Supreme Court Case No. S195852
2nd Civil No. B212966 c/w B214470

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

TODAY'S FRESH START, INC.,

Plaintiff, Respondent and Cross-Appellant,

vs.

LOS ANGELES COUNTY OFFICE OF EDUCATION, ET AL.

Defendants, Appellants and Cross-Respondents

After a Decision by the Court of Appeal
Second Appellate District, Division One, Case No. B212966 c/w B214470
Los Angeles Superior Court Case No. BS112656

APPLICATION TO FILE AMICUS CURIAE OF EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS, APPELLANTS AND CROSS-RESPONDENTS AND PROPOSED AMICUS CURIAE BRIEF

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[Exempt from filing fees pursuant to Gov. Code, § 6103]

APPLICATION OF EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS, APPELLANTS AND CROSS-RESPONDENTS

TO: THE HONORABLE CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT

I. INTRODUCTION

Pursuant to California Rules of Court, rule 8.520(f), the Education Legal Alliance of the California School Boards Association ("Amicus Curiae") respectfully requests permission to file the accompanying amicus curiae brief ("Amicus Curiae Brief") in support of Defendants, Respondents and Cross-Respondents, Los Angeles County Office of Education and Los Angeles County Board of Education ("Defendants"). Amicus Curiae will address:

1) Charter schools' status as public school districts as it affects entitlement to due process protections;
2) The unconstitutionality of delegating charter school revocation to a third-party outside the Public School System;
3) The lack of any direct, personal, substantive pecuniary interest on the part of charter school authorizers to establish bias in the revocation process; and,

4) The adequacy of the process afforded charter schools by the statutory revocation process.

II. INTEREST OF AMICUS CURIAE

The California School Boards Association ("CSBA") is a California non-profit corporation. CSBA is a member-driven association composed of nearly 1,000 K-12 school district governing boards and county boards of education throughout California. CSBA supports local school board governance and advocates on behalf of school districts and county offices of education.

As part of CSBA, the Education Legal Alliance (the "Alliance") helps to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local educational agencies. The Alliance represents its members, just under 800 of the State's approximately 1,000 school districts and county offices of education, by addressing legal issues of statewide concern to school districts. The Alliance's activities include joining in litigation where the interests of public education are at stake.

In the instant case, Amicus Curiae represent the interests of its school district members that are charged with the oversight of charter schools. If the Plaintiff were to prevail on this appeal, the delegation of the revocation process to a third-party would dramatically and negatively impact every member of the CSBA. To shift the revocation responsibility

impairs the governing board's ability to meet its constitutional and statutory obligations in the oversight of charter schools. Moreover, educational agencies will suffer from the effects of the fiscal burden created by a formal evidentiary proceeding before a hearing officer. The State's scarce public education funds must not be directed away from the classroom to support a process that is contrary to law.

The California Constitution entrusts educationally related decisions to our locally elected school boards. (Cal. Const., art. IX, § 14.) It is through oversight by the State's locally elected boards that the Charter Schools Act ties charter schools to the State's Public School System. The revocation authority is critical to the chartering authority's ability to hold charter schools accountable and ensure a safe and legally compliant public education for California's students. To remove this crucial responsibility from the governing board undermines the constitutionality of the Charter Schools Act and the ability of the authorizer to meet its oversight obligations to the benefit of students.

III. AMICUS CURIAE BRIEF WILL ASSIST THE COURT

Amicus Curiae have reviewed Defendants' briefs and are familiar with the questions involved in this case and the scope of their presentation. Amicus Curiae believes that its Amicus Curiae Brief will assist the Court in the following key ways: (1) by addressing relevant points of law and

arguments not discussed in the briefs of either party; (2) further distinguishing and clarifying the case law relied upon by Plaintiff.

IV. CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully request that the Court accept the accompanying Brief for filing in this case.

Dated: March 19, 2012

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PROPOSED AMICUS CURIAE BRIEF OF THE EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF DEFENDANTS, APPELLANTS AND CROSS-RESPONDENTS

COMES NOW Amicus Curiae, the Education Legal Alliance of the California School Boards Association, to offer the following Argument regarding the above captioned matter.

I. INTRODUCTION

The creation of charter schools did not change the fundamental nature of public education from a public function to a private business venture. Charter schools were statutorily created like school districts to provide for the local operation of the State's Public School System. "Charter schools are grounded in private-sector concepts such as competition-driven improvement ..., employee empowerment and customer focus. *But they remain very much a public-sector creature*, with in-bred requirements of accountability and broad-based equity." (*Wilson v. State Bd. of Education* (1999) 75 Cal.App.4th 1125; emphasis added.) As this Court has acknowledged, charter schools cannot be characterized as "nongovernmental entities that contract with state and local governments to provide services on their behalf." (*Wells v. One2One* (2006) 39 Cal.4th 1164, 1201.)

Like school districts, charter schools such as Today's Fresh Start ("TFS") are not individuals entitled to due process protections nor do they

hold a property interest in the charter or the public education funds that support the operation of the public schools of the State. To hold that a property interest exists for a charter school in the face of long standing authority holding that school districts have no such right, creates a dual system that is contrary to the State Constitution. (Cal. Const., art. IX, § 5.)

Though charter schools do not have due process rights, as creatures of the State they hold the rights afforded by statute. Having created charter schools as part of the Public School System, the Legislature retains the authority to determine under what circumstances the charter school may continue to operate. With regard to revocation of a charter, those rights are set forth in Education Code section 47607. While a charter authorizer is required to comply with the statutory process, the process is not subject to challenge for failure to provide due process.

Education Code section 47607 plainly provides that revocation is the purview of the authorizing agency. This was purposeful on the part of the Legislature. As explained in *Wilson v. State Board of Education* (1999) 75 Cal.App.4th 1125, charter schools are constitutional by virtue of their connection to school districts, county offices of education, and the State Board of Education and by these educational entities' authority to revoke the charter. Moreover, through our Constitution we entrust to our locally elected school boards educationally related decisions including whether a charter school is operating in a manner that requires the charter be revoked.

(Cal. Const., art. IX, § 14.) The revocation process reflects the State's interest in ensuring California's students are afforded a compliant public education.

To substitute the role of the locally elected governing board with an evidentiary hearing before a third-party hearing officer or decision-maker is not only an undue expense, it is an illegal delegation of the role of the oversight board. The Court of Appeal correctly held that the process set forth in section 47607 is more than adequate to protect any charter school interest.

II. STATEMENT OF THE CASE

A. FACTS AND PROCEDURAL HISTORY

Amicus Curiae hereby adopts and incorporates by reference the factual background and procedural history set forth in the Statement of Facts and Procedural History in the Answer Brief On the Merits. (Answer Brief, pp. 3-14.)

B. ISSUE PRESENTED

Does due process require an evidentiary hearing before a neutral hearing officer or decision-maker prior to the revocation of a charter school's charter by a county board of education?

III. ARGUMENT

A. CHARTER SCHOOLS ARE PUBLIC SCHOOL DISTRICTS WHOSE ESTABLISHMENT, OPERATION, OVERSIGHT AND REVOCATION ARE GOVERNED BY STATUTE

The Charter Schools Act of 1992 ("the Act") was enacted to create opportunities for innovation and expanded school choice within the public school system by exempting charter schools from many of the state laws governing public schools. Charter schools are public schools that "operate independently from the existing school district structure;" however, they "are part of the Public School System." (Ed. Code, §§ 47601, 47615(a)(1).)[1]

In the wake of the 1998 amendments to the Act, a taxpayer suit was filed to challenge the constitutionality of charter schools. (*Wilson v. State Bd. of Education* (1999) 75 Cal.App.4th 1125 (*Wilson*).) Petitioners' challenge was founded in article IX of the California Constitution, sections 5, 6, and 8, which require a single Public School System; preclude the delegation of the State's function to provide free public education; and, prohibit the appropriation of public money for "any school not under the exclusive control of the officers of the public schools." (Cal. Const., art. IX, § 8.)

[1] All statutory references are to the California Education Code unless otherwise noted.

The *Wilson* court held the Act constitutional finding that charter schools are part of the State's Public School System:

> The Charter Schools Act represents a valid exercise of legislative discretion aimed at furthering the purposes of education. Indeed, it bears underscoring that charter schools are *strictly* creatures of statute. From how charter schools come into being, to who attends and who can teach, to how they are governed and structured, to funding, accountability and evaluation - the Legislature has plotted all aspects of their existence. Having created the charter school approach, the Legislature can refine it and expand, reduce or abolish charter schools altogether. (See §§ 47602, subd. (a)(2), 47616.5.) In the meantime the Legislature retains ultimate responsibility for all aspects of education, including charter schools. "'Where the Legislature delegates the local functioning of the school system to local boards, districts or municipalities, it does so, always, with its constitutional power and responsibility for ultimate control for the common welfare in reserve.'" (*Phelps v. Prussia* (1943) 60 Cal.App.2d 732, 738 [], quoting trial court decision.)

(75 Cal.App.4th at 1135-36; emphasis in original.)

The *Wilson* court relied upon the fact that charter schools are under the "exclusive control of officers of the public schools" in finding the Act was not an unconstitutional transfer of the public education system. (*Wilson, supra*, 75 Cal.App.4th at 1139.) Critical to the court's conclusion that creation of charter schools did not transfer control over public education or create a dual system was the charter authorizer's oversight role and ability to revoke the charter.

> [W]e wonder what level of control could be more complete than where, as here, the very destiny of charter schools lies solely in the hands of public agencies and offices, from the local to the state level: school districts, county boards of

> education, the Superintendent and the Board. The chartering authority controls the application approval process, with sole power to issue charters. (See §§ 47605, 47605.5.) Approval is not automatic, but can be denied on several grounds, including presentation of an unsound educational program. (§ 47605, subd. (b)(1).) Chartering authorities have continuing oversight and monitoring powers, with (1) the ability to demand response to inquiries concerning financial and other matters (§ 47604.3); (2) unlimited access to "inspect or observe any part of the charter school at any time" (§ 47607, subd. (a)(1)); and (3) the right to charge for actual costs of supervisorial oversight (§ 47613.7, subd. (a)). *As well, chartering authorities can revoke a charter for, among other reasons, a material violation of the charter or violation of any law.* (§ 47607, subd. (b)(1).) Short of revocation, they can demand that steps be taken to cure problems as they occur. (*Id.*, subd. (c).)

(*Wilson, supra,* 75 Cal.App.4th at 1139-40; emphasis added.)

The court further rejected the argument that a charter school's status as a nonprofit public benefit corporation took it outside the Public School System or otherwise created a dual system of schools in violation of the Constitution:

> [T]he sum of these features, which we conclude add up to the requisite constitutional control over charter schools, are in place whether a school elects to "operate as, or be operated by, a nonprofit public benefit corporation" (§ 47604, subd. (a)), or whether it remains strictly under the legal umbrella of the chartering authority. *In other words, even a school operated by a nonprofit could never stray from under the wings of the chartering authority, the Board, and the Superintendent.* We note too that situating the locus of control with the public school system rather than the nonprofit is not incompatible with the laws governing nonprofit public benefit corporations.

(*Wilson, supra,* 75 Cal.App.4th at 1140; emphasis added.)

As the *Wilson* case makes clear, charter schools are deemed constitutional because: 1) they are a statutory creation of the Legislature made part of the Public School System; 2) they are public school districts particularly for funding purposes; 3) though unelected, their officials are officers of public schools to the same extent as members of other boards of education of public school districts; 4) they operate under the exclusive oversight control of the constitutionally recognized public entities charged with public education; and, 5) they are subject to the "control" of the authorizer by virtue of the revocation power of the chartering authority. (*Wilson, supra,* 75 Cal.App.4th at 1135-42; see also, *California School Bds. Assn. v. State Bd. of Education* (2010) 186 Cal.App.4th 1298, 1326 (*CSBA v. SBE*).)

To grant a charter school due process rights afforded private entities and to remove the oversight role from the authorizing agency as TFS demands only serves to undermine the constitutionality of charter schools in California. To maintain the Act, the proper conclusion is that charter schools, like other public school districts, have no due process rights and

have no property or liberty interest in the provision of free public education. A charter school's rights are those set forth in statute.[2]

B. PUBLIC SCHOOL DISTRICTS, INCLUDING CHARTER SCHOOLS, ARE NOT ENTITLED TO DUE PROCESS PROTECTIONS UNDER THE FEDERAL OR STATE CONSTITUTION

TFS's argues that the revocation procedure violated its due process right to a fair hearing, invoking both the federal and California due process clauses. (U.S. Const., 14th Amend., § 1; Cal. Const., art. I, § 7(a).) Citing *Mathews v. Eldridge* (1976) 424 U.S. 319, the appellate court states: "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment" and determined that "[w]hether the statute complies with due process is a question of first impression." (Opinion, p. 459.) Treating the charter school as a private school under contract with the State, the appellate court held that, "TFS therefore had a protectable property interest in its charter and in the financial stability of its business, and was entitled to due process protections in the administrative revocation process." (Opinion, p. 461,

[2] The issue of a charter school's entitlement to due process protections was raised by both the Court of Appeal's opinion (*Today's Fresh Start v. Los Angeles County Office of Education* (2011) 197 Cal.App.4th 436, 460-61, review granted Oct. 26, 2011, S195852 ("Opinion")) and TFS's Opening Brief on the Merits before this Court (TFS Opening Brief, pp. 10-11). In any event, this Court may address questions of law with important policy implications even if they are raised for the first time by amicus. (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 654, fn. 3.)

citing *California Assn. of Private Special Education Schools v. Dept. of Education* (2006) 141 Cal.App.4th 360 (*California Assn. of Private Special Education Schools*).)

Amicus challenges this conclusion on the grounds that because charter schools were created by the State as part of the Public School System, charter schools are not "persons" within the meaning of the due process clauses. (§ 47612(a)(c).) It is the charter school's status as a school district within the Public School System together with the authorizer's oversight that allows the Charter Schools Act to withstand constitutional challenge. Like other State educational agencies, a charter school does not hold a private property interest in the operation of the charter school or the receipt of public education funds that would entitle it to due process protections.[3]

1. Governmental Entities Are Not "Persons" Entitled To Due Process

As repeated by TFS "'[t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security of interest that a *person* has already acquired in specific benefits.'" (TFS Opening Brief, p. 10, quoting *Bd. of Regents v. Roth* (1972) 408 U.S. 564, 576; emphasis added.)

[3] To the degree it is suggested that a charter school holds a "liberty interest," this premise is equally flawed as due process protections whether founded on a property or liberty interest, requires that a *private* interest be impacted by governmental action. (*Moore v. Super. Ct.* (2010) 50 Cal.4th 802, 819.)

However, TFS ignores the fact that the U.S. Supreme Court has limited the scope of the term "person" to exclude governmental entities.[4] (See *South Carolina v. Katzenbach* (1966) 383 U.S. 301, 323-24.) In fact, the first step in determining the scope of due process protection is to determine "the *private* interest that will be affected." (*California Assn. of Private Special Education Schools, supra,* 131 Cal.App.4th at 372, citing *Mathews v. Eldridge, supra,* 424 U.S. at 335; emphasis added.)

The limitation of due process to private individuals has been echoed by California courts. "*Star-Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, noted that the Fourteenth Amendment confers fundamental rights on *individual citizens.* 'Political subdivisions cannot assert constitutional rights which are intended to limit governmental action vis-à-vis individual citizens ….'" (*Bd. of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 296, quoting *Star-Kist v. County of Los Angeles, supra,* 42 Cal.3d at 8 (*Star-Kist*), quotation omitted; emphasis in original.)

In *Star-Kist,* this Court examined "whether counties and municipalities may invoke the federal Constitution to challenge a state

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[4] Both the federal and State Constitutions extend due process protections to "persons." (U.S. Const., 14th Amend., § 1 ["… nor shall any State deprive any person of life, liberty, or property, without due process of law;…"]; Cal. Const., art. I, § 7(a) ["A person may not be deprived of life, liberty, or property without due process of law…"].) As the Court of Appeal explained, the analysis for purposes of this dispute is the same under either provision. (Opinion, p. 460; see also, *California Assn. of Private Special Education Schools,* 141 Cal.App.4th at 376.)

law…." (*StarKist, supra,* 42 Cal.3d at 6.) *Star-Kist* noted that "[c]ounties and cities must look to the state Constitution and legislature for their creation and delegated powers" and that they "are subject to the sovereign's right to extend, withdraw or modify the powers delegated." (*Ibid.*)

> This legislative control over cities and counties is reflected in the well-established rule that subordinate political entities, as "creatures" of the state, may not challenge state action as violating the entities' rights under the due process or equal protection clauses of the Fourteenth Amendment or under the contract clause of the federal Constitution. "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator. [Citations.]"

(*Ibid.*)

As stated in *Santa Monica Community College Dist. v. Public Employment Relations Bd.* (1980) 112 Cal.App.3d 684:

> [The Community College District] does not assert a violation of constitutional guarantees of due process. The reason for this omission is undoubtedly the long line of cases which hold that *a public entity, being a creature of the state, is not a "person" within the meaning of the due process clause, and is not entitled to due process from the state.*

(*Id.* at 690, citations omitted; emphasis added; see also, *Rogers v. Brockette* (5th Cir. 1979) 588 F.2d 1057, 1068, fn. 19, cert. den., (1979) 444 U.S. 827 [school district to be treated as a "municipality" as this principle applies "to all political subdivisions created by a state"].)

The Ninth Circuit has reached the same conclusion.[5] (*Premo v. Martin* (9th Cir. 1997) 119 F.3d 764, 771 [a state is not a "person" for purposes of due process]; *City of South Lake Tahoe v. California Tahoe* (9th Cir. 1980) 625 F.2d 231, 233, cert. den. (1980) 449 U.S. 1039 [political subdivision could not challenge constitutionality of an action of another state subdivision].)

As one district court reasoned:

> It is well settled that a municipality is a creature of the state, created by the state legislature for the exercise of such powers as the state sees fit,…. Although both private and municipal corporations are "persons" for most purposes, the distinction between the two is that a municipality operates as an agent or subdivision of the state, while a private corporation functions totally apart from the state. Thus a state cannot confer a constitutional status upon a municipality which the state does not itself enjoy, since the municipality performs the same function as the state.

(*City of Sault Ste. Marie, Michigan v. Andrus* (D.D.C. 1980) 532 F.Supp. 157, 167-68; see also, *Village of Arlington Heights v. Regional Transportation Authority* (7th Cir. 1981) 653 F.2d 1149, 1151 [municipalities could not challenge state statute under the Fourteenth Amendment because they are "creatures and instrumentalities of the state"].)

[5] As the Court of Appeal explained, decisions construing both the federal and state constitutional due process provisions are persuasive in the analysis. (Opinion, p. 460.)

Taken together, these cases make clear that governmental entities are not "persons" for purposes of due process protections. Instead, as creations of the State, school districts and charter schools alike are not persons entitled to due process under either the federal or California Constitution.

2. A California Charter School Is Not a Person Entitled To Due Process Protections

A charter school is a creature of the State, created by the Legislature to operate as an agent of the State in the provision of public education. (§ 47601; *Wilson, supra,* 75 Cal.App.4th at 1135.) The State cannot confer a constitutional status upon a charter school that the State does not itself enjoy. (*StarKist, supra,* 42 Cal.3d at 6; *Santa Monica Community College Dist. v. Public Employment Relations Bd., supra,* 112 Cal.App.4th at 690.) While no California court has considered whether a charter school is a private entity with due process rights, two federal court decisions have answered this question in the negative.

In *Greater Heights Academy v. Zelman* (6th Cir. 2008) 522 F.3d 678 (*Zelman*), a federal appellate court examined if a Ohio charter school (also known in Ohio as a "community school") could bring claims under the Fourteenth Amendment against the State Superintendent of Public Instruction in a dispute over charter school funding. *Zelman* noted that in Ohio, charter schools "contract with an authorized 'sponsor' that provides oversight and support to the school, ensuring that they comply with state

requirements." Under the system "[s]ponsors decide whether to place a community school on probation, suspension, or permanently terminate the community schools' contract because of non-compliance with state and federal education requirements." (*Id*. at 679.) These charter schools were fully funded by Ohio with funds diverted from school districts. (*Ibid*.)

Zelman recited the general rule that "political subdivisions cannot sue the state of which they are part," explaining that "[a]n entity is a political subdivision of the state if it is a creation of the state, if its power to act rests entirely within the discretion of the state, and if it can be destroyed at the mere whim of the state …." (*Zelman, supra,* 522 F.3d at 680.) Thus, "[a]fter considering Ohio's statutory and case law, as well as the substantial control that Ohio exerts on its community schools, it is apparent that community schools are political subdivisions of the state." (*Id*.)

To support this conclusion, the court noted that charter schools "bear many of the characteristics of a political subdivision under the control of the State." (*Zelman, supra,* 522 F.3d at 680.) For example, the schools were created by state legislation and state law characterized the community schools as "public school[s], independent of any school district, and part of the state's program of education." (*Id.* at 680-81.) Additionally, the schools were subject to the same public records and open meeting laws as traditional public schools. (*Id*.) Finally, the schools were funded with Ohio tax dollars and were required to be open to all residents, again, akin to

traditional public schools. Given these characteristics, *Zelman* found that the community school was a political subdivision that was barred from invoking the protections of the Fourteenth Amendment.

A similar result was reached in *Nampa Classical Academy v. Goesling* (2010 D. Idaho) 714 F.Supp.2d 1079 (*Goesling*), affd. (9th Cir. 2011) 447 Fed.Appx. 776. An Idaho charter school sued the Idaho Public Charter School Commission under section 1983 alleging that its policies violated the First and Fourteenth Amendments. The court dismissed the charter school's claims finding it was a subordinate unit of government "created by the State" and not a "person." (*Id*. at 1088.) Specifically, it explained that in Idaho "charter schools … are not private entities but are instead created by statute as part of the public education system and, therefore, have the same rights to sue and be sued as school districts. [Citations.] Because charter schools in Idaho are part of the state's program of public education, which is a delegated governmental function, they are not 'persons' who can sue under § 1983." (*Id*. at 1088, fn. 11.)

As in *Zelman* and *Goesling,* California's charter schools are created by the State as a subordinate unit of government within the Public School System performing the governmental function of delivering public education. (*Wilson, supra,* 75 Cal.App.4th at 1136; see also § 47615(a)(1) ["Charter schools are part of the Public School System, as defined in Article IX of the California Constitution"].) They do not operate by

contract; instead, they are "*strictly* creatures of statute" operated by boards that are "on the same constitutional footing" as school board members. (*Id.* at 1135, 1141.) They are "created by the State" and "[h]aving created the charter school approach, the Legislature can refine it and expand, reduce or abolish charter schools altogether. (See §§ 47602, subd. (a)(2), 47616.5.)" (75 Cal.App.4th at 1135.) This is true regardless of a charter school's status as a nonprofit public benefit corporation as the "locus of control" is "with the public school system rather than the nonprofit . . ." (*Id*. at 1140.)

Nor are charter schools private entities with a contractual right to access education funds. To the contrary, charter schools are deemed school districts for funding purposes and fully funded by taxpayer dollars. (§§ 47612, 47615.)

In addition, California's charter schools are public employers within the meaning of the Educational Employment Relations Act (§ 47611.5), are subject to the same free school guarantee, public records law and open meetings requirements as school districts, and must be open to all residents. (§§ 47605(d), 47610.) The Fair Political Practices Commission advises that charter schools, regardless of whether created as a nonprofit public benefit corporation, are public entities for the purposes of the Political Reform

Act.[6] As in *Zelman* and *Goesling*, all of these factors confirm California charter schools are not persons for purposes of due process protections.

Wells v. One2One Learning Foundation (2006) 39 Cal.4th 1164 (*Wells*), determined that charter schools could be classified as "persons" for some liability purposes. However, its analysis is distinguishable as the Court was interpreting specific statutory definitions of "person" in the California False Claims Act (CFCA) or Unfair Competition Law (UCL), not the term "person" within the meaning of the constitutional due process provisions. Unlike the definitions under the CFCA and UCL, this Court has recognized that entities created by the State to perform a public function are not "persons" for purposes of a due process. (*Star-Kist*, *supra*, 42 Cal.3d at 8.)

Additionally, *Wells* specifically distinguished charter school operators from "nongovernmental entities that contract with state and local governments to provide services on their behalf." (39 Cal.4th at 1201.) As this comparison makes clear, *Wells* did not hold that charter schools are

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[6] The FPPC's conclusion is based on the fact that: (1) A charter school is formed with express legislative authorization and with the specific approval of the chartering public entity; (2) Charter schools rely on public funds; (3) Charter schools provide the same type of public education services that local school districts are authorized to provide and typically do provide; (4) Section 47615 (a)(1) provides that charter schools are part of the public school system for the purposes of certain provisions of the California Constitution. (See *Walsh Advice Letter*, No. A-98-234 (1998), citing *In re Siegel* (1977) 3 FPPC Ops. 62; see also, *Fadely Advice Letter*, No. A-02-223 (2002).)

"persons" with entitlement to due process rights. Instead, *Wells* considered whether, under the definitions of those statutory schemes and in light of the public policies invoked by those schemes, it was appropriate to afford charter schools immunity from liability under the specific statutes.

In line with *Wells*, *Wilson* held that not only was it the Legislature's express intent in creating charter schools that they be part of the Public School System, it held charter schools are on the same constitutional footing as public school districts. (*Wilson,* 75 Cal.App.4th at 1141.)

> First, the Legislature has explicitly found that charter schools are (1) part of the article IX 'Public School System'; (2) under its jurisdiction; and (3) entitled to full funding. (§47615, subd. (a).) These findings are entitled to deference. [citations omitted.] As well, the Legislature has directed that the Charter Schools Act 'shall be liberally construed to effectuate [these] findings ....' (§ 47615, subd. (b).) … Second, the establishment of charter schools does not create a dual system of public schools, as, for example, would be the case if there were a competing local system. Rather, *while loosening the apron springs of bureaucracy, the Act places charter schools within the common system of public schools*...

(75 Cal.App.4th at 1137-38; emphasis added.)

The due process protections provided by the federal and California Constitutions are intended to protect individuals from the government. Because charter schools are created by the State to operate as part of the State's Public School System, charter schools are not "persons" and therefore have no constitutional entitlement to due process protections.

3. A Charter School Has No Proprietary Interest In The Operation of Public Schools

Even if California charter schools could be considered "persons" entitled to due process protections, they do not hold a property interest in order to avail themselves of due process protections. Because public education is a function of the State, no school district or charter school can be said to have any property interest in their ability to operate a school or in the funding for that school.

> "Management and control of the public schools is a matter of state care and supervision; local districts are the state's agents for local operation of the common school system. (*Id*. at p. 681 [].)"

(*Mendoza v. State* (2007) 149 Cal.App.4th 1034, 1052; see also, *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 243.)

In recognition of the State's role, the courts have long held there is no proprietary interest in the operation of a public school. "Local school districts do not have political autonomy and have no proprietary interest in the properties or moneys they hold in trust for the state." (*CTA v. Hayes* (1992) 5 Cal.App.4th 1513.)

> …"[s]chool districts are agencies of the state for the local operation of the state school system. [Citations.]" [Citations.] "The Legislature's power over the public school system has been described as exclusive, plenary, absolute, entire, and comprehensive, subject only to constitutional constraints.... The Legislature has the power to create, abolish, divide, merge, or alter the boundaries of school districts.... The state is the beneficial owner of all school properties and local districts hold title as trustee for the state.... School moneys

> belong to the state and the apportionment of funds to a school district does not give the district a proprietary interest in the funds...."

(*Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc.* (1996) 43 Cal.App.4th 630, 635, quoting *Hall v. City of Taft* (1956) 47 Cal.2d 177, 181, *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1579, fn. 5.)

This has been clear for over a hundred years, "[a] county (or reclamation or school district) is a mere political agency of the state, that it holds its property on behalf of the state for governmental purposes, and that it has no private proprietary interest in such property as against the state." (*Reclamation Dist. v. Super. Ct.* (1916) 171 Cal. 672, 680.) Charter schools, as school districts, are agencies of the State for the local operation of the state school system and the State is the beneficial owner of all school properties. Charter schools are not private vendors operating a business under contract with the State or its local educational agencies. (*Wells, supra,* 29 Ca.4th at 1201.) School moneys belong to the State and the apportionment of funds to a charter school does not give the charter school a proprietary interest in the funds.

Further, the law is replete with examples demonstrating that school site staff has no property interest or due process right against a school district that acts to close a school. Just the same, school districts hold no property interest or resulting due process entitlement where the State acts to

close a public school. For example, section 52055.5 provides that where a public school fails to meet accountability requirements, the State Superintendent of Public Instruction shall "[a]ssume all the legal rights, duties, and powers of the governing board with respect to that school" and may, among other options, "close the school." (§ 52055.5(b)(2)(A), (G).) Yet there is no provision in the statute for due process prior to the State Superintendent initiating or undertaking such action.

This is because the State "owns" public education and the assets of individual school districts and charter schools, which are held "in trust for the state." (*CTA v. Hayes, supra,* 5 Cal.App.4th at 1534.) The State holds a compelling interest in ensuring proper public education for the students of California. (*California Assn. of Private Special Education Schools, supra,* 131 Cal.App.4th at 375.) It is the students' and community's interests, not the "financial stability" of a charter operator's "business" which are protected by taking steps to revoke a charter that is not operating in compliance with the State's requirements.

Charter schools are the State's agents for local operation of the common school system and hold no property interest in the charter or the public funds that support the operation of California's public schools.

4. A Charter Is Not A Contract And Does Not Confer Property Interests In The Operation Of A Public School

TFS repeatedly suggests a "contractual relationship" with the authorizer to claim a property interest in the charter school operation and to suggest that it is entitled to the full panoply of procedural safeguards afforded private contractors that rely upon public contracting for a livelihood. (Cf. *Golden Day Schools Inc. v. State Dept. of Education* (2000) 83 Cal.App.4th 695 (*Golden Day*).) However, the premise that charter schools are private vendors in a contractual relationship with a charter authorizer has already been rejected by this Court. (*Wells, supra,* 39 Cal.4th at 1201 [distinguishing charter school operators from "nongovernmental entities that contract with state and local governments to provide services on their behalf"].) As clarified by *Wilson*, charter schools are *strictly* creatures of statute. They are governed by the full statutory scheme including regulation. They do not operate by contract with the Public School System; rather they are deemed *part of* the Public School System. (75 Cal.App.4th at 1135.)

As the *Wilson* court recognized, "the Legislature has plotted all aspects of [charter schools'] existence." (*Ibid*.) "Having created the charter school approach, the Legislature can refine it and expand, reduce or abolish charter schools altogether." (*Ibid*.) It is the Legislature that has determined the process and the criteria by which a charter petition may be approved or

revoked. The charter is not a contract; instead, it sets forth the statutory criteria and represents the charter school's commitments to the community, its employees and its students as to how it will operate its public educational program.

The statutory framework for establishment of a charter school does not call for the parties to negotiate charter provisions as in the case of a private vendor contracting with the government. Instead, petitioners submit the petition and the would-be authorizer must consider whether the petition meets the statutory criteria. As stated by the court in *CSBA v. SBE*, "[a] district board's discretion to deny a charter petition is limited. The statute provides that a school district 'shall grant a charter ... if it is satisfied that granting the charter is consistent with sound educational practice.'" (186 Cal.App.4th at 1307, quoting § 47605(b).)

In short, upon a decision to grant a petition, the relationship created is not of a contractual nature – the relationship is statutory. The charter school is obligated to comply with law, its charter, meet pupil outcomes and operate in a fiscally responsible manner. (§ 47607(c)-(e).) The authorizer is charged, not by the charter but by statute, with oversight of the charter school and to take action in the face of a charter school's noncompliance. (§§ 47604.3, 47605, 47607.)

As held in *Wells*, charter schools simply cannot be characterized as "nongovernmental entities that contract with state and local governments to

provide services." (39 Cal.4th at 1201.) Rather they are creations of statute, operating pursuant to the procedures defined by the Legislature and upon the condition that they do not engage in the activities that subject the charter to revocation. There is no contractual relationship and TFS has no property interest based thereon.[7]

5. Case Law Relied Upon By The Court Of Appeal And TFS Does Not Support A Finding Of A Property Interest

TFS relies upon three cases to establish that "there is no dispute that Today's Fresh Start is entitled to due process protections in this case": *Slochower v. Bd. of Education* (1956) 350 U.S. 551; *Wieman v. Updegraff* (1952) 344 U.S. 183; and *California Assn. of Private Special Education Schools, supra,* 141 Cal.App.4th 360. However, none of these cases holds that a public school has a right to due process. Instead, these cases address the rights of *a private individual or private vendor* to due process in the face of a governmental decision affecting their property interest. As this Court has recognized, charter school operators are *not* "nongovernmental entities that contract with state and local governments to provide services on their behalf." (*Wells, supra,* 39 Cal.4th at 1201.)

[7] As *Zelman* held, even in a case where the relationship between a charter school and its authorizer could be characterized as contractual, the charter school's status as a government entity eliminates the need for due process. (*Zelman, supra,* 522 F.3d at 681.)

Slochower involved the due process rights of an individual in his employment with the governmental entity. (350 U.S. at 554 ["Slochower had 27 years' experience as a college teacher and was entitled to tenure under state law."].) *Wieman* involved the individuals' rights to due process where the employees were immediately terminated and barred from employment with the government based upon the refusal to sign a loyalty oath. The loyalty oath was deemed overbroad and the Court held that the constitutional due process protection extends to an individual whose "exclusion pursuant to a statute is patently arbitrary or discriminatory." (344 U.S. at 191.) Neither of these cases involve the right of a state created agency to due process.

TFS asserts that "continued operation of a school has also been considered a substantial property interest entitled to due process protection" citing *California Assn. of Private Special Education Schools, supra,* 141 Cal.App.4th 360. However, as its title suggests, that case held that a *private school* operated by a *private vendor* by virtue of *a contract* with the State, invoked due process protections. The court concluded: "the private interest at issue, the financial stability of a nonpublic, nonsectarian school …" entitled the private school to due process. (*Id*. at 374.) No case cited or that CSBA has been able to find holds that a public school is entitled to due process prior to closure. On the contrary, because public education is a matter of State concern, public school districts such as charter schools have

no right or entitlement in the operation of a public school or the funds associated with public education. (*CTA v. Hayes, supra,* 5 Cal.App.4th at 1534.) And, as discussed *supra,* a charter school's operation is by statute, not contract.

Relying on *California Assn. of Private Special Education Schools, supra,* 141 Cal.App.4th 360, the appellate court found TFS had a "protectable property interest in its charter and in the financial stability of its business." (Opinion, p. 461.) However, this Court has recognized the key distinction between the plaintiff private school and charter schools: charter schools are not private entities operating under contract with the government to provide services on its behalf. (*Wells, supra,* 39 Cal.App.4th at 1201.)

The State's creation of charter schools as part of the public school system did not change the fundamental nature of public education to a private business venture. Even with private-sector concepts at play, charter schools "*remain very much a public-sector creature …*" (*Wilson, supra,* 75 Cal.App.4th at 1129; emphasis added.) Indeed, the constitutionality of charter schools is founded in the fact that they are part of the Public School System.

TFS relies heavily upon *Golden Day Schools Inc. v. State Dept. of Education, supra,* 83 Cal.App.4th 695, to argue a due process entitlement to a hearing before a third party. However, in *Golden Day,* it was undisputed

that the school was a private school operating under contract with the government and subject to debarment for failure to comply with the government's requirements in the fulfillment of the contract. (*Id.* at 698-702.) As the *Golden Day* court held, although the right to bid on a contract with the government is not a property interest, government debarment which *excludes a person from doing business with the government* for a defined period implicates a liberty interest protected by the due process clause (U.S. Const., 14th Amend.). (83 Cal.App.4th at 707-08.) Again, charter schools are not "persons" "doing business with the government" but are "part of the Public School System, as defined in Article IX of the California Constitution." (§ 47615; *Wells, supra,* 39 Cal.4th at 1201.)

The courts have recognized that charter schools are not private schools. (*Wilson, supra,* 75 Cal.App.4th at 1139.) Indeed, section 47602, subdivision (b), specifically bars a private school from operating a charter school. Unlike those cases finding a private person or vendor held a property or liberty interest, charter school operators are not private individuals with contractual rights entitling them to operate charter schools or to the state funds supporting public education, they are part of the Public School System. Accordingly, they are not entitled to due process under either the federal or State Constitution.

C. DELEGATION OF REVOCATION TO A THIRD PARTY IS COUNTER TO THE ACT AND THE CALIFORNIA CONSTITUTION

Charter schools' existence and operation is comprehensively addressed in the Act. As explained above, this includes section 47607 which prescribes the responsibility of an authorizer to revoke a charter and the procedure for doing so. Indeed, under the Act, an authorizer may be held liable for the failure to comply with its oversight obligations. (§ 47604(c).)

The public hearing provided for under section 47607(e), as with other public hearings under the Education Code, is to "be held in the normal course of business" and is designed, in large part, to afford the public an opportunity to participate.[8]

TFS argues that as a charter school it is entitled to something different than provided by the statute, never considering the detrimental impact on public participation should a third-party conduct a formal evidentiary hearing. (Gov. Code, § 54954.3 [affording every member of the public the opportunity to directly address the legislative body regarding matters under consideration].) TFS suggests that this Court should rewrite section 47607 to include a requirement for an evidentiary hearing before a third-party. There is no statutory support for this position. More importantly, transferring the revocation process from the authorizing agency into the

[8] See e.g., §§ 1620, 17211, 35182.5, 35524, 35720.5, 37688, 42103, 45253.

hands of a third-party would be an illegal delegation and undermine the constitutionality of the Charter Schools Act.

In tacit recognition of its error, TFS appears to withdraw its contention that a third-party must consider a revocation on Reply and instead asserts that only *sometimes* would that be required. (TFS Reply, p. 4.) Yet, TFS offers neither a basis for this contention nor any means for an authorizer to determine when the statute would require a third-party to be involved. The Legislature's determination that revocation is the purview of the chartering authority must be respected and upheld.

1. Education Code Section 47607 Is Clear On Its Face That Revocation Is To Be Determined By The Authorizer Board, Not A Third-Party

Education Code section 47607, subdivisions (c)-(e), governs revocation procedures. In apparent recognition that nothing in the statute supports the contention that a third-party is to determine revocation, TFS skips review of the statute and jumps to the conclusion that due process requires a third-party to: 1) hold a hearing; 2) make rulings upon the formal presentation of evidence; and, 3) conclude whether substantial evidence supports a finding that the charter school failed to remedy violations of the charter, failed to meet pupil outcomes, engaged in fiscal mismanagement and/or violations of law. (TFS Opening Brief, pp. 10-22.)

Canons of statutory construction undermine TFS's assertions. TFS may not impermissibly add words and considerations to the statute that are

simply not there, and which serve to render portions of the statute a nullity. (*Lakin v. Watkin Associated Industries* (1993) 6 Cal.4th 644, 659; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735; *Dyna-Med Inc. v. Fair Employment & Housing Com*. (1987) 43 Cal.3d 1379, 1387-88.)

Courts apply the well-established rules of statutory construction and seek to "ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*Polster v. Sacramento County Office of Education* (2009) 180 Cal.App.4th 649, 663, citation omitted). This analysis begins with the words of a statute, giving them their ordinary meaning. If the statutory language is clear and unambiguous, the analysis ends. (*Ibid*; see also, *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698.)

For example, in *California Assn. of Private Special Education Schools*, the court relied on the plain language of the statute and regulation to hold that nonpublic schools were not entitled to a hearing before suspension or revocation. (141 Cal.App.4th at 371.) Despite a due process challenge, the court concluded that private schools were not entitled to pre-suspension or pre-revocation hearings given the plain language of the statute, notwithstanding the presumption of pre-revocation hearing in other administrative contexts. (*Ibid*.)

The plain words of section 47607 make clear that the charter is to be revoked "by the chartering authority," if "the chartering authority finds" a

violation of section 47607(c)(1), (2), (3), or (4), through a showing of substantial evidence. The statute requires "the chartering authority to hold a public hearing, in the normal course of business, on the issue of whether evidence exists to revoke the charter." It is then the chartering authority "shall not revoke a charter, unless it makes written factual findings supported by substantial evidence, specific to the charter school, that supports its findings."

Entirely absent from the statute is any reference or suggestion of a third-party's involvement in the process for deciding whether to revoke a charter or the substitution of a finding by the chartering authority with that of a third-party. Yet, contrary to the statutory and constitutional role of a local district or county board as the chartering authority, TFS seeks to pin a third-party with the badge of authority expressly and specifically granted to the charter's authorizing board.

2. Delegation Of The Decision Whether Or Not To Revoke A Charter Creates An Unconstitutional Delegation Of Authority In Violation Of California Constitution Article IX

To delegate revocation to one other than the authorizing agency not only flies in the face of the statutory procedures delineated by the Legislature, but also improperly transfers control of the Public School System in contravention of the Constitution. To redirect the fundamental oversight responsibility from the locally elected governing board severs the

requisite tie to the Public School System, rendering the Act unconstitutional. "It is, thus, the very control and oversight by public officials that legitimizes charter schools." (*CSBA v. SBE, supra*, 186 Cal.App.4th at 1326.)

As Amicus set forth in detail above, the California Constitution prohibits the transfer of authority over any part of the school system to entities outside of the Public School System. (*Mendoza, supra*, 149 Cal.App.4th at 1059.) In determining that the Act did not run afoul of Article IX, sections 5, 6 or 8 as an improper delegation of the Public School System, *Wilson* relied upon the fact that, "the Legislature has specifically declared that charter schools are under 'the exclusive control of the officers of the public schools.'" (*Wilson, supra*, 75 Cal.App.4th at 1139, quoting 47615(a)(2).) "[T]hrough their powers to deny petitions and revoke charters, chartering authorities *do* exercise control over these educational functions." (75 Cal.App.4th at 1141; emphasis in original.)

> [C]harter schools are not just nominally, but are effectively, under the control of state officials through the charter approval process, through continuing oversight and monitoring powers, through unlimited access for inspection and observation, and *through the power to revoke a charter in the face of serious breaches of financial or educational responsibilities or for violations of the law*.

(*CSBA v. SBE, supra*, 186 Cal.App.4th at 1326, citing *Wilson, supra*, 75 Cal.App.4th at 1138-41; emphasis added.) Notably, revocation is the central oversight action afforded a charter authorizer. (§ 47607.)

The delegation TFS seeks is also an affront to the role of the authorizer board and to the "sovereignty over public education provided within [an authorizer's] boundaries . . ." (*CSBA v. SBE*, *supra*, 186 Cal.App.4th at 1320-21.) The California Constitution guarantees that the ability of the Public School System "is not impaired by the dissipation of authority and loss of control that would result if parts of the system were transferred from the system or placed under the jurisdiction of some other authority." (*California Teachers Assn. v. Bd. of Trustees* (1978) 82 Cal.App.3d 249, 254, quotation omitted.) To transfer any part of the revocation process or educational related decision as to whether a charter school is complying with its charter, meeting pupil outcomes, engaging in fiscal mismanagement or violating the law, to a third-party undermines the control deemed necessary to uphold the Act.

D. THERE WAS NO IMPERMISSIBLE BIAS PREVENTING LACBOE FROM REVOKING THE CHARTER

Contrary to TFS's implications, the Los Angeles County Board of Education's ("LACBOE") members did not have any direct pecuniary interest in revocation of TFS's charter to create bias. Moreover, there was no overlap of "prosecutorial" and "adjudicatory" functions. Even if such a bias could be said to have existed, the rule of necessity allowed the LACBOE to act.

1. A Charter Authorizer Has No Pecuniary Bias

Assuming that charter schools are entitled to due process and that the revocation process is an "adjudicatory function," TFS argues that it was denied due process because the LACBOE had a financial interest in revoking its charter. However, this argument misunderstands the funding of TFS and inappropriately grafts cases addressing an *individual's* pecuniary bias onto a government body. A charter authorizer holds no "direct personal, substantive pecuniary interest" in a revocation decision.

First, TFS's charter was originally granted under section 47605.6. Under this section, a charter may be granted to operate a school "that operates at one or more sites within the geographical boundaries of the county *and that provides instructional services* that *are not generally provided by a county office of education*." (§ 47605.6(a)(1); emphasis added.) In other words, by its charter, TFS was not as a matter of law in "competition" with the Los Angeles County Office of Education ("LACOE") for students or any associated finding. Therefore, without any competition for students the allegations of pecuniary bias by the LACBOE fall away.

Second, TFS suggests that because the LACOE *as an institution* may allegedly compete with TFS for students, and therefore funding, the LACBOE cannot be allowed to decide on revocation of TFS's charter. In support, TFS cites a number of cases where the pecuniary interest of

individual adjudicators or *individual* members of an adjudicatory board was found to be impermissible. However, none of these cases support TFS's much broader argument that an *institution* such as a school district, county office of education or a State educational agency may have a disqualifying pecuniary bias. Notably, TFS has not alleged any pecuniary bias on the part of any individual LACBOE board member.

Specifically, *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, was a challenge to the selection of an administrative hearing officer where the outcome of the hearing could influence the hearing officer's individual interest in future employment as a hearing officer. *Liljeberg v. Health Services Acquisition Corporation* (1988) 486 U.S. 847, found that a federal district court judge who sat on the board of trustees of a university could not hear a case involving the university. *Gibson v. Berryhill* (1973) 411 U.S. 564, involved a challenge to the composition of a licensing board, where board members could see personal pecuniary impact from decisions of the board. In *Nissan Motor Corporation v. New Motor Vehicle Bd.* (1984) 153 Cal.App.3d 109, *Chevrolet Motor Division v. New Motor Vehicle Bd.* (1983) 146 Cal.App.3d 533, and *University Ford Chrylser-Plymouth, Inc. v. New Motor Vehicle Bd.* (1986) 179 Cal.App.3d 796, the courts addressed challenges to the New Motor Vehicle Board based on the financial interest of the car dealership owners who sat on that board. As is

apparent, each case involved an *individual's* interest in the subject of the hearing.

More relevant is this Court's decision in *Lolley v. Campbell* (2002) 28 Cal.4th 367. In *Lolley*, an employee represented himself during an administrative hearing before the Labor Commissioner after which the Commissioner awarded him unpaid wages. The employer appealed and the Commissioner agreed to represent the employee in exchange for any attorneys' fees awarded. The employer alleged the arrangement violated due process by giving the Commissioner a "pecuniary interest" in the case since ruling in the employer's favor would destroy any chance to recover fees. (*Id*. at 379.) In rejecting the challenge, this Court explained:

> The high court held that "it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a *direct, personal, substantial, pecuniary interest* in reaching a conclusion against him in his case." (*Id.* at p. 523 [].) The same is not true in the present case. Even if [the employer] had challenged the impartiality of the hearing officer, there is no showing that the hearing officer had "a direct, personal, substantial, pecuniary interest" in the case.

(28 Cal.4th at 379; see also, *Dugan v. Ohio* (1928) 277 U.S. 61 [no due process violation where mayor-judge received salary "paid out of fund to which fines accumulated from his court" because "he receives salary in any event, whether he convicts or acquits"]; *Love v. City of Monterey* (1995) 37 Cal.App.4th 562, 584 ["We have already acknowledged the government

interest in generating revenue from parking tickets. We do not believe that this interest inherently promotes bias favoring the validation of questionable citations"].)

The rationale behind these cases rebuts the position of TFS. The fact that the LACOE, or any charter authorizer as an institution, may receive additional funds if a charter is revoked is no different from the Labor Commissioner's office potentially receiving fees or the government potentially receiving revenue for a court's validation of a citation.[9] There is no suggestion or support for the proposition that a charter authorizer's individual board members have a "direct, personal, substantial, pecuniary interest" in the revocation of a charter school to establish pecuniary bias.

2. No Impermissible Bias Was Created By Overlapping Roles Of Investigation And Revocation

TFS complains that the LACBOE was bias based on its staff's overlapping roles as "prosecutor" and "advisor" to the decision-maker. To support this argument, TFS cites cases addressing the combination of "prosecutorial" and "adjudicatory" functions. However, neither of these functions was involved in the revocation.

[9] Any such pecuniary benefit to a charter authorizer is also wholly speculative. There are a myriad of educational options for students affected by charter revocation including enrollment in other charter schools, private schools, and home schooling.

First, revocation is an oversight function, not a prosecutorial function. The cases relied upon by TFS involve adversarial proceedings in which agency staff acted as a "prosecutor." (See TFS Opening Brief, p. 19.)[10] However, TFS does not, and cannot explain how agency staff prosecuted TFS before the LACBOE.

Even if the revocation proceeding could be characterized as an "adjudication," this combination of roles is not impermissible. (See *Kloepfer v. Com. on Judicial Performance* (1989) 49 Cal.3d 826, 833 [in disciplinary proceeding brought against judge, the combination of investigative and adjudicatory functions by the Commission on Judicial Performance did not constitute denial of due process].) Quoting *Withrow v. Larkin* (1975) 421 U.S. 35, 46–47, the *Kloepfer* court states:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment

[10] TFS also cites *Quintero v. City of Santa Ana* (2004) 114 Cal.App.4th 810 for the proposition that a "city attorney's interactions with board on other occasions suggested probable influence and appearance of unfairness." (TFS Opening Brief, p. 20.) However, to the extent *Quintero* could be construed to adopt a per se rule barring an administrative agency's attorneys from prosecuting and advising the agency, it was rejected by this Court's holding in *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 739-40, fn. 2.)

> that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

(49 Cal.3d at 834, quotation omitted.)

Clearly TFS has not met this burden. In fact, as noted in *Withrow* and *Kloepfer*, there is a "presumption of honesty and integrity in policymakers with decision making power." (*Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 579 citing *Hortonville Joint School Dist. No. 1 v. Hortonville Education Assn.* (1976) 426 U.S. 482, 492 [school board's role in negotiations preceding strike did not impact its ability to serve as impartial decision-maker in terminating teachers].)

Here, agency staff investigated TFS's compliance with the law and its charter and then recommended revocation. It did not take any action which could be characterized as "prosecuting" the charter school before the LACBOE. Moreover, there is no legitimate challenge to the honesty and integrity of the governing board. Therefore, the statutorily required integration of the LACOE and LACBOE does not lead to the conclusion that TFS was not provided a fair hearing.

3. Even If A Conflict Was Cognizable, The Rule Of Necessity Allowed The LACBOE To Revoke TFS's Charter

Where "'an administrative body has a duty to act, and is the only entity capable of action, the fact that the body may have an interest in the result does not disqualify it from acting.'" (*Weinberg v. Cedars-Sinai*

Medical Center (2004) 119 Cal.App.4th 1098, 1113, quoting *Hongsathavij v. Queen of Angels etc. Medical Center* (1998) 62 Cal.App.4th 1123, 1142-43.) In *Weinberg*, the court rejected a doctor's argument that due process prevented a board of directors of the medical center from making a final determination on termination of his physician privileges because the board would have an incentive to immunize the medical center by suspending or revoking the physician's privileges. (*Id*. at 1112.) The court applied the "rule of necessity" to deny the claim of "structural bias." (*Ibid*; see also *Southern California Underground Contractors, Inc. v. City of San Diego* (2003) 108 Cal.App.4th 533, 549 (*Underground Contractors*) [applying rule of necessity to allow city council to make debarment decision even where contractor claimed city was both prosecutor and adjudicator].)

This same rule applies here to defeat TFS's claims. LACBOE was specifically charged by the Legislature with the responsibility to revoke a charter for noncompliance and was the only administrative body with the authority to take the actions set forth in section 47607 (c) through (e) to process the revocation. As the only body with the ability to take such action, no institutional bias prevents LACBOE, or any charter authorizer, from acting pursuant to the Education Code.

E. THE COURT OF APPEAL PROPERLY HELD THE STATUTORY PROCESS IS ADEQUATE TO PROTECT ANY CHARTER SCHOOL INTEREST

Even to assume that a charter school is a person entitled to due process protections, TFS has not demonstrated a need or entitlement to a rigid trial-like proceeding requiring the formal introduction of evidence and a neutral third-party adjudicator. It is notable that while TFS complains of an unfair process, it does not challenge that the decision to revoke was supported by substantial evidence. (Opinion, p. 835.) It follows that TFS has shown no harm by the allegations of an unfair proceeding. Nonetheless, as the Court of Appeal held, case law does not support this demand.

At its most basic, "[d]ue process is the opportunity to be heard at a meaningful time and in a meaningful manner." (*Underground Contractors, supra,* 108 Cal.App.4th at 543, citing *Mathews, supra,* 424 U.S. at 333.) Contrary to TFS's position, "there is no constitutional entitlement to the full panoply of judicial trial procedures…" (108 Cal.App.4th at 543, quotation omitted.) Instead the reasonableness of procedures is based on the facts of the situation.

> To determine whether administrative procedures are constitutionally sufficient in specific circumstances "generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and

> finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

(Opinion, pp. 459-60, quoting *Mathews*, *supra*, 424 U.S. at 335.)

Application of this test does not yield the result desired by TFS. As noted above, a charter school does not have the requisite "private interest" to trigger these protections and neither of the two remaining factors militates in TFS's favor.

Education Code section 47607 sets forth a procedure to address potential risk of erroneous deprivation. It requires revocation will be supported by substantial evidence and affords the charter school appeal rights. Additionally, this procedure allows charter schools to provide responses to the results of any investigation by the authorizing agency both in response to the notice of violation required by section 47607(d) and at the public hearing required by section 47607(e). Finally, the statutory scheme provides for review of this decision by the State Board of Education and a charter school is further free to ask a court to review the decision, as TFS has done in this case.[11]

A similar procedure was found to provide sufficient due process in *Taylor Bus Service v. San Diego Bd. of Education* (1987) 195 Cal.App.3d 1331. There, a bidder challenged revocation of a conditional award of a

[11] A district sponsored charter school also has the right to appeal to the county office of education before proceeding to the State. (§ 47607(f)(1).)

contract on the grounds it was not provided due process. The court rejected this argument, as the bidder "was on notice" of the school district's concerns and the bidder was given "several opportunities to present its position." (*Id*. at 1344.) The same is true under section 47607. Charter schools receive both adequate notice and an opportunity to respond to an authorizing agency's concerns. (§ 47604(d)(e).) This provides the requisite process and protection.

Adding the burdensome requirement of a formal presentation of evidence before the authorizer or a third-party would not lessen the risk of erroneous deprivation. Notably absent from TFS's brief is any explanation as to the process it envisions to be required. Further, the charter school has not considered that this step may even make erroneous deprivation more likely if the charter school does not have the resources to understand and participate in this additional trial-like procedure.

Second, authorizing agencies have an important oversight role in charter schools, and removing any part of the revocation process from authorizing agencies severely impacts this interest.[12] Indeed, a charter authorizer may face liability for the failure to meet its oversight obligations. (§ 47604; see also, *CSBA v. SBE*, *supra*, 186 Cal.App.4th at 1326-27 [mandamus will lie to compel revocation].)

[12] The constitutional importance of an authorizing agency's oversight responsibility, which includes revocation, is reviewed in detail above.

Charter authorizing agencies are responsible for implementing the State's "compelling interest in ensuring that the schools that are charged with protecting children are operated in a safe and lawful fashion." (*California Assn. of Private Special Education Schools, supra,* 141 Cal.App.4th at 375.) Giving control of this process to a third-party, which is not part of the Public School System, inhibits the ability of authorizing agencies to adequately perform their oversight functions and raises questions about the constitutionality of charter schools. Formalizing the revocation process into a court-like proceeding will only hamstring authorizing agencies, making it more difficult for them exercise their constitutional obligations and hold charter schools accountable. (*CSBA v. SBE*, *supra,* 186 Cal.App.4th at 1326 ["Local school districts and county boards of education, as well as parents and teachers, have a right to expect that charter schools will hew not just to the law, but to their charters and the conditions imposed upon them through official action taken at a public hearing."])

Finally, requiring additional procedural steps would place large and unnecessary fiscal and administrative burdens on authorizing agencies. The additional steps TFS seeks could add tens of thousands of dollars in staff time and outside contractors to a revocation proceeding – mandated costs that the Legislature did not contemplate and has not provided for. At this time of severe cuts to education funds, such unnecessary costs will only

further interfere with efforts to provide a quality education to students. TFS has not identified any benefit which outweighs this undue burden. Indeed, TFS does not contend the process lead to an incorrect decision in that it does not contest that the decision was supported by substantial evidence.

The lack of formal trial procedures or application of the California Administrative Procedures Act ("APA") indicates that the Legislature has deemed the process required by section 47607 to contain appropriate process. Where the Legislature intends an adjudicatory process with a third-party hearing officer, it has expressed this intent. (See *Cockshott v. Dept. of Forestry & Fire Protection* (2004) 125 Cal.App.4th 235, 239 ["[T]he Legislature has demonstrated that where it intends the APA to apply, it clearly says so. Conversely, a failure to so state can only be interpreted as indicating the inapplicability of the APA."].) More specifically, where an adjudicatory proceeding has been deemed appropriate under the Education Code, the Legislature has incorporated the application of the APA.[13]

> "In the vast bulk of circumstances, the procedures chosen by the legislature or by the agency are likely to be based on application of a *Mathews*-type cost-benefit test by an institution positioned better than a court to identify and quantify social costs and benefits. A court should give serious consideration to second-guessing a legislative or agency choice of procedures only when it has indications that the

[13] See, e.g., §§ 8403, 8445, 8448, 44246, 44944, 44948.5, 87675, 94940.

> agency or legislature chose its procedures in bad faith or without considering the implications of its choice of procedures".... [¶] ... "In assessing what process is due ..., substantial weight must be given to the good-faith judgments of the [agency]." [Citations.]

(*Underground Contractors, supra,* 108 Cal.App.4th at 547, quoting *Mohilef v. Janovici* (1996) 51 Cal.App.4th 267.)

The Legislature, in enacting section 47607, did not contemplate a hearing before a third-party complete with witnesses and formal rules of evidence. Rather, the Legislature invoked the educational expertise of locally elected governing boards to perform the oversight function, including revocation, for the benefit students who are entitled to a safe and legally compliant public education.

IV. CONCLUSION

Charter schools are part of our public school system and, like other educational agencies, do not hold due process rights. The Legislature, having created charter schools, has determined all aspects of their existence, including how a charter is to be revoked. The Legislature has called upon the State's locally elected boards to oversee charter schools and invoke the revocation process in the face of noncompliance. This structure is central to the constitutionality of the Charter Schools Act.

The procedures deliberately chosen by the Legislature provide the "the opportunity to be heard at a meaningful time and in a meaningful manner." The procedure meets the State's compelling interest in ensuring a

safe and legally compliant public education for California students. The additional procedures crafted by the TFS, not only rewrite the Education Code, but add expensive and unnecessarily formal new requirements to the revocation process without providing benefit to charter school or furthering the State's interests. The balance of interests does not require these additional procedures and only serves to undermine the constitutionality of the Charter Schools Act.

Dated: March 19, 2012

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c) of the California Rules of Court, this **PROPOSED AMICUS CURIAE BRIEF OF EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF DEFENDANTS, APPELLANTS AND CROSS-RESPONDENTS** was produced using 13-point Roman type including footnotes and contains approximately 11,873 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: March 19, 2012

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 301 East Ocean Boulevard, Suite 1750, Long Beach, CA 90802.

On the date set forth below I served the foregoing document described as **APPLICATION TO FILE AMICUS CURIAE OF EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS, APPELLANTS AND CROSS-RESPONDENTS AND PROPOSED AMICUS CURIAE BRIEF** on interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

☒ **(VIA U.S. MAIL)** I caused such document to be placed in the U.S. Mail at Long Beach, California with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **(BY PERSONAL SERVICE)** I caused such envelope to be delivered by hand to the offices of the addressee.

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I declare under penalty of perjury under the laws of the State of California that the foregoing March 19, 2012 at Long Beach, California.

Ila Friend

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