LIU, J.

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Case No. S208611

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

CALIFORNIA CHARTER SCHOOLS ASSOCIATION,

Plaintiff and Respondent,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT, *et al.*

Defendants and Appellants.

After a Decision by the Court of Appeal
Second Appellate District, Division Five
Case No. B242601

Los Angeles Superior Court Case No. BC438336
Honorable Terry A. Green, Presiding Judge, Dept. 14

REPLY IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

The Second District's decision in this case conflicts with decades of settled principles of law espoused by this Court. Respondent California Charter Schools Association ("CCSA") is aware of many amicus curiae requests for this Court to review this case, including one from the former President of the State Board of Education at the time the State Board adopted the regulation at issue here (Mr. Reed Hastings), one from another former President of the State Board of Education during the time the regulation was in effect (Mr. Ted Mitchell of NewSchools Venture Fund), one from a highly-regarded non-profit education reform organization (Parent Revolution), and nearly two dozen from charter schools across the state.

The reason for this groundswell of concern is that the Second District's decision raises very important questions of law regarding when a local governmental body – here, a school district – may ignore language in a statewide regulation when that local body considers the regulation to be inconsistent with the intent of the authorizing statute. Appellants' (collectively, "LAUSD") Answer to CCSA's Petition for Review ignores the far-reaching implications in the Second District's decision. However, when compared to the prevailing case law regarding the appropriate method of statutory and regulatory interpretation as well as administrative law principles governing deference to quasi-legislative regulations, the *CCSA v.*

LAUSD decision stands out as conflicting with well-settled law, creating confusion and uncertainty.

First, LAUSD incorrectly asserts that the most important issues raised by the *CCSA v. LAUSD* decision are not actually presented. The substance of the Implementing Regulations[1] has always been at issue. CCSA timely raised the exact issues presented to this Court in a Petition for Rehearing ("Rehearing Petition") that it filed in the Court of Appeal after the Second District published the decision. In the Rehearing Petition, CCSA alerted the Second District that its decision did not conform to well-settled canons of construction and principles of administrative law. That was more than enough to preserve the issues presented in CCSA's Petition for Review.

Second, the Second District (1) ignored key language in Section 11969.3, subdivision (b)(1) of the Implementing Regulations requiring the use of an inventory in assigning classroom space to charter schools, (2) failed to harmonize *all* of the words in the regulation to be workable and reasonable, and (3) accorded no deference to the state administrative agency tasked with promulgating and interpreting the Implementing Regulations. Contrary to LAUSD's claims, the *CCSA v. LAUSD* decision

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[1] Cal. Code Regs., tit. 5, § 11969.1 to 11969.11 ("Implementing Regulations").

conflicts with long-settled canons of construction and "proper interpretation" of regulations.

Third, *CCSA v. LAUSD* unquestionably conflicts with *Bullis Charter School v. Los Altos School District* (2011) 200 Cal.App.4th 1022 (*Bullis*), as well as a decision of this Court to which LAUSD refers in its Answer: *Hartzell v. Connell* (1984) 35 Cal.3d 899 (*Hartzell*). The decision conflicts with *Bullis* because using district-wide norming ratios necessarily excludes classrooms from the analysis of comparison group schools, defying the *Bullis* court's instructions that school districts must consider and accurately measure *all* of the facilities of the comparison group schools when making offers of space. Moreover, the decision conflicts with *Hartzell* because, in *Hartzell*, this Court held that when State Board of Education regulations address a specific program, activity or matter, school districts do not have the discretion to deviate from the applicable regulation. The *CCSA v. LAUSD* decision does just that, allowing school districts to ignore specific instructions in a quasi-legislative regulation adopted by the State Board.

In sum, the issues presented by CCSA in its Petition and discussed in this Reply raise legal questions of statewide importance. Many stakeholders have recognized the negative consequences that the *CCSA v. LAUSD* opinion will cause, as evidenced by the dozens of amicus curiae letters in support of review that have been submitted to this Court. CCSA respectfully requests that this Court grant review.

II. ARGUMENT

A. The Issues Presented In The Petition Are Properly Before This Court

LAUSD's assertion that the issues framed by CCSA are not presented by the *CCSA v. LAUSD* decision does not withstand scrutiny. (Answer, pp. 7-9.) The issues CCSA presents here were certainly before the Court of Appeal and, as such, are properly before this Court.

The central question here is whether LAUSD's use of district-wide "norming ratios" complies with the Implementing Regulations. CCSA contends that the use of norming ratios ignores the specific direction in the relevant Implementing Regulation to determine the number of teaching stations (classrooms) that must be offered to charter schools "using the classroom inventory prepared pursuant to California Code of Regulations, title 2, section 1859.31. . . ." (Cal. Code Regs., tit. 5, § 11969.3, subd. (b)(1).) LAUSD largely ignores that portion of the Regulation, focusing only on the first sentence, which states that "[f]acilities made available by a school district to a charter school shall be provided in the same ratio of teaching stations (classrooms) to ADA as those provided to students in the school district attending comparison group schools." (*Id.*) At every stage of this case, the disagreement between the parties has implicated issues of how regulations are to be interpreted as well as the deference to be given to quasi-legislative regulations adopted by a state administrative agency.

Specifically, after the Second District published the *CCSA v. LAUSD* decision, CCSA timely filed its Rehearing Petition. In the Rehearing Petition, CCSA raised the *exact* concerns it now raises on Petition for Review to this Court: (1) that the Second District's interpretation of the regulation contravened rules of construction; and (2) that the Second District failed to give proper (or any) deference to the State Board's rulemaking authority and guidance. (See Rehearing Pet., pp. 4-6.) LAUSD is wrong when it states that in order for those issues to be before this Court, "the Court of Appeal would have needed to unilaterally invalidate the regulation, excise language from the regulation, or add language to the regulation of its own volition." (Answer, p. 8.) California Rules of Court Rule 8.500(c) permits this Court to consider issues timely raised by a petitioner in the Court of Appeal, especially if those issues are omissions or misstatements called to the Court of Appeal's attention in a petition for rehearing. (Cal. Rules of Court, rule 8.500(c)(1)-(2).) Because CCSA urged the Second District to correct the errors in the decision, and those errors provided the impetus for CCSA's Petition for Review, the issues CCSA presents are properly before this Court.

Further, and for the reasons expressed in the Petition, it is clear from the *CCSA v. LAUSD* decision that the Second District implicitly struck language in the regulation by rendering it surplusage. The Second District recognized that Section 11969.3, subdivision (b)(1) contains language

requiring a school district to use a classroom inventory in its classroom allocation process, yet the Second District chose to disregard that part of the regulation. (See *Cal. Charter Schools Assn. v. Los Angeles Unified School Dist.* (2012) 212 Cal.App.4th 689, 695 ["We make a distinction between facilities that are 'provided' and 'classroom inventory.'"].) By authorizing the use of district-wide "norming ratios," a concept that does not exist in the Implementing Regulations, and substituting that for the inventory requirement specified in the Implementing Regulations, the Second District effectively deleted a key, substantive part of the Implementing Regulations.

B. The Second District Ignored Key Language In The Regulation And Neglected To Give Any Deference To The State Board Of Education's Expertise

LAUSD contends that the Second District did nothing wrong when it offered a diminutive interpretation to a regulation that a state administrative agency adopted under a valid exercise of statutorily delegated rulemaking authority. (Answer, pp. 9-16.) LAUSD is incorrect. The Second District's interpretation did not conform to well-settled law, but instead created a conflict with decades of jurisprudence.

For instance, LAUSD argues that the Second District "accorded meaning to every word and phrase" in Section 11969.3, subdivision (b)(1) of the Implementing Regulations. As discussed *ante* in Part A, the Court of Appeal neglected to address what the State Board of Education meant when

it adopted a regulation requiring school districts to determine the number of teaching stations (classrooms) to offer charter schools "using the classroom inventory prepared pursuant to California Code of Regulations, title 2, section 1859.31. . . ." (Cal. Code Regs., tit. 5, § 11969.3, subd. (b)(1).) The Second District did *not* follow that "sound principle of statutory construction." (Answer, p. 10.) Rather, the Second District ignored language in the regulation, transforming "meaningful words . . . into meaningless surplusage," in *conflict* with sound principles of construction. (See, e.g., *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1135; *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545; *S. B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 382; Code Civ. Proc., § 1858.)

Moreover, the Second District's determination that interpreting Section 11969.3, subdivision (b)(1) literally as it is written "may have anomalous results" does nothing to make the regulation "reasonable and workable," as claimed by LAUSD. (Answer, pp. 11-12.) A workable regulation is one in which *all* of its words are considered as a whole and harmonized together to avoid absurd results. (See *Rao v. Campo* (1991) 233 Cal.App.3d 1557, 1567.) In its Respondent's Brief and Rehearing Petition, CCSA described many ways that Section 11969.3, subdivision (b)(1) could be interpreted reasonably, giving effect to *all* of its words, and still avoiding anomalous results. (Respondent's Brief, pp. 31-39; Rehearing Pet., pp. 8-10.) In addition, LAUSD proffered no admissible

evidence to the trial court or the Court of Appeal to support its contention that following the clear formula in the regulation would yield absurd or anomalous results and cause disruption to LAUSD students and programs. Because the Court of Appeal neglected to harmonize the language of Section 11969.3, subdivision (b)(1) with other sections of the Implementing Regulations, it did not follow standard rules of construction, thus creating a conflict in the case law.

Finally, LAUSD wrongly states that the Second District correctly assessed the intent of Prop. 39 in construing Section 11969.3, subdivision (b)(1), and that the *CCSA v. LAUSD* decision defers to the Final Statement of Reasons drafted for the Implementing Regulations. (Answer, pp. 13-16.) LAUSD focuses on the language of Education Code Section 47614, subdivision (a). But LAUSD ignores that Prop. 39 *also* obligated the Department of Education to propose regulations implementing Prop. 39 for the State Board of Education's consideration, including the definition of "conditions reasonably equivalent." (Ed. Code, § 47614, subd. (b)(6).) The Implementing Regulations include such a definition, and Section 11969.3, subdivision (b)(1) is an integral component of it. So, the explicit and detailed language included in the regulation was promulgated under a grant of quasi-legislative rulemaking authority. In such instances, the regulation should bind courts "as firmly as statutes themselves." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.) The

CCSA v. LAUSD decision ignores these administrative law principles in quickly determining, without detailed analysis, that using "norming ratios" meets the general intent of Prop. 39.

In addition, the Implementing Regulations have been upheld as a valid exercise of the State Board's rulemaking authority under Prop. 39. (*Cal. School Bds. Assn. v. State Bd. of Ed.* (2010) 191 Cal.App.4th 530.) But the *CCSA v. LAUSD* decision completely ignores the rigorous process that the State Board undertook to adopt the regulation, as well as the Final Statement of Reasons supporting the Implementing Regulations. LAUSD claims that the Court of Appeal "considered and deferred to the Final Statement of Reasons," but nowhere in the decision is the Final Statement of Reasons mentioned. Indeed, the Final Statement of Reasons explains that using district-wide standards would be inappropriate in determining whether a school district has met its Prop. 39 obligations. (See CCSA's Request for Judicial Notice, Exh. A, pp. 10-11.) The Second District gave no deference to the Final Statement of Reasons in the decision, in conflict with prevailing legal principles. (See *Environmental Protection & Information Center v. Cal. Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 490 [noting that "courts will be deferential to government agency interpretations of their own regulations, particularly when the interpretation involves matters within the agency's expertise and does not plainly conflict with a statutory mandate"]; *Ridgecrest Charter School v.*

Sierra Sands Unified School Dist. (2005) 130 Cal.App.4th 986, 1000 [Final Statement of Reasons for the Prop. 39 Implementing Regulations is entitled to consideration and respect by the courts].)

Overall, LAUSD's claims that the Court of Appeal interpreted the regulation correctly, with due deference to the State Board, have no merit. The *CCSA v. LAUSD* decision has created conflicts in the law, and review is needed to maintain uniformity of decision and consistent principles governing the proper interpretation of quasi-legislative regulations and the proper amount of deference owed to administrative agencies that promulgate and interpret such rules.

C. ***CCSA v. LAUSD* and *Bullis* Are Undoubtedly In Tension**

LAUSD also argues that there is no conflict between the *CCSA v. LAUSD* decision and *Bullis*. (Answer, pp. 16-19; *Bullis, supra*, 200 Cal.App.4th 1022.) That is incorrect. LAUSD states that the *Bullis* court required the Los Altos School District to "consider the total amount of *non-classroom* space *available* to the students at the comparison group schools when conducting a comparison group analysis." (Answer, p. 17.) LAUSD asserts that no conflict exists between *Bullis* and the *CCSA v. LAUSD* decision because LAUSD "considered *all of the classrooms made available to District school students*" and "counted every single classroom actually '*provided*' to students in LAUSD attending comparison group schools. . . ." (*Id.*)

LAUSD misconstrues *Bullis*' holding. There, the charter school demonstrated that the school district understated the "actual amount" of nonteaching station space at comparison group schools, and the court held that violated Prop. 39 and the Implementing Regulations. (*Bullis, supra*, 200 Cal.App.4th at pp. 1044-50.) The court stated, "a school district, in determining the amount of nonteaching station space it must allocate to the charter school, must take an *objective* look at *all* of such space available at the schools in the comparison group." (*Id.* at p. 1047, emphasis added.) The court held that a school district's *subjective* determination of what is *available* is not legal under Prop. 39, as it excludes space "to the potential detriment of the charter school." (*Ibid.*)

Reading *Bullis* fairly, and for all the points expressed in CCSA's Petition for Review (Pet. For Review, pp. 25-27), a school district's use of district-wide norming ratios to offer classroom space to charter schools could result in existing, unused classroom space being impermissibly withheld from the analysis of how many teaching stations (classrooms) charter schools should be able to use. This is tantamount to excluding classrooms from the analysis of comparison group schools, defying *Bullis*' clear instructions to "to consider and accurately measure *all* of the facilities of the comparison group schools" when making offers of space. (*Bullis, supra*, 200 Cal.App.4th at p. 1030, emphasis added.) As such, *CCSA v.*

LAUSD and *Bullis* cannot be reconciled, and CCSA respectfully requests that the Court grant review to resolve this conflict.

D. **Contrary to LAUSD's Assertions, *CCSA v. LAUSD* Cannot Be Reconciled With *Hartzell v. Connell***

LAUSD claims that *CCSA v. LAUSD* is in line with this Court's previous decision in *Hartzell.* (Answer, p. 19; *Hartzell, supra*, 35 Cal.3d 899.) LAUSD's reasoning, however, is superficial at best, as the only congruity it identifies between the two decisions is the fact that in both cases the reviewing court read the "plain language of a regulation." (Answer, p. 19.) Contrary to LAUSD's assertion, *CCSA v. LAUSD* clearly repudiates the *Hartzell* decision.

Hartzell described a school district's obligation to follow regulations promulgated by the State Board of Education. (*Hartzell, supra*, 35 Cal.3d at pp. 914-916.) There, a school district attempted to impose fees on students for participating in extracurricular activities, arguing that its fee program "is authorized because title 5, section 350 is only an administrative regulation, not a 'law' within the meaning of section 35160" of the Education Code. (*Id.* at p. 916.)

This Court disagreed, holding that "[s]chool districts are authorized only to 'initiate and carry on any program, activity or . . . otherwise act in any manner *which is not in conflict with . . . any law. . . .*" (*Hartzell, supra*,

35 Cal.3d at p. 915 [citing Ed. Code, § 35160], italics in original.) This Court elaborated:

> Under defendants' construction, section 35160 would work a radical change in the relationship between local school districts and the State Board. *If valid administrative regulations were not "laws" under section 35160, the section would authorize local school districts to act in derogation of all regulations promulgated by the State Board.*

(*Id.* at p. 916, emphasis added.)

Accordingly, under *Hartzell*, when State Board of Education regulations address a specific program, activity or matter, school districts do not have the discretion to deviate from the applicable regulation. (*Hartzell, supra*, 35 Cal.3d at p. 916.) Here, because the Implementing Regulations specify how school districts must make Prop. 39 compliant offers to charter schools, LAUSD must adhere to the requirements of Implementing Regulations Section 11969.3, subdivision (b)(1). The use of norming ratios is directly in conflict with that regulation because it ignores the required facilities inventory methodology. As such, *CCSA v. LAUSD* is conflicts with *Hartzell.* CCSA respectfully requests that this Court grant its Petition to resolve that conflict.

E. LAUSD's Request For Review Of An Additional Issue Should Be Denied

LAUSD also requests that this Court determine the correct standard of review a court must apply when assessing a public agency's noncompliance with the terms of a settlement agreement. (Answer, pp. 20-22.) This is unnecessary because the law is settled.

Where a governmental entity and a private party enter into an agreement in which the governmental entity agrees to follow the law, a claim arising from that agreement is to be reviewed pursuant to a breach of contract standard. (*300 DeHaro Street Investors v. Dept. of Housing & Community Dev.* (2008) 161 Cal.App.4th 1240, 1256 (*DeHaro*).) In *DeHaro*, the court held that the "fact that the contract incorporated various statutes verbatim does not prevent the parties from exercising their remedies for breach of contract," and that "when statutory language is included in a contract, it assumes a new legal identity: that of contractual language." (*Ibid.*) LAUSD's request should be denied.

III. CONCLUSION

The *CCSA v. LAUSD* decision has created confusion over the proper method of interpreting statewide quasi-legislative regulations and the level of deference that must be given to administrative agencies' promulgation of such regulations. The issues discussed in CCSA's Petition for Review are

properly before this Court, and CCSA respectfully requests that this Court grant review to consider the important questions of law raised in this case.

Respectfully submitted,

DATED: March 15, 2013

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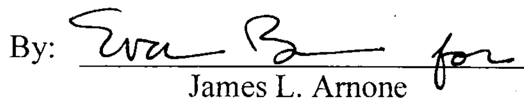
By: 
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CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.504(d)(1) of the California Rules of Court, I certify that the word count for the reply brief above, excluding the caption and tables of contents and authorities is 3,127 words. I relied upon the word count feature provided by Microsoft Word.

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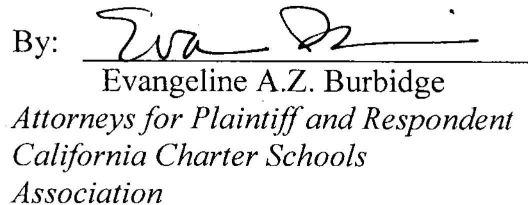
By: 

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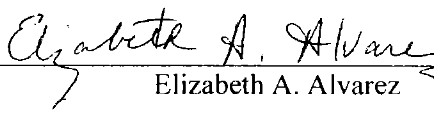

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