Case No. S247266

IN THE SUPREME COURT
FOR THE STATE OF CALIFORNIA

CALIFORNIA SCHOOL BOARDS ASSOCIATION, et al.,
Appellants and Petitioners,

v.

STATE OF CALIFORNIA, et al.,
Appellees and Respondents.

CALIFORNIA STATE ASSOCIATION OF COUNTIES, LEAGUE OF CALIFORNIA CITIES, AND CALIFORNIA SPECIAL DISTRICTS ASSOCIATION APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS AND PETITIONERS CALIFORNIA SCHOOL BOARDS ASSOCIATION, ET AL.

First Appellate District, Division Five, Case No. A148606
Alameda County Superior Court, Case No. RG 11554698
The Honorable Evelio Grillo

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I. APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND INTEREST OF AMICUS CURIAE

Pursuant to Rule 8.520(f) of the California Rules of Court, the California State Association of Counties ("CSAC"), the League of California Cities ("League"), and the California Special Districts Association (CSDA)[1] respectfully request leave to file the attached amicus curiae brief in support of Appellants and Petitioners California School Boards Association, et al.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The League is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and

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[1] No party or counsel for a party authored the attached brief, in whole or in part. No one made a monetary contribution intended to fund the preparation or submission of this brief.

identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The California Special Districts Association ("CSDA") is a California non-profit corporation consisting of approximately 1,000 special district members throughout California. These special districts provide a wide variety of public services to urban, suburban and rural communities, including water supply, treatment and distribution; sewage collection and treatment; fire suppression and emergency medical services; recreation and parks; security and police protection; solid waste collection, transfer, recycling and disposal; library; cemetery; mosquito and vector control; road construction and maintenance; pest control and animal control services; and harbor and port services. CSDA is advised by its Legal Advisory Working Group, comprised of attorneys from all regions of the state with an interest in legal issues related to special districts. CSDA monitors litigation of concern to special districts and identifies those cases that are of statewide or nationwide significance. CSDA has identified this case as having statewide significance for special districts.

II. ISSUES TO BE BRIEFED IN PROPOSED AMICUS CURIAE BRIEF

Counsel for proposed Amici Curiae CSAC, the League, and CSDA has reviewed the briefing in this case, and will not duplicate those arguments. Instead, the proposed amicus brief provides this Court with legal analysis and examples to aid the Court in determining whether the State of California has provided the required subventions to school districts for the Graduation Requirement and the Behavioral Intervention Plan mandates. That issue requires this Court to evaluate the statute adopted by the

Legislature (Gov. Code, § 17557, subd. (d)(2)(B)), which permits the State to request that the parameters and guidelines for making claims for mandate reimbursements be updated to reflect offsetting revenue and offsetting savings. Specifically, this Court must determine whether statutes directing that State Budget Act funds to be "used first" to pay for the mandates are "offsetting revenues" or "offsetting savings" that would support the State's request to update the parameters and guidelines for the mandates.

In order to assist this Court in interpreting these provisions, the proposed amicus brief provides background on the purpose and intent of the constitutional subvention requirement (Cal. Const., art. XIII B, § 6), which is critical in determining whether the statutory process for updating parameters and guidelines, as applied here, is constitutional. In addition, the proposed brief provides examples of why the Court of Appeal's analysis of the issue fails to meet the constitutional standard. Finally, the proposed brief provides an explanation on how to assess which party bears the burden of showing that no additional subventions are required to be provided to local agencies for the costs of mandated programs. CSAC, the League and CSDA believe this information not only provides the Court with the views of our respective members, but also provides the Court with valuable information to assist in reaching a conclusion on these important issues.

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III. CONCLUSION

For these reasons, CSAC, the League and CSDA respectfully request that this Court grant this application for leave to file the proposed amicus curiae brief, and order the brief submitted with this application to be filed.

Dated: September 28, 2018

/s/
_____
Jennifer B. Henning, SBN 193915
Litigation Counsel
California State Association of Counties

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I. INTRODUCTION

In 1978 and 1979, California voters amended the constitution to limit local government revenue raising authority. Recognizing, however, that this would limit local government's ability to carry out programs and services on behalf of the State, the voters also required that if the State mandates that local agencies perform new or expanded programs or services, it must provide corresponding revenue for those costs.

In the intervening years, the State has developed numerous strategies for attempting to avoid this obligation so that it can enjoy the benefits of the laudable policy objectives of the various new and expanded programs and services it creates without meeting its constitutional obligation to provide the corresponding funding. Many of these attempts have been thwarted by the courts as unconstitutional. This case represents another one of those attempts.

Here, the State argues to this Court that it can meet the subvention requirement for the two mandates at issue by directing schools to use their existing state funding for the costs, notwithstanding the fact that this funding is already dedicated to other programs and services that are, on the whole, severely underfunded. There have been no offsetting program reductions and no new revenue. Is it constitutional for the State Legislature to designate funding it already provides as offsetting revenue for purposes of meeting the State's obligation to fund mandates?

The answer to that question is clear: Using existing revenues to "pay first" for these mandates will only leave other mandate costs unpaid, ultimately resulting in local agencies using their own funds to pay for state mandates. Like the proverbial blanket that is too small for the bed, pulling on one end does not cover the bed, it only leaves another part uncovered. Similarly, directing local agencies to use existing funds for a mandated service – funds that are already insufficient for the programs they are intended to cover – does not meet the State's constitutional requirement to provide local agencies with funding for new programs or services. It only pulls funding away from other programs and services, leaving the local agency no option but to use local funds to meet State mandates.

This is not merely a policy determination that results in a questionable fiscal structure. Rather, it circumvents constitutional restrictions put in place directly by the voters that are specifically intended to avoid this precise result. As such, the Court of Appeal erred in finding that Government Code section 17557(d)(2)(B),[2] as applied to the mandates as issue in this case, is constitutional. This Court should reverse, and determine that in order to be consistent with the California Constitution, section 17557(d)(2)(B) requires a showing of actual offsetting revenue or of programmatic reductions that provide a net savings to local agencies that

[2] All further statutory references are to the Government Code unless otherwise specified.

are sufficient to pay the costs of the mandate. This Court should further hold that designation of existing revenue already being used to fund other programs does not provide the requisite offsetting revenues necessary to amend the parameters and guidelines for mandated services or programs.

II. ARGUMENT

A. Government Code section 17557(d)(2)(B) Must Be Considered In Light of the Constitutional Requirement to Provide Subventions.

In 2010, as part of a budget trailer bill, the Legislature enacted section 17557(d)(2)(B), which allows a local agency, a school district, or the State to request that the Commission on State Mandates amend the parameters and guidelines (the claiming instructions for state mandated programs and services) to update "offsetting revenue and offsetting savings that apply to the mandated program." (Gov. Code, § 17557, subd. (d)(2)(B).) At the heart of this case is whether existing State revenue, that is already being provided to local agencies or school districts to fund other programs and services, can be considered "offsetting revenue" if the Legislature directs by statute that such existing State funds be used first to pay for the mandated service. To answer that question, it is critical that this Court evaluate the statute to ensure that it properly implements and reflects the

constitutional requirement to provide local agencies with State subventions for mandated programs.

1. The history and intent of Article XIII B, Section 6 of the California Constitution require the State to make local agencies whole for the costs of new or expanded programs and services.

In June 1978, the voters adopted Proposition 13, capping the property tax rate and imposing high thresholds for special taxes, which severely restricted the ability to increase revenue at the local level for cities, counties, and schools. (Cal. Const., art. XIII A; *California Public Records Research, Inc. v. County of Yolo* (2016) 4 Cal.App.5th 150, 186.) Proposition 13 was partly a reflection of the economy in California at the time, in which rapidly rising inflation led to a dramatic increase in property taxation. (Note, *Prisoners of Proposition 13: Sales Taxes, Property Taxes and the Fiscalization of Municipal Land Use Decisions* (1997) 71 S.Cal. L.Rev. 183, 185.)

The following year, the voters adopted Proposition 4, which added article XIII B to the California Constitution. Proposition 4, among other provisions, established an appropriations limit each fiscal year for each entity of government, which cannot be exceeded (known as the "Gann Limit"). (Cal. Const., art. XIII B, § 1; *Santa Barbara County Taxpayers Assn. v. Bd. of Supervisors* (1989) 209 Cal.App.3d

940, 944.) The measure was intended to be a "permanent protection for taxpayers from excessive taxation" and "a reasonable way to provide discipline in tax spending at state and local levels." (*County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446.)

While voters were clearly providing themselves local tax relief at the ballot, surveys taken in 1977, 1978 and 1979 also show that voters did not desire fewer services. (See *Prisoners of Proposition 13, supra*, 71 S.Cal. L.Rev. at p. 185.) Perhaps recognizing that the State would want to continue to provide the services desired by the public at the same time that local agencies were restricted by Prop. 13 and the Gann Limit, the voters imposed the subvention requirement at issue in this case by approving Proposition 4. (Cal. Const., art. XIII B, § 6; *Cal. School Boards Assn. v. State of Cal.* (2018) 19 Cal.App.5th 566, 571.) The purpose of the subvention requirement is to "prevent 'the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.'" (*Ibid.*, citing *County of San Diego v. State of Cal.* (1997) 15 Cal.4th 68, 81.) The context surrounding the adoption of article

XIII B, section 6 is critical because it is a fundamental rule of construction that courts must interpret a constitutional amendment to give effect to the intent of the voters adopting it. (*Armstrong v. County of San Mateo* (1983) 146 Cal.App.3d 597, 618.)

2. This Court must interpret the mandate reimbursement statutes to reflect the constitutional standard.

The Court of Appeal properly noted below that the constitutional scheme described above leaves the "vexing problem" of precisely how the State complies with its constitutional obligation to reimburse for State mandates. (*Cal. School Boards Assn., supra,* 19 Cal.App.5th at p. 566.)

The State here, with approval from the Court of Appeal, answers that problem by asserting that Government Code section 17557(d)(2)(B) allows the State to identify existing funding as "offsetting revenue" to pay for a mandate if the State specifies that such revenue should be "used first" to pay for the mandated service. Indeed, the Court of Appeal adopted this conclusion, even while recognizing that the "pay first" statute "may have largely eliminated the State's obligation to reimburse school districts and county office of education . . . without actually providing any new or additional

funding." (*Cal. School Boards Assn., supra,* 19 Cal.App.5th at p. 585.)

Section 17557 is part of the legislatively-adopted process for complying with the constitutional mandate reimbursement requirement in article XIII B, section 6. (Gov. Code, § 17500 ["It is the intent of the Legislature in enacting this part to provide for the implementation of Section 6 of Article XIIIB of the California Constitution."].) However, section 17557(d)(2)(B), as an implementing statute, must advance the clear directive made by the voters that the State not be permitted to shift costs for mandated programs to local agencies. In interpreting and applying that section, the requirement to show "offsetting revenue" must be read in the context of the voters' intent in passing Prop. 13, the Gann Limit, and the subvention requirement for State mandates. This Court must ask whether this implementing language, as the State has applied it to the Graduation Requirement ("GR") and the Behavioral Intervention Plan ("BIP") mandates at issue in this case, accurately reflects the constitutional standard.

As detailed below, the answer is certainly no. The Court of Appeal's opinion upholding application of 17557(d)(2)(B) in this

manner places local agencies in precisely the position that voters said they should not be: performing new services that are required by the State without new revenue to pay for the services. Because local agencies are not made whole, allowing "pay first" statutes to qualify as "offsetting revenue" in section 17557(d)(B)(2) is inconsistent with both the plain language and intent of article XIII B, section 6 and must be rejected.

B. The Interpretation of Government Code section 17557 Put Forth by the State and Adopted by the Court of Appeal Does Not Accurately Reflect the Constitutional Standard for Providing Subventions.

Section 17557(d)(2)(B) allows the State or a local agency to request that the Commission consider amending parameters and guidelines to "update offsetting revenues and offsetting savings that apply to the mandated program." As to the GR and BIP mandates at issue in this case, the alleged offsets are not reductions in other programs that resulted in net savings that can be allocated to the mandates, nor are they new State funds that have been made available. Rather, the alleged offsets are two statutory provisions, which merely state that existing funding "shall be used first" to pay for the mandates. (Ed. Code, §§ 56523, subd. (f), 42238.24.) There is no program reduction. There is no additional funding. In fact, there are

no changes in actual revenues or programmatic responsibilities that would cause a need to "update" the parameters and guidelines other than a legislative proclamation that school districts are to use their existing funding to pay for the mandated programs.

There are two reasons why permitting section 17557(d)(2)(B) to be applied in this manner should be rejected. First, in the absence of savings achieved by service reductions, declaring that existing funds already committed to other programs constitute an "offset" simply does not meet the common definition of the term offset. An offset is "a claim or amount that reduces or balances another claim or amount." (Webster's 9th New Collegiate Dict. (1991) p.820.) It stretches credulity to assert that there is any reduction or balancing in the total funding available to school districts when there has been no changes to their programmatic responsibilities or the amount of funding available to them.

Second, and more importantly, even if there were an argument that the "pay first" provisions could be an offset as that term might ordinarily be understood, it certainly does not amount to an offset when section 17557(d)(B)(2) is interpreted in light of the plain language and voters' intent in adopting article XIII B, section 6. As

described above, and as articulated by this Court on several occasions, the voters clearly intended to prevent the State from shifting program responsibilities to local agencies without corresponding funding. (*Dept. of Finance v. Com. on State Mandates* (2016) 1 Cal.5th 749, 763; *County of San Diego v. State of Cal.* (1997) 15 Cal.4th 68, 81; *County of Los Angeles v. State of Cal*. (1987) 43 Cal.3d 46, 56.)

Section 17557(d)(2)(B) is supposed to implement that intent. And yet, schools are left to perform all of their existing programs, as well as the GR and BIP mandates, with no additional revenue and no program or service reductions that would result in net savings to generate funding for the mandates. That simply cannot be a constitutional reading of the statute.

This constitutional defect is even more pronounced when the existing State funding is insufficient to meet the costs of existing State programs, let alone the newly imposed mandates. For example, the record in this case shows that special education in California has been significantly underfunded for years. (Opening Br., p. 17, citing to JA II:748-751.) And yet, the Court of Appeal concluded that so long as the BIP is paid from special education funding first, there would be no constitutional violation. The court found:

> The BIP mandate is estimated to cost $65 million per year, but school districts and county offices of education receive approximately $3 billion in special education funding. Given that special education funding is sufficient to cover the costs of the BIP mandate, then section 17557, subdivision (d)(2)(B), as applied in Education Code section 56523, subdivision (f) [the BIP mandate "pay first" statute], does not conflict with article XIII B, section 6 of the California Constitution.

(*Cal. School Boards Assn., supra,* 19 Cal.App.5th at pp. 585-86.)

A simplified hypothetical illustrates why the court's analysis on compliance with constitutional subvention requirements is flawed. Assume that a local agency receives $200 million from the State Budget Act to provide three programs, which have each been determined to be state mandates. Each of the programs costs $100 million. In this example, there is no question that the local agency is underfunded because it has received only $200 million to perform $300 million in services. Assume further that the Legislature then enacts a statutory provision for each of the mandated services specifying that State Budget Act funding "shall be used first" to pay for that service. The Court of Appeal's analysis would say that the parameters and guidelines should be updated to reflect offsetting revenue for Program A because the local agency receives a total of $200 million, and it only costs $100 million to perform Program A.

As such, the local agency cannot show that it must use local revenue to pay for Program A.

That conclusion belies the fact that the same $200 million is being asserted by the State as subventions for $300 million in programs. Even though the local agency has been directed to "pay first" for Program A with State funds, there is no way for the local agency to pay for all three programs without spending its own local revenue. Without any program reductions or new funding, the fact that local agencies must spend their own revenue to perform the mandates cannot be avoided by merely directing use of existing revenue first. That is simply inconsistent with the requirements of article XIII B, section 6.

Just as in the hypothetical, the total amount received by school districts certainly exceeds the cost of providing any one mandate, but it falls far short of paying for all of the services it is intended to cover. Indeed, the "pay first" statutes are essentially premised on the fact that there is insufficient funding to pay for all of the programs the agency is required to perform. If there were sufficient funding, there would be no need to direct the local agency to pay for a particular mandate first

as there would be available funding even if the mandate were paid last.

Allowing the State to avoid its constitutional subvention obligation by merely stating that revenue must be used first falls far short of the constitutionally imposed subvention requirement by any measure. The seriousness of this issue for local agencies cannot be understated. Section 17557(d)(B)(2) must be interpreted in a manner that reflects the objectives of article XIII B, section 6, and the Court of Appeal's decision must therefore be reversed.

C. The State Bears the Burden of Proving It Need Not Provide a Subvention for the Mandated Activities.

Among the reasons that the Court of Appeal found in favor of the State in this case was that "CSBA and the School Districts have not established that the statute requires them to use local revenues to pay for the costs" of the mandates. (*Cal. School Boards Assn*., supra, 19 Cal.App.5th at p. 582.) The court, however, articulated the burden exactly backwards. It should have held instead that the State's claim that subventions are not required fails if the State cannot show that there is funding actually available to provide reimbursements for the mandates to be paid for by the funding.

As this Court recently found, article XIII B, section 6 "establishes a general rule requiring reimbursement of all state-mandated costs." (*Dept. of Finance v. Com. on State Mandates* (2016) 1 Cal.5th 749, 769.) This Court further noted that "[t]ypically, the party claiming the applicability of an exception bears the burden of demonstrating that it applies." (*Ibid.*) In that case, the Department of Finance alleged that the mandates at issue were exempted from the subvention requirement because they were imposed by federal law. On the issue of burden, this Court concluded that requiring the State to prove that the exemption applies, rather than requiring the local agencies to prove the opposite, furthers the purpose of article XIII, section 6, which is "to protect local governments from state attempts to impose or shift the costs of new programs or increased levels of service by entitling local governments to reimbursement." (*Ibid.*)

Though the State argues that CSBA failed to demonstrate that schools will be required to use their own tax revenues to pay for the mandate (Answer Br., pp. 30-33), that position is inconsistent with this Court's approach on the issue of which party bears the burden of showing that an exemption to the subvention requirement applies. It is also inconsistent with the process established for requesting an update to the parameters and guidelines, which requires a request to be filed with the Commission on State Mandates providing an explanation and documentary evidence to support the request. (2 Cal. Code Reg § 118.17.) Yet, without

any citation, the State's argument presumes that it can file a request with the Commission that parameters and guidelines be updated, but that the local agency carrying out the mandate bears the burden of proving that the update should be denied. That just completely upends how the administrative process works. It is incumbent upon the party seeking the change to prove that the change meets the statutory and constitutional standards. (See, e.g., 2 Cal. Code Reg. § 1190.5, subd. (a) [In mandate reconsiderations, the Commission must make an initial determination as to whether requester has made an adequate showing of a subsequent change in the law, and deny the request if such showing is not made].)

In order to further the purpose of article XIII B, section 6, it is incumbent upon the State to prove it is relieved from providing further subventions. It is not the burden of CSBA to prove the opposite. In other words, in order for the State to prevail on its argument that the "pay first" provisions in the Education Code justify updating the parameters and guidelines for the mandated programs, it must show that it has provided adequate offsetting revenues to actually pay for the mandated programs under section 17557(d)(B)(2). It is not the burden of CSBA to show that the State did not provide adequate offsetting revenues.

III. CONCLUSION

The questions posed by this case raise critical issues that impact the fiscal well-being of all local agencies, and require consideration of the will

of the voters in adopting tax and spend limits and the subvention requirement. The Court of Appeal's opinion allows the State to avoid its constitutional obligation to provide subventions for mandated activities without making any reductions in programs or providing new revenue. This result is not only inconsistent with the plain meaning of the implementation statutes, but is also directly contrary to constitutional requirements. The decision further errs by reaching this conclusion under the assumption that it is CSBA's obligation to prove that the subvention requirement is not met rather than the State's obligation to prove that the subvention requirement has been met.

For these reasons, Amici respectfully urge this Court reverse the appellate court ruling and provide the relief requested by Petitioners.

/s/

Dated: September 28, 2018 _____

Jennifer B. Henning, SBN 193915
Litigation Counsel
California State Association of Counties

Attorney for Amici Curiae

CERTIFICATION OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the word count feature in my Microsoft Word software, this brief contains 3,388 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 28th day of September, 2018 in Sacramento, California.

Respectfully submitted,

/s/

By: _____
JENNIFER B. HENNING
Attorney for Amici Curiae

Proof of Service by Mail

California School Boards Association v. State of California

Case No. S247266

I, JENNIFER HENNING, declare:

That I am, and was at the time of the service of the papers herein referred to, over the age of eighteen years, and not a party to the within action; and I am employed in the County of Sacramento, California, within which county the subject mailing occurred. My business address is 1100 K Street, Suite 101, Sacramento, California, 95814. I served the within **APPLICATION FOR LEAVE TO FILE AND PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS AND PETITIONERS CALIFORNIA SCHOOL BOARDS ASSOCIATION, ET AL.** by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

A. Proof of Service List

Party	Attorney
California School Boards Association, Et al.: Plaintiffs and Appellants	Deborah B. Caplan Richard C. Miadich Olson, Hagel & Fishburn, LLP 555 Capitol Mall, Suite 400 Sacramento, CA 95814
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and by placing the envelopes for collection and mailing following our ordinary business practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 28, 2018 at Sacramento, California.

/s/

Jennifer Henning