Case No. D068657

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

COUNTY OF SAN DIEGO; COUNTY OF LOS ANGELES; COUNTY OF ORANGE; COUNTY OF SACRAMENTO; and COUNTY OF SAN BERNARDINO
Plaintiffs and Appellants,

v.

COMMISSION ON STATE MANDATES; STATE OF CALIFORNIA; DEPARTMENT OF FINANCE FOR THE STATE OF CALIFORNIA; JOHN CHIANG, in his official capacity as the California State Controller, and DOES 1 through 10, inclusive.
Defendants and Respondents,

DEPARTMENT OF FINANCE FOR THE STATE OF CALIFORNIA; and DOES 11 through 25,
Real Parties in Interest.

[PROPOSED] AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF PLAINTIFFS AND APPELLANTS COUNTY OF SAN DIEGO, ET AL.

On Appeal from a Judgment of the San Diego County Superior Court
Case No. 37-2014-00005050-CU-WM-CTL
The Honorable Richard E. L. Strauss

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I. INTRODUCTION

The governing legal principles in this case are fairly straightforward. The State of California is not required to provide a subvention of funds to local agencies for activities that are expressly included in, or necessary to implement, a voter-approved ballot measure. Respondents contend that the mere restatement of previously established mandated activities in a voter-approved ballot measure constitutes a subsequent change in law thereby relieving the State of its obligation to reimburse Appellant Counties for the costs of providing these activities. Amici respectfully submit that Respondents' position is not supported by the facts and is contrary to established law.

In this case, the previously established mandates involve eight discrete activities that were imposed on counties by the Legislature as part of the Sexually Violent Predators Act. The question before this Court is whether, as a result of Proposition 83, these discrete activities are no longer mandated by the State. Therefore, in order for Respondents to prevail, the previously established mandates must be either expressly included in, or necessary to implement, Proposition 83.

The California State Association of Counties and League of California Cities submit that neither has occurred and the State is obligated to continue to provide a subvention of funds for these eight discrete activities. First, the mandates cannot be considered to be expressly included in Proposition 83 where they were merely reprinted therein to fulfil the so-called "reenactment rule." The fact that the Legislature has amended these technical reprints without meeting the requisite voting threshold, not only for Proposition 83, but for other voter-approved ballot measures as well, illustrates that not even the State considers mere technical reprints to be an express part of the voters' actions.

Second, the mandated activities are not necessary to implement Proposition 83. There is no finding or evidence in the record that these tasks are required to meet minimum due process requirements for civil commitments, or that there are no alternative mechanisms that the State could employ to implement the mandated activities.

For these reasons, both the Commission on State Mandates and the trial court erred in concluding that Proposition 83 constitutes a subsequent change in law that modified the State's obligation to provide subventions for the mandates related to the Sexually Violent

Predators Act. The trial court's decision should therefore be reversed and the relief requested by the Appellant Counties should be granted.

II. ARGUMENT

A. The Sexually Violent Predators Act mandates are not expressly included within Proposition 83.

In 1998, the Commission on State Mandates approved eight activities imposed by the Sexually Violent Predators Act for reimbursement. (Com. on State Mandates, Statement of Decision on Sexually Violent Predators, No. CSM-4509 (June 25, 1998.)) These eight activities, hereinafter referred to as the "mandated activities," are found in Welfare and Institutions Code sections 6601, 6602, 6603, 6604, 6605, and 6608, and are as follows:

> **Activity 1:** Designation by the County Board of Supervisors of the appropriate District Attorney or County Counsel who will be responsible for the sexually violent predator civil commitment proceedings. (Welf. & Instit. Code, § 6601, subd. (i).)
>
> **Activity 2:** Initial review of reports and records by the county's designated counsel to determine if the county concurs with the state's recommendation. (Welf. & Instit. Code, § 6601, subd. (i).)
>
> **Activity 3:** Preparation and filing of the petition for commitment by the county's designated counsel. (Welf. & Instit. Code, § 6601, subd. (i).)

Activity 4: Preparation and attendance by the county's designated counsel and indigent defense counsel at the probable cause hearing. (Welf. & Instit. Code, § 6602.)

Activity 5: Preparation and attendance by the county's designated counsel and indigent defense counsel at trial. (Welf. & Instit. Code, §§ 6603, 6604.)

Activity 6: Preparation and attendance by the county's designated counsel and indigent defense counsel at subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Instit. Code, §§ 6605, subds. (b)-(d), 6608, subds. (a)-(d).)

Activity 7: Retention of necessary experts, investigators, and professionals for preparation for trial and subsequent hearings regarding the condition of the sexually violent predator. (Welf. & Instit. Code, §§ 6603, 6605, subd. (d).)

Activity 8: Transportation and housing for each potentially sexually violent predator at a secured facility while the individual awaits trial on the issue of whether he or she is a sexually violent predator. (Welf. & Instit. Code, § 6602.)

In order for the State to be relieved of the obligation to provide a subvention for these mandated activities, as required by section 6 of article XIII B of the California Constitution, these activities must be either expressly included in, or necessary to implement, Proposition 83.[1] (Gov. Code, §§ 17570, subd. (a)(2), 17556, subd. (f).) This

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[1] Proposition 83, known as "The Sexual Predator Punishment and Control Act: Jessica's Law," was adopted by the voters on November 7, 2006. It will be referenced as Proposition 83 throughout this brief.

Court should conclude that the mandated activities are not expressly included in Proposition 83.

1. The reenactment rule requires that the entire section of a provision be printed in the ballot, even if the language itself is not being amended.

The text of Proposition 83 included the text of five of the eight mandated activities. Proposition 83 made no changes to the text of the mandated activities, but nevertheless included them in the ballot measure as a result of the so-called "reenactment rule." This is a constitutional requirement that a "section of a statute may not be amended unless the section is reenacted as amended." (Cal. Const., art. IV, § 9.) The purpose of the rule is to allow the public to be fully apprised of the full context of the proposed changes without having to make the necessary examination and comparison with the existing, unchanged portions of the section being amended. (*American Lung Assn. v. Wilson* (1996) 51 Cal.App.4th 743, 749.)

As the Appellant Counties point out at length in the Opening Brief, the law in this State for more than 100 years is that unchanged portions of a statute that are simply reprinted under the reenactment rule – what this brief will refer to as a technical restatement – do not actually repeal and reenact those provisions, but are merely

restatements of existing law. (Opening Br., pp. 26-28. See also *People ex rel. Warfield v. Sutter S. R. Co.* (1897) 117 Cal. 604; *Vallejo & N. R. Co. v. Reed Orchard Co*. (1918) 177 Cal. 249 [The portions of the amended sections which are copied without change are not to be considered as repealed and re-enacted, but to have been the law all along]; *People v. Fowler* (1938) 32 Cal.App.2d Supp. 737 [reprinted provisions that are substantially the same as existing law shall be construed as continuations of existing law and not new enactments].)

It is therefore clear that the law does not consider technical restatements – printed in a ballot measure or statute only to comply with the reenactment rule and not because any substantive changes are made – to be new enactments. Rather, for a mandate to be expressly within a voter-adopted initiative, it must be an activity directly created by the voters, and not simply technically reprinted under the constitutional requirement to print the entire section of an amended statute.

2. The State has subsequently amended technically restated provisions of ballot measures without meeting voting thresholds, thereby illustrating that the State does not consider such provisions to be voter enacted.

The Legislature may only amend or repeal an initiative statute by another statute if that statute is approved by the voters, unless the initiative statute permits amendment or repeal without their approval. (Cal. Const., art. II, § 10, subd. (c).) It is telling that while the State Respondents assert the technically restated provisions are voter enactments for purposes of avoiding mandate reimbursement, the State has not considered technical restatements to be voter enactments for purposes of the restrictions on amending such provisions. The State cannot have it both ways.

Proposition 83 itself serves as an example. Its amendment clause states that its provisions cannot be amended by the Legislature except by a 2/3 vote, unless the amendment expands the scope or increases the punishments or penalties provided by Proposition 83, which may be accomplished by a majority vote. Yet, the Legislature has in fact amended, in a manner that does not expand the scope or increase the punishments, the technically restated provisions of Proposition 83 without meeting the 2/3 vote requirement:

- AB 109 [Stats 2011, ch. 15, § 443] amended Penal Code section 667.5, subd. (a), which was technically restated in Section 9 of Proposition 83. AB 109 changed the provision related to a prison term to reflect incarceration in county jail. It was passed without a 2/3 vote.
- ABx1_17 [Stats 2011-2012, 1st Ex. Sess., ch. 12, § 10] amended Penal Code section 667.5, subd. (b), which was technically restated in Section 9 of Proposition 83. ABx1_17 allowed post-release supervision to qualify as a prior county jail term for the purposes of the one-year enhancement. It was passed without a 2/3 vote.
- AB 109 [Stats 2011, ch. 15, § 468] amended Penal Code section 3000, subd. (b), which was technically restated in Section 17 of Proposition 83. AB 109 changed the body responsible for discharging an inmate to parole from the Parole Board to the courts. It was passed without a 2/3 vote.
- AB 109 [Stats 2011, ch. 15, § 472] amended Penal Code section 3001, subd. (a), which was technically restated in Section 19 of Proposition 83. AB 109 changed the period of parole before a parolee is eligible for discharge from one year to six months. It was passed without a 2/3 vote.
- AB 109 [Stats 2011, ch. 15, § 473] amended Penal Code section 3003, subd. (a), which was technically restated in Section 20 of Proposition 83. AB 109 added post-release supervision to the parole provisions of this section. It was passed without a 2/3 vote.

Proposition 83 is not the only voter-adopted measure in which this occurs. For example, on November 8, 2008, the voters adopted Proposition 9, known as the "Victims' Bill of Rights Act of 2008: Marsy's Law." Proposition 9 has an amendment clause similar to Proposition 83. It states that its statutory provisions cannot be

amended by the Legislature without a 3/4 vote, unless the amendments recognize additional rights of victims of crimes. Nevertheless, the Legislature adopted SB 230 (Stats 2015, ch. 470, § 4), which made changes to provisions of Penal Code section 3041.5 that were technically restated in Proposition 9, including a substantive change to a provision regarding postponing parole to rescinding parole.[2] SB 230 was passed without a 3/4 vote.

Clearly, if the technically restated provisions are actually voter enactments, rather than just included in the ballot to comply with the reenactment rule, the Legislature could not amend the provisions without complying with the required vote thresholds. To argue here that the technical restatements amount to "express inclusion" in the ballot measure for purposes of avoiding mandate payment, while also amending technical restatements without meeting the voting

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[2] The provision technically restated in Proposition 9 read: "Within 10 days of any board action resulting in the postponement of a previously set parole date, the board shall send the prisoner a written statement setting forth a new date and the reason or reasons for that action and shall offer the prisoner an opportunity for review of that action." SB 230 amended that paragraph to read: "Within 10 days of a board action resulting in the rescinding of parole, the board shall send the inmate a written statement setting forth the reason or reasons for that action, and shall schedule the inmate's next hearing in accordance with paragraph (3)."

thresholds, is inconsistent. It must be acknowledged, as the case law has stated for over 100 years, and as the Legislature has indeed treated Proposition 83, that the technical restatements are just a continuation of existing law rather than a new legal provision. It is why the State is able to make amendments to such provisions without meeting the vote threshold, and it is why they are not considered expressly included in the ballot measure for purposes of this mandate redetermination.

3. **Concluding that technical restatements are sufficient to change the State's mandate obligations would lead to absurd results.**

Respondents' argument that technical restatements become substantive voter enactments would also lead to absurd results based solely on the original drafting structure of a statutory provision. Such arbitrary application of whether the Legislature can amend a provision with a simple majority, and whether the provision is a subsequent change in the law for purposes of mandate redeterminations, cannot be what was intended.

For example, imagine a statutory scheme where, as originally drafted, all of the substantive provisions are included within one section of code, with twenty paragraphs ((a) through (t)). If the voters wanted to make a change only to paragraph (a) of the section, the

reenactment rule would require not only the changes in paragraph (a) to be included in the text of the ballot measure, but also the technical reprinting of paragraphs (b) through (t). Now imagine that same statutory scheme was initially drafted as twenty different sections, 6000.01 through 6000.20 for example. If the voters wanted to make a change only to the first section, the reenactment rule requires that only section 6000.01 would be printed in the ballot. Sections 6000.02 through 6000.20 would not be included.

Under Respondents' argument, in the first example, all of paragraphs (a) through (t) are considered fully reenacted, meaning the Legislature cannot make any amendments unless the measure so provides, and any mandates therein are transformed and no longer reimbursable. In the second example, however, only the very first section is considered reenacted, and the remaining provisions continue on as existing law. The Legislature is free to make amendments, and any existing mandates continue to be reimbursable.

This Court should reject such arbitrary results. By following more than a century of case law finding that a technical restatement merely continues existing law, this Court would put in place the

common sense result that only those provisions actually changed by the voters are considered voter-adopted provisions.

B. The Sexually Violent Predators Act mandates are not necessary to carry out Proposition 83.

In order to be relieved of the obligation to provide subventions for the mandated activities, the State must show the activities are either expressly included in the ballot measure, or are necessary to carry out Proposition 83. Amici explain above why technical restatement does not make a provision expressly included in a ballot measure for purposes of a mandate redetermination. The Department of Finance therefore had the burden before the Commission of demonstrating that the activities required by the relevant Welfare & Institutions Code provisions are necessary to implement Proposition 83. As discussed below, Respondents failed to meet their burden before the Commission to demonstrate that the mandated activities are necessary to carry out Proposition 83.

It is important to first note that finding that a mandated activity is necessary to implement a voter-adopted measure is critical to the constitutionality of the mandate redetermination process. Local governments are constitutionally entitled to a subvention of funds to reimburse them for the costs of programs and services imposed upon

them by the State. (Cal. Const., art. XIII B, § 6.) Certainly a mandate not imposed by the State does not require subventions. But to avoid the constitutionally required subvention, it is not sufficient to find that a duty is reasonably within the scope of a ballot measure. (*California School Boards Assn. v. State of California* (2009) 171 Cal.App.4th 1183, 1189-1190.) Without a clear finding that the activity is truly necessary to carry out a voter-adopted measure, the redetermination process would be unconstitutional. (*Id.* at p. 1215.) The activity must be "part and parcel" of the initiative. (*San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859, 890.)

Despite that constitutionally required standard, there has been very little discussion of why the mandated activities are necessary to implement Proposition 83. The Statement of Decision issued by Respondent Commission on State Mandates concluded that five of the eight mandated activities (Activities 1, 2, 3, and 6, and part of Activity 7) are no longer imposed by the State because they were expressly included in Proposition 83. Having so concluded, the Commission undertakes no further analysis on why they would also be necessary to implement Proposition 83. Similarly, there is no discussion

whatsoever in Respondents' brief explaining why these activities are necessary to implement Proposition 83. Should this Court agree with Appellants and Amici that a technical restatement of the mandated activities is not sufficient to be considered expressly included in Proposition 83, there is nothing in the Statement of Decision, trial court opinion, or either of the Respondent's briefs to explain why these activities are necessary to implement Proposition 83.

The only activities for which any analysis has been provided on necessity are Activity 5, and parts of Activities 7 and 8. For these, the Commission on State Mandates concluded in its Statement of Decision that the liberty interests and due process rights associated with implementing the voter-adopted provisions of Proposition 83 required that these activities[3] are necessary to implement Proposition 83. (Com. on State Mandates, Statement of Decision on Sexually Violent Predators, No. 12-MR-01, pp. 33-35, 37 (Dec. 6, 2013).) By

[3] The Commission concluded that the following activities are required to meet the minimum process due to sexually violent predators: preparation and attendance by county's designated counsel and indigent defense counsel at trial; retention of necessary experts, investigators and professionals for preparation for trial regarding the condition of the sexually violent predator; and transportation and housing of each potentially sexually violent predator while awaiting trial.

contrast, the Commission concluded that the probable cause hearing (as opposed to the trial) is not necessary to meet minimum due process standards, and therefore the two activities related to probable cause hearings (Activity 4 and part of Activity 8), remain reimbursable mandates.

Though Respondents provide this Court with no legal analysis on the issue, it may be true that due process requires some type of trial prior to a deprivation of liberty. However, there is no indication as to why the counties must be responsible for providing these services, or whether alternatives exist to the mandated activities that would still ensure due process is provided. For example, the Commission concluded that transportation to the trial on the issue of whether an offender is a sexually violent predator is necessary to implement Proposition 83 because due process requires such a trial. But could the trial be provided in some other manner? Would video-conferencing, for example, meet minimum due process standards?

Similarly the Commission determined that attendance by the county's designated counsel at the trial is necessary to implement Proposition 83. However, there is no discussion as to why counsel must be provided by the county in order to meet minimum due

process standards. For example, could not the State create a panel of attorneys, paid for by the State, to prepare for and attend these hearings? There is certainly nothing about County Counsel or District Attorney participation that uniquely meets due process requirements that could not also be met by other attorneys and paid for by other means. It may be convenient for the State to use county resources to meet this obligation, but Respondents have not shown that county resources are required for due process, and therefore necessary to implement Proposition 83.[4]

This Court should look closely at the record and at each of the mandated activities to determine whether they are necessary to implement Proposition 83. In so doing, this Court will find that no analysis has been provided at any place in the record for the majority of mandated activities, which were merely presumed to be expressly included in Proposition 83 because of their technical restatement.

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[4] As noted above, AB 109, which was part of the "2011 Realignment" effort to shift certain prisoners and associated responsibilities from the State to counties, amended several provisions of Proposition 83 without meeting the 2/3 vote threshold. There is no reason why the tasks associated with due process requirements could not similarly be shifted from the counties to the State. That the State elects not to do so for reasons of convenience or cost does not relieve the State of its constitutional obligation to provide subvention for mandated activities.

Further, there is nothing about the process due to a sexually violent predator that requires a *county* to provide the mandated activities. Alternatives are available to meet minimum due process requirements, and that these alternatives may be less convenient or more expensive to the State does not make the mandated activities *necessary* to implement Proposition 83. Should the State elect to continue using counties to fulfill these obligations, the State should also be required to continue providing subventions to counties for the costs involved. The State is also free to find alternative ways of providing the services.

C. The State's argument that the inability to suspend the Sexually Violent Predators Act mandates means they can no longer be considered mandates is a tautology and must be rejected.

Respondents California Department of Finance, California State Controller, and State of California argue that because of Proposition 83, the State can no longer suspend the mandated activities, and thus

the activities cannot be considered to be state imposed.[5] (State Respond. Br., pp. 28-31.) It is not clear how this argument advances the State's position. Under the mandate redetermination at issue, the State is relieved of its obligation if the mandated activities are expressly included in, or necessary to implement, Proposition 83. If the State is asserting here that the mandated activities cannot be suspended because they are required to meet minimum due process requirements, that argument is duplicative of its position on "necessary to implement," and is addressed above.

If the State is arguing that it cannot suspend these mandates because they are voter-imposed (and therefore not subject to amendment by the Legislature), it is a circular argument that must be rejected. There is no dispute among the parties that a voter-mandated program or activity does not require a subvention of funds. So the precise issue before this Court is whether the activities are in fact voter-mandated as a result of Proposition 83. That issue is not

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[5] Respondent Commission on State Mandates disagrees with the State Respondents on this point. The Commission states in its brief that "the Legislature's ability, or lack thereof, to suspend a state-mandate by defunding the program is not an element indicating whether a voter-enacted ballot measure constitutes a subsequent change in the law with respect to a particular program." (CSM Respond. Br., p. 31.) Amici agree with the Commission.

resolved by asserting that the activities cannot be suspended because they are voter-mandated. To the contrary, if this Court rules in favor of Appellants, it will conclude that the activities are not voter-mandated, and therefore can be suspended. Thus the State's argument is a mere tautology that does not help resolve the issue.

D. A change that may increase the volume of work, but does not change the nature of the tasks to be performed, is not a "subsequent change in the law" that warrants reconsideration of an existing mandate.

Respondent Commission on State Mandates argues that Proposition 83 constitutes a subsequent change in the law for purposes of a mandate redetermination in part because it broadened the definition of "sexually violent predator" from a person convicted of a violent offense against two or more victims to a person convicted of a violent offense against one or more victims. (CMS Respond. Br., pp. 28-29.) Thus, there is a larger category of offenders eligible for a Sexually Violent Predators Act commitment as a result of Proposition 83.

While it is certainly true that the voters expanded the pool of offenders eligible for civil commitment under the program, that fact has no relevance to the question of whether the mandated activities are either expressly included in, or necessary to implement,

Proposition 83. The changes merely have the potential to increase the volume of work, but not the nature of the activities themselves. The eight mandated activities continue to be provided in exactly the same manner notwithstanding the changes made to the program by Proposition 83.

An example outside of the Sexually Violent Predators Act may help illustrate the point. Between 1996 and 1999, the Commission on State Mandates concluded that a number of costs incurred by local governments related to domestic violence arrests are reimbursable mandates.[6] In 2013, the Legislature adopted and the Governor signed AB 16. That bill amended Penal Code section 273.5, which expanded the definition of a domestic violence crime. The prior definition included offenses against a spouse, former spouse, cohabitant, former cohabitant, or mother or father of the offender's child. AB 16 added to that list the "offender's fiancé or fiancée, or someone with whom

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[6] The Statements of Decision finding reimbursable mandates related to domestic violence are as follows: Crime Victims' Domestic Violence Incident Reports (99-TC-08); Domestic Violence Arrest Policies (CSM 96-362-02); Domestic Violence Arrests and Victims Assistance (98-TC-14); and Domestic Violence Treatment Services (CSM 96-281-01).

the offender has, or previously had, an engagement or dating relationship."

Just as Proposition 83 expanded the population eligible for the Sexually Violent Predators Act mandated activities, AB 16 likewise expanded the population eligible for the domestic violence mandated activities. Yet no redetermination claim was filed on that basis, and the domestic violence mandates have been funded for the current fiscal year. And rightfully so, as a legislative change that may impact the volume of work, but not the nature of the activity itself, is not considered a subsequent change in law warranting a mandate redetermination. (See Gov. Code, § 17556.) For the same reason, a legislative change enacted by the voters that may impact the volume of work, but does not change the mandated activity itself, cannot serve as the basis for a redetermination.

III. CONCLUSION

The State is constitutionally obligated to either fund or suspend the previously established mandated activities under the Sexually Violent Predators Act unless the mandated activities are expressly included in, or necessary to implement, Proposition 83. Neither has occurred. The majority of the mandated activities subject to this

appeal were found by the Commission on State Mandates to have been expressly included within Proposition 83. However, these were merely restated within Proposition 83 as required under the reenactment rule, and courts have long held that these technical restatements only continue existing law. The State acknowledges as much when it amends such provisions without meeting the required voting threshold. Therefore, this Court should conclude that the mandated activities are not expressly included within Proposition 83.

The mandated activities have also not been shown to be necessary to implement Proposition 83. There is scant evidence or analysis within the Commission's Statement of Decision, the trial court opinion, or either of the Respondent's brief explaining why the mandated activities are part and parcel of Proposition 83. There has been no explanation to this Court of precisely what process is due in these civil commitment proceedings, or why that due process cannot be reasonably achieved by other means. Allowing the State to avoid its subvention obligation without holding the State to a strict finding of necessity would violate section 6 of article XIII B of the California Constitution.

For these reasons, Amici respectfully urge this Court to reverse the trial court order and grant the relief requested by the Appellant Counties.

/s/

Dated: June 3, 2016 _____

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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 4,599 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 3rd day of June, 2016 in Sacramento, California.

Respectfully submitted,

/s/

By: _____
JENNIFER B. HENNING
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