

## **Minutes**

### **COMMISSION ON STATE MANDATES**

Location of Meeting: via Zoom  
December 4, 2020

Present: Member Gayle Miller, Chairperson  
Representative of the Director of the Department of Finance  
Member Andre Rivera  
Representative of the State Treasurer, Vice Chairperson  
Member Lee Adams  
County Supervisor  
Member Jeannie Lee  
Representative of the Director of the Office of Planning and Research  
Member Sarah Olsen  
Public Member  
Member Carmen Ramirez  
City Council Member  
Member Jacqueline Wong-Hernandez  
Representative of the State Controller

*NOTE: The transcript for this hearing is attached. These minutes are designed to be read in conjunction with the transcript.*

#### **CALL TO ORDER AND ROLL CALL**

Chairperson Miller called the meeting to order at 10:07 a.m. Executive Director Heather Halsey called the roll and Members Adams, Lee, Miller, Olsen, Ramirez, Rivera, and Wong-Hernandez all indicated that they were present.

#### **APPROVAL OF MINUTES**

Chairperson Miller asked if there were any objections or corrections to the September 25, 2020 minutes. Member Olsen made a motion to adopt the minutes. With a second by Member Rivera, the September 25, 2020 hearing minutes were adopted by a unanimous voice vote of members present.

#### **PUBLIC COMMENT FOR MATTERS NOT ON THE AGENDA**

Chairperson Miller asked if there was any public comment. There was no response. Assistant Executive Director Heidi Palchik stated that there was a resolution of the Commission in recognition of Member Ramirez's eight years of serving the Commission. Chairperson Miller thanked Member Ramirez for her understanding, great questions, support, and service to the State of California. Assistant Executive Director Palchik read the resolution into the record. Member Ramirez replied in appreciation of the work of staff, litigants and fellow Commission members. Member Olsen stated that she enjoyed the experience of serving with Member Ramirez, Member Wong-Hernandez thanked her for her service, and Executive Director Halsey thanked her for her dedication and congratulated her on her new position as a supervisor for the County of Ventura.

**CONSENT CALENDAR**

INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLES 7 AND 8 (action)

**STATEWIDE COST ESTIMATE**

Item 6\*      *Public School Restrooms: Feminine Hygiene Products*, 18-TC-01  
Education Code Section 35292.6; Statutes 2017, Chapter 687 (AB 10)

Executive Director Halsey stated that Item 6 was proposed for consent. Chairperson Miller asked if there were any objections to the Consent Calendar. There was no response.

Member Wong-Hernandez made a motion to adopt the Consent Calendar. Member Ramirez seconded the motion. Chairperson Miller asked if there was any public comment on the Consent Calendar. There was no response. The Consent Calendar was adopted by a unanimous voice vote of members present.

**HEARINGS AND DECISIONS PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, ARTICLE 7 (GOV. CODE, § 17551, 17557, 17559, and 17570) (action)**

Executive Director Halsey swore in the parties and witnesses participating in the Article 7 portion of the hearing.

**APPEAL OF EXECUTIVE DIRECTOR DECISIONS PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTION 1181.1(c) (info/action)**

Item 2      Appeal of Executive Director Decisions

Executive Director Halsey stated that there were no appeals to consider for this hearing.

**TEST CLAIM**

Item 3      *Accomplice Liability for Felony Murder*, 19-TC-02  
Penal Code Sections 188, 189, and 1170.95; Statutes 2018, Chapter 1015 (SB 1437)  
County of Los Angeles, Claimant

Executive Director Halsey stated that the claimant representative will not be attending the hearing but has authorized three witnesses to speak on behalf of the claimant, County of Los Angeles.

Senior Commission Counsel Juliana Gmur presented this item and recommended that the Commission adopt the Proposed Decision to deny this Test Claim.

The following appearances were made: Lucia Gonzalez, Craig Osaki, and Felicia Grant appeared as witnesses for the claimant; and Christina Snider and John O’Connell appeared on behalf of the County of San Diego.

Following the parties, interested parties, and witnesses stating their positions and providing evidence, and discussion between Member Olsen, Member Wong-Hernandez, Member Ramirez, Chairperson Miller, Member Adams, and Commission staff, Chairperson Miller made a motion to adopt the staff recommendation. With a second by Member Ramirez, the motion to adopt the

staff recommendation was adopted by a vote of 4-3 with Member Adams, Member Olsen, and Member Wong-Hernandez voting no.

## **PARAMETERS AND GUIDELINES**

- Item 4      *Vote by Mail Ballots: Prepaid Postage, 19-TC-01*  
Elections Code Section 3010; Statutes 2018, Chapter 120 (AB 216)  
County of Los Angeles, Claimant

Senior Commission Counsel Eric Feller presented this item and recommended that the Commission adopt the Proposed Decision and Parameters and Guidelines.

The following appearances were made: Lucia Gonzalez appeared on behalf of the claimant; Dillon Gibbons appeared on behalf of the California Special Districts Association; and Andy Nichols appeared on behalf of Nichols Consulting.

Following the parties and interested persons stating their positions, and discussion between parties, interested persons, and Commission staff, Member Olsen made a motion to adopt the staff recommendation. With a second by Member Wong-Hernandez, the motion to adopt the staff recommendation was adopted by a vote of 7-0.

## **HEARINGS ON COUNTY APPLICATIONS FOR FINDINGS OF SIGNIFICANT FINANCIAL DISTRESS PURSUANT TO WELFARE AND INSTITUTIONS CODE SECTION 17000.6 AND CALIFORNIA CODE OF REGULATIONS, TITLE 2, ARTICLE 2 (info/action)**

- Item 5      Assignment of County Application to Commission, a Hearing Panel of One or More Members of the Commission, or to a Hearing Officer

Executive Director Heather Halsey stated that no SB 1033 applications have been filed.

## **REPORTS**

- Item 7      Chief Legal Counsel: New Filings, Recent Decisions, Litigation Calendar (info)

Chief Legal Counsel Camille Shelton presented this item.

- Item 8      Executive Director: Workload Update and Tentative Agenda Items for the January and March 2021 Meetings (info)

Executive Director Halsey described the Commission's pending caseload.

## **CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS 11126 AND 11126.2 (info/action)**

### **A. PENDING LITIGATION**

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matters pursuant to Government Code section 11126(e)(1):

#### Trial Courts:

1. *On Remand from the California Supreme Court, Case No. S247266, and the First District Court of Appeal, Case No. A148606 California School Board Association (CSBA) v. State of California et al.*

Alameda County Superior Court, Case No. RG11554698  
[Multiple Causes of Action on the Mandates Process]

Courts of Appeal:

1. ***On Remand from California Supreme Court, Case No. S214855, State of California Department of Finance, State Water Resources Control Board, and California Regional Water Quality Control Board, Los Angeles Region v. Commission on State Mandates and County of Los Angeles, et al*** (petition and cross-petition)  
Second District Court of Appeal Case No. B292446  
[Los Angeles County Superior Court, Case No. BS130730, Related Appeal from Second District Court of Appeal, Case No. B237153 [*Municipal Storm Water and Urban Runoff Discharges*, 03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21, Los Angeles Regional Water Quality Control Board Order No. 01-182, Permit CAS004001, Parts 4C2a., 4C2b, 4E & 4Fc3]
2. ***On Remand from the Third District Court of Appeal, Case No. C070357 State of California Department of Finance, State Water Resources Control Board, and California Regional Water Quality Board, San Diego Region v. Commission on State Mandates and County of San Diego, et al.*** (petition and cross-petition)  
Third District Court of Appeal, Case No. C092139  
Sacramento County Superior Court Case No. 34-2010-80000604  
[*Discharge of Stormwater Runoff*, Order No. R9-207-000 (07-TC-09), California Regional Water Control Board, San Diego Region Order No. R9-2007-001, NPDES No. CAS0108758, Parts D.1.d.(7)-(8), D.1.g., D.3.a.(3), D.3.a.(5), D.5, E.2.f, E.2.g, F.1, F.2, F.3, I.1, I.2, I.5, J.3.a.(3)(c) iv-vii & x-xv, and L]
3. ***City of San Diego v. Commission on State Mandates, State Water Resources Control Board, Department of Finance***  
Third District Court of Appeal, Case No. C092800  
Sacramento County Superior Court, Case No. 2019-80003169  
(*Lead Sampling in Schools: Public Water System No. 3710020 (17-TC-03)*)

California Supreme Court:

1. ***Coast Community College District, et al. v. Commission on State Mandates***, California Supreme Court, Case No. S262663  
(Petition for Review Filed June 10, 2010)  
Third District Court of Appeal, Case No. C080349  
Sacramento County Superior Court, Case No. 34-2014-80001842  
[*Minimum Conditions for State Aid*, 02-TC-25/02-TC-31  
(Education Code Sections 66721, 66721.5, 66722, 66722.5, 66731, 66732, 66736, 66737, 66738, 66740, 66741, 66742, 66743, 70901, 70901.5, 70902, 71027, 78015, 78016, 78211.5, 78212, 78213, 78214, 78215, 78216, 87482.6, and 87482.7; Statutes 1975, Chapter 802; Statutes 1976, Chapters 275, 783, 1010, and 1176; Statutes 1977, Chapters 36 and 967; Statutes 1979, Chapters 797 and 977; Statutes 1980, Chapter 910; Statutes 1981, Chapters 470 and 891; Statutes 1982, Chapters 1117 and 1329; Statutes 1983, Chapters 143 and 537; Statutes 1984, Chapter 1371; Statutes 1986, Chapter 1467; Statutes 1988, Chapters 973 and 1514; Statutes 1990, Chapters 1372 and 1667; Statutes 1991, Chapters 1038, 1188, and 1198; Statutes 1995, Chapters 493 and 758; Statutes

1998, Chapter 365, 914, and 1023; Statutes 1999, Chapter 587; Statutes 2000, Chapter 187; and Statutes 2002, Chapter 1169; California Code of Regulations, Title 5, Sections 51000, 51002, 51004, 51006, 51008, 51012, 51014, 51016, 51018, 51020, 51021, 51022, 51023, 51023.5, 51023.7, 51024, 51025, 51027, 51100, 51102, 53200, 53202, 53203, 53204, 53207, 53300, 53301, 53302, 53308, 53309, 53310, 53311, 53312, 53314, 54626, 54805, 55000, 55000.5, 55001, 55002, 55002.5, 55004, 55005, 55006, 55100, 55130, 55150, 55160, 55170, 55182, 55200, 55201, 55202, 55205, 55207, 55209, 55211, 55213, 55215, 55217, 55219, 55300, 55316, 55316.5, 55320, 55321, 55322, 55340, 55350, 55401, 55402, 55403, 55404, 55500, 55502, 55510, 55512, 55514, 55516, 55518, 55520, 55521, 55522, 55523, 55524, 55525, 55526, 55530, 55532, 55534, 55600, 55601, 55602, 55602.5, 55603, 55605, 55607, 55620, 55630, 55750, 55751, 55752, 55753, 55753.5, 55753.7, 55754, 55755, 55756, 55756.5, 55757, 55758, 55758.5, 55759, 55760, 55761, 55762, 55763, 55764, 55765, 55800, 55800.5, 55801, 55805, 55805.5, 55806, 55807, 55808, 55809, 55825, 55827, 55828, 55829, 55830, 55831, 58102, 58104, 58106, 58107, 58108, 59404, and 59410; Handbook of Accreditation and Policy Manual, Accrediting Commission for Community and Junior Colleges (Summer 2002); and “Program and Course Approval Handbook” Chancellor’s Office California Community Colleges (September 2001).]

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matter pursuant to Government Code section 11126(e)(2):

Based on existing facts and circumstances, there is a specific matter which presents a significant exposure to litigation against the Commission on State Mandates, its members or staff.

#### **B. PERSONNEL**

To confer on personnel matters pursuant to Government Code section 11126(a)(1).

The Commission adjourned into closed executive session at 11:52 a.m., pursuant to Government Code section 11126(e)(2), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda; and to confer with and receive advice from legal counsel regarding potential litigation; and to confer on personnel matters pursuant to Government Code section 11126(a)(1).

#### **RECONVENE IN PUBLIC SESSION**

#### **REPORT FROM CLOSED EXECUTIVE SESSION**

At 12:14 p.m., the Commission reconvened in open session. Chairperson Miller reported that the Commission met in closed executive session pursuant to Government Code section 11126(e)(2) to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the public notice and agenda, and to confer with and receive advice from legal counsel regarding potential litigation, and, pursuant to Government Code section 11126(a)(1) to confer on personnel matters.

## **ADJOURNMENT**

Hearing no further business, Chairperson Miller requested a motion to adjourn the meeting. Member Olsen made a motion to adjourn the meeting. Member Rivera seconded the motion. The December 4, 2020 meeting was adjourned by a unanimous voice vote at 12:15 p.m.

A handwritten signature in cursive script, appearing to read "Heather Halsey".

Heather Halsey  
Executive Director

STATE OF CALIFORNIA  
COMMISSION ON STATE MANDATES



PUBLIC MEETING

FRIDAY, DECEMBER 4, 2020

10:07 A.M.

MEETING HELD

VIA ZOOM,

A VIDEO COMMUNICATIONS PLATFORM

REPORTER'S TRANSCRIPT OF PROCEEDINGS

**ORIGINAL**

REPORTED BY:

KATHRYN S. SWANK

Certified Shorthand Reporter No. 13061

Registered Professional Reporter

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KATHRYN S. SWANK, CSR  
303 Paddock Court  
Roseville, California 95661  
Telephone (916) 390-7731  
KathrynSwankCSR@sbcglobal.net

KATHRYN S. SWANK, CSR, RPR (916) 390-7731

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**A P P E A R A N C E S**

(All attendees appeared remotely, via Zoom.)

**COMMISSIONERS PRESENT**

GAYLE MILLER  
Representative for KEELY BOSLER, Director  
Department of Finance  
(Chair of the Commission)

ANDRE RIVERA  
Representative for FIONA MA  
State Treasurer  
(Vice Chair of the Commission)

JACQUELINE WONG-HERNANDEZ  
Representative for BETTY T. YEE  
State Controller

JEANNIE LEE  
Representative for KATE GORDON, Director  
Office of Planning & Research

LEE ADAMS III  
Sierra County Supervisor  
Local Agency Member

SARAH OLSEN  
Public Member

M. CARMEN RAMIREZ  
Oxnard City Council Member  
Local Agency Member

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**COMMISSION STAFF**

ERIC FELLER  
Senior Commission Counsel

JULIANA GMUR  
Senior Commission Counsel

HEATHER A. HALSEY  
Executive Director



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**A P P E A R A N C E S C O N T I N U E D**

HEIDI PALCHIK  
Assistant Executive Director

CAMILLE N. SHELTON  
Chief Legal Counsel

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**PUBLIC PARTICIPANTS**

DILLON GIBBONS  
California Special Districts Association

LUCIA GONZALEZ  
County of Los Angeles, Claimant

FELICIA GRANT  
County of Los Angeles, Claimant

ANDY NICHOLS  
Nichols Consulting

JOHN O'CONNELL  
County of San Diego

CRAIG OSAKI  
County of Los Angeles, Claimant

CHRISTINA SNIDER  
County of San Diego

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1 FRIDAY, DECEMBER 4, 2020, 10:07 A.M.

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3 CHAIRPERSON MILLER: The meeting on the Commission  
4 of State Mandates will come to order.

5 Welcome and thank you to everyone for participating  
6 via Zoom.

7 Please note that in response to COVID-19 and its  
8 impact on public meetings, under the Bagley-Keene Open  
9 Meeting Act, Governor Newsom's Executive Order N-2920  
10 suspends, on an emergency basis, pursuant to California  
11 Government Code section 8571, certain requirements for  
12 public meetings.

13 Accordingly, requiring the physical presence of  
14 board members at public meetings and providing a  
15 physical space for members of the public to observe and  
16 participate have been suspended until further notice, so  
17 long as the agency makes it possible for members of the  
18 public to observe and address the meetings remotely; for  
19 example, via web or audio conferencing such as Zoom.

20 The Commission is committed to ensuring that our  
21 meetings are accessible to the public and the public has  
22 the opportunity to observe the meeting and to  
23 participate by providing written and verbal comment on  
24 Commission matters.

25 During this extraordinary time, and as we explore

1 new ways of doing business with new technologies, we ask  
2 that you remain patient with us.

3 Please note that the materials for today's meeting,  
4 including the notice, agenda, and witness list, are all  
5 available on the Commission's website, [www.csm.ca.gov](http://www.csm.ca.gov),  
6 under the "Hearings" tab.

7 Ms. Halsey, will you please call the roll.

8 MS. HALSEY: Mr. Adams.

9 MEMBER ADAMS: Here.

10 MS. HALSEY: Ms. Lee.

11 MEMBER LEE: Here.

12 MS. HALSEY: Ms. Miller.

13 CHAIRPERSON MILLER: Here.

14 MS. HALSEY: Ms. Olsen.

15 MEMBER OLSEN: Here.

16 MS. HALSEY: Ms. Ramirez.

17 MEMBER RAMIREZ: I'm here.

18 MS. HALSEY: Ms. Rivera -- Mr. Rivera, sorry.

19 MEMBER RIVERA: I'm here.

20 MS. HALSEY: Ms. Wong-Hernandez.

21 MEMBER WONG-HERNANDEZ: Here.

22 MS. HALSEY: Thank you.

23 CHAIRPERSON MILLER: Great. Thank you very much.

24 The next item is Item Number 1. Are there any  
25 objections or corrections to the minutes from

1 September 25th, 2020?

2 MEMBER OLSEN: I will move adoption.

3 CHAIRPERSON MILLER: Thank you, Ms. Olsen.

4 May we have a second, please.

5 MEMBER RIVERA: I second.

6 CHAIRPERSON MILLER: Great. Thank you, Mr. Rivera.

7 We have a motion and a second for the adoption of  
8 the September 25th, 2020, minutes.

9 All those in favor of adopting the minutes, please  
10 signify by saying "aye." Please unmute yourselves.

11 (Ayes)

12 CHAIRPERSON MILLER: Great.

13 Are any opposed?

14 (No response)

15 CHAIRPERSON MILLER: Any abstentions?

16 (No response)

17 CHAIRPERSON MILLER: Seeing none, the minutes are  
18 adopted. Thank you very much.

19 MS. HALSEY: And now we will take up public comment  
20 for matters not on the agenda. Please note that the  
21 Commission cannot take actions not on the agenda.  
22 However, it can schedule issues raised by the public for  
23 consideration at future meetings.

24 CHAIRPERSON MILLER: Great. Any -- Ms. Palchik, do  
25 you see anyone?



1 MS. PALCHIK: So I see nobody going for public  
2 comment, Madam Chair.

3 CHAIRPERSON MILLER: Great.

4 MS. PALCHIK: And then we do have the resolution,  
5 please.

6 CHAIRPERSON MILLER: Yes. And I'm hoping one of  
7 you will be able to read that for me.

8 So I just wanted to make sure -- we are so  
9 incredibly grateful to Carmen Ramirez. It's been such a  
10 pleasure getting to know you and learning from you. And  
11 I am just kind of in awe of how well you understood this  
12 and the great questions you asked and your support of me  
13 as, a new chair, and the staff. It's been a true  
14 pleasure, Ms. Ramirez, and I'm just incredibly grateful  
15 for your service to the State of California and the way  
16 you delved into these issues and really, really made  
17 this process so fair and forthright. And I think we,  
18 the State of California, owe you a huge debt of  
19 gratitude.

20 So Ms. Palchik, could you maybe read that beautiful  
21 resolution for us, please.

22 MS. PALCHIK: Absolutely. It would be my pleasure.

23 MEMBER RAMIREZ: I didn't see this on agenda.

24 MS. PALCHIK: Before we take any other public  
25 comment, we would like to present a resolution of the

1 Commission to Ms. Carmen Ramirez in recognition of her  
2 eight years serving the Commission. So I will begin:

3 Before the Commission on State Mandates, in honor  
4 of Maria "Carmen" Ramirez, Member, Commission on State  
5 Mandates, 2012-2020.

6 Whereas, M. Carmen Ramirez is a public interest  
7 lawyer who has served the community since she was  
8 admitted to practice in December 1974, and was elected  
9 to Oxnard City Council, the 19th largest city in  
10 California, in November 2010, while maintaining a  
11 private legal practice focusing on consumer matters,  
12 Social Security Disability cases, as well as  
13 immigration; and

14 Whereas, since Governor Jerry Brown appointed her  
15 to the Commission on State Mandates in 2012, Ms. Ramirez  
16 has distinguished herself as a member representing local  
17 agencies, as well as a member of the Commission's  
18 legislation and litigation subcommittees; and

19 Whereas, in her eight years as a Commission member,  
20 Ms. Ramirez has participated in over 40 Commission  
21 hearings and advised and influenced the Commission in  
22 determining test claims, parameters and guidelines,  
23 incorrect reduction claims and other matters related to  
24 article XIII B, section 6 of the California  
25 Constitution, including Test Claims on Behavioral

1 Intervention Plans (and its mandate redetermination),  
2 Standardized Testing and Reporting II and III, Race to  
3 the Top, California Assessment of Student Performance  
4 and Progress, Public School Restrooms: Feminine Hygiene  
5 Products, and the heavily-litigated Sexually Violent  
6 Predators mandate redetermination; and

7       Whereas, Ms. Ramirez is always well-prepared for  
8 Commission hearings having thoroughly read through the  
9 hundreds of pages of analyses and materials; and

10       Whereas, Ms. Ramirez makes all the parties and  
11 witnesses feel welcomed and comfortable at Commission  
12 hearings and validates their particular concerns; and

13       Whereas, Ms. Ramirez is always supportive of  
14 Commission staff offering appreciation for work  
15 accomplished or a job well done; and

16       Whereas, Ms. Ramirez is being honored by the  
17 Members and Staff of the Commission on State Mandates in  
18 appreciation of her outstanding dedication, leadership,  
19 and service to the State of California;

20       Now Therefore, be it resolved that the Members and  
21 Staff of the Commission on State Mandates warmly  
22 congratulate M. Carmen Ramirez on her election to the  
23 Ventura County Board of Supervisors, knowing that her  
24 service to the people of Ventura County will be as  
25 excellent as her service to the Commission has been.

1           On this fourth day of December 2020, County of  
2 Sacramento, State of California, in witness, thereof by  
3 Members and Staff of the Commission on State Mandates.

4           (Applause)

5           MEMBER RAMIREZ: Whoa. Thank you. Thank you.  
6 What a surprise. It seemed like it was just -- I forgot  
7 it was eight years. And I will -- it's been such a  
8 pleasure. This is a great place for a lawyer to be, and  
9 I think that's why I really appreciated all of the work  
10 of the staff and the litigants and my fellow Commission  
11 members, dealing with things that people don't quite see  
12 the complexity when they are standing apart.

13           And I will just never forget the hardworking staff  
14 of this Commission. It's just awesome how hard you work  
15 to make -- to get this done. And, really, thank you. I  
16 will miss being here, but I will follow what you are up  
17 to.

18           And thank you for this very much. Appreciate it.

19           CHAIRPERSON MILLER: Thank you very much, many  
20 Ms. Ramirez.

21           I know some of your fellow board members, I think,  
22 would like to make a comment, and I just -- I want to  
23 make sure to give Ms. Halsey and Ms. Shelton a moment  
24 too.

25           And Ms. Palchik, that may have been the best

1 reading of a resolution I have ever heard. So thank you  
2 for that.

3 MS. PALCHIK: Thank you.

4 CHAIRPERSON MILLER: Everything is so true, and I  
5 loved how much passion was in that. Thank you for that.  
6 Ms. Olsen.

7 MEMBER OLSEN: Well, Carmen, I have just enjoyed  
8 immensely the experience of serving with you. And I  
9 just want you to know, as the person who I am most  
10 likely to get eye contact with, given our seating  
11 arrangement, I have appreciated the nonverbal  
12 communication also that has gone between us.

13 So thank you so much for your service.

14 MEMBER RAMIREZ: I was trying to get you to do a  
15 motion.

16 MEMBER OLSEN: I know. Who is motioning? Who is  
17 seconding?

18 CHAIRPERSON MILLER: Great.

19 Anyone else want to make a comment?

20 Ms. Wong-Hernandez, please.

21 MEMBER WONG-HERNANDEZ: I just wanted to also add  
22 my thanks to Ms. Ramirez, because you were -- when I was  
23 a new chair and just being on here -- I haven't been on  
24 nearly as long as she has. And just -- you were so  
25 welcoming and, obviously, you are such a great

1 commissioner in terms of asking questions and really  
2 trying to do what's right and help all of us tease it  
3 out, and especially with your legal perspective too.

4 So thank you, and thank you for your service, and  
5 they are lucky to have you and congratulations.

6 CHAIRPERSON MILLER: Anyone else?

7 Oh, please, Ms. Halsey.

8 MS. HALSEY: I would just like to say thank you for  
9 your service and for being on the Commission. You have  
10 been such a thoughtful member and so well prepared, and  
11 I know how much work it is to read those analyses and  
12 look at that evidence and come prepared on top of your  
13 other full-time job and how much work that is, and just  
14 that you were so dedicated to it and ended it so well.  
15 I really appreciate it.

16 And we will miss you and, certainly, Ventura  
17 County's gain is our loss. No doubt that. So I wish  
18 you Godspeed in Ventura County, and I think that they  
19 are very fortunate to have you as a supervisor.

20 MEMBER RAMIREZ: Thank you.

21 CHAIRPERSON MILLER: Thank you.

22 Well, thank you again, truly, Ms. Ramirez.

23 Any other public comment, either in general or just  
24 to congratulate Ms. Ramirez? Ms. Palchik, do we see  
25 anyone in the queue?

1 MS. PALCHIK: No, Madam Chair.

2 CHAIRPERSON MILLER: Great. Thank you very much.  
3 Okay. So seeing none, we will move to the next  
4 item, please, Ms. Halsey.

5 MS. HALSEY: Item 6 is proposed for consent.

6 CHAIRPERSON MILLER: Great.

7 Are there any objections to the proposed consent  
8 calendar?

9 (No response)

10 CHAIRPERSON MILLER: Seeing none, may we have a  
11 motion and a second, please.

12 MEMBER WONG-HERNANDEZ: Move approval of the  
13 consent calendar.

14 MEMBER RAMIREZ: I will second.

15 CHAIRPERSON MILLER: Okay. Great. Moved by  
16 Ms. Wong-Hernandez; seconded by Ms. Ramirez.

17 So we're going to do the -- any public comment on  
18 the consent calendar at all?

19 (No response)

20 CHAIRPERSON MILLER: No? Seeing none, the motion  
21 was moved by Ms. Wong-Hernandez; seconded by  
22 Ms. Ramirez.

23 All those in favor, please unmute yourselves and  
24 say "aye."

25 (Ayes)

1 CHAIRPERSON MILLER: All opposed, please say --  
2 unmute yourselves and say "no."

3 (No response)

4 CHAIRPERSON MILLER: Seeing none, any abstentions?

5 (No response)

6 CHAIRPERSON MILLER: Great. The consent calendar  
7 passes.

8 MS. HALSEY: Thank you.

9 Let's move to the Article 7 portion of the hearing.  
10 Now will the parties and witnesses for Items 3 and 4  
11 please turn on your video and unmute your microphones  
12 and please rise.

13 (Parties/witnesses stood to be sworn or  
14 affirmed.)

15 MS. HALSEY: Please be seated and turn off your  
16 videos and mute your microphones.

17 Thank you. Item 2 is reserved for appeals of  
18 Executive Director decisions. There are no appeals to  
19 consider for this hearing.

20 Next is Item 3. Senior Commission Counsel Juliana  
21 Gmur will please turn on her video and unmute her  
22 microphone and present a proposed decision on a test  
23 claim on *Accomplice Liability for Felony Murder*.

24 At this time we invite the witness parties and  
25 witnesses for Item 3 to please turn on their video and



1 unmute their microphones. The claimant representative  
2 will not be attending this hearing, but he has  
3 authorized three witnesses to speak on behalf of the  
4 claimant, County of Los Angeles.

5 MS. GMUR: Good morning.

6 CHAIRPERSON MILLER: Good morning. We're so glad  
7 to see you. Welcome.

8 MS. GMUR: Thank you so much. It's my pleasure to  
9 be here.

10 Test claims addresses changes to criminal law which  
11 limit the application of the felony murder rule and the  
12 Natural and Probable Consequences Doctrine to only those  
13 individuals who have either an intent to kill or who  
14 were major participants in the underlying crime and  
15 acted with reckless indifference to human life.

16 To apply these standards retroactively, Penal Code  
17 section 1170.95 sets forth a petition process allowing  
18 those individuals who were convicted of first or second  
19 degree murder under the felony murder rule or the  
20 Natural and Probable Consequences Doctrine to request  
21 the Court to vacate the murder conviction and to  
22 resentence the petitioner on any remaining counts.

23 The claimant seeks reimbursement for the costs  
24 associated with the participation in the petition  
25 hearing process by county district attorneys and public

1 defenders when appointed to defend the petitioner.

2 Staff finds, however, that the test claim statute  
3 and the costs and activities alleged by the claimant do  
4 not impose a reimbursable state-mandated program on  
5 local agencies within the meaning of article XIII B,  
6 section 6, because the test claim statute eliminated a  
7 crime within the meaning of Government Code section  
8 17556(g).

9 Accordingly, the staff recommends that the  
10 Commission adopt the proposed decision to deny the test  
11 claim, and authorize staff to make any technical,  
12 nonsubstantive changes to the proposed decision  
13 following the hearing.

14 CHAIRPERSON MILLER: Great. Thank you very much.  
15 And we're really thrilled for all the work you've been  
16 doing at the Commission. Thank you.

17 Parties and witnesses, will you please state your  
18 names for the record, and may we please begin with the  
19 County of Los Angeles.

20 MS. GONZALEZ: Lucia Gonzalez with the Office of  
21 County Counsel, County of Los Angeles.

22 MR. OSAKI: Craig Osaki with the L.A. County Public  
23 Defender's Office.

24 MS. GRANT: Felicia Grant with the Los Angeles  
25 County Alternate Public Defender's Office.

1 CHAIRPERSON MILLER: Great. Thank you very much  
2 for that.

3 So we'll go to comments. Does the public -- does  
4 the Department of Finance have any comments?

5 (No response)

6 CHAIRPERSON MILLER: Seeing none, please -- will  
7 you please begin with your comments on these items?  
8 Ms. Gonzalez, do you want to start, or would you like  
9 one of your colleagues to start?

10 MS. GONZALEZ: Yes. I would like to start. Thank  
11 you.

12 CHAIRPERSON MILLER: Thank you.

13 MS. GONZALEZ: Yes.

14 Good morning, Commissioners and Commission staff.  
15 Thank you for the opportunity to present this test claim  
16 at this hearing today.

17 The County of Los Angeles respectfully requests  
18 that the Commission redraft the proposed draft decision  
19 to deny the test claim for *Accomplice Liability for*  
20 *Felony Murder*.

21 Under California Constitution Article XIII B,  
22 whenever the Legislature or any state agency mandates a  
23 new program or higher level of service in any local  
24 government, the State shall provide a subvention of  
25 funds requiring the State to reimburse local government

1 for the cost of those programs.

2 The Commission staff concedes that by enacting  
3 Penal Code section 1170.95, Senate Bill 1437 imposes  
4 additional requirements on the County. In fact, this  
5 test claim imposes additional requirements on county  
6 departments, such as the Office of the Public Defender,  
7 the Office of the Alternate Public Defender, and the  
8 Office of the District Attorney, and the sheriff's  
9 department, by requiring a new petition process and  
10 hearing process that allows those convicted of first and  
11 second degree murder, under the felony murder rule or  
12 Natural and Probable Consequences Doctrine, who would  
13 not have been convicted under the amended Penal Code  
14 sections 188 and 189 to obtain a review.

15 So what is at issue today is whether these  
16 requirements are reimbursable under article XIII B,  
17 section 6 of the California Constitution.

18 The County asserts that indeed this Commission may  
19 grant this test claim consistent with the requirements  
20 under the constitution and the Government Code and make  
21 a finding that SB 1437 mandated a new process on the  
22 County, which requires the County to reimbursement.

23 I will now ask that Ms. Felicia Grant, head deputy  
24 for the Alternate Public Defender's Office, provide a  
25 statement; and then following, if any questions or

1 additional statements, Mr. Craig Osaki with the Los  
2 Angeles Public Defender's Office.

3 Thank you.

4 CHAIRPERSON MILLER: Thank you.

5 Ms. Grant, please go ahead.

6 MS. GRANT: Thank you. Good morning.

7 I have reviewed all the comments submitted to this  
8 Commission, asking you to reconsider the decision to  
9 deny reimbursement for costs incurred in connection with  
10 Penal Code section 1170.95. And I won't take up this  
11 Commission's time reiterating all of the well-taken  
12 arguments and the comments.

13 However, I do think it's important to speak to you  
14 about a point that I think is at the heart of this test  
15 claim.

16 Los Angeles County respectfully contends that the  
17 Commission's decision to deny the test claim because the  
18 test claim statute eliminates a crime within the meaning  
19 of Government Code section 17556(g) is an error. A  
20 "crime," in the context of our statutes, means an  
21 offense that may be prosecuted by the State and is  
22 punishable by law.

23 Crimes of criminal offenses contained in the Penal  
24 Code: First-degree murder is a crime; second-degree  
25 murder is a crime.

1           In order to convict a defend of a crime, a jury  
2 must unanimously agree that the prosecution proved the  
3 elements of the crime beyond a reasonable doubt. In  
4 contrast, felony murder and the Natural and Probable  
5 Consequences Doctrine are just theories that the  
6 prosecution may argue to a jury in order to prove that  
7 the defendant committed the crime of murder.

8           These are not crimes in and of themselves, and, in  
9 fact, the law is very clear that a jury need not  
10 unanimously agree on any one particular theory. A  
11 defendant may properly be convicted of the crime of  
12 murder even if the jurors don't agree on one or more of  
13 the theories proposed by the prosecution. It's  
14 sufficient that each juror believes, beyond a reasonable  
15 doubt, that the defendant is guilty of murder as that  
16 offense is defined by statute.

17           Let me give you an example:

18           Two men go into a 7-Eleven to rob a cashier. At  
19 trial, the prosecutor presents evidence that the second  
20 defend yells "Shoot him," to the first defendant, who,  
21 in fact, then shoots and kills the cashier.

22           In argument, the prosecutor tells the jury that the  
23 Defendant 2 is guilty of murder as a direct aider and  
24 abettor because he acted with the intent that Defendant  
25 1 shoot and kill the cashier.

1           But just to hedge his bets, he also says, in  
2 argument, if the jury doesn't believe the evidence that  
3 the Defendant Number 2 acted with the intent to  
4 encourage Number 1 to commit a murder, he is still  
5 guilty of murder under the felony murder rule,  
6 regardless of what his intent is.

7           Jurors go back into the jury room.

8           Eight of them believe the prosecutor's argument  
9 that, in fact, Juror [sic] Number 2 is guilty of murder  
10 as a direct aider and abettor. Four of them disagree.  
11 They think the evidence was insufficient to show that he  
12 was a direct aider and abettor, but they think that he's  
13 guilty under the felony murder rule.

14           Does the prosecutor care? No. It doesn't matter  
15 to the prosecutor at all because, at the end of the day,  
16 all that matters to the prosecutor is that the defendant  
17 is convicted of murder, because the crime is murder.  
18 The theory is not the crime.

19           What SB 1437 did was modify the scope of malice  
20 aforethought. Penal Code section 188 now reads:

21           "Except as stated in subdivision (e) of section  
22 189, in order to be convicted of murder, a principal in  
23 a crime should act with malice aforethought, and malice  
24 shall not be imputed to a person based solely on his or  
25 her participation in a crime. Even with the changes to

1 the scope of malice aforethought, the doctrine of felony  
2 murder is not eliminated."

3 As pointed out by the Court in *People v. Cervantes*  
4 at 46 Cal.App.5th 213, SB 1437 modified California's  
5 felony murder rule and Natural and Probable Consequences  
6 Doctrine to ensure that murder liability is not imposed  
7 on someone unless they were the actual killer, acted  
8 with the intent to kill, or acted as a major participant  
9 in the underlying felony, and with reckless indifference  
10 to human life.

11 And, additionally, Penal Code section 189(f)  
12 provides that when a defendant kills a peace officer  
13 during the commission of an enumerated felony,  
14 regardless of their intent, they are guilty of murder  
15 under the felony murder rule.

16 So the felony rule is still alive and well, albeit  
17 modified. No crime was eliminated by 1437's amendments  
18 to 188 and 189 of the Penal Code. These amendments  
19 merely modified the scope of malice aforethought, but  
20 they did not, in any way, eliminate the crime of murder,  
21 nor did it change the penalty for the crime of murder.

22 Therefore, subdivision (g) of Government Code  
23 section 17556 has no application to SB 1437.

24 Los Angeles County respectfully urges this  
25 Commission to reconsider its decision and find that the



1 test claim imposes a reimbursable state mandate on the  
2 County within the meaning of Article XIII B, section 6,  
3 of the California Constitution, without exception.

4 Thank you.

5 CHAIRPERSON MILLER: Thank you very much.

6 Please go ahead, Mr. Osaki.

7 MR. OSAKI: Thank you. Good morning, members of  
8 the Commission.

9 The purpose of the California Constitution,  
10 Article XIII B, section 6, was to prevent the State from  
11 unfairly shifting the costs of government on to local  
12 entities that were ill-equipped to shoulder the task.  
13 This mandate process allows local government to seek  
14 reimbursement for costs incurred as a result of higher  
15 burdens imposed upon them by passage of the laws, and SB  
16 1437 is such a law.

17 It created a post-conviction proceeding, which  
18 required an enormous amount of resources from both --  
19 from the Public Defender's Office, the Alternate Public  
20 Defender's Office, and the LA District Attorney's  
21 Office. Oh, and including the sheriff's department as  
22 well.

23 What happened -- what has to happen is that we have  
24 to look at old transcripts, perhaps decades old; we have  
25 to recreate the record; investigations must be

1 completed; experts may have to be consulted with. It's  
2 an enormous burden put upon the local government at this  
3 time.

4 It appears the sole basis of the proposed  
5 Commission decision for its denial of the test claim is  
6 section 17556(g), specifically a clause stating that a  
7 crime has been eliminated. However, 1437 did not  
8 eliminate a crime. The crimes at issue are first and  
9 second-degree murder.

10 After the passage of 1437, the crimes -- those  
11 crimes were not eliminated. It created a new process  
12 where an analysis is conducted to see whether there are  
13 other theories of liabilities which could sustain a  
14 conviction for murder or not.

15 Given the purpose behind article XIII B, section 6,  
16 of the California Constitution, we believe the 17556(g)  
17 be interpreted as written: Meaning that a crime must be  
18 eliminated, not theories of liability. As Ms. Grant  
19 pointed out, they are not the same thing.

20 To the extent that the Commission's proposed  
21 decision utilizes 17556(g) to deny the claim, we believe  
22 that it runs counter to the purpose behind the  
23 California Constitution and is unconstitutional.

24 We respectfully request that this Commission  
25 reconsider its proposed decision.

1 Thank you.

2 CHAIRPERSON MILLER: Great. Thank you very much.  
3 I appreciate that.

4 Any further public comment?

5 MS. HALSEY: I just wanted to say one clarifying  
6 thing, and it's just procedural.

7 But there's been no Commission decision. This is  
8 the first time this proposed decision has been before  
9 the Commission, so there's no decision to overturn or  
10 revise. This is just the proposed decision and the  
11 Commission is now, for the first time, hearing argument  
12 on it. So that's what I wanted to clarify.

13 CHAIRPERSON MILLER: Thank you for that  
14 clarification.

15 And just -- any additional public comment? And I  
16 just want to ask one more time if the Department of  
17 Finance has any comments.

18 MS. SNIDER: This is Christina Snider with the  
19 County of San Diego, and I and my colleague, John  
20 O'Connell, did sign up to comment as well.

21 But I will defer to the Department of Finance if  
22 they have comments.

23 CHAIRPERSON MILLER: Thank you.

24 I don't see the Department of Finance, so, please,  
25 Ms. Snider, go ahead, and thank you for stating your

1 name for the record.

2 MS. SNIDER: Great.

3 So, again, I'm Christina Snider. I'm a senior  
4 deputy county counsel with County Counsel of the County  
5 of San Diego.

6 I have my colleague here, John O'Connell, who is  
7 the deputy public defender, who has been practicing  
8 criminal law for, I think, 26 years, and so he knows the  
9 ins and outs of criminal law a little bit better than I  
10 do. So I have asked him to speak about the issue of  
11 eliminating a crime.

12 And then I would like to pivot and talk about  
13 whether 1170.95 should be considered independently of  
14 Penal Code 188 and 189, so I'm going to defer to  
15 Mr. O'Connell now and let him make his comments, and  
16 then we'll come back to me.

17 CHAIRPERSON MILLER: Great. Thank you.

18 Mr. O'Connell.

19 MR. O'CONNELL: All right. Thank you for letting  
20 me speak to you. I'm going to keep my comments brief  
21 because some of the -- my arguments have already been  
22 made, I think eloquently --

23 CHAIRPERSON MILLER: Mr. O'Connell, could you state  
24 your name, for the record, please, sir.

25 MR. O'CONNELL: Oh, yeah. It's John O'Connell.

1 I'm a deputy public defender with the County of San  
2 Diego. I apologize.

3 Again, I will be brief, because, again, I think  
4 Ms. Grant eloquently has stated a lot of the arguments.

5 But I do want to emphasize one point: And that,  
6 again, is on the issue of whether or not Senate Bill  
7 1437 eliminated a crime, because, again, I think the  
8 Commission's proposed decision is confusing crimes with  
9 liabilities.

10 I also am reading the revised decision, got the  
11 impression that the -- at least the writers of the  
12 proposed decision thought that our argument, that these  
13 are separate -- that crimes and theories are separate  
14 was an interesting argument but that it was wrong.

15 What I want to point out, is it not just an  
16 interesting argument, that it is actually the law. The  
17 California Supreme Court has been very clear in the fact  
18 that felony murder and natural and probable consequences  
19 are only theories and are not crimes.

20 As pointed out in our response to the Commission,  
21 you can find this in the law of jury unanimity, which I  
22 cannot say. Ms. Grant, I think, again, clearly laid out  
23 the law of jury unanimity, so I'm not going to go over  
24 it again. But I do want to point out a couple specific  
25 cites for the Commission:

1           One is in *People v. Moore*, which was not listed in  
2 our response, but is part of the extensive case law  
3 involving this issue. It is at -- it was decided in  
4 2011. It is at 51 Cal.4th 386. And at page 418, the  
5 California Supreme Court specifically laid out, and I  
6 quote, "Felony murder and premeditated murder are not  
7 distinct crimes."

8           They had to hold that again to show that juries  
9 could not -- don't have to be unanimous in deciding  
10 those particular issues. On the issue of natural and  
11 probable consequences, which cannot be found anywhere in  
12 the murder statutes, but is based on aiding and abetting  
13 statutes, I'm going to turn to another case: *People v.*  
14 *Jenkins* -- which is cited in our response -- which was  
15 decided in 2000, at cite 22 Cal.4th 900 at page 1025.

16           In that case, the California Supreme Court held --  
17 and I quote -- "Naturally, in order to return a guilty  
18 verdict, the jury must agree unanimously that each  
19 element of the charged crime has been proved, but the  
20 factors that establish aiding and abetting liability are  
21 not included as elements of the crime of murder."

22           So when it comes to natural and probable  
23 consequences, not only is it not a crime, but the  
24 factors used in natural and probable consequences are  
25 not even considered to be elements of the crime. So,

1 again, the elimination of those factors do not eliminate  
2 any crime.

3 So, again, just to my conclusion, the revised  
4 decision stating that Senate Bill 1437, by narrowing the  
5 felony murder rule and narrowing the definition of  
6 "implied malice," which, in essence, eliminates natural  
7 and probable consequences for murder, the decision  
8 stating that those eliminate crimes is contrary to law,  
9 as established by the California Supreme Court.

10 And that's all I have to say. Thank you.

11 CHAIRPERSON MILLER: Excuse me. Thank you very  
12 much.

13 Ms. Snider.

14 MS. SNIDER: I will pick up from there then.

15 Thank you, Mr. O'Connell.

16 So my concern -- and I first should start with, I  
17 know that the Commission staff works very hard and is  
18 very thoughtful about these opinions, so these are very  
19 respectful comments and just trying to maybe show a  
20 different approach to the analysis.

21 So my concern is that the Commission staff -- the  
22 revised proposed decision looks at all three of the  
23 statutes as one, as opposed to three. And I'm concerned  
24 that that is contrary to mandates law, in general, and  
25 perhaps the way that the Commission has looked at

1 statutes in the past.

2 And I will quote from page 41 of the revised  
3 proposed decision. The page -- it says -- the decision  
4 says, "This petition and hearing process is not a  
5 stand-alone process, but instead is inexorably linked to  
6 the amendment to section 188 and 189 and therefore part  
7 of the elimination of a crime under Government Code  
8 section 17556(g)."

9 And to be clear, there, the Commission is referring  
10 to the petition and hearing process contained in  
11 1170.95.

12 And so the Commission -- or the Commission staff  
13 has linked 188, 189, and 1170.95 and consider them to be  
14 one statute, while they are three separate statutes.  
15 And they did all come from one bill, and maybe there was  
16 one intention behind it, to deal with this issue, but  
17 that they should be considered as three separate  
18 statutes. And mandates law says that each statute  
19 should be considered separately, I propose.

20 So let's go to Cal Government Code 17514, which we  
21 did cite in our comments, but it's just one of the basic  
22 Commission on State Mandates's Mandates Government Code  
23 sections.

24 And that says (as read), "Costs mandated by the  
25 State means any increased costs which a local



1 agency...is required to incur...as a result of any  
2 statute enacted on or after January 1st, 1975."

3 And then there's a lot more to that step -- to that  
4 particular statute.

5 So we're looking at every statute, and that  
6 particular section of the Government Code doesn't define  
7 the word "statute," so we don't have a definition for  
8 what "statute" means within context of unfunded  
9 mandates. Unfortunately, I found no case law on that.

10 There are some definitions of statutes contained in  
11 different sections of different codes, but they are all  
12 very specific to that -- those code sections. So you  
13 are not going to find a definition of the word "statute"  
14 that applies.

15 And it could be because we -- as we all know, when  
16 we're doing statutory construction, you are just  
17 supposed to consider the reasonable and ordinary meaning  
18 of the word. So it could be that they didn't need to  
19 define the word "statute" because each statute is  
20 supposed to be considered separately.

21 So -- and also, case law, recent case law, does  
22 describe 1170.95 as a new statute. And these are three  
23 cases that we also didn't cite in our comments because  
24 it's something I found about -- I thought about later.  
25 But if you just look through any of the cases that are

1 describing what the bill 1437 did, they say, 1437  
2 amended Penal Code sections 188 and 189, and it created  
3 this new statute, 1170.95, so this is a whole new  
4 statute that we need to review independently and say,  
5 does that particular statute impose a new mandate?

6 And if you look at the requirements in 1170.95,  
7 they are extensive. And I think there's no doubt that  
8 revised proposed decision does not even hint that these  
9 particular requirements in 1170.95 actually eliminate a  
10 crime. In order to reach that conclusion, staff links  
11 them with 188 and 189. There's no doubt that 1170.95  
12 standing alone does not eliminate a crime.

13 But back to -- back to the three -- I will just put  
14 them on the record just so that we have them. There are  
15 three cases, three recent cases, that specifically  
16 describe 1170.95 as a new statute:

17 That's *People v. Prado*, 49 Cal.App.5th 408; *People*  
18 *v. Garcia*, 57 Cal.App.5th 1100 -- I'm sorry. 100; and  
19 *People v. Carter*, 34 Cal.App.5th 831. And there's no  
20 particular need to go dig into those cases, because, as  
21 I said, what they do is just describe 1170.95 as a new  
22 statute.

23 So I think everyone does see that as a new statute.

24 The question is, for purposes of unfunded mandates,  
25 why wouldn't that be also looked at as a separate

1 statute from 188 and 189? We look and that and say, did  
2 1170.95 impose new costs?

3 And I know that past Commission decisions, there's  
4 no precedential value. But I will note that there --  
5 there's a similar one out there, to the extent the  
6 Commission staff would like to look at it. And that's  
7 the post-conviction DNA court proceedings. That's  
8 number 00-TC-21 and 00-TC-08.

9 And in that decision, basically the Legislature had  
10 created a new proceeding for people to go to court and  
11 ask for their DNA to be looked at.

12 And if -- in the end, if their DNA, you know,  
13 exculpated them, of course their convictions would be  
14 vacated or reversed, but the Commission didn't look at  
15 it that way. They said, this is a separate proceeding  
16 that has been created.

17 So even if their crimes would be eliminated,  
18 quote/unquote, because the DNA would show that they  
19 weren't guilty, that there were still costs incurred for  
20 coming to court and initiating that completely separate  
21 proceeding, which is the same thing as what's happening  
22 here. There's a separate post-conviction proceeding  
23 under 1170.95. That proceeding in and of itself, that  
24 is where the costs are incurred.

25 And then if you just look at other Commission

1 proceedings, Commission decisions in the past, I think  
2 that all the statutes and regulations have not been  
3 considered in conjunction but have been considered  
4 separately.

5 And I won't go through all of them, and I will say,  
6 I really appreciate the new search function that's on  
7 the new -- that's on the Commission website now. That's  
8 helpful. But I still, of course, don't know all of the  
9 Commission decisions as well as Commission staff does,  
10 but I did find a couple of them. One of them was the  
11 peace offer training 17-TC-06, and, there, there were  
12 various Penal Code sections and the Commission viewed  
13 them differently, and said some of these sections do  
14 impose mandates; some of these sections don't.

15 And then, I will point this one out, just because  
16 everyone is aware of it right now: The minimum  
17 conditions for state aid. I know that one, for the  
18 education, I know that one is on appeal right now, but  
19 my understanding is there were -- if I got this right --  
20 27 Education Code sections and 141 regulations contained  
21 in that test claim. And the Commission said, well, some  
22 of these are unfunded mandates; some of them aren't.

23 So I would just propose the same analysis be  
24 conducted here, even if the Commission believes that 188  
25 and 189 fall within an exception, they -- or they don't

1 impose costs on a local agency, I propose that the  
2 Commission view 1170.59 independently, its own statute;  
3 what does that particular statute do, and not consider  
4 it in conjunction with the other two.

5 But with that, thank you for all your work, and  
6 that's all I have.

7 CHAIRPERSON MILLER: Great. Thank you very much,  
8 Ms. Snider.

9 Any other public comment?

10 (No response)

11 CHAIRPERSON MILLER: No. And we still don't have  
12 anyone from Finance. Great. Obviously their record is  
13 in there.

14 Yes, please, Ms. Shelton.

15 MS. SHELTON: Just -- Juliana can answer any of  
16 your specific questions about this analysis, but I do  
17 want to make clear, when you are looking at the  
18 analysis, there are separate mandate findings on each  
19 code section pled. So that has been complied with.

20 In addition, on -- if you look on page 18, that is  
21 a citation and a full quote of section 1170.95. And  
22 subdivision (a)(3) expressly refers to section 188 and  
23 189, and says that the person can seek a petition  
24 process when "the petitioner could not be convicted of  
25 first or second degree murder because of the changes to

1 section 188 or 189 made effective January 1, 2019."

2 And under the rules of statutory construction, you  
3 have to read them all together to understand the meaning  
4 of 1170.95.

5 So to be clear, mandate findings are made on each  
6 code section independently. 189 and 188 do not impose  
7 any state-mandated activities, so those could not be  
8 eligible for reimbursement. And 1170.95 went through  
9 the full mandate process, or analysis, found that there  
10 were new requirements, but those new requirements do not  
11 result in costs mandated by the State.

12 CHAIRPERSON MILLER: Thank you very much,  
13 Ms. Shelton.

14 I'm now going to open it up to board members.

15 Please, Ms. Olsen, Ms. Wong-Hernandez. And if  
16 anyone else has questions, please just raise your hand.

17 Ms. Olsen.

18 MEMBER OLSEN: I actually find the testimony from  
19 Los Angeles County and San Diego County rather  
20 compelling.

21 I would like the Commission staff to address this  
22 issue of theories versus crimes.

23 MS. GMUR: And that would be my pleasure, Madam  
24 Chair, if I may.

25 So Ms. Grant was quite correct. The crime is an

1 offense against the state, and it's been prosecuted and  
2 punished. And when you learn about crimes and the  
3 individual crimes, and, in this case, a crime of murder,  
4 they have elements. Generally speaking, the elements  
5 are a mental state and an act. Depending on the crime,  
6 the acts may be different, but it does require the  
7 mental state.

8 In order to obtain a mental state, it either has to  
9 be proven by the evidence in front of you or you may  
10 apply a theory. Let's talk about the felony murder rule  
11 theory.

12 And let's use Ms. Grant's -- let's use Ms. Grant's  
13 example of the two people holding up a 7-Eleven. Let's  
14 change the facts slightly: The people come in with the  
15 intent to rob the 7-Eleven. Defendant Number 2 believes  
16 that Defendant Number 1 is unarmed. Defendant -- I'm  
17 sorry. Believes that Defendant Number 1 is armed, but  
18 is not going to shoot.

19 Defendant 1 panics and shoots, or doesn't even have  
20 to shoot. He can just scare an individual who falls  
21 over, hits their head, or has a heart attack. Any death  
22 in the commission of the crime can then be imputed,  
23 under the theory of the felony murder rule, to the aider  
24 and abettor, Defendant Number 2.

25 That's the way the law used to be.

1           We imply intent because you intended the underlying  
2 crime. You intended to be there for the robbery. So,  
3 therefore, if a death occurs, any death, then you  
4 intended the death.

5           The statute has changed.

6           The test claim legislation has now taken a look and  
7 said, we're not going to impute intention anymore.  
8 We're going to look at the actions of Defendant Number  
9 2. We are going to say, did that person individually  
10 have the intent to kill? That is, the prosecution is  
11 going to have to prove that point. Or did that person,  
12 an aider and abettor, have the -- was that person a  
13 major participant who acted with reckless indifference  
14 to human life? A different kind of intent.

15           We are no longer going to use the legal theory,  
16 although it still exists. To impute the intent, we have  
17 to look at the individual actions of Defendant 2 to  
18 prove the intent for the conviction.

19           Did that help, Ms. Olsen?

20           MEMBER OLSEN: No. I think that just restated what  
21 had been said before. But I --

22           MS. SHELTON: Can I clarify thought?

23           The result of that, with the successful petition,  
24 means that the crime of murder is vacated for that  
25 individual. So the crime of murder has been eliminated



1 for those who -- whose intent would have been originally  
2 applied under prior law. There's no -- the person's  
3 crime of murder is vacated if they have a successful  
4 petition.

5 MEMBER OLSEN: But -- okay. So my concern here is  
6 that we don't generally look at the Commission's work,  
7 as applied individually, but as -- I'm not an attorney.  
8 I will say that right here. Okay?

9 But it seems impractical, to me, and different than  
10 what we usually do, to look at this as crime rather than  
11 theory at the individual level. Either a crime has been  
12 eliminated or it has not, and I don't see that the crime  
13 itself has been eliminated.

14 I actually find it rather compelling, this idea  
15 that how you apply the theory is what's -- is what has  
16 changed here, not the underlying crime.

17 Can you address that?

18 MS. GMUR: I understand that.

19 CHAIRPERSON MILLER: Let me -- oh, please, if you  
20 want to go ahead and answer that.

21 MS. GMUR: Thank you, Madam Chair.

22 Yes, I understand that. And you are correct, the  
23 crime of murder is still on the books, the theories  
24 still exist. And I understand your position for -- that  
25 it's individual, and it is, to a degree, individual. It

1 is how it is applied to a class of people.

2 So prior to the law, Defendant Number 2, prior to  
3 the change in law, Defendant Number 2, walking into a  
4 7-Eleven to rob it, could be charged and convicted under  
5 felony murder. Now that individual cannot.

6 So we have an entire class of people who cannot --  
7 no longer be charged and convicted with murder, because  
8 the elements of the crime have changed.

9 Before, we had the act. In this case, this person  
10 walked in to commit the act; they are committing  
11 robbery. And they had the mental state. Except, for  
12 Defendant Number 2, there is no mental state here. We  
13 didn't have to prove it. We proved you walked in. That  
14 means you must have intended to commit one crime,  
15 burglary, therefore, in for a penny, in for a pound, you  
16 intended the death.

17 Now we say, for this class of people, you have to  
18 prove their individual intent.

19 Also, if there were no change in law, there would  
20 be no need for the petition process. Now, we have  
21 people who are convicted of murder, who can make that  
22 conviction go away by applying the new law retroactively  
23 to their -- to their conviction.

24 And that's the process set forth in 1170.95.

25 CHAIRPERSON MILLER: Right.

1           And I thank you for that, Ms. Gmur. And I think,  
2 Ms. Olsen, it's not that it eliminated the crime of  
3 murder. It eliminated a crime of murder, under the  
4 felony murder rule. So it's within the meaning of  
5 17556(g), like Ms. Gmur said. So it's not the entire  
6 crime. It's the crime -- it's a crime of murder. So  
7 obviously murder still exists.

8           Ms. Wong-Hernandez, do you want to --

9           MEMBER WONG-HERNANDEZ: Yeah. I actually -- my  
10 questions are of a different type.

11           I had -- thank you, Ms. Olsen, for the questions  
12 you asked, because I was feeling the same way and sort  
13 of -- and found the local testimony really compelling.

14           My question -- and I'm not sure who this is best  
15 suited for, probably for multiple people who have  
16 already testified -- is really about the right to  
17 counsel in the post-conviction hearing, and then the  
18 post-conviction hearing, sort of, itself.

19           So my question is, absent the enactment of the  
20 hearing process, in 1170.95, which would happen if  
21 somebody believed that they had a habeas claim due to  
22 the changes in 188 and 189? Like absent -- so those  
23 changes have made -- let's say 1170.95 never gets  
24 enacted, so they don't have that separate hearing  
25 process. And maybe, Ms. Snider, maybe it's you. I'm

1 not sure.

2 But if those had happened, like, what is the  
3 recourse for somebody for whom the law has now changed  
4 that led to their conviction, or they believe that the  
5 law has changed, right? Because, I mean, the law has  
6 changed, but they believe they are affected by it.  
7 Because, to everyone's prior points, it's not that the  
8 felony murder rule or the theory of probable -- I'm  
9 losing the -- the consequences can't be applied. It's  
10 that they are limiting the application.

11 So we don't actually know, right? Like, I may  
12 think that I fall under one of the exceptions now, and I  
13 should never have been charged that way. And I think  
14 one of the commenters -- I don't remember if it was L.A.  
15 County or others -- said, essentially, that they have  
16 reviewed some number of petitions that they can look at  
17 on face and say this doesn't apply to you. But that  
18 there are others where they really have to do a lot more  
19 digging.

20 So my, sort of, question is -- to restate again --  
21 absent the creation of a specific new hearing process,  
22 what would have been the recourse for individuals who  
23 felt like they were no longer able to be convicted under  
24 these rules?

25 MS. SNIDER: And I will respond briefly, just

1 because you called out my name. I'm actually going to  
2 defer to the claimant and, I think, probably Mr. Osaki,  
3 because he had commented -- I think he had helped draft  
4 some comments in that regard. But I will defer to the  
5 claimant. And then if Mr. O'Connell would like to chime  
6 in, then I will defer to him as well. I'm just a mere  
7 civil litigator.

8 MEMBER WONG-HERNANDEZ: Well, because you had  
9 mentioned the hearing process as being taken sort of  
10 separately from everything else. And I really am  
11 fixated on the hearing process, because that felt very  
12 new to me and that it was specifically and affirmatively  
13 put in there by the Legislature to say, this is your  
14 specific recourse.

15 But I don't have the legal knowledge and I didn't  
16 see any -- in any of the documentation, anyone speak to  
17 what would happen, specifically absent that provision.

18 MS. SNIDER: Okay.

19 MR. OSAKI: So if I can -- and, perhaps, Ms. Grant,  
20 if you could help out with this, as well, because this  
21 is more of an appellate matter than a trial one.

22 So as far as I -- as far as I know, there's  
23 something called the Estrada rule. And so if a case is  
24 closed, that individual has -- really has no recourse  
25 unless the Legislature allows it. And in this case, the

1 Legislature allows case, that's long considered to be  
2 final, to be basically reopened with this new procedure.

3 And so if -- for those individuals who had been  
4 convicted long ago, and whose appellate rights have  
5 lapsed, those individuals would not get the benefit of  
6 this, and there would be no recourse for them.

7 I actually -- and Ms. Grant, if you could correct  
8 me if I'm wrong.

9 MS. GRANT: You are not wrong at all.

10 If their cases were final on appeal, then they  
11 would be post-conviction habeas. We're not funded for  
12 that. So those -- the only way that they get our  
13 services is by the statutes specifically saying that  
14 they are entitled to it.

15 MEMBER WONG-HERNANDEZ: So I have a follow-up  
16 question, then, just to make sure that I understand what  
17 you are saying is, if I am this person and I say, like,  
18 okay, the law has changed now. I feel like -- I have a  
19 habeas claim. I need to go either find an attorney,  
20 file a petition on my own. Like, essentially somebody  
21 would -- if I were to figure this out and file a  
22 petition, I have a right to potentially having my  
23 conviction vacated, but I don't have to be provided  
24 counsel.

25 Is that what I'm hearing? You are not saying that,

1 absent this statute, no one who had been convicted in  
2 the past could go back and say, I want my conviction  
3 vacated.

4 MS. GRANT: Well, you can go back.

5 But so what happens is, if you are in the process  
6 of appeal, your appeal is not final. The appellate  
7 court can remand it back, but the courts, through  
8 Estrada, have sort of had a cut-off point, which says,  
9 basically, if your case is final on appeal, then you  
10 don't actually have a vehicle to get back into trial  
11 court unless you file a habeas. And that's a  
12 post-conviction habeas. Laws change all the time on  
13 those.

14 Like, for instance when --

15 MEMBER WONG-HERNANDEZ: Right. That's why I'm  
16 trying to figure out what is -- what's the procedure for  
17 a post-conviction habeas?

18 MS. GRANT: So what generally happens is if -- if  
19 the statute itself provides for representation, then we,  
20 as public defenders, will take it.

21 But if the cases are final -- an example of this is  
22 three-and five-year priors became discretionary. Some  
23 other one-year priors are no longer in effect.

24 A lot of those clients, in prison right now, want  
25 to try to get back into the trial court to be

1 resentenced. And if their case is final on appeal, they  
2 don't have a mechanism to do it. We don't represent  
3 them in those unless somehow they have gotten back into  
4 court. So they often will -- so, yeah.

5 I guess the bottom line is, the public defender  
6 generally does not handle post-conviction habeases  
7 unless there's some type of legislation that gives us  
8 the authority to do so.

9 I don't know. Mr. O'Connell, maybe you have a  
10 different opinion from San Diego, but that's basically  
11 the way it generally works here.

12 MR. O'CONNELL: No. I don't have a different  
13 opinion.

14 Just a couple things: I tried looking up some  
15 stuff, and I actually found what's called a writ of  
16 audita querela. And I will spell that: It's  
17 A-U-D-I-T-A Q-U-E-R-E-L-A. And that is basically a  
18 means of attacking a judgment that was correct at the  
19 time rendered, but which is rendered infirm by matters  
20 which arise after its rendition.

21 However, I also found a case, *People v. Vasilyan*.  
22 I'm going to spell it because I can't pronounce it:  
23 V-A-S-I-L-Y-A-N. That's 174 Cal.App.4th 443, page 457,  
24 and footnote 2, which basically says, that's a -- was a  
25 writ of common law, and they don't believe it exists in



1 criminal law anymore.

2 So I think the answer is correct; there is actually  
3 no writ that you can get or a habeas in this situation.

4 The only thing I would note, at least in my office,  
5 when we do get these habeas petitions, and we get  
6 assigned to them, my understanding is, we get, in those  
7 cases, reimbursed by the State. So those have been  
8 found to be something that the State reimburses us for.  
9 So I just want to point that out, because it's not the  
10 typical thing that public defenders do. Post-conviction  
11 stuff is something outside our normal realm, and when we  
12 do it, we actually are reimbursed by the State.

13 MEMBER WONG-HERNANDEZ: Thank you, all, for  
14 answering my questions. I really appreciate it.

15 What I am struggling with is the idea that the  
16 Legislature would put a new hearing into law and  
17 specifically say that you have a right to counsel, kind  
18 of for a post-conviction proceeding, that is  
19 nonstandard, and that we would say that that is not a  
20 state-imposed mandate, like a reimbursable mandate.  
21 Like, I'm really struggling with that, and I'm open to  
22 somebody explaining to me why that's correct.

23 I do think of 188 and 189 as separate. And I do --  
24 I don't actually think -- I think that those fall  
25 under -- I don't know if it falls strictly under the

1 sort of crimes and infractions disclaimer, but I am  
2 compelled by the idea that, look, if we change the law  
3 and it changes the way that you provide counsel to your  
4 clients, that that's -- I don't think that that is a new  
5 duty or a higher level of service. But I am -- I remain  
6 concerned about 1170.95.

7 And I -- it feels -- this doesn't feel right to me,  
8 the idea that they would put into law, because whenever  
9 a law has changed, that changed a criminal penalty or a  
10 crime, there hasn't always been a hearing put into  
11 statute that said, here's going to be the procedure for  
12 how you go back and get something vacated. And,  
13 certainly, then specifically, guaranteeing right to  
14 counsel in that new hearing, I think is new. I don't  
15 know how we could honestly say that that's not a mandate  
16 by the State on to the locals.

17 So I'm happy to keep hearing that, but that's --  
18 that's how I'm looking at this right now. I think that  
19 it's -- you know, and if we find that -- that's the  
20 issue that I'm having with the proposed decision right  
21 now. It's a different issue than the one that Ms. Olsen  
22 is having, but perhaps that goes back to the theory of  
23 unanimity. We kind of have our different issues with  
24 the proposed decision.

25 But I also think that even -- however we end up

1 deciding as a reimbursement, like, we should. Like, we  
2 the State, should fund this. If this was the way that  
3 we decided that we were going to go about correcting a  
4 wrong or dealing with changing a law in a way that's  
5 sort of more just, it seems appropriate that the  
6 Legislature should -- you know, should fund this,  
7 especially if it's going to be mostly a one-time thing.

8 I mean, it will be some amount of ongoing, but  
9 these are short-term activities. If you are talking  
10 about going back, everything going forward -- like, at a  
11 certain point, it should drop off. There should be  
12 people who have the opportunity to, you know, make their  
13 case for why their conviction should be vacated or they  
14 should be resentenced; and then we should just have a  
15 going-forward point.

16 Sorry. I have talked a lot. I'm going to stop  
17 talking now. I'm sure other people have questions.

18 CHAIRPERSON MILLER: Thank you.

19 I'm going to open it up. I do just want to make  
20 the point that the legislative intent, while it may have  
21 been the intent, it would be -- that's not how the  
22 Commission staff see it, the law as written, because of  
23 the way they actually eliminated the crime. So I would  
24 like the commission staff to speak to that.

25 So, obviously, the Legislature would have an

1 opportunity to write a law that was a little bit  
2 different as well. So I just want to make sure we're  
3 not speaking to legislative intent as providing a higher  
4 level of service, because I do think that that could be  
5 a dangerous precedent for us to have as a Commission.

6 But, Ms. Gmur and Ms. Shelton, do you want to go  
7 ahead and speak to that?

8 MS. GMUR: Yes. Actually, I definitely would.

9 Thank you, Commissioner Wong-Hernandez, for that,  
10 because I too struggled with that point for quite some  
11 time. And my initial work was that it was separate.

12 And, yet, as I'm looking at the hearing process  
13 from 1170.95, it definitely is linked, because it is the  
14 mechanism by which the application of the changes of  
15 Penal Code sections 188 and 189 are applied  
16 retroactively. It is simply a mechanism that allows  
17 that to be applied to those who have already been  
18 convicted and it -- as you noted, as you go forward, it  
19 will cease to exist because the laws -- the changes to  
20 188 and 189 will be applied prospectively. So I too  
21 struggled with that, but I couldn't actually make it to  
22 break it off.

23 As Ms. Shelton already pointed out, the language  
24 references the changes in sections 188 and 189. In  
25 addition, it really is -- it can't stand on its own,

1 because, without the changes in 188 and 189, there would  
2 be no reason to go back.

3 Also, we cannot delve into the legislative history  
4 if the statutes are clear on their face. And in this  
5 case, they are very clear on their face, especially  
6 1170.95. It is very well laid out as to how this  
7 process is supposed to go forward.

8 So why? I don't -- I don't know.

9 But I can say that, as much as I tried to see it as  
10 a stand-alone, ultimately, I had to conclude that it was  
11 directly linked to the rest of 1437 and the rest of the  
12 legislation.

13 MEMBER WONG-HERNANDEZ: Thank you.

14 I can appreciate that.

15 What -- I guess what I'm -- I'm not saying that it  
16 should be a stand-alone. I'm saying that I think that  
17 188 and 189 stand alone; that they could exist without  
18 the additional of the hearing -- the addition of the  
19 hearing process, and -- because there would be a  
20 different mechanism, and it wouldn't involve a right to  
21 counsel. And please tell me if that's not the case, if  
22 there wouldn't be any other mechanism, but that's what I  
23 was just hearing from Ms. Grant. And I don't feel  
24 like -- I mean, if what Ms. Grant said is not your  
25 understanding, I would love to hear that.

1           And then the only other thing I wanted to say is,  
2 with regard to legislative intent, I'm not suggesting in  
3 any way that we look at legislative intent, and I  
4 apologize if I was unclear.

5           All I'm saying is that if this Commission decides  
6 not to reimburse, that we decide that it does not meet  
7 the tests necessary to qualify under the constitution as  
8 a reimbursable mandate, I believe that the Legislature  
9 passed the law and imposed the new requirements, that we  
10 all agree are requirements, whether or not they are  
11 reimbursable. And I think we all agree that they are  
12 cost-driving, even if they are not reimbursably mandated  
13 by the State; that the right thing to do would also be  
14 for them to include an appropriation and a subvention of  
15 funds for those purposes, even if it does not meet the  
16 letter. And that could be -- that would be done outside  
17 of a mandates process.

18           CHAIRPERSON MILLER: I appreciate that  
19 clarification. Thank you.

20           Ms. Shelton, and then I'm going to go to  
21 Ms. Ramirez.

22           MS. SHELTON: I think I am wanting to speak so a  
23 point that was made a little bit earlier. And I'm sort  
24 of questioning myself, but I want to bring this up.

25           So if you read through the history in this test

1 claim, the courts were questioning the felony murder  
2 rule of the Natural and Probable Consequences Doctrine,  
3 and one of the cases, I believe, found that it was cruel  
4 and unusual punishment, in that particular case, to find  
5 that the person be convicted of murder.

6 It's very similar to this legislation. It's very  
7 similar to a test claim the Commission had, about a year  
8 ago, in youth offender parole hearings; where, there,  
9 you were, under prior law, holding people that committed  
10 crimes as juveniles in life without the possibility of  
11 parole or 25 years to life, which, there, the courts  
12 also found to be cruel and unusual punishment.

13 And the Legislature did lay out, by statute, a new  
14 petition process to change that penalty in that case.  
15 Similarly, here, they have created a new statute to  
16 allow a petition process to eliminate that crime in  
17 those circumstances where the defendant doesn't have  
18 intent to kill or was not a major participant of -- in  
19 that particular crime and it caused reckless disregard  
20 to human life. So for that class of individual, the  
21 crime of murder has been eliminated.

22 So this analysis does agree that there are new  
23 requirements, and, certainly, there are a lot of costs,  
24 no doubt, to counties for their D.A. and their public  
25 defender.

1 But we are following the mandate rules in 17556(g),  
2 and it says, when it eliminates a crime -- and, here,  
3 we're finding, it's pretty clear that it's eliminating a  
4 crime for that class of defendant, then we can't find  
5 that reimbursement is required under the constitution.

6 CHAIRPERSON MILLER: Thank you.

7 Ms. Ramirez, did you have a question?

8 MEMBER RAMIREZ: Well, I have a comment too. I'm  
9 very -- I am very compelled, because I see what it takes  
10 to provide justice for people. And we know -- we know  
11 there have been many cases where it's tragic, where the  
12 actual person sitting in the car, not understanding  
13 what's going on, inside the 7-Eleven, actually gets the  
14 death penalty, not specifically in California, but other  
15 cases; and the person who actually did the shooting does  
16 not. And -- so there's been so much injustice with the  
17 death penalties, totally aside from what we're dealing  
18 with today, and it's very troubling.

19 So I think -- totally agree with Ms. Wong-Hernandez  
20 about the Legislature. So many times we have come up  
21 with this situation where we see what it takes to  
22 comply. And we find that the mandates statute, the  
23 amendment, just doesn't allow us to do -- this  
24 Commission to do what some of us feel is the right thing  
25 to do, because it's not within our power, and that's



1 always a headache for me.

2 And it is a problem for the Legislature not -- for  
3 whatever good or indifferent reason, not providing the  
4 resource that we know all the State is really strapped  
5 in terms of resources now to provide to our cities and  
6 counties.

7 So I don't -- I don't know what we could do to get  
8 around what Ms. Shelton is saying about the mandates  
9 statutes.

10 I'm very troubled. I would like to see if we have  
11 some other -- I don't know if we can make a compromise  
12 here at all. Let me -- let me know. Can we have staff  
13 address that at all?

14 CHAIRPERSON MILLER: I'm going to have  
15 Ms. Shelton -- if you want to address that. And then I  
16 saw your hand, Mr. Osaki. I will call on you next.

17 MS. SHELTON: Unfortunately, these are questions of  
18 law. So a court would review the Commission's decision  
19 de novo and determine whether it's correct as a matter  
20 of law. So it really is, you have to either find that  
21 this is reimbursable, under Article XIII B, section 6,  
22 or it's not. And the Commission does not have the  
23 authority to negotiate any kind of agreement.

24 MEMBER RAMIREZ: That's what I thought.

25 CHAIRPERSON MILLER: Thank you for that.

1 Mr. Osaki. And then I'm going to see if there's  
2 any other board member question. So please raise your  
3 hands, Board Members, if you have questions.

4 Go ahead, Mr. Osaki.

5 MR. OSAKI: Well, Ms. Ramirez, I wanted to address  
6 that particular point, because if we -- if you feel  
7 constrained by the statute, 17556(g) specifically says  
8 it has to eliminate a crime. And so, as case law -- as  
9 Mr. O'Connell and Ms. Grant have pointed out -- it's not  
10 about eliminating a legal theory. It's -- the statute  
11 specifically says "eliminate a crime."

12 The crime here is first- and second-degree murder.  
13 So just because a class of individuals would not obtain  
14 any liability as a result of the passage of this  
15 statute, here, the crime at issue is first- and  
16 second-degree murder, and those crimes have not been  
17 eliminated by the passage of this statute.

18 Just a clear wording of 17556(g) is such that, you  
19 know, if you just follow that, it would be clear that  
20 there -- there is a valid test claim here and that you  
21 have to add additional words to the statute in order for  
22 you to just -- to follow the staff's recommendation. If  
23 you just look at 17556(g), it has to eliminate a crime.  
24 And I don't -- and we just don't have that.

25 CHAIRPERSON MILLER: I'm going to -- thank you.

1 I'm going to -- I see Mr. O'Connell. I'm going to call  
2 on staff.

3 So obviously the statute doesn't speak to first-  
4 and second-degree. It's the intent. So, I mean, we  
5 understand where the disagreement is in the words in the  
6 statute. So, you know, we're not suggesting that this  
7 eliminates first- and second-degree murder as a crime.  
8 We're suggesting that it eliminates this provision of  
9 intent, so it's a crime within that murder statute.

10 So I think that is clearly where the disagreement  
11 is, and I think the -- and that's where staff has done  
12 their analysis. But, certainly, no words have been  
13 added. We -- but we are disagreeing on the  
14 interpretation. So I just want to correct that for the  
15 record.

16 Any other board member questions -- I'm actually  
17 going to start to call the question here -- from the  
18 board? To -- Mr. Adams, please.

19 MEMBER ADAMS: Thank you, Madam Chair --  
20 Chairwoman.

21 I'm having a little problem with section 17556(g),  
22 because I'm seeing it reads, created a new crime or  
23 infraction, eliminated a crime or infraction, or changed  
24 the penalty for a crime or infraction.

25 How does that spell out, where this, in fact, is

1 changing a penalty for a certain class of offender?

2 MS. GMUR: If I may, Madam Chair.

3 CHAIRPERSON MILLER: Please, thank you.

4 MS. GMUR: So, actually, when you look at it, it  
5 doesn't change the penalty, because if you have somebody  
6 who is convicted, who is an aider and abettor, basically  
7 convicted before the change in law, and that individual  
8 petitions, it doesn't change the penalty. It  
9 reverses -- it reverses the conviction. It vacates the  
10 sentence. It makes it go away.

11 It applies to -- if you would not have been  
12 convicted under the new law, it makes your conviction go  
13 away. That does, in a way, change the penalty, because  
14 you are not paying any penalty, but it does so by  
15 eliminating the underlying crime. It finds you didn't  
16 commit the murder because it can't be proven under the  
17 new law, and, thus, you vacate the prior sentence.

18 CHAIRPERSON MILLER: Thank you.

19 Any follow-up to that, Mr. Adams?

20 MEMBER ADAMS: I do.

21 CHAIRPERSON MILLER: Please.

22 MEMBER ADAMS: Thank you.

23 My follow-up question is, if -- under the new  
24 rules, if the DA or the public defender do not proceed  
25 with this, what happens to folks that are otherwise

1 convicted under the old felony murder rule?

2 By operation of law, can they potentially go away,  
3 or does somebody, in fact, have to take action to have  
4 these penalties changed or, again, if the DA just  
5 decides not to pursue it and not to incur costs. Once a  
6 claim is filed, A, I was convicted under the old law,  
7 and I want this change.

8 MS. GMUR: Again, if I may.

9 So the process requires that it -- that you do have  
10 to act. The convicted individual can file the petition  
11 on their own and get the ball rolling, get the court to  
12 review. The court may overturn it on its face. They  
13 may call for a hearing, and, at that point, you would  
14 get counsel and the -- the district attorney.

15 If you were -- and then -- and then upon the  
16 hearing, if you did have -- if the evidence did show  
17 that you had your own personal intent, then you wouldn't  
18 be able to apply the new law, and -- but it is not  
19 automatic. It does require the filing of a petition  
20 with the court to get the ball rolling.

21 MEMBER ADAMS: Thank you for that.

22 And just a final comment: I'm struggling with the  
23 idea that a crime has been eliminated. I really  
24 appreciate the argument that has been put forward.  
25 Thanks.

1 CHAIRPERSON MILLER: Thank you, Mr. Adams.

2 Any other board member questions?

3 I see your hand, Mr. O'Connell. Any other board  
4 member questions?

5 (No response)

6 CHAIRPERSON MILLER: Okay. Mr. O'Connell, why  
7 don't we have one final comment from you, and then I'm  
8 going to let the staff close. And assuming there's no  
9 other board member questions, we'll see the disposition  
10 of the board.

11 Mr. O'Connell.

12 MR. O'CONNELL: Yes, I kind of want to address the  
13 issue -- I think Ms. Olsen had it right -- the  
14 difference between individuals now not being convicted  
15 of the crime and the crime itself being eliminated,  
16 because I think that's very clear. All SB 1437 did was  
17 narrow the number of people who can be convicted, and it  
18 didn't eliminate crimes. It also didn't eliminate the  
19 intent, as being stated. It just basically redefined  
20 and gave different definitions for those crimes and  
21 intent.

22 I would give an example. For example, let's say  
23 the Legislature decided, in the next session, to raise  
24 the standard of proof, from beyond a reasonable doubt to  
25 beyond all doubt. If they did that, that would make it

1 that certain people now would not be convicted of the  
2 crime. I don't think that would eliminate any crimes.  
3 It would just make it more difficult for the prosecution  
4 to prove that somebody was guilty of it. That's all SB  
5 1437 did.

6 In theory, the prosecution might still be able to  
7 convict some of these people in the future, under  
8 different other theories or other facts or making  
9 certain arguments. They use these usually because they  
10 didn't have to, but they may be able to in the future.  
11 So all it did was made it more difficult.

12 Another example I can think of is, what if the  
13 Legislature decided to eliminate self-defense. They  
14 decided you can no longer claim self-defense. Now a  
15 whole bunch of people who might have been able to get  
16 acquitted of murder, may now be convicted of. But does  
17 that now create a crime? Do we now have a crime of  
18 non-self-defense murder? No. It just made it so the  
19 group of people -- more people could be convicted of  
20 murder.

21 SB 1437, all it did was narrow -- it very  
22 narrowly -- actually, it's a very small sliver of people  
23 now -- will no longer be able to be convicted. The  
24 crime itself still exists.

25 And that's all I have to say.

1 CHAIRPERSON MILLER: Thank you.

2 And, again, therein lies the question as to whether  
3 or not the crime itself still exists.

4 And so a couple, just, points on that:

5 I do think that this is a case where the  
6 Legislature probably did need to write a law that was a  
7 little bit more clear, because the black-and-white  
8 reading of the law is that it eliminated this provision  
9 of the crime of murder.

10 I completely understand what you are saying.

11 And to Ms. Wong-Hernandez's point, does the  
12 Legislature need to consider what it did? Those are all  
13 true, but that's not within the scope of what the  
14 Commission on State Mandates can look at. And so that  
15 is the -- that is -- that's the issue here.

16 So I actually am going to move the staff  
17 recommendation that we do approve the decision, and I  
18 will -- I will open that question to the board, assuming  
19 that there's no further public comment.

20 Let me see if there's a second.

21 MEMBER RAMIREZ: I -- reluctantly yes; I will  
22 second that.

23 CHAIRPERSON MILLER: Thank you. So it was moved by  
24 Miller; seconded by Ms. Ramirez.

25 And I appreciate how extraordinarily difficult this



1 is.

2 So with that, Ms. Halsey, are there any -- I'm just  
3 going to call one more time on Finance to see if there's  
4 any additional public comment.

5 (No response)

6 CHAIRPERSON MILLER: I don't see any from Finance.  
7 Any other comment, Ms. Palchik, that we see?

8 MS. PALCHIK: No. There's none.

9 CHAIRPERSON MILLER: Great. Thank you very much.  
10 Any other final board member questions before we  
11 take the roll?

12 (No response)

13 CHAIRPERSON MILLER: Okay. Seeing none, it's been  
14 moved and seconded.

15 And Ms. Halsey, will you please call the roll.

16 MS. HALSEY: Sure.

17 Mr. Adams.

18 MEMBER ADAMS: No.

19 MS. HALSEY: Ms. Lee.

20 MEMBER LEE: Sorry about that. I couldn't find  
21 my -- find my microphone.

22 I agree with Miller -- or Chair Miller and  
23 Ms. Ramirez.

24 MS. HALSEY: So aye?

25 MEMBER LEE: Aye. Sorry.

1 MS. HALSEY: All right.

2 Ms. Miller.

3 CHAIRPERSON MILLER: Aye.

4 MS. HALSEY: Ms. Olsen.

5 MEMBER OLSEN: No.

6 MS. HALSEY: Ms. Ramirez.

7 MEMBER RAMIREZ: Yes.

8 MS. HALSEY: Mr. Rivera.

9 MEMBER RIVERA: Aye.

10 MS. HALSEY: Ms. Wong-Hernandez.

11 MEMBER WONG-HERNANDEZ: No.

12 CHAIRPERSON MILLER: Thank you.

13 MS. SHELTON: So the motion carries with four  
14 votes.

15 CHAIRPERSON MILLER: Great. Thank you very much,  
16 and I really appreciate that discussion and how  
17 incredibly challenging this is to the representatives  
18 here, from L.A. and San Diego and certainly encourage  
19 you to work with the Legislature.

20 So thank you so much for you time and your  
21 diligence and your integrity during this call.  
22 Sincerely appreciate it, and especially to the board  
23 members for the thoughtful discussion and to Ms. Gmur,  
24 who had a really tough first presentation. Thank you  
25 for that.

1 MS. GMUR: Thank you.

2 CHAIRPERSON MILLER: Ms. Halsey.

3 MS. HALSEY: We now ask the presenters for Item 3  
4 to please turn off their videos and mute their  
5 microphones.

6 And next is Item 4. Senior Commission Counsel Eric  
7 Feller will please turn on his video and unmute his  
8 microphone, and present a proposed decision and  
9 parameters and guidelines on *Vote By Mail Ballots:*  
10 *Prepaid Postage.*

11 At this time, we invite the parties and witnesses  
12 for Item 4 to turn on their videos and unmute their  
13 microphones.

14 MR. FELLER: Good morning. I would like to add my  
15 congratulations to those who have already been said  
16 (verbatim) to Ms. Ramirez. Been a pleasure working with  
17 you.

18 So this is the proposed decision and parameters and  
19 guidelines for *Vote By Mail: Prepaid Postage* test claim,  
20 that provides reimbursement for elections officials to  
21 provide prepaid postage, identification envelopes  
22 delivered to voters with their vote by mail ballots,  
23 beginning January 1, 2019, for elections required by  
24 law. Reimbursement is not required for discretionary  
25 elections or elections that could have been consolidated

1 with a regular election within statutory deadlines, or  
2 for elections where the county or city has fee authority  
3 to hold the election.

4       Some of the comments on the draft parameters and  
5 guidelines requested that cities and special districts  
6 for which elections are conducted be eligible for  
7 reimbursement. Local entities that do not conduct  
8 elections are not mandated by the State to provide  
9 prepaid postage and identification envelopes for vote by  
10 mail ballots, even though these entities may incur costs  
11 by paying a county or city to conduct their elections  
12 for them.

13       The staff finds that only local entities that  
14 conduct elections are eligible for reimbursement.

15       Other comments focused on a business reply mail  
16 subscription to provide prepaid postage, and staff found  
17 that that business reply mail subscription is a  
18 reasonably necessary way to comply with the mandate.

19       The proposed decision and parameters and guidelines  
20 also identifies offsetting funds from the 2018, 2019,  
21 and 2020 State Budget Acts, that were appropriated and  
22 can be used to pay for the mandate.

23       Staff recommends the Commission adopt the proposed  
24 decision and parameters and guidelines and authorize  
25 staff to make any technical, nonsubstantive changes to

1 those following the hearing.

2 CHAIRPERSON MILLER: Thank you very much.

3 Will the parties and witnesses for this item please  
4 state your name for the record.

5 MS. GONZALEZ: Hello. Lucia Gonzalez with the  
6 Office of County Counsel for Los Angeles County.

7 We concur with the Commission's draft proposed  
8 decision and parameters and guidelines.

9 CHAIRPERSON MILLER: Thank you, Ms. Gonzalez, and  
10 nice to see you again.

11 Mr. Gibbons.

12 MR. GIBBONS: Dillon Gibbons with the California  
13 Special Districts Association.

14 CHAIRPERSON MILLER: Great. Thank you.

15 Mr. Nichols?

16 MR. NICHOLS: Andy Nichols. I'm sorry. Andy  
17 Nichols. State mandated-cost consultant to cities,  
18 counties, and special districts.

19 CHAIRPERSON MILLER: Great. Thank you very much.

20 Any other witnesses here?

21 (No response)

22 CHAIRPERSON MILLER: Seeing none. I don't see  
23 anyone from the Controller's Office.

24 Great. So may we begin then? We've heard from  
25 Ms. Gonzalez, Mr. Gibbons. And Mr. Nichols, do you have

1 anything you wanted to add to that?

2 Go ahead, Mr. Nichols.

3 MR. NICHOLS: I think I was listed first, but  
4 Mr. Gibbons was going to lead on this one.

5 CHAIRPERSON MILLER: All right. Great. Thank you.

6 MR. GIBBONS: Thank you. Chair, Members of the  
7 Commission, my name is Dillon Gibbons, and I'm the  
8 senior legislative representative for the California  
9 Special Districts Association.

10 Thank you for allowing me the opportunity to  
11 address you today about this additional, added cost to  
12 local elections, and thank you for the staff for working  
13 with me to make it happen.

14 And, again, special congratulations to  
15 Commissioner/Supervisor Ramirez.

16 As noted in our comments to the Commission dated  
17 September 25th, CSDA is opposed to the Commission  
18 adopting this proposed decision and parameters and  
19 guidelines related to prepaid postage for vote by mail  
20 ballots.

21 We ask that the Commission and staff reevaluate the  
22 proposed decision.

23 And I have a question that I would like answered by  
24 the Commission.

25 Article XIII B, section 6 of the State

1 Constitution: "A mandated new program or higher level  
2 of service includes a transfer by the Legislature from  
3 the State to cities, counties, cities and counties, or  
4 special districts of complete or partial financial  
5 responsible responsibility for a required program for  
6 which the State previously had complete or partial  
7 financial responsibility."

8 My question to the Commission is, when the  
9 Legislature is requiring financial responsibility for a  
10 new program be absorbed by a county running an election,  
11 and those costs associated for a different local agency  
12 are then forced on to them by the State, via the county,  
13 those cities and special districts are now paying for a  
14 higher level of service mandated by the State  
15 Legislature.

16 How is that not similar to the passthrough of costs  
17 described in Article XIII B, section 6?

18 The Commission --

19 MR. FELLER: Would you like me to address that?

20 MR. GIBBONS: Well, let me -- I got to add one more  
21 comment, and then, yes, that would be great.

22 So the Commission is very clear that the county  
23 cannot absorb the increased costs mandated by the  
24 Legislature and claim it to be reimbursable, as there is  
25 a fee authority offset. The cost of that fee authority

1 on cities and special districts for the mandated  
2 activity is a direct result of legislative mandate.

3 So thank you again for allowing me to present. I  
4 look forward to the Commission -- to the Commission's  
5 response.

6 CHAIRPERSON MILLER: Thanks, Mr. Gibbons.  
7 Go ahead, Mr. Feller.

8 MR. FELLER: So the provision --

9 CHAIRPERSON MILLER: Please state your name for the  
10 record, sir.

11 MR. FELLER: Eric Feller, Commission on State  
12 Mandates.

13 The provision that Mr. Gibbons refers to prohibits  
14 a transfer of financial -- a responsibility from the  
15 State to the locals -- to the local agencies without the  
16 State paying for it.

17 The -- in this case, that's not what's happening.  
18 The -- what's happening is that the counties who --  
19 and -- primarily, and some cities, who run the elections  
20 are the ones that are required by the test claim statute  
21 to provide the service of prepaid postage.

22 The special districts and the other districts are  
23 not providers of that service. They are consumers of  
24 that service. And while we do not deny that they may  
25 incur increased costs, the California Supreme Court has



1 said that, in a 2004 case footnoted on page 60 -- on  
2 page -- I think -- no, footnote 69 of your analysis,  
3 that increased cost alone do not require reimbursement.

4 The local agencies have to actually be providing a  
5 new program or a higher level of service. And, in this  
6 case, that -- that -- this only applies to elections  
7 officials, and elections officials are employed by  
8 counties and sometimes cities if they hold their own  
9 elections.

10 So that is consistent with our test claim decision  
11 and consistent with Article XIII B, section 6, as it's  
12 been interpreted by the California Supreme Court.

13 MS. SHELTON: May I also just add that that finding  
14 has already been made and it is included in a final  
15 decision of the Commission on this test claim for vote  
16 by mail. So the P's & G's have to be consistent with  
17 that.

18 Also, to clarify even further, Mr. Gibbons, a  
19 question about the transfer of state fiscal  
20 responsibility to special districts or cities that don't  
21 conduct their elections; that provision in the  
22 Constitution only works if the State had prior  
23 responsibility for the program before, and that has  
24 never been shifted. Counties have always been the  
25 elections officials, and sometimes cities, to conduct

1 these elections, so that never changed, and that  
2 provision does not apply.

3 You have to have a state-mandated activity imposed  
4 on you, and the only activity imposed on here are those  
5 election officials that are conducting the elections.

6 So we have a final decision that can't be  
7 overturned.

8 CHAIRPERSON MILLER: So this is -- go ahead,  
9 Mr. Gibbons. But just to be clear, this is -- you know,  
10 we do all these decisions in stages, and this is the  
11 end.

12 Go ahead, Mr. Gibbons.

13 MR. GIBBONS: Yeah. I understand that.

14 And that's -- I completely agree with the -- where  
15 we're at in the process. As far as counties are  
16 required to hold the elections for the State, they put  
17 things on the ballot; the counties are required to do  
18 them. So that is a mandate on the counties to do the  
19 State's activities.

20 When those costs go up, as a result of this  
21 mandate, where special districts are also required to  
22 consolidate our elections, per legislation -- so, in,  
23 2016, statutes went into effect that required special  
24 districts to consolidate their elections with statewide  
25 elections. Should voter turnout not be at a certain

1 level, we are now required to participate in that  
2 election process. It is not an option; we're required  
3 to.

4 So now, we're required to participate in that  
5 election. That election -- those elections costs go up.  
6 As a mandate from the State, those two things combined,  
7 now increased our costs as a result of the State  
8 mandate. Not just because the costs are going up,  
9 because we now have a pay for a portion of a requirement  
10 to run a statewide election.

11 So that's where we're at.

12 And I -- again, I know where we're at in the  
13 process, so I'm not anticipating we're going to undo  
14 this.

15 But I just want to make it clear that, you know,  
16 special districts, when counties pass along the cost of  
17 the added mandate from the State, we're on the hook for  
18 this. This is an added cost from a mandate and this  
19 sets a bad precedent, that we can just have passthrough  
20 costs from counties on to special districts, and say no,  
21 because the special districts isn't directly having to  
22 pay the cost to the -- of the State; it's the county  
23 cost that now we're not eligible for reimbursement. I  
24 think it sets a bad precedent.

25 Thank you very much.

1 CHAIRPERSON MILLER: Thanks, Mr. Gibbons.

2 Mr. Feller, go ahead, please.

3 MR. FELLER: So in addition to what we have already  
4 said, and as Camille pointed out, this is a final,  
5 binding decision that already took place in the test  
6 claim phase.

7 But the fact that special districts have to hold  
8 elections is not new. They have always had to hold  
9 elections. The timing may have changed, but they have  
10 always held elections because they have board members  
11 that have to be elected and other things.

12 So in addition to the reasons that we stated,  
13 elections generally are not new to special districts,  
14 and this -- this particular cost for prepaid postage is,  
15 and we understand that. But that's just not a new  
16 thing. The timing may be new, but the contract with the  
17 counties generally have always taken place, at least  
18 since the special district has been formed.

19 CHAIRPERSON MILLER: Great. Thank you.

20 Any -- Mr. Gibbons, we can't hear you if you are  
21 trying to speak.

22 MR. GIBBONS: I don't -- I don't want to end up  
23 getting in a back-and-forth, so I'll end it.

24 CHAIRPERSON MILLER: I appreciate that. Yes.

25 Thank you.

1 Any other comments or questions?

2 (No response)

3 CHAIRPERSON MILLER: From the State Controller --  
4 again, do you have any comments?

5 (No response)

6 CHAIRPERSON MILLER: Ms. Palchik, can I just  
7 confirm with you that we don't have the State Controller  
8 on the line?

9 MS. PALCHIK: That's correct. Nobody has offered  
10 to appear on behalf of the State Controller, and I see  
11 no hands.

12 CHAIRPERSON MILLER: Great. Thank you very much.  
13 Are there any members that have questions?

14 MR. NICHOLS: Madam Chair, may I be allowed to  
15 speak?

16 CHAIRPERSON MILLER: Oh, I'm sorry, Mr. Nichols. I  
17 thought you did. Yes, please, go ahead. I sincerely  
18 apologize.

19 MR. NICHOLS: I greatly appreciate that.

20 CHAIRPERSON MILLER: Trying to keep track of all my  
21 squares on the Zoom. Thank you, Mr. Nichols. Please.

22 MR. NICHOLS: Thank you, Madam Chair.

23 My name is Andy Nichols. As I mentioned before,  
24 I'm a state-mandated cost consultant for cities,  
25 counties, and special districts. And I do want to thank

1 the Commission staff, and I do appreciate the analysis.

2 And although I do disagree with it, I did want to  
3 share a few things as we go -- as we look at this. I  
4 recognize that a decision is in place, but I'm going to  
5 kind of date myself with this a little bit. I'm not  
6 going to talk terribly long, but back in the summer of  
7 1997, I assisted Jim Cunningham, who was then the  
8 legislative mandate specialist for San Diego Unified  
9 School District on a parameter and guidelines amendment  
10 to the existing program absentee ballots, which covered  
11 the full costs of the absentee ballots.

12 And as a result of that amendment, it allowed, at  
13 that time, school districts and college districts to  
14 claim their absentee ballot costs that were being passed  
15 on to them, when it was previously only a special city  
16 and county and special district local agency  
17 reimbursement program.

18 The reason I mention that is, when that occurred in  
19 December 1997, the parameters and guidelines had  
20 included -- they were included before then, but they  
21 were still in there afterwards. If you looked at my  
22 Exhibit F, which is the letter I wrote back on  
23 September 22nd, on those adopted P's & G's by the  
24 Commission, you will see, under section A, three  
25 separate methods for agencies that have elections done

1 by the county election official and billed to the local  
2 agency those three separate methods for them to claim  
3 their reimbursement when they were being invoiced for  
4 that program. And it was usually a line item cost.

5 It's interesting, Los Angeles -- once again, to  
6 date myself; obviously I don't lead a very exciting life  
7 here. But Los Angeles County, when I spoke to Leonard  
8 Kay, for those of you who may be familiar with the name,  
9 he put it right on the bill, and we do identify it as  
10 reimbursable under this program.

11 And that's what I was envisioning when this test  
12 claim came through and was approved, that this was  
13 something where it was analyzed and may have been  
14 misstated, hence my letter on the 22nd.

15 If you -- it would be something where it would be  
16 something as straightforward as a method of claiming  
17 those costs.

18 Additionally, I recognized that in the case of  
19 cities, if they run their own election, as Mr. Feller  
20 had stated, they would be eligible for costs. But if  
21 they contracted with the county, they would not be.

22 What I found curious, though, is they may call an  
23 election, hire a third party -- let's say someone in  
24 Contra Costa County that runs elections, known as The  
25 Helsing Group. And even though they are not technically

1 doing all the work, they would get a bill from The  
2 Helsing Group, and I'm sure there would be a line item  
3 amount that they would be able to claim under what has  
4 been approved by the Commission on State Mandates.

5 To -- in a separate direction here, to  
6 Mr. Gibbons's point, under Article XIII B, section 6(c),  
7 I recognize that that applies to the State shifting a  
8 program on to -- directly on to a local government  
9 agent. But we have the State Legislature, the  
10 legislative wing of our government, passing 216, AB 216.  
11 And then we have the administrative arm of the State.  
12 The commission telling counties, like Mr. Gibbons was  
13 stating, telling those folks that conduct the elections,  
14 you must bill other folks that you're doing this work  
15 for, because we're not going to reimburse you, because  
16 it must show up -- you have fee authority, and it must  
17 show up separately. It can't be part of your  
18 reimbursement claim.

19 And with that in mind, you have two -- two  
20 different arms or two different wings of state  
21 government sending those costs to cities and special  
22 districts that have elections run by someone else.

23 And like Mr. Gibbons said, this -- this is one of  
24 those things where it's an added cost. It's been  
25 allowed in the past, under the absentee ballot program,



1 which still is an existing program, even though it's  
2 been Budget Act-suspended for the past ten years.

3 So I guess, for me, I'm frustrated. I recognize  
4 that the Commission disagrees with this. The staff  
5 has -- wants -- believes it's a different direction.  
6 But I would respectfully request the Commission consider  
7 an alternative motion, including these cities and  
8 special districts. They are being charged as a direct  
9 result of AB 216.

10 Thank you very much, and I appreciate your time.

11 CHAIRPERSON MILLER: Great. Thank you very much,  
12 Mr. Nichols.

13 Any further comments? Just making sure I didn't  
14 miss anyone else. I apologize again.

15 Questions or comments from the board?

16 (No response)

17 CHAIRPERSON MILLER: Seeing none, and seeing no  
18 further public comment -- correct, Ms. Palchik?

19 MS. PALCHIK: That is correct.

20 CHAIRPERSON MILLER: Great. Thank you for that.

21 Is there a motion?

22 MEMBER OLSEN: So moved. I will move the staff's  
23 recommendation.

24 CHAIRPERSON MILLER: Thanks, Ms. Olsen.

25 MEMBER WONG-HERNANDEZ: Second.

1 MEMBER RIVERA: Second.

2 CHAIRPERSON MILLER: Moved by Ms. Olsen. Seconded

3 by Ms. Wong-Hernandez.

4 Thank you.

5 Ms. Halsey, will you call the roll, please?

6 MS. HALSEY: Mr. Adams.

7 MEMBER ADAMS: Aye.

8 MS. HALSEY: Ms. Lee.

9 MEMBER LEE: Aye.

10 MS. HALSEY: Ms. Miller.

11 CHAIRPERSON MILLER: Aye.

12 MS. HALSEY: Ms. Olsen.

13 MEMBER OLSEN: Aye.

14 MS. HALSEY: Ms. Ramirez.

15 MEMBER RAMIREZ: Aye.

16 MS. HALSEY: Mr. Rivera.

17 MEMBER RIVERA: Aye.

18 MS. HALSEY: Ms. Wong-Hernandez.

19 MEMBER WONG-HERNANDEZ: Aye.

20 CHAIRPERSON MILLER: Great. Thank you.

21 That motion carries.

22 MS. HALSEY: Item 6 was on consent.

23 Item 7. Chief Legal Counsel Camille Shelton will

24 present the Chief Legal Counsel Report.

25 MS. SHELTON: Good morning.

1           Since our last hearing, the City of San Diego has  
2 filed a notice of appeal on its challenge to the  
3 Commission's decision in *Lead Sampling in Schools*.  
4 There, the trial court did agree with the Commission's  
5 decision, in finding that the requirement to test for  
6 lead in the drinking water of every K-12 school that had  
7 a public water system and that serves -- that requested  
8 the testing at no cost to the school does not impose a  
9 new program or higher level of service.

10           We have no other recent decisions.

11           As you can see from the hearing calendar, we do  
12 have a case management conference scheduled for  
13 January 29th, 2021, in *California School Board*  
14 *Association* case.

15           Secondly, on the remand of the Commission's  
16 decision on *Municipal Stormwater*, that case is pending  
17 in the Second District Court of Appeal. It has had two  
18 court hearings in the Court of Appeal, and the Court of  
19 Appeal has just issued a request for supplemental  
20 briefing, which is due December 9th. And they will  
21 issue their opinion after that supplemental briefing.

22           And that's all I have.

23           CHAIRPERSON MILLER: Great.

24           Any questions for Ms. Shelton?

25           (No response)

1 CHAIRPERSON MILLER: Seeing none, Ms. Halsey with  
2 the Executive Director Report, please.

3 MS. HALSEY: Sure.

4 After this hearing, there are 41 pending test  
5 claims, including one new filing, 39 of which are  
6 regarding NPDES permits, or stormwater permits. There's  
7 also one active parameters and guidelines and two  
8 statewide cost estimates pending.

9 And on inactive status, pending the outcome of  
10 litigation, there is an additional parameters and  
11 guidelines and an additional statewide cost estimate,  
12 and both of those are regarding NPDES permits. And  
13 there is one parameters and guideline amendment  
14 regarding graduation requirements.

15 Finally, there are ten IRCs, or incorrect reduction  
16 claims, pending, including three new filings.

17 Commission staff currently expects to complete all  
18 currently pending test claims and IRCs by approximately  
19 the July 2023 Commission hearing, depending on staffing  
20 and other workload. And some of the test claims and  
21 IRCs may be heard and decided earlier than currently  
22 indicated if they are consolidated for hearing, and then  
23 those consolidation issues are pending.

24 Please take a look at the Executive Director Report  
25 to see if an item you are interested in is likely to

1 come up in the next hearing or two. You can also use  
2 our pending caseload, which has all of our caseload on  
3 it. And that is also updated at least bimonthly, and  
4 that's available on our website and you can see when  
5 something is tentatively scheduled for hearing.

6 And that's all I have.

7 CHAIRPERSON MILLER: Great. Thank you.

8 Any questions for Ms. Halsey? Ms. Olsen, do you  
9 have a question?

10 MEMBER OLSEN: Nope.

11 CHAIRPERSON MILLER: Oh, okay. Sorry. I just saw  
12 your hand move.

13 Great. Thank you very much.

14 Now the Commission will meet in closed executive  
15 session -- Ms. Halsey just resent the closed session  
16 Zoom invitation -- pursuant to Government Code section  
17 11126(e) to confer with and receive advice from legal  
18 counsel for consideration and action, as necessary and  
19 appropriate, upon the pending litigation listed on the  
20 published notice -- on the published notice and  
21 agenda -- excuse me -- and to confer with and receive  
22 advice from legal counsel regarding potential  
23 litigation. The Commission will also confer on  
24 personnel matters pursuant to Government Code section  
25 11126(a)(1).

1           And we will reconvene in open session in  
2 approximately 15 minutes.

3           With that, please leave this Zoom, go to your  
4 e-mail, find the new Zoom link, and join us in closed  
5 session.

6           Thank you, everyone, and see you momentarily.

7           (Closed session was held from  
8 11:52 a.m. to 12:14 p.m.)

9           CHAIRPERSON MILLER: I think we have a quorum, so I  
10 can go ahead and get started. Right, Heather?

11          Okay. Great. Thank you.

12          The Commission met in closed executive session  
13 pursuant to Government Code section 11126(e)(2) to  
14 confer with and receive advice from legal counsel for  
15 consideration and action, as necessary and appropriate,  
16 upon the pending litigation listed on the published  
17 notice and agenda; and to confer with and receive advice  
18 from legal counsel regarding potential litigation; and,  
19 pursuant to Government Code section 11126(a)(1), to  
20 confer on personnel matters.

21          With no further business to discuss, I would like  
22 to wish all of you very happy holidays.

23          And just, again, congratulations to Ms. Ramirez and  
24 a huge thank you to the Commission staff for everything  
25 they have done during these incredibly trying times,

1 really, to all of you, because your service is really  
2 important to the State of California. So thank you very  
3 much.

4 And with that, I will entertain a motion to  
5 adjourn, please.

6 MEMBER OLSEN: So moved.

7 CHAIRPERSON MILLER: Thanks, Ms. Olsen.

8 All those in favor --

9 MEMBER RIVERA: I will second.

10 CHAIRPERSON MILLER: -- please unmute and signify  
11 by saying "aye."

12 (Ayes)

13 CHAIRPERSON MILLER: Anyone opposed to adjourning?

14 (No response)

15 CHAIRPERSON MILLER: No? Great.

16 Well, thank you for much, and the meeting is  
17 adjourned. Take care, everyone, and happy holidays.

18 (Proceedings concluded at 12:15 p.m.)

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CERTIFICATE OF REPORTER

I, KATHRYN S. SWANK, a Certified Shorthand Reporter of the State of California, do hereby certify:

That I am a disinterested person herein; that the foregoing proceedings were reported in shorthand by me, Kathryn S. Swank, a Certified Shorthand Reporter of the State of California, and thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said proceedings nor in any way interested in the outcome of said proceedings.

IN WITNESS WHEREOF, I have hereunto set my hand this 27th day of December 2020.



KATHRYN S. SWANK, CSR  
Certified Shorthand Reporter  
License No. 13061