maintenance to those features often cannot be done without interrupting access specifically for individuals with disabilities. For example, curb ramps will need to be repaved and elevators will need to be repaired because physical materials break down. In contrast, the Department believes that, despite the dynamic nature of web content and mobile apps, incorporating accessible design principles and best practices will generally enable public entities to anticipate and avoid many instances of isolated or temporary noncompliance due to maintenance or repairs—including many isolated or temporary instances of noncompliance that would have such a significant impact that they would affect people with disabilities' ability to use web content or mobile apps in a substantially equivalent way. Some of these best practices, such as regular accessibility testing and remediation, would likely be needed for public entities to comply with subpart H of this part regardless of whether the Department incorporated a provision regarding isolated or temporary interruptions. And practices like testing content before it is made available will frequently allow maintenance and repairs that affect accessibility to occur without interrupting access, in a way that is often impossible in physical spaces. The Department declines to adopt a limitation for isolated or temporary interruptions due to maintenance or repairs. Such a limitation may disincentivize public entities from implementing processes that could prevent many interruptions from affecting substantially equivalent access.

Numerical Approach

The Department considered requiring a certain numerical percentage of conformance to the technical standard. This percentage could be a simple numerical calculation based on the number of instances of nonconformance across the public entity's web content or mobile app, or the percentage could be calculated by weighting different instances of nonconformance differently. Weighted percentages of many different types, including giving greater weight to more important content, more frequently accessed content, or more severe access barriers, were considered.

When discussing a numerical approach in the NPRM, the Department noted that the approach seemed unlikely to ensure access.[239] Even if only a very small percentage of content does not conform to the technical standard, that could still block an individual with a disability from accessing a service, program, or activity. For example, even if there was only one instance of nonconformance, that single error could prevent an individual with a disability from submitting an application for public benefits. Commenters agreed with this concern. As such, the Department continues to believe that a percentage-based approach would not be sufficient to advance the objective of subpart H of this part to ensure equal access to State and local government entities' web content and mobile apps. Commenters also agreed with the Department that a percentage-based standard would be difficult to implement because percentages would be challenging to calculate.

Based on the public comments it received about this framework, which overwhelmingly agreed with the concerns the Department raised in the NPRM, the Department continues to believe that adopting a percentage-based approach is not feasible. The Department received a very small number of comments advocating for this approach, which were all from State and local government entities. Even fewer commenters suggested a framework for implementing this approach (*i.e.,* the percentage of conformance that should be adopted or how that percentage should be calculated). Based on the very limited information provided in support of a percentage-based approach submitted from commenters, as well as the Department's independent assessment, it would be challenging for the Department to articulate a sufficient rationale for choosing a particular percentage of conformance or creating a specific conformance formula. Nothing submitted in public comments meaningfully changed the Department's previous concerns about calculating a percentage or specifying a formula. For all of the reasons discussed, the Department declines to adopt this approach.

[238] *See* 28 CFR part 35, appendix B, at 705 (2022) (providing that it is impossible to guarantee that mechanical devices will never fail to operate).

[239] 88 FR 51982–51983.

Policy-Based Approach

The Department also considered allowing a public entity to demonstrate compliance with subpart H of this part by affirmatively establishing and following certain robust policies and practices for accessibility feedback, testing, and remediation. Under this approach, the Department would have specified that nonconformance to WCAG 2.1 Level AA does not constitute noncompliance with subpart H if a public entity has established certain policies for testing the accessibility of its web content and mobile apps and remediating inaccessible content, and the entity can demonstrate that it follows those policies. Potential policies could also address accessibility training.

As the Department stated in the NPRM, there were many ways to define the specific policies that would have been deemed sufficient under this approach.[240] Though many commenters supported the idea of a policy-based approach, they suggested a plethora of policies that should be required by subpart H of this part. Commenters disagreed about what type of testing should be required (*i.e.,* automated, manual, or both), who should conduct testing, how frequently testing should be conducted, and how promptly any nonconformance should be remediated. As just one example of the broad spectrum of policies proposed, the frequency of accessibility testing commenters suggested ranged from every 30 days to every five years. A few commenters suggested that no time frames for testing or remediation should be specified in subpart H; rather, they proposed that the nature of sufficient policies should depend on the covered entity's resources, the characteristics of the content, and the complexity of remediating the nonconformance. Commenters similarly disagreed about whether, when, and what kind of training should be required. Commenters also suggested requiring many additional policies and practices, including mechanisms for providing accessibility feedback; accessibility statements; third-party audits; certifications of conformance; documentation of contracting and procurement practices; adopting specific procurement practices; setting certain budgets or staffing requirements; developing statewide panels of accessibility experts; and making accessibility policies, feedback, reports, or scorecards publicly available.

The Department declines to adopt a policy-based approach because, based on the wide range of policies and practices proposed by commenters, there is not a sufficient rationale that would justify adopting any specific set of accessibility policies in the generally applicable regulation in subpart H of this part. Many of the policies commenters suggested would require the Department to dictate particular details of all public entities' day-to-day operations in a way the Department does not believe is appropriate or sufficiently justified to do in subpart H. There was no consensus among commenters about what policies would be sufficient, and most commenters did not articulate a specific basis supporting why their preferred policies were more appropriate than any other policies. In the absence of more specific rationales or a clearer consensus among commenters or experts in the field about what policies would be sufficient, the Department does not believe it is appropriate to prescribe what specific accessibility testing and remediation policies all State and local government entities must adopt to comply with their obligations under subpart H. Based on the information available to the Department at this time, the Department's adoption of any such specific policies would be unsupported by sufficient evidence that these policies will ensure accessibility, which could cause significant harm. It would allow public entities to comply with their legal obligations under subpart H based on policies alone, even though those policies may fail to provide equal access to online services, programs, or activities.

The Department also declines to adopt a policy-based approach that would rely on the type of general, flexible policies supported by some commenters, in which the sufficiency of public entities' policies would vary depending on the factual circumstances. The Department does not believe that such an approach would give individuals with disabilities sufficient certainty about what policies and access they could expect. Such an approach would also fail to give public entities sufficient certainty about how they should meet their legal obligations under subpart H of this part. If it adopted a flexible approach suggested by commenters, the Department might not advance the current state of the law, because every public entity could choose any accessibility testing and remediation policies it believed would be sufficient to meet its general obligations, without conforming to the technical standard or ensuring access. The Department has heard State and local government entities' desire for increased clarity about their legal obligations, and adopting a flexible standard would not address that need.

Organizational Maturity

Another compliance approach that the Department considered would have allowed an entity to demonstrate compliance with subpart H of this part by showing organizational maturity (*i.e.,* that the organization has a sufficiently robust program for web and mobile app accessibility). As the Department explained in the NPRM, while accessibility conformance testing evaluates the accessibility of a particular website or mobile app at a specific point in time, organizational maturity evaluates whether an entity has developed the infrastructure needed to produce accessible web content and mobile apps consistently.[241]

Commenters, including disability advocacy organizations, State and local government entities, trade groups representing public accommodations, and accessibility experts were largely opposed to using an organizational maturity approach to evaluate compliance. Notably, one of the companies that developed an organizational maturity model the Department discussed in the NPRM did not believe that an organizational maturity model was an appropriate way to assess compliance. Other commenters who stated that they supported the organizational maturity approach also seemed to be endorsing organizational maturity as a best practice rather than a legal framework, expressing that it was not an appropriate substitute for conformance to a technical standard.

Misunderstandings about what an organizational maturity framework is and how the Department was proposing to use it that were evident in several comments also demonstrated that the organizational maturity approach raised in the NPRM was not sufficiently clear to the public. For example, at least one commenter conflated organizational maturity with the approach the Department considered that would assess an organization's policies. Another commenter seemed to understand the Department's consideration of organizational maturity as only recommending a best practice, even though the Department was considering it as legal requirement. Comments like these indicate that the organizational maturity approach the Department considered to measure compliance would be confusing to the public if adopted.

Among commenters that supported the organizational maturity approach, there was no consensus about how organizational maturity should be defined or assessed, or what level of organizational maturity should be sufficient to demonstrate compliance with subpart H of this part. There are many ways to measure organizational maturity, and it is not clear to the Department that one organizational maturity model is more appropriate or more effective than any other. The Department therefore declines to adopt an organizational maturity approach in subpart H because any organizational maturity model for compliance with web accessibility that the Department could develop or incorporate would not have sufficient justification based on the facts available to the Department at this time. As with the policy-based approach discussed previously in this appendix, if the Department were to allow public entities to define their own organizational maturity approach instead of adopting one specific model, this would not provide sufficient predictability or certainty for people with disabilities or public entities.

The Department also declines to adopt this approach because commenters did not provide—and the Department is not aware of—information or data to suggest that increased organizational maturity reliably resulted in increased conformance to WCAG 2.1 Level AA. Like the policy-based approach discussed previously in this appendix, if the Department were to adopt an organizational maturity approach that was not sufficiently rigorous, public entities would be able to comply with subpart H of this part without providing equal access. This would undermine the purpose of the part.

[240] *Id.* at 51983–51984.

[241] *Id.* at 51984; *see also* W3C, *Accessibility Maturity Model: Group Draft Note, § 1.1: About the Accessibility Maturity Model* (Dec. 15, 2023), *https://www.w3.org/TR/maturity-model/* [*https://perma.cc/UX4X-J4MF*].

Other Federal, International, and State Approaches

The Department also considered approaches to measuring compliance that have been used by other agencies, other countries or international organizations, and States, as discussed in the NPRM.[242] As to other Federal agencies' approaches, the Department has decided not to adopt the Access Board's standards for section 508 compliance for the reasons discussed in § 35.200 of the section-by-section analysis regarding the technical standard. The Section 508 Standards require full conformance to WCAG 2.0 Level AA,[243] but the Department has determined that requiring perfect conformance to the technical standard set forth in subpart H of this part would not be appropriate for the reasons discussed elsewhere in this appendix. Perfect conformance is less appropriate in subpart H than under section 508 given the wide variety of public entities covered by title II of the ADA, many of which have varying levels of resources, compared to the relatively limited number of Federal agencies that must follow section 508. For the reasons stated in the section-by-section analysis of § 35.200 regarding compliance time frame alternatives, the Department also declines to adopt the tiered approach that the Department of Transportation took in its regulation on accessibility of air carrier websites, which required certain types of content to be remediated more quickly.[244]

The Department has also determined that none of the international approaches to evaluating compliance with web accessibility laws that were discussed in the NPRM are currently feasible to adopt in the United States.[245] The methodologies used by the European Union and Canada require reporting to government agencies. This would pose counterproductive logistical and administrative difficulties for regulated entities and the Department. The Department believes that the resources public entities would need to spend on data collection and reporting would detract from efforts to increase the accessibility of web content and mobile apps. Furthermore, reporting to Federal agencies is not required under other subparts of the ADA, and it is not clear to the Department why such reporting would be more appropriate under subpart H of this part than under others. New Zealand's approach, which requires testing and remediation, is similar to the policy-based approach already discussed in this section, and the Department declines to adopt that approach for the reasons stated in that discussion. The approach taken in the United Kingdom, where a government agency audits websites and mobile apps, sends a report to the public entity, and requires the entity to fix accessibility issues, is similar to one method the Department currently uses to enforce title II of the ADA, including title II web and mobile app accessibility.[246] Though the Department will continue to investigate complaints and enforce the ADA, given constraints on its resources and the large number of entities within its purview to investigate, the Department is unable to guarantee that it will conduct a specific amount of enforcement under subpart H of this part on a particular schedule.

The Department has considered many States' approaches to assessing compliance with their web accessibility laws[247] and declines to adopt these laws at the Federal level. State laws like those in Florida, Illinois, and Massachusetts, which do not specify how compliance will be measured or how entities can demonstrate compliance, are essentially requiring 100 percent compliance with a technical standard. This approach is not feasible for the reasons discussed earlier in this section. In addition, this approach is not feasible because of the large number and wide variety of public entities covered by the ADA, as compared with the relatively limited number of State agencies in a given State. Laws like California's, which require entities covered by California's law to certify or post evidence of compliance, would impose administrative burdens on public entities similar to those imposed by the international approaches discussed in the preceding paragraph. Some State agencies, including in California, Minnesota, and Texas, have developed assessment checklists, trainings, testing tools, and other resources. The Department will issue a small entity compliance guide,[248] which should help public entities better understand their obligations. As discussed elsewhere in this appendix, the Department may also provide further guidance about best practices for a public entity to meet its obligations under subpart H of this part. However, such resources are not substitutes for clear and achievable regulatory requirements. Some commenters stated that regulations should not be combined with best practices or guidance, and further stated that testing methodologies are more appropriate for guidance. The Department agrees and believes State and local government entities are best suited to determine how they will comply with the technical standard, depending on their needs and resources.

The Department also declines to adopt a model like the one used in Texas, which requires State agencies to, among other steps, conduct tests with one or more accessibility validation tools, establish an accessibility policy that includes criteria for compliance monitoring and a plan for remediation of noncompliant items, and establish goals and progress measurements for accessibility.[249] This approach is one way States and other public entities may choose to ensure that they comply with subpart H of this part. However, as noted in the discussion of the policy-based approach, the Department is unable to calibrate requirements that provide sufficient predictability and certainty for every public entity while maintaining sufficient flexibility. The Department declines to adopt an approach like Texas's for the same reasons it declined to adopt a policy-based approach.

Commenters suggested a few additional State and international approaches to compliance that were not discussed in the NPRM. Though the Department reviewed and considered each of these approaches, it finds that they are not appropriate to adopt in subpart H of this part. First, Washington's accessibility policy[250] and associated standard[251] require agencies to develop policies and processes to ensure compliance with the technical standard, including implementing and maintaining accessibility plans. As with Texas's law and a more general policy-based approach, which are both discussed elsewhere in this appendix, Washington's approach would not provide sufficient specificity and certainty to ensure conformance to a technical standard in the context of the title II regulatory framework that applies to a wide range of public entities; however, this is one approach to achieving conformance that entities could consider.

Additionally, one commenter suggested that the Department look to the Accessibility for Ontarians with Disabilities Act[252] and consider taking some of the steps to ensure compliance that the commenter states Ontario has taken. Specifically, the commenter suggested requiring training on how to create accessible content and creating an advisory council that makes suggestions on how to increase public education about the law's requirements. Though the Department will consider providing additional guidance to the public about how to comply with subpart H of this part, it declines to require State and local government entities to provide training to their employees. This would be part of a policy-based compliance approach, which the Department has decided not to adopt for the reasons discussed. However, the Department notes that public entities will likely find that some training is necessary and helpful to achieve compliance. The Department also declines to require State and local government entities to adopt accessibility advisory councils because, like training, this would be part of a policy-based compliance approach. However, public entities remain free to do so if they choose.

Finally, a coalition of State Attorneys General described how their States' agencies currently determine whether State websites and other technology are accessible, and suggested that the Department incorporate

[242] 88 FR 51980–51981.

[243] 36 CFR 1194.1; *id.* at part 1194, appendix A, section E205.4.

[244] *See* 14 CFR 382.43.

[245] 88 FR 51980.

[246] *See* § 35.172(b) and (c) (describing the process for compliance reviews). As noted, however, the Department is unable to guarantee that it will conduct a specific amount of enforcement under subpart H of this part on a particular schedule.

[247] 88 FR 51980–51981.

[248] *See* Public Law 104–121, sec. 212, 110 Stat. at 858.

[249] 1 Tex. Admin. Code secs. 206.50, 213.21 (West 2023).

[250] Wash. Tech. Sols., *Policy 188—Accessibility, https://watech.wa.gov/sites/default/files/2023-09/188_Accessibility_2019_AS%2520v3%2520Approved.docx.* A Perma archive link was unavailable for this citation.

[251] Wash. Tech. Sols., *Standard 188.10—Minimum Accessibility Standard, https://watech.wa.gov/sites/default/files/2023-09/188.10_Min_Std_2019_AS_Approved_03102020_1.docx.* A Perma archive link was unavailable for this citation.

[252] *Accessibility for Ontarians With Disabilities Act, 2005, S.O. 2005, c. 11* (Can.), *https://www.ontario.ca/laws/statute/05a11* [*https://perma.cc/V26B-2NSG*].

similar practices into its compliance framework. Some of these States have designated agencies that conduct automated testing, manual testing, or both, while others offer online tools or require agencies to conduct their own manual testing. Though some of these approaches come from States not already discussed, including Hawaii, New Jersey, and New York, the approaches commenters from these States discussed are similar to other approaches the Department has considered. These States have essentially adopted a policy-based approach. As noted elsewhere in this appendix, the Department believes that it is more appropriate for States and other regulated entities to develop their own policies to ensure compliance than it would be for the Department to establish one set of compliance policies for all public entities. Several State agencies conduct regular audits, but as noted previously in this appendix, the Department lacks the capacity to guarantee it will conduct a specific number of enforcement actions under subpart H of this part on a particular schedule. And as an agency whose primary responsibility is law enforcement, the Department is not currently equipped to develop and distribute accessibility testing software like some States have done. State and local government entities may wish to consider adopting practices similar to the ones commenters described even though subpart H does not require them to do so.

Other Approaches Suggested by Commenters

Commenters also suggested many other approaches the Department should take to assess and ensure compliance with subpart H of this part. The Department has considered all of the commenters' suggestions and declines to adopt them at this time.

First, commenters suggested that public entities should be permitted to provide what they called an ''accommodation'' or an ''equally effective alternative method of access'' when web content or mobile apps are not accessible. Under the approach these commenters envisioned, people with disabilities would need to pursue an interactive process where they discussed their access needs with the public entity and the public entity would determine how those needs would be met. The Department believes that adopting this approach would undermine a core premise of subpart H of this part, which is that web content and mobile apps will generally be accessible by default. That is, people with disabilities typically will not need to make a request to gain access to services, programs, or activities offered online, nor will they typically need to receive information in a different format. If the Department were to adopt the commenters' suggestion, the Department believes that subpart H would not address the gaps in accessibility highlighted in the need for the rulemaking discussed in section III.D.4 of the preamble to the final rule, as the current state of the law already requires public entities to provide reasonable modifications and effective communication to people with disabilities.[253] Under title II, individuals with disabilities cannot be, by reason of such disability, excluded from participation in or denied the benefits of the services, programs, or activities offered by State and local government entities, including those offered via the web and mobile apps.[254] One of the goals of the ADA also includes reducing segregation.[255] Accordingly, it is important for individuals with disabilities to have access to the same platforms as their neighbors and friends at the same time, and the commenters' proposal would not achieve that objective.

Second, commenters suggested a process, which is sometimes referred to as ''notice and cure,'' by which a person with a disability who cannot access web content or a mobile app would need to notify the public entity that their web content or mobile app was not accessible and give the public entity a certain period of time to remediate the inaccessibility before the entity could be considered out of compliance with subpart H of this part. The Department is not adopting this framework for reasons similar to those discussed in relation to the ''equally effective alternative'' approach rejected in the previous paragraph. With subpart H, the Department is ensuring that people with disabilities generally will not have to request access to public entities' web content and content in mobile apps, nor will they typically need to wait to obtain that access. Given the Department's longstanding position on the accessibility of online content, discussed in section III.B and C of the preamble to the final rule, public entities should already be on notice of their obligations. If they are not, the final rule unquestionably puts them on notice.

Third, commenters suggested a flexible approach to compliance that would only require substantial compliance, good faith effort, reasonable efforts, or some similar concept that would allow the meaning of compliance to vary too widely depending on the circumstances, and without a clear connection to whether those efforts result in actual improvements to accessibility for people with disabilities. The Department declines to adopt this approach because it does not believe such an approach would provide sufficient certainty or predictability to State and local government entities or individuals with disabilities. Such an approach would undermine the benefits of adopting a technical standard.

The Department has already built a series of mechanisms into subpart H of this part that are designed to make it feasible for public entities to comply, including the delayed compliance dates in § 35.200(b), the exceptions in § 35.201, the conforming alternate version provision in § 35.202, the fundamental alteration or undue burdens limitations in § 35.204, and the compliance approach discussed here. In doing so, the Department has allowed for several departures from the technical standard, but only under clearly defined and uniform criteria, well-established principles in the ADA or WCAG, or circumstances that would not affect substantially equivalent access. Many of the approaches that commenters proposed are not similarly cabined. Those approaches would often allow public entities' mere attempts to achieve compliance to substitute for access. The Department declines to adopt more flexibility than it already has because it finds that doing so would come at too great a cost to accessibility and to the clarity of the obligations in subpart H.

Fourth, several commenters proposed a multi-factor or tiered approach to compliance. For example, one commenter suggested a three-tiered system where after one failed accessibility test the public entity would investigate the problem, after multiple instances of nonconformance they would enter into a voluntary compliance agreement with the Department, and if there were widespread inaccessibility, the Department would issue a finding of noncompliance and impose a deadline for remediation. Similarly, another commenter proposed that enforcement occur only when two of three criteria are met: errors are inherent to the content itself, errors are high impact or widely prevalent, and the entity shows no evidence of measurable institutional development regarding accessibility policy or practice within a designated time frame. The Department believes that these and other similar multi-factor approaches to compliance would be too complex for public entities to understand and for the Department to administer. It would also be extremely challenging for the Department to define the parameters for such an approach with an appropriate level of precision and a sufficiently well-reasoned justification.

Finally, many commenters proposed approaches to compliance that would expand the Department's role. Commenters suggested that the Department grant exceptions to the requirements in subpart H of this part on a case-by-case basis; specify escalating penalties; conduct accessibility audits, testing, or monitoring; provide grant funding; develop accessibility advisory councils; provide accessibility testing tools; specify acceptable accessibility testing software, resources, or methodologies; provide a list of accessibility contractors; and provide guidance, technical assistance, or training.

With the exception of guidance and continuing to conduct accessibility testing as part of compliance reviews or other enforcement activities, the Department is not currently in a position to take any of the actions commenters requested. As described in this section, the Department has limited enforcement resources. It is not able to review requests for exceptions on a case-by-case basis, nor is it able to conduct accessibility testing or monitoring outside of compliance reviews, settlement agreements, or consent decrees. Civil penalties for noncompliance with the ADA are set by statute and are not permitted under title II.[256] Though the Department sometimes seeks monetary relief for individuals aggrieved under title II in its enforcement actions, the appropriate amount of relief is determined on a case-by-case basis and would be

[253] Section 35.130(b)(7) and 35.160.

[254] 42 U.S.C. 12132.

[255] 42 U.S.C. 12101(a)(2) and (5).

[256] *See* 42 U.S.C. 12188(b)(2)(C) (allowing civil penalties under title III); *see also* 28 CFR 36.504(a)(3) (updating the civil penalty amounts).

challenging to establish in a generally applicable rule. The Department does not currently operate a grant program to assist public entities in complying with the ADA, and, based on the availability and allocation of the Department's current resources, it does not believe that administering advisory committees would be the best use of its resources. The Department also lacks the resources and technical expertise to develop and distribute accessibility testing software.

The Department will issue a small entity compliance guide [257] and will continue to consider what additional guidance or training it can provide that will assist public entities in complying with their obligations. However, the Department believes that so long as public entities satisfy the requirements of subpart H of this part, it is appropriate to allow public entities flexibility to select accessibility tools and contractors that meet their individualized needs. Any specific list of tools or contractors that the Department could provide is unlikely to be helpful given the rapid pace at which software and contractor availability changes. Public entities may find it useful to consult other publicly available resources that can assist in selecting accessibility evaluation tools and experts.[258] Resources for training are also already available.[259] State and local government entities do not need to wait for the Department's guidance before consulting with technical experts and using resources that already exist.

Public Comments on Other Issues in Response to the NPRM

The Department received comments on a variety of other issues in response to the NPRM. The Department responds to the remaining issues not already addressed in this section-by-section analysis.

Scope

The Department received some comments that suggested that the Department should take actions outside the scope of the rulemaking to improve accessibility for people with disabilities. For example, the Department received comments suggesting that the rulemaking should: apply to all companies or entities covered under title III of the ADA; prohibit public entities from making information or communication available only via internet means; revise other portions of the title II regulation like subpart B of this part (general requirements); require accessibility of all documents behind any paywall regardless of whether title II applies; and address concerns about how the increased use of web and mobile app technologies may affect individuals with electromagnetic sensitivity. While the Department recognizes that these are important accessibility issues to people with disabilities across the country, they are outside of the scope of subpart H of this part, which focuses on web and mobile app accessibility under title II. Accordingly, these issues are not addressed in detail in subpart H.

The Department also received comments recommending that this part cover a broader range of technology in addition to web content and mobile apps, including technologies that may be developed in the future. The Department declines to broaden this part in this way. If, for example, the Department were to broaden the scope of the rulemaking to cover an open-ended range of technology, it would undermine one of the major goals of the rulemaking, which is to adopt a technical standard State and local government entities must adhere to and clearly specify which content must comply with that standard. In addition, the Department does not currently have sufficient information about how technology will develop in the future, and how WCAG 2.1 Level AA will (or will not) apply to that technology, to enable the Department to broaden the part to cover all future technological developments. Also, the Department has a long history of engaging with the public and stakeholders about web and mobile app accessibility and determined that it was appropriate to prioritize regulating in that area. However, State and local government entities have existing obligations under title II of the ADA with respect to services, programs, and activities offered through other types of technology.[260]

Another commenter suggested that the rulemaking should address operating systems. The commenter also suggested clarifying that public entities are required to ensure web content and mobile apps are accessible, usable, and interoperable with assistive technology. The Department understands this commenter to be requesting that the Department establish additional technical standards in this part beyond WCAG 2.1 Level AA, such as technical standards related to software. As discussed in this section and the section-by-section analysis of § 35.104, subpart H of this part focuses on web content and mobile apps. The Department also clarified in the section-by-section analysis of § 35.200 why it believes WCAG 2.1 Level AA is the appropriate technical standard for subpart H.

Coordination With Other Federal and State Entities

One commenter asked if the Department has coordinated with State governments and other Federal agencies that are working to address web and mobile app accessibility to ensure there is consistency with other government accessibility requirements. Subpart H of this part is being promulgated under part A of title II of the ADA. The Department's analysis and equities may differ from State and local government entities that may also interpret and enforce other laws addressing the rights of people with disabilities. However, through the NPRM process, the Department received feedback from the public, including public entities, through written comments and listening sessions. In addition, the final rule and associated NPRM were circulated to other Federal Government agencies as part of the Executive Order 12866 review process. In addition, under Executive Order 12250, the Department also coordinates with other Federal agencies to ensure the consistent and effective implementation of section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of disability, and to ensure that such implementation is consistent with title II of the ADA across the Federal Government.[261] Accordingly, the Department will continue to work with other Federal agencies to ensure consistency with its interpretations in the final rule, in accordance with Executive Order 12250.

Impact on State Law

Some commenters discussed how this part might impact State law, including one comment that asked how a public entity should proceed if it is subject to a State law that provides greater protections than this part. This part will preempt State laws affecting entities subject to title II of the ADA only to the extent that those laws provide less protection for the rights of individuals with disabilities.[262] This part does not invalidate or limit the remedies, rights, and procedures of any State laws that provide greater or equal protection for the rights of individuals with disabilities. Moreover, the Department's provision on equivalent facilitation at § 35.203 provides that nothing prevents a public entity from using designs, methods, or techniques as alternatives to those prescribed in subpart H of this part, provided that such alternatives result in substantially equivalent or greater accessibility and usability. Accordingly, for example, if a State law requires public entities in that State to conform to WCAG 2.2, nothing in subpart H would prevent a public entity from conforming with that standard.

Preexisting Technology

One public entity said that the Department should permit public entities to continue to use certain older technologies, because some public entities have systems that were developed several years ago with technologies that may not be able to comply with this part. The commenter also added that if a public entity is aware of the technical difficulties or need for remediation in relation to recent maintenance, updates, or repairs, more leniency should be given to the

[257] *See* Public Law 104–121, sec. 212, 110 Stat. at 858.

[258] *See, e.g.,* W3C, *Evaluating Web Accessibility Overview, https://www.w3.org/WAI/test-evaluate/* [*https://perma.cc/6RDS-X6AR*] (Aug. 1, 2023).

[259] *See, e.g.,* W3C, *Digital Accessibility Foundations Free Online Course, https://www.w3.org/WAI/courses/foundations-course/* [*https://perma.cc/KU9L-NU4H*] (Oct. 24, 2023).

[260] *See* §§ 35.130(b)(1)(ii) and (b)(7) and 35.160.

[261] Memorandum for Federal Agency Civil Rights Directors and General Counsels, from Kristen Clarke, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, *Re: Executive Order 12250 Enforcement and Coordination Updates* (Jan. 20, 2023), *https://www.justice.gov/media/1284016/dl?inline* [*https://perma.cc/AL6Q-QC57*]; Memorandum for Federal Agency Civil Rights Directors and General Counsels, from John M. Gore, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, *Re: Coordination of Federal Agencies' Implementation of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act,* Civil Rights Division, U.S. Department of Justice (Apr. 24, 2018), *https://www.justice.gov/crt/page/file/1060321/download* [*https://perma.cc/9Q98-BVU2*].

[262] *See* 42 U.S.C. 12201.

public entity with respect to the compliance time frame.

The Department believes it has balanced the need to establish a workable standard for public entities with the need to ensure accessibility for people with disabilities in many ways, such as by establishing delayed compliance dates to give public entities time to ensure their technologies can comply with subpart H of this part. In addition, subpart H provides some exceptions addressing older content, such as the exceptions for archived web content, preexisting conventional electronic documents, and preexisting social media posts. The Department believes that these exceptions will assist covered entities in using their resources more efficiently. Also, the Department notes that public entities will be able to rely on the fundamental alteration or undue burdens and limitations in subpart H where they can satisfy the requirements of those provisions. Finally, the Department discussed isolated or temporary interruptions in § 35.205 of the section-by-section analysis, where it explained its decision not to separately excuse an entity's isolated or temporary noncompliance with § 35.200 due to maintenance or repairs.

Overlays

Several comments expressed concerns about public entities using accessibility overlays and automated checkers.[263] Subpart H of this part sets forth a technical standard for public entities' web content and mobile apps. Subpart H does not address the internal policies or procedures that public entities might implement to conform to the technical standard under subpart H.

[263] *See* W3C, *Overlay Capabilities Inventory: Draft Community Group Report* (Feb. 12, 2024), *https://a11yedge.github.io/capabilities/* [*https://perma.cc/2762-VJEV*]; *see also* W3C, Draft *Web Accessibility Evaluation Tools List, https://www.w3.org/WAI/ER/tools/* [*https://perma.cc/Q4ME-Q3VW*] (last visited Feb. 12, 2024).

ADA Coordinator

At least one commenter suggested that the Department should require public entities to hire an ADA Coordinator devoted specifically to web accessibility, similar to the requirement in the existing title II regulation at § 35.107(a). The Department believes it is important for public entities to have flexibility in deciding how to internally oversee their compliance with subpart H of this part. However, nothing in subpart H would prohibit a public entity from appointing an ADA coordinator for web content and mobile apps if the public entity believes taking such an action would help it comply with subpart H.

Dated: April 8, 2024.

Merrick B. Garland,

Attorney General.

[FR Doc. 2024–07758 Filed 4–23–24; 8:45 am]

BILLING CODE 4410–13–P

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 March 11, 2025, I served the:

- **Current Mailing List dated March 11, 2025**
- **Notice of Complete Test Claim, Schedule for Comments, and Notice of Tentative Hearing Date issued March 11, 2025**
- **Test Claim filed by the County of Santa Clara on December 16, 2024**

  Internet Websites and Email Addresses, 24-TC-04
  Statutes 2023, Chapter 586 (AB 1637); Government Code Section 50034(a)(1)-(2) and (b)
  County of Santa Clara, 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 March 11, 2025 at Sacramento, California.

Jill Magee

Jill Magee
Commission on State Mandates
980 Ninth Street, Suite 300
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(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 3/11/25

Claim Number: 24-TC-04

Matter: Internet Websites and Email Addresses

Claimant: County of Santa Clara

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.)

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