Hearing Date: July 26, 2013
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ITEM __

MANDATE REDETERMINATION
FIRST HEARING: ADEQUATE SHOWING

DRAFT STAFF ANALYSIS AND PROPOSED STATEMENT OF DECISION

Welfare and Institutions Code Sections 6601, 6602, 6603, 6604, 6605, and 6608

Statutes 1995, Chapter 762 (SB 1143); Statutes 1995, Chapter 763 (AB 888); Statutes 1996, Chapter 4 (AB 1496)

Sexually Violent Predators, (CSM-4509)

As Alleged to be Modified by:

Proposition 83, General Election, November 7, 2006

12-MR-01

Department of Finance, Requester

Attached is the draft proposed statement of decision for this matter. This Executive Summary and the draft proposed statement of decision also function as the draft staff analysis, as required by section 1190.05 of the Commission's regulations.

EXECUTIVE SUMMARY

Overview

On June 25, 1998, the Commission adopted a statement of decision approving reimbursement for the *Sexually Violent Predators* (SVP) program, CSM-4509, which established civil commitment procedures for the civil detention and treatment of sexually violent predators following completion of the individual's criminal sentence for certain sex-related offenses. Before civil detention and treatment are imposed, the county attorney is required to file a petition for civil commitment. A trial is then conducted to determine beyond a reasonable doubt if the person is a sexually violent predator. If the person alleged to be a sexually violent predator is indigent, the counties are required to provide the indigent person with the assistance of counsel and experts necessary to prepare the defense.

In the CSM-4509 test claim decision, the Commission determined that Welfare and Institutions Code sections 6601(i), 6602, 6603, 6604, 6605(b)-(d), and 6608(a)-(d) as enacted or amended by the 1995 and 1996 test claim statutes, imposed the following reimbursable state-mandated on counties:

- Designation by the County Board of Supervisors of the appropriate District Attorney or County Counsel who will be responsible for the sexually violent predator civil commitment proceedings. (Welf. & Inst. Code, § 6601(i).)

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

On September 24, 1998, the Commission adopted parameters and guidelines for the approved activities. On October 30, 2009 the parameters and guidelines were amended.

On November 7, 2006 the voters approved Proposition 83, also known as Jessica's law, which, among other changes, amended and reenacted several sections of the Welfare and Institutions Code, including sections approved for reimbursement in the CSM-4509 test claim.

On January 15, 2013, the Department of Finance (DOF) filed a request for redetermination of the CSM-4509 decision pursuant to Government Code section 17570.[3] DOF asserts that Proposition 83 constitutes a subsequent change in the law, as defined in section 17570, which, pursuant to section 17556(f), results in the state's liability under the test claim statutes being modified.[4] Specifically, DOF argues that because sections 6601, 6604, 6605, and 6608 were included in their entirety in Proposition 83, the voters reenacted the entirety of those sections, "including the

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

[2] The title of the parameters and guidelines for the *Sexually Violent Predators* program refers to Welfare and Institutions Code sections 6250 and 6600 through 6608. However, the Commission approved reimbursement for only the activities required by sections 6601, 6602, 6603, 6604, 6605, and 6608.

[3] Based on the January 15, 2013 filing date, the potential period of reimbursement affected by this redetermination begins July 1, 2011.

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

portions not amended." DOF also argues that "[t]he remainder of the mandate's Welfare and Institutions Code sections that were not expressly included in the ballot measure [i.e., sections 6602 and 6603] are, nevertheless, necessary to implement the ballot measure." DOF concludes that "all activities found to be reimbursable by the Commission in the *Sexually Violent Predator* mandate are no longer reimbursable pursuant to Government Code section 17556, subdivision f, as they are either: (1) expressly included in Prop 83 or, (2) necessary for the implementation of Prop 83."[5]

Section 17570 provides a process whereby a previously determined mandate finding can be redetermined by the Commission, based on a subsequent change in law. The redetermination process provides for a two-step hearing. The Commission's regulations state that "the first hearing shall be limited to the issue of whether the requester has made an adequate showing which identifies a subsequent change in law as defined by Government Code section 17570, material to the prior test claim decision, that may modify the state's liability pursuant to Article XIII B, section 6, subdivision (a) of the California Constitution." The regulations state that the Commission "shall find that the requester has made an adequate showing if it finds that the request, when considered in light of all of the written responses and supporting documentation in the record of this request, has a substantial possibility of prevailing at the second hearing." The regulations further state that "[i]f the commission proceeds to the second hearing, it shall consider 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 decision.[6]

Therefore, the sole issue before the Commission at this first hearing is whether DOF, as the requester, has made an adequate showing that the state's liability has been modified pursuant to a subsequent change in law, as defined in section 17570.

Because the determination of this matter will have significant budgetary impacts on the state and eligible local agency claimants beginning in the 2011-2012 fiscal year, requests have been made by DOF and some of the eligible local agency claimants to expedite this matter. Those requests were granted and, as a result, this matter has been scheduled for hearing ahead of other matters which were filed before it.

Staff Analysis

Government Code section 17556(f) provides that the Commission *shall not find* costs mandated by the state, within the meaning of article XIII B, section 6, if a test claim statute or executive order "imposes duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election." Section 17556(f) also states that this rule "applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters."[7]

Staff finds that Proposition 83, which amended and reenacted Welfare and Institutions Code sections 6601, 6604, 6605, and 6608, constitutes a subsequent change in law, as defined in section 17570. The duties imposed by sections 6601, 6604, 6605, and 6608 are now expressly

[5] *Ibid*.

[6] Code of Regulations, Title 2, section 1190.05 (Register 2010, No. 48).

[7] Government Code section 17556 (As amended by Stats. 2010, ch. 719 (SB 856)).

included in a ballot measure approved by the voters in a statewide election and, pursuant to section 17556(f), the Commission shall not find costs mandated by the state for the activities required by those statutes. Therefore, DOF has made an adequate showing that the state's liability under the CSM-4509 test claim decision has been modified, and that DOF has a substantial possibility of prevailing at the second hearing.

Staff Recommendation

Staff recommends that the Commission adopt this statement of decision and, pursuant to Government Code section 17570(b)(d)(4), direct staff to notice the request for a second hearing to determine if a new test claim decision shall be adopted to supersede the previously adopted test claim decision. If the Commission adopts the attached proposed statement of decision, the second hearing for this matter will be set for September 27, 2013.

Staff also recommends that the Commission authorize staff to make any non-substantive, technical changes to the proposed statement of decision following the hearing.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE MANDATE REDETERMINATION: FIRST HEARING: ADEQUATE SHOWING ON: Welfare and Institutions Code sections 6601, 6602, 6603, 6604, 6605, and 6608; As added or amended by Statutes 1995, Chapter 762 (SB 1143); Statutes 1995, Chapter 763 (AB 888); Statutes 1996, Chapter 4 (AB 1496). *Sexually Violent Predators* (CSM-4509) As Alleged to be Modified by: Proposition 83, General Election, November 7, 2006 Filed on January 15, 2013 By the Department of Finance, Requester.	Case No.: 12-MR-01 *Sexually Violent Predators (CSM-4509)* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500, ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted July 26, 2013*)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this mandate redetermination during a regularly scheduled hearing on July 26, 2013. [Witness list will be included in the final statement of decision.]

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., title 2, California Code of Regulations 1189 et seq., and related case law.

The Commission [adopted/modified] the staff analysis at the hearing by a vote of [vote count will be included in the final statement of decision], and [directed/did not direct] staff to notice a second hearing to determine whether to adopt a new test claim decision to supersede the previously adopted test claim decision.

Summary of the Findings

The Commission finds that the Department of Finance (DOF) has made an adequate showing that the state's liability pursuant to article XIII B, section 6(a) of the California Constitution, for the CSM-4509 mandate has been modified based on a subsequent change in law. Specifically, Proposition 83, adopted by the voters on November 7, 2006 expressly included Welfare and

Institutions Code sections 6601, 6604, 6605, and 6608 and Government Code section 17556(f) excludes duties that are expressly included in a ballot measure approved by the voters from a finding of costs mandated by the state. Pursuant to Government Code section 17570(b)(d)(4), the Commission will hold a second hearing to determine if a new test claim decision shall be adopted to supersede the previously adopted test claim decision.

COMMISSION FINDINGS

Chronology

06/25/1998	The Commission adopted the test claim statement of decision for *Sexually Violent Predators*, (CSM-4509), approving reimbursement for certain activities under Welfare and Institutions Code sections 6601, 6602, 6603, 6604, 6605, and 6608.[8]
09/24/1998	The Commission adopted parameters and guidelines.[9]
11/08/2006	California voters approved Proposition 83, which amended and reenacted several sections of the Welfare and Institutions Code.[10]
10/30/2009	The Commission adopted amended parameters and guidelines.[11]
1/15/2013	DOF filed a request for redetermination of CSM-4509.[12]
1/24/2013	Commission staff deemed the filing complete.
2/13/2013	The State Controller's Office (SCO) submitted comments.[13]
2/13/2013	The County of Los Angeles requested an extension of time to file comments.
2/13/2013	The California State Association of Counties (CSAC) requested an extension of time to file comments.
2/14/2013	The County of San Diego requested an extension of time to file comments.
2/15/2013	The Executive Director granted an extension of time for the submittal of all comments until March 27, 2013, and set the matter for the first hearing on July 26, 2013.
3/19/2013	California District Attorneys' Association (CDAA) submitted comments on the request for redetermination.[14]
3/22/2013	CSAC submitted comments on the request for redetermination.[15]

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

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

[10] See Exhibit A, Request for Redetermination.

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

[12] Exhibit A, Request for Redetermination.

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

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

3/25/2013	California Public Defenders' Association (CPDA) submitted comments on the request for redetermination.[16]
3/25/2013	District Attorney of San Bernardino County submitted comments on the request for redetermination.[17]
3/25/2013	County of San Bernardino submitted comments on the request for redetermination.[18]
3/26/2013	District Attorney of Sacramento County submitted comments on the request for redetermination.[19]
3/26/2013	District Attorney of Los Angeles County submitted comments on the request for redetermination.[20]
3/27/2013	County of Los Angeles submitted comments on the request for redetermination.[21]
3/27/2013	Alameda County Public Defender submitted comments on the request for redetermination.[22]
3/27/2013	County Counsel of San Diego County submitted comments on the request for redetermination.[23]
3/29/2013	Alameda County District Attorney submitted comments on the request for redetermination.[24]

I. Background

The Sexually Violent Predator Program and Alleged Subsequent Change in Law

The *Sexually Violent Predators* (SVP) program established civil commitment procedures for the civil detention and treatment of sexually violent predators following the completion of an individual's criminal sentence imposed for certain sex-related offenses. Before civil detention and treatment are imposed, the county counsel or district attorney is required to file a petition for

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

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

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

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

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

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

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

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

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

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

civil commitment. A trial is then conducted to determine beyond a reasonable doubt if the person is a sexually violent predator. If the person alleged to be a sexually violent predator is indigent, the county is required to provide the indigent person with the assistance of counsel and experts necessary to prepare the defense.

The Commission concluded, in the CSM-4509 test claim statement of decision, that Welfare and Institutions Code sections 6601(i), 6602, 6603, 6604, 6605(b)-(d), and 6608(a)-(d) as enacted or amended by the 1995 and 1996 test claim statutes, imposed a reimbursable state-mandated program, on counties within the meaning of article XIII B, section 6, of the California Constitution.[25]

On November 7, 2006, the voters approved Proposition 83, also known as "Jessica's Law." Proposition 83 effected a number of amendments to the Penal Code, including, among other changes, strengthening penalties for kidnapping and sexual offenses perpetrated upon children, and expanding the definitions of certain sexual offenses, especially by removing the requirement of "force, violence, duress, menace, or fear of immediate and unlawful bodily injury" from the definitions of several crimes.[26] Proposition 83 also mandated consecutive sentences for a number of sexual offenses,[27] mandated a minimum 25 year sentence for a "habitual sexual offender," as defined,[28] and required persons released on parole from a "registerable sex offense" to be monitored for the duration of their parole by a global positioning system device, for which the parolee is responsible to pay, unless granted a waiver by the Department of Corrections.[29]

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

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

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

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

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

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

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

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

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

And finally, Proposition 83 amended section 6608 to provide that, notwithstanding the provisions of section 6605, a person may petition the court for "*conditional release or an unconditional discharge*" without approval from the director of the Department of Mental Health. The test claim statute stated "conditional release *and subsequent* unconditional discharge."[30]

Mandate Redetermination Process under Section 17570

Government Code section 17570 provides a process whereby a test claim decision may be redetermined and superseded by a new test claim decision, if a subsequent change in law, as defined, has altered the state's liability for reimbursement. The redetermination process calls for a two stage hearing; at the first stage, the requester must make "an adequate showing which identifies a subsequent change in law as defined by Government Code section 17570, material to the prior the claim decision, that may modify the state's liability pursuant to Article XIII B, section 6, subdivision (a) of the California Constitution."[31]

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

> [A] change in law that requires a finding that an incurred cost is a cost mandated by the state, as defined by Section 17514, or is not a cost mandated by the state pursuant to Section 17556, or a change in mandates law, except that a "subsequent change in law" does not include the amendments to Section 6 of Article XIII B of the California Constitution that were approved by the voters on November 2, 2004. A "subsequent change in law" also does not include a change in the statutes or executive orders that impose new state-mandated activities and require a finding pursuant to subdivision (a) of Section 17551.[32]

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[30] Compare Penal Code sections 6601, 6604, 6605, and 6608 (as added or amended by Stats. 1995, ch. 762; Stats. 1995, ch. 763; Stats. 1996, ch. 4) with Penal Code sections 6601, 6604, 6605, and 6608, as amended by Proposition 83.

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

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

If the Commission finds, at the first hearing, that the requester has made an adequate showing, "when considered in light of all of the written responses, rebuttals and supporting documentation in the record and testimony at the hearing, the commission shall publish a decision finding that an adequate showing has been made and setting the second hearing on the request to adopt a new test claim decision to supersede the previously adopted test claim decision."[33]

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

A. Department of Finance, Requester

DOF submitted a request to adopt a new test claim decision regarding Welfare and Institutions Code sections 6601, 6602, 6603, 6604, 6605, and 6608, pursuant to Government Code section 17570. DOF asserts that Proposition 83 constitutes a subsequent change in the law, as defined in section 17570, which, when analyzed in light of section 17556, results in the state's liability under the test claim statutes being modified. DOF argues that "the state's obligation to reimburse affected local agencies has ceased."[34] Specifically, DOF argues that because sections 6601, 6604, 6605, and 6608 were included in their entirety in Proposition 83, the voters reenacted the entirety of those sections, "including the portions not amended," and therefore the test claim statutes impose duties expressly included in the voter-enacted ballot measure. DOF also argues that "[t]he remainder of the mandate's Welfare and Institutions Code sections that were not expressly included in the ballot measure are, nevertheless, necessary to implement the ballot measure." DOF concludes that "all activities found to be reimbursable by the Commission in the *Sexually Violent Predator* mandate are no longer reimbursable pursuant to Government Code section 17556, subdivision f, as they are either: (1) expressly included in Prop 83 or, (2) necessary for the implementation of Prop 83."[35]

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

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

> The County opposes the DOF's request to adopt a new test claim on the basis that: 1) the extraneous text included in the body of Prop 83 did not constitute a change in the law; 2) Prop 83 did not convert activities identified in the Commission's 1998 Statement of Decision to activities necessary to implement Prop 83, therefore, no longer reimbursable; and 3) Government Code Section 17570 is unconstitutional.[36]

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

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[33] California Code of Regulations, Title 2, section 1190.05(a)(5)(B).

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

[35] *Ibid.*

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

> The changes actually proposed by Prop 83 were few and narrow, particularly in light of revisions to SVP laws that had recently been codified by S8 1128. The Secretary of State's practice of giving textual context to a ballot proposal by including unaffected statutory provisions is a benign protocol intended to fully inform the voters. Affirmation of existing law most certainly does not give rise to the change in law contemplated by Section 17570.[37]

Thus, LA County also implies, in the excerpt above, that sections 6601, 6604, 6605, and 6608 were reproduced in the ballot measure in their entirety as a matter of "protocol," not because the ballot measure was intended to effect substantive or pervasive changes. Finally, LA County argues that section 17570 is unconstitutional on separation of powers grounds, and because it is "an infringement of article XIII 8, section 6, of the California Constitution."[38]

C. State Controller's Office

The SCO agrees with DOF "that the eight activities previously determined to be reimbursable in the Statement of Decision adopted on June 25, 1998 cease to be reimbursable."[39]

D. Other Interested Parties and Persons

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

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

> The Department of Finance contention that the mere recitation of any portion of a statute contained in a proposition, brings it within the "expressly included in" language of Government Code § 17556(f) regardless of whether the sections mandating local activity were amended or not, and whether or not the intent of the initiative and purpose of the initiative was to eliminate the subvention requirements of Article XIII B §6 by operation of Government Code § 17566(f), is not warranted. Such an interpretation would make the application of the statute so over broad and vague that no voter, local official, or legal analyst could accurately predict whether state mandated subvention would cease to exist as they voted to pass any ballot initiative that referenced existing law.[40]

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

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

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

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

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

reimbursable by the state." They assert that this conclusion should be given great weight, "despite the Department of Finance's now changed opinion."[41]

2. California State Association of Counties

CSAC submitted comments in response to DOF's request to adopt a new test claim decision, in which CSAC argues that the state's liability has not been affected by Proposition 83. CSAC argues that the California Constitution mandates reimbursement for new programs or higher levels of service, subject to "four exceptions, but none of them are relevant in this case." CSAC argues that "[i]n particular, there is no exception for a ballot measure that voters pass years later that does not substantively amend any of the language that established the mandate in the first place."[42] CSAC further argues that the SVP program was unaffected by the passage of Proposition 83: "[b]ecause the ballot measure made no substantive changes to the reimbursable aspects of the program, the SVP program established by the Legislature would have remained in place whether voters approved or disapproved Proposition 83." CSAC also notes that "SB 1128, by Senator Alquist, amended Sections 6600, 6601, 6604, 6604.1, and 6605 of the Welfare and Institutions Code, among many others," less than two months prior to the election in which Proposition 83 was adopted, and that therefore Proposition 83 made no substantive changes to the law in effect at that time. Finally, CSAC argues that the request should be rejected because the Director of DOF "told the voters that counties would be reimbursed." CSAC cites the ballot materials and the analysis published leading up to the election:

> At the time Proposition 83 went to the ballot, the chief analysts representing both the Administration and the Legislature- the Director of Finance and the Legislative Analyst- agreed that all county costs related to the SVP commitment process would be reimbursed by the state. They stated the fact that counties would be reimbursed four times in their official fiscal analysis provided to the Attorney General, and voters decided the outcome of Proposition 83 based in part on that assurance.
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> In their official fiscal analysis of the ballot measure required by law, the Legislative Analyst and Director of Finance state unequivocally that Proposition 83 would increase state costs to, among other things, "reimburse counties for their costs for participation in the SVP commitment process."[43]

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

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

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

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

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

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

> (1) The 2012 legislative amendment and re-enactment of the Sexually Violent Predator Act (SVP A) either confirmed the viability of the Sexually Violent Predator Mandate (CSM-4509), or, *arguendo,* superseded any impact that Proposition 83 may have affected on the mandate; (2) Misrepresentation and the doctrines of estoppel and unclean hands bar the DOF's redetermination request; (3) Proposition 83 did not effectuate a "subsequent change in the law" as contemplated by Government Code section 17570; and (4) Government Code section17570 is unconstitutional.[44]

The comments note that in 2012, the Legislature enacted substantive amendments to the SVP program, which, it is argued, "superseded any impact" of Proposition 83. CPDA and the Alameda County Public Defender's Office argue that due to the 2012 amendments to the relevant codes sections "Proposition 83 is no longer the statutory authority supporting the SVPA; consequently the cost incurred by local agencies to comply with the 2012 legislatively enacted SVPA is a cost mandated by the state."[45] The comments cite the LAO and DOF analysis of Proposition 83, and argue that DOF should now be estopped from seeking redetermination of the SVP mandate because of the position taken prior to the election on Proposition 83.[46] The comments also focus on the 2006 legislative amendment to the SVP program, arguing that DOF's request for redetermination "is misleading because the statutory language quoted from the SVPA by the DOF's January 15,2013, request, as well as that include [sic] in the actual proposition, was not the statutory language in effect at the time Proposition 83 was passed on November 7, 2006."[47] And finally, the comments assert that section 17570 is unconstitutional, because it is unconstitutionally vague, with respect to the term "subsequent change in law," and because it violates separation of powers doctrine.[48]

4. County of San Bernardino

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

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

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

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

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

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

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

San Bernardino also implies that no subsequent change in law has occurred, reasoning that "[t]he statutory changes in the initiative did not relieve counties of their preexisting state mandated activities per Welfare and Institutions Code section 6601 through 6604."[49]

5. Sacramento County District Attorney's Office

The Sacramento County DA argues that no subsequent change in law has occurred, and that "the legislature still retains a true choice in whether to have the duties imposed on local government in the statute remain with local governments, or change the statutes so that the mandated duties are performed at the state level." The Sacramento County DA focuses on the fact that Proposition 83 permits the Legislature "to amend, by a statute passed by a roll call vote of two-thirds of each house," and implies that the failure to relieve local agencies of the duties imposed by Proposition 83 constitutes a reimbursable state mandate.

The Sacramento County DA argues further that "[t]he fact that pre-existing law has simply been recited again, either in a statute re-enacted by the legislature, or as part of a new ballot measure…does not amount to a change in the law for § 17570 purposes." The Sacramento County DA focuses on the fact that "the mandated activities at issue here were in place before the initiative was enacted," and concludes that "there has been no change in the applicable law."[50]

Finally, the Sacramento County DA argues that DOF's redetermination request was never intended by the voters, and that a new test claim decision eliminating reimbursement would provide a windfall to the state, and impose a hardship on local governments.[51]

6. Los Angeles County District Attorney's Office

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

The LA County DA's comments argue that Proposition 83 "simply reaffirmed many of the changes already effectuated by SB 1128," that "the changes actually proposed by Prop 83 were few and narrow," and that "[a]ffirmation of existing law certainly does not give rise to the change in law contemplated by Section 17570."[52] LA County DA's comments argue that "inclusion, within the text of an initiative, of language that is unaffected by proposed revisions to the law does not constitute a change in the law,"[53] LA County DA's comments further assert that "[a]n activity may not fairly be recharacterized as "necessary to implement" another activity simply because an antecedent activity may have been affected by a change in the law," and that "a reimbursable activity does not cease to be a reimbursable activity because it happens to have constitutional implications." And LA County DA's comments argue that "Prop 83's mere

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

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

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

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

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

reaffirmation of legislative action does not constitute a change in the law."[54] Additionally, LA County DA's comments proffer a theory of equitable estoppel, based on the LAO and DOF analysis of Proposition 83 leading up to the election, discussed below, and the conclusion that Proposition 83 would not affect mandates.[55] And finally, LA County DA's comments assert that section 17570 is unconstitutional, as a violation of separation of powers doctrine.[56]

7. County Counsel of San Diego

The County Counsel of San Diego argues that "Jessica's Law [Proposition 83] did not make any changes material to the relevant statutes as they existed immediately before the adoption of Jessica's Law," that the 2012 reenactment "supersedes any effects that Jessica's Law may have had on the state's obligation," that "DOF's Request is based on the unconstitutionally broad language in Section 17556(f) that impermissibly directs the commission to apply the ballot measure exception to previously enacted legislation." The County Counsel of San Diego further argues that "DOF's Request relies on the unconstitutionally broad definition of what constitutes a 'subsequent change in the law' set forth in Section 17570."[57]

8. Alameda County District Attorney's Office

The Alameda County DA argues that Proposition 83 did not make any material changes to the responsibilities of county counsel offices or district attorneys' offices; that DOF's interpretation of section 17556(f) "cannot be the correct interpretation;" and that DOF's request "should be rejected on common law principles of laches and estoppel."[58]

III. Discussion

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

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[59] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[60] In making its decisions, the Commission must strictly construe

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

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

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

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

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

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

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

article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[61]

Under Government Code section 17570, upon request, the Commission may consider the adoption of a new test claim decision to supersede a prior test claim decision based on a subsequent change in law which modifies the states liability.

The first hearing in the mandate redetermination process is intended, pursuant to the Government Code and the Commission's regulations, to determine only whether the requester has made an adequate showing that the state's liability has been modified based on a subsequent change in law, as defined. Therefore, analysis of section 17556(f), as well as consideration of the comments submitted by interested parties, will be limited to whether the request, when considered in light of all of the written responses and supporting documentation in the records of this request, has a substantial possibility of prevailing at the second hearing."[62] A thorough mandates analysis to determine whether and to what extent the state's liability has been modified, considering the applicable law, the arguments put forth by the parties and interested parties, and the facts in the record, will be prepared for the second hearing on this matter**.**

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

On May 28, 1998, the Commission heard the CSM-4509 test claim on the *Sexually Violent Predators* program. That test claim alleged that the following Welfare and Institutions Code sections imposed reimbursable state-mandates: 6250, and 6600 through 6608, as amended by Statutes 1995, chapter 762; Statutes 1995, chapter 763; and Statutes 1996, chapter 4.[63]

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

1. Designation by the County Board of Supervisors of the appropriate District Attorney or County Counsel who will be responsible for the sexually violent predator civil commitment proceedings. (Welf. & Inst. Code, § 6601, subd. (i).)

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[61] *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.

[62] Code of Regulations, Title 2, section 1190.05 (Register 2010, No. 48). This regulation describes the standard for the first hearing as follows:

> The first hearing shall be limited to the issue of whether the requester has made an adequate showing which identifies a subsequent change in law as defined by Government Code section 17570, material to the prior test claim decision, that may modify the state's liability pursuant to Article XIII B, section 6, subdivision (a) of the California Constitution. The commission shall find that the requester has made an adequate showing if it finds that the request, when considered in light of all of the written responses and supporting documentation in the record of this request, has a substantial possibility of prevailing at the second hearing.

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

2. Initial review of reports and records by the county's designated counsel to determine if the county concurs with the state's recommendation. (Welf. & Inst. Code, § 6601, subd. (i).)
3. Preparation and filing of the petition for commitment by the county's designated counsel. (Welf. & Inst. Code, § 6601, subd. (i).)[64]
4. Preparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing. (Welf. & Inst. Code, § 6602.)
5. Preparation and attendance by the county's designated counsel and indigent defense counsel at trial. (Welf. & Inst. Code, §§ 6603 and 6604.)
6. Preparation and attendance by the county's designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6605, subds. (b) through (d), and 6608, subds. (a) through (d).)
7. Retention of necessary experts, investigators, and professionals for preparation for trial and subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Inst. Code, §§ 6603 and 6605, subd. (d).)
8. Transportation and housing for each potential sexually violent predator at a secured facility while the individual awaits trial on the issue of whether he or she is a sexually violent predator. (Welf. & Inst. Code, § 6602.)

All remaining provisions of the test claim statutes were denied.[65]

DOF asserts, in its request for a new test claim decision, that activities 1, 2, 3, and 6, approved in the test claim statement of decision, were expressly included in Proposition 83. Activities 1, 2, and 3 involve the county's role in filing and litigating a civil commitment hearing on behalf of the state. These activities are required by section 6601(i), and while DOF concedes that Proposition 83 did not make amendments to subdivision (i), specifically, it amended and reenacted the entirety of section 6601, including the activities approved under subdivision (i). Activity 6 is required by sections 6605 and 6608. The sections encompassing these activities were reenacted and amended also by Proposition 83.[66] DOF asserts that the reenactment of sections 6601, 6604, 6605, and 6608 is sufficient to implicate the "expressly included in" limitation of section 17556(f), prohibiting the Commission from finding "costs mandated by the state," which supports the adoption of a new test claim decision.

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

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

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

As discussed above, Proposition 83 reenacted in whole sections 6601, 6604, 6605, and 6608, and required counties to perform the same activities approved in the CSM-4509 test claim.

DOF asserts as well that Activities 4, 5, and 7 are necessary to implement Proposition 83, and therefore these requirements also have been superseded by the ballot initiative.[67] DOF, relying on section 17556(f), therefore brings this request to adopt a new test claim decision, in accordance with the provisions of section 17570.

DOF's request is silent with respect to activity 8, regarding the transportation and housing of potential sexually violent predators during the civil detention proceedings process, and makes no specific allegation regarding whether that activity continues to impose a reimbursable state mandate. DOF, however, asserts that the entire program is no longer eligible for reimbursement under article XIII B, section 6 of the California Constitution.[68]

B. Section 17556(f) is Not Self-Executing, but Requires Commission Action Pursuant to Section 17570, Where a Commission Decision on the Test Claim Statutes has been Previously Adopted.

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

> The statute or executive order imposes duties that are necessary to implement, or are expressly included in, a ballot measure approved by the voters in a statewide or local election. This subdivision applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters.[69]

California School Boards Association v. State of California makes clear that the statutory exclusion from reimbursement contained in the first sentence is consistent with the subvention requirements of article XIII B, section 6.[70] The court in *CSBA I* reasoned that the subvention requirement applies to mandates imposed by the Legislature, not by the voters; the voters' powers of initiative and referendum are reserved powers, and not vested in the Legislature, and are therefore not limited by article XIII B, section 6. *CSBA I* holds that the reimbursement requirement applies only to state-mandated costs, not costs incurred by way of "the people acting pursuant to the power of initiative."[71]

"Having established that costs imposed on local governments by ballot measure mandates need not be reimbursed by the state," and thus approving the statutory exclusion to the extent of statutes "expressly included in" a ballot measure, the court considered also whether activities embodied in a test claim statute that are "necessary to implement" a voter-enacted ballot measure are subject to reimbursement. In *San Diego Unified School District v. Commission on State*

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[67] Exhibit A, Redetermination Request, at pp. 2-3.

[68] Exhibit A, Redetermination Request, at p. 2.

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

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

[71] *Ibid.*

Mandates, costs that were incidental to a federal mandate were not reimbursable under section 17556(c), because those costs were imposed under Education Code provisions "adopted to implement a federal due process mandate." The *CSBA I* court therefore concluded that "[t]he language of [section 17556(f)] relieving the State of the obligation to reimburse a local government for duties 'necessary to implement' a ballot measure is *unobjectionable* because it corresponds to the Supreme Court's holding in *San Diego Unified* that state statutes codifying federal mandates are not reimbursable." [72],[73] The court rejected, however, the "reasonably within the scope of" test also provided in subdivision (f) at that time, and the Legislature amended the code section the following year to excise the offending language.[74]

Section 17556(f) also states that the rule "applies regardless of whether the statute or executive order was adopted prior to or after the date on which the statute or executive order was enacted or issued." This provision, like the "reasonably within the scope of," and "necessary to implement" tests, first appeared in section 17556 in 2005.[75] This last provision, stating that the order of enactment is not material to the analysis under section 17556(f), has not yet been determined in the courts.[76] However, the Commission must presume that the statutes enacted by the Legislature are constitutional,[77] and therefore if a voter-enacted ballot initiative embracing the same subject matter were to be enacted either before or after a test claim statute, an analysis under section 17556(f) would be in order.

In the context of a ballot measure enacted *after the test claim decision* on the subject matter has been adopted, section 17556(f) cannot be self-executing, consistent with the broader statutory scheme of which it is a part. The Commission's process is the sole and exclusive venue in which eligible claimants vindicate the reimbursement requirement of article XIII B, section 6, and the Commission's decision on a test claim is final and binding, absent judicial review.[78] A later-enacted ballot measure expressly including the same duties imposed by a test claim statute that was previously determined to impose a mandate cannot, of its own force, undermine the Commission's mandate determination in a prior test claim decision. Nor can there be any

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[72] *San Diego Unified*, *supra*, (2004) 33 Cal.4th 859.

[73] *California School Boards Association v. State* (*CSBA I*) (Cal. Ct. App. 3d Dist. 2009) 171 Cal.App.4th 1183, at p. 1213 [emphasis added].

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

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

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

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

[78] *CSBA I, supra,* 171 Cal.App.4th 1183, at pp. 1199-1200.

resolution of the issue of whether other requirements, which are not expressly included in the ballot measure, but may be necessary to implement the ballot measure, continue to be reimbursable, without the matter being heard and determined by the Commission pursuant to Government Code section 17570. Section 17570 thus provides the mechanism for considering section 17556(f) when there is a subsequent change in law, as defined, "material to the prior test claim decision, that may modify the state's liability" pursuant to article XIII B, section 6.

"Subsequent change in law," is defined in section 17570(a)(2) as follows:

> [A] change in law that requires a finding that an incurred cost is a cost mandated by the state, as defined by Section 17514, or is not a cost mandated by the state pursuant to Section 17556, or a change in mandates law, except that a "subsequent change in law" does not include the amendments to Section 6 of Article XIII B of the California Constitution that were approved by the voters on November 2, 2004. A "subsequent change in law" also does not include a change in the statutes or executive orders that impose new state-mandated activities and require a finding pursuant to subdivision (a) of Section 17551.[79]

Section 17570 provides, then, an opportunity to redetermine a test claim decision previously decided, but for which the decision might be materially different in accordance with section 17556, if determined on the basis of a subsequent change in law.

C. The Department of Finance has made an Adequate Showing that the State's Liability has been Modified.

DOF brings this request to adopt a new test claim decision relying on Government Code section 17556(f), and Proposition 83. DOF asserts that because Proposition 83 reenacted in whole sections 6601, 6604, 6605, and 6608 of the Welfare and Institutions Code, which were previously found by the Commission, as amended by Statutes 1995, chapters 762 and 763, and Statutes 1996, chapter 4, to impose a reimbursable state-mandated program, those sections are made non-reimbursable by the "expressly included in" exception provided for in section 17556(f). Furthermore, DOF argues that because the remaining code sections approved (6602 and 6603) are inextricably linked to the provisions reenacted, the entire mandated program is made non-reimbursable by the operation of section 17556(f).

The comments filed on this request challenge DOF's position, and are addressed below.

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

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

Several comments note that many of the amendments to the Welfare and Institutions Code outlined by Proposition 83 were earlier enacted by SB 1128 (Statutes 2006, chapter 337) and, therefore, Proposition 83 does not constitute a "subsequent change in the law" in accordance

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

with section 17570.[80] CSAC argues that "many of the changes [DOF] claim[s] voters made were in fact made by the Legislature."[81] And CPDA argues that

> S.B. 1128 contained many of the same or substantially similar amendments to the SVPA as did Proposition 83, for example, providing for indeterminate commitments and expansion of the list of qualifying offenses. Therefore, Proposition 83 does not constitute a "subsequent change in the law" as contemplated by Government Code section 17570.[82]

In addition, LA County District Attorney's Office comments state that "[i]n 2006, the legislature passed Senate Bill 1128 (SB 1128), urgency legislation that went into effect on September 20, 2006…[l]ess than two months later, the electorate passed Prop 83, commonly known as "Jessica's Law"…[which] simply reaffirmed many of the changes already effectuated by SB 1128."

However, it is irrelevant to the analysis of Proposition 83 whether there were substantive changes to the law in effect immediately prior to its enactment, or whether Proposition 83 made any substantive changes to the SVP code sections.

The analysis of whether a subsequent change in law has occurred turns on whether, under 17556(f), there are now any costs mandated by the state, where a ballot measure expressly includes some of the same activities as the test claim statutes that were found to impose a reimbursable mandate in CSM-4509. Here, with respect to the code sections reenacted in Proposition 83, it must be said that the test claim statutes impose duties that are expressly included in a voter-enacted ballot measure.[83] Therefore, DOF has made an adequate showing that the state's liability as determined in CSM-4509 has been modified, and thus DOF has a substantial possibility of prevailing at the second hearing.

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

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

> The enactment of A.B. 1488, A.B. 1470, and S.B. 760 in 2012 pertaining to the SVPA result in a cost mandated by the state as defined by Government Code section 17514. The entire text of the sections amended by legislation in 2012, including the portions not amended, was reenacted by the Legislature pursuant to Article IV, section 9, of the California Constitution. The remainder of the SVPA sections that were not expressly included in the 2012 legislation are, nevertheless, necessary to implement the 2012 legislation under Government Code section 17556, subdivision (f), and therefore are mandated by statute and thus reimbursable under California Constitution Article XIII B, section 6. Therefore, Proposition 83 is no longer the statutory authority supporting the SVPA;

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[80] See, e.g., Exhibit G, CSAC Comments, at pp. 2-3; Exhibit H, CPDA Comments, at pp. 4-5.

[81] Exhibit G, CSAC Comments, at p. 2.

[82] Exhibit H, CPDA Comments, at p. 4.

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

> consequently the cost incurred by local agencies to comply with the 2012 legislatively enacted SVPA is a cost mandated by the state.[84]

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

If the 2012 statute imposes duties *in excess of* what was required under prior law, and no 17556 exceptions apply, then those activities could be found to impose a new program or higher level of service and costs mandated by the state. However, a new test claim would have to be filed for the Commission to hear and decide the issue on the 2012 statute. The Commission's jurisdiction and findings in this matter only extend to the test claim statutes pled in CSM-4509 (Sections 6601, 6602, 6603, 6604, 6605, and 6608, as amended by Statutes 1995, Chapter 762 (SB 1143); Statutes 1995, Chapter 763 (AB 888); and Statutes 1996, Chapter 4 (AB 1496)) as those sections are alleged to be modified by Proposition 83, approved by the voters on November 7, 2006.

2. Some of the Requirements of the Test Claim Statutes Approved in CSM-4509 Impose Duties Expressly Included In a Ballot Measure

Section 17556(f), as discussed above, provides that the Commission shall not find costs mandated by the state, within the meaning of section 17514, if the statute or executive order imposes duties that are expressly included in a ballot measure enacted by the voters in a statewide or local election, and that this exception to the reimbursement requirement applies regardless of whether the statute or the ballot measure was enacted first. DOF, relying on section 17556(f), has alleged that the reenactment of sections 6601, 6604, 6605, and 6608 in Proposition 83 results in those sections, which were found to impose reimbursable mandates in CSM-4509, impose duties that are expressly included in a ballot measure approved by the voters in a statewide election.

CDAA argues, in its comments, that DOF reads section 17556(f) incorrectly:

> The Department of Finance contention that the mere recitation of any portion of a statute contained in a proposition, brings it within the "expressly included in" language of Government Code § 17556(f) regardless of whether the sections mandating local activity were amended or not, and whether or not the intent of the initiative and purpose of the initiative was to eliminate the subvention requirements of Article XIII B §6 by operation of Government Code § 17566(f), is not warranted. Such an interpretation would make the application of the statute so over broad and vague that no voter, local official, or legal analyst could

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

> accurately predict whether state mandated subvention would cease to exist as they voted to pass any ballot initiative that referenced existing law.

But CDAA overstates the case; the comments imply that "any ballot initiative that referenced existing law" could result in a mandate redetermination request. Proposition 83 goes much further than simply "referenc[ing] existing law;" entire code sections that were approved for reimbursement are reenacted by the voters in Proposition 83. A finding for the DOF in this case does not lead to the unpredictable upending of mandates law that CDAA's comment implies. Moreover, the plain language of section 17556(f) supports DOF's interpretation: section 17556(f) *does not require* that a test claim statute be *amended* by a ballot proposition, or that the entire section or program be included in a ballot proposition. Section 17556(f) only prohibits a finding of costs mandated by the state if the statute upon which a test claim finding is to be made "*imposes duties that are…expressly included in*" a ballot measure, whether the ballot measure is enacted before or after the statute. Furthermore, as discussed below, whether eliminating subvention was intended by the voters in Proposition 83, as raised by CDAA, is not dispositive where section 17556 is applicable.

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

a. Misrepresentation, Unclean Hands, Equitable Estoppel

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

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

> Not only was the electorate misled by the foregoing analysis and the September 2, 2005, letter, so were local government officials. Had local government officials not been lulled into a false sense of security, it is reasonably probable they would have publically [sic] opposed Proposition 83 given the financial ramifications due to the loss of mandate monies now proposed by the DOF. It is also reasonably probable that the electorate would have rejected Proposition 83 due to the same concerns. Furthermore, the probability of defeat would have increased had the electorate been accurately apprised of what law they were voting to replace- i.e., S.B. 1128 and not the language included in the ballot proposition, as discussed in the next section.[85]

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

The LA County DA argues, for its part, that "the Legislative Analyst's Office (LAO), in association with the Department of Finance, sent California Attorney General Bill Lockyer a fiscal analysis of the initiative eventually known as Prop 83." The LA County DA argues that "California courts have long held that voters are presumed to carefully review published materials that concern the initiatives on which they vote, including measures that are more complex." The LA County DA concludes, therefore, that "[a]s the electorate is presumed to have relied upon the state's broadly publicized assurances regarding the state's assumption of the fiscal costs associated with Prop 83 were it to pass, the state is foreclosed from using Prop 83 as the basis of its invocation of Section 17570 and request for a new test claim decision."[86]

CDAA does not explicitly invoke equitable defenses, but argues that:

> The unequivocal conclusion of both officials is that the costs of the SVP program would remain a reimbursable by the state. "The portion of costs related to changes in the Sexual Violent Predators program would be reimbursed by the state." Since official duties are presumed to be correctly performed (Evidence Code § 664), the Director of Finance, the Legislative Analyst and the Attorney General must have been aware of the interaction of Government Code§ 17556(f) on Proposition 83 and the state mandate in Article XIII B §6 in drawing their conclusion that the SVP program would remain reimbursable. Strong weight should be given to this conclusion, despite the Department of Finance's now changed opinion.[87]

The defenses of unclean hands and misrepresentation are not neatly applied in this case. Unclean hands, if asserted successfully against DOF, would prohibit DOF from obtaining relief (i.e., prevailing in its request for a new test claim decision) because of some alleged inequitable conduct. A misrepresentation of the facts surrounding a ballot initiative might suffice for such alleged conduct, if that misrepresentation permitted DOF to obtain a benefit. CPDA argues, as cited above, that DOF misrepresented the effect of Proposition 83 on mandates reimbursement, and that the measure might not have been successfully adopted had the effect been known.[88] LA County, though not expressly implicating misrepresentation or unclean hands, argues that "the electorate is presumed to have relied upon the state's broadly publicized assurances regarding the state's assumption of the fiscal costs associated with Prop 83."[89] And CDAA, also not expressly invoking equitable defenses or terms of art, suggests that the conclusion of the LAO and DOF in 2006 should be given considerable weight in considering the present redetermination request.

What all of these comments fail to acknowledge is that in 2006 that conclusion was correct, and was not in fact a misrepresentation of the facts as they existed at that time. As discussed above, section 17556(f) is not self-executing in the respect of a later-enacted ballot measure embracing the same subject matter as a test claim statute. When Proposition 83 was enacted, there was no process or mechanism by which to redetermine a test claim; thus there would have been no effect on mandate reimbursement. Only after the mandate redetermination process embodied in section 17570 was *added to the code in 2010* was there any possibility of utilizing Proposition 83 to

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[86] Exhibit L, LA County DA Comments, at pp. 8-10.

[87] Exhibit F, CDAA Comments, at p. 4.

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

[89] Exhibit L, LA County DA Comments, at pp. 8-10

change a prior mandate finding.[90] Therefore, any representation that might be alleged to have misled the voters was provided in good faith, and cannot now support a defense of 'unclean hands.'

The related doctrine of estoppel is similarly misplaced in this case. The essence of an estoppel is that the party to be estopped has by false language or conduct led another to do that which he or she would not otherwise have done and as a result has suffered injury.[91] Estoppel is applied where the conduct of one party has induced a behavior or posture in the other party that would result in injury if the first were permitted to repudiate its acts or position.[92] Estoppel generally binds not only the immediate parties but also those in privity with them (agents of the same government are held to be in privity with one another).[93] And, estoppel is available against the government, but "it will not be applied against the government if to do so would effectively nullify a strong rule of policy adopted for the benefit of the public, or would contravene directly any statutory or constitutional limitations."[94] As discussed above, whatever representations were made regarding the effect on mandate reimbursement prior to the adoption of Proposition 83, and however local governments might have detrimentally relied on those representations, they were *true when made*, and only later did the circumstances allow for mandate reimbursement to be modified. Moreover, to apply estoppel against DOF in this case would "contravene directly" the statutory and constitutional limitations on reimbursement, and would "effectively nullify" the mandate redetermination process created in the Government Code.

Ultimately, all of the proffered equitable arguments are inapplicable to this case. The Commission is vested, pursuant to the Government Code, with sole and exclusive jurisdiction to determine mandates claims. Whether a statute requires reimbursement is a question of law, to be decided by the Commission, or the courts on review, and "legislative disclaimers, findings, and budget control language are not determinative."[95] Thus the question of reimbursement must be evaluated in this test claim by the Commission, exclusively, pursuant to article XIII B, section 6 of the California Constitution, on the basis of the statutes and case law that guide Commission decisions generally, and without regard for the expression of the Legislature, DOF, the LAO, or

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

[91] California Jurisprudence 3d, Vol. 30, Estoppel and Waiver, section 1 [internal citations omitted].

[92] California Jurisprudence 3d, Vol. 30, Estoppel and Waiver, section 3 [internal citations omitted].

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

[94] California Jurisprudence 3d, Vol. 30, Estoppel and Waiver, section 5 [internal citations omitted].

[95] *County of Los Angeles v. Commission on State Mandates*, (Cal. Ct. App. 2d Dist. 2003) 110 Cal.App.4th 1176, 1186; 1194. See also, Government Code section 17552, which states that "This chapter shall provide the sole and exclusive procedure by which a local agency or school district may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution."

any other executive agency or department.[96] And furthermore, the intent of the voters, or of the Legislature, is only to be considered when the plain language is ambiguous; here, no such ambiguity is found. Finally, equitable defenses are not appropriate to the mandates process, because the Commission is charged with implementing the California Constitution.

b. Laches, or Unreasonable Delay of Cause of Action

The Alameda County District Attorney's Office argues, in its comments, that "[t]he Department of DOF request for a new test claim, filed some six and one-half years after the passage of Proposition 83, is untimely and should be rejected on common law principles of laches and estoppel." The Alameda County DA continues:

> The State has continued to treat the SVP A as a reimbursable mandate for the six and one half years since Proposition 83 was passed. During that time, my office has performed its obligations under the SVPA without exception. We have allocated personnel and resources to these proceedings, invested in the training and expertise of our prosecutors and incurred expenses to provide for their continuing education. We have done so in good faith and in detrimental reliance on the earlier decisions of this Commission and the promise of eventual reimbursement by the State.
>
> That expectation of reimbursement was bolstered by the actions of the Commission, the Legislature and Governors Schwarzenegger and Brown over the last six and one-half years. Although many mandates were suspended, set aside or even cancelled during that time, reimbursement to county prosecutors for their efforts in furtherance of the SVP A has not faltered. The counties have continued to perform these mandates and the State has reimbursed us. Even the State's current budget includes appropriations for these expenses. All of these factors directly contradict the Department of Finance's position that Proposition 83 created a change in the state mandate and act as an estoppel against a new test claim.
>
> Finally, I note that this Commission's January 24, 2013 hearing notice indicates reimbursement or loss of reimbursement would be decided for fiscal year 2011-2012. I object to that. As noted above, my office continues to incur expenses to meet our mandated obligations under the SVP A. We have done so in reliance on the previous decisions of this Commission and with expectation of eventual reimbursement from the State.[97]

Laches is not applicable to this case. As raised by the Alameda County DA, the defense of laches is based on an assertion that the plaintiff unreasonably delayed bringing an action, and that the defendant has been prejudiced by the delay, such that granting relief would be inequitable.[98] The Alameda County DA asserts that a delay of more than six years after the passage of Proposition 83 is unreasonable. But as discussed above, the mandate redetermination

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[96] *Kinlaw, supra*, 53 Cal.3d 482, 487; Government Code section 17551 and 17552.

[97] Exhibit P, Alameda County DA Comments, at p. 6.

[98] See California Jurisprudence 3d., Vol. 30, Equity, section 36.

process was only added to the Government Code in 2010.[99] Prior to that, even if Proposition 83 were *known*, without any dispute and by all parties, to have undermined the 1998 mandate finding regarding the SVP program, there was no mechanism in place to bring the issue before the Commission. Therefore, any delay that might be attributed to DOF cannot be said to begin until such mechanism was provided, in Government Code section 17570, as added by Statutes 2010, chapter 719 (SB 856).

Moreover, laches requires, in addition to an unreasonable delay in bringing an action, either acquiescence or prejudice to the other resulting from the delay. Here, it is difficult to identify any prejudice that results from DOF's delay. As discussed, DOF would have had no right or ability to bring this matter before the Commission prior to 2010. And while DOF could be said to have "acquiesced" from the effective date of section 17570 to the time of filing this request, in the intervening two years and three months, the claimants (in the shoes of a defendant here) have continued to receive reimbursement. The statute provides that if DOF prevails, reimbursement will be ended beginning in the 2011-2012 fiscal year, based on the filing date of this redetermination request.[100] Had DOF filed this request two years earlier, the potential reimbursement period affected would have begun in the 2009-2010 fiscal year. Therefore, eligible claimants for the CSM-4509 mandate have not been harmed by DOF's delay in filing this request for redetermination, and may have, in fact, benefited from it.

4. Constitutionality of Section 17570

Several comments have raised the constitutionality of section 17570.[101] The Commission is not the proper venue for airing constitutional arguments regarding the Commission's governing statutes. The Commission must presume that the Government Code statutes pertaining to the Commission's processes are constitutional, including section 17570, pursuant to article III, section 3.5 of the California Constitution.[102] The Commission therefore declines to address the constitutional concerns of the interested parties and persons.

5. Conclusion

The issue for this first hearing is whether DOF has made an adequate showing that the state's liability has been modified based on a subsequent change in law. A subsequent change in law, as discussed above, is defined as a change in law that requires a finding that an incurred cost is a cost mandated by the state under section 17514, or is not a cost mandated by the state under section 17556. Here, a section 17556 analysis, presuming, as the Commission must, the constitutionality of the Government Code, would indisputably result in a finding that at least some portion of the activities imposed by the test claim statutes are expressly included in or

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

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

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

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

necessary to implement Proposition 83. It is not necessary in this hearing to consider the extent to which the test claim statutes may be expressly included in or necessary to implement Proposition 83; it is sufficient, at this time, to determine that at least some number of the mandated activities imposed by the test claim statutes have been modified by a subsequent change in law.

IV. CONCLUSION

Based on the foregoing, the Commission finds that DOF has made a sufficient showing at this first hearing to proceed to a second hearing to determine whether to adopt a new test claim decision.[103] The Commission hereby directs Commission staff to notice the second hearing and to prepare a full mandates analysis on the issue of whether the CSM shall adopt a new test claim decision to supersede the Commission's previously adopted test claim decision in CSM-4509.

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