Case No. C078491

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

ANDERSON UNION HIGH SCHOOL DISTRICT,

Plaintiff and Appellant,
v.

SHASTA SECONDARY HOME SCHOOL,

Defendant and Respondent.

Appeal from the Superior Court of the State of California
County of Shasta, Superior Court Case No. 177944
Honorable Monica Marlow, Judge Presiding

APPLICATION OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION EDUCATION LEGAL ALLIANCE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF AND APPELLANT ANDERSON UNION HIGH SCHOOL DISTRICT AND PROPOSED AMICUS CURIAE BRIEF

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APPLICATION OF
THE CALIFORNIA SCHOOL BOARDS ASSOCIATION
EDUCATION LEGAL ALLIANCE
FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT
OF PLAINTIFF AND APPELLANT
ANDERSON UNION HIGH SCHOOL DISTRICT

TO: THE HONORABLE PRESIDING JUSTICE OF THE
THIRD APPELLATE DISTRICT

Pursuant to California Rules of Court, rule 8.200(c), the California School Boards Association Education Legal Alliance ("Amicus") respectfully requests permission to file the accompanying amicus curiae brief ("Amicus Brief") in support of Plaintiff and Appellant Anderson Union High School District.

I. INTERESTS OF AMICUS CURIAE

The California School Boards Association ("CSBA") is a non-profit, membership organization composed of nearly 1,000 California school district governing boards and county boards of education. CSBA advances the interests of California's more than 6 million public school students by supporting and advocating on behalf of school districts and county offices of education.

As part of CSBA, the Education Legal Alliance ("ELA") helps to ensure that local school boards retain their authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local educational agencies. The ELA's activities include joining in litigation where legal issues of statewide concern affecting public education are at stake.

In the instant case, Amicus represents the interests of its school district members that are charged with the oversight of charter schools. The California Constitution entrusts educationally related decisions to our locally elected school boards. (Cal. Const., art. IX, § 14.) Among those significant decisions is whether to grant a petition to establish a charter school. (Ed. Code, § 47605.) It is the approval and oversight by the State's locally elected boards that tie charter schools to the State's Public School System as required by the Constitution. (*Wilson v. State Bd. of Educ.* (1999) 75 Cal.App.4th 1125, 1139.) A charter school's location and operations are 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. Removing from the governing board the crucial responsibility to approve charter school locations in conformity with the requirements of the Charter Schools Act as part of the petition process would undermine the constitutionality of the Charter Schools Act and the ability of the authorizer to meet its oversight obligations to the benefit of students.

II. HOW THE AMICUS CURIAE BRIEF WILL ASSIST THE COURT

Amicus has reviewed the briefs and is familiar with the questions involved in this case and the scope of their presentation. Amicus believes that its brief will assist the Court by addressing relevant points of law and arguments not discussed in the briefs of the parties, further clarifying case law relied upon in the dispute, and demonstrating that this case is a matter of general statewide importance affecting districts across California. Presentation of such legal argument is the very reason for affording amicus curiae status to interested and responsible parties such

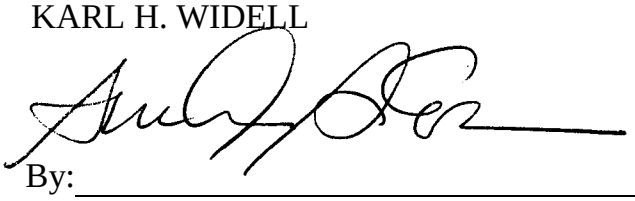
as the California School Boards Association Education Legal Alliance. (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405 fn. 14.)

III. INDEPENDENCE OF AMICUS CURIAE

No party or counsel for a party has authored any part of this brief, nor has any person or entity made a monetary contribution intended to fund the preparation and submission of this brief, other than Amicus, its members, and counsel of record.

DATED: December 4, 2015

DANNIS WOLIVER KELLEY
SUE ANN SALMON EVANS
KARL H. WIDELL



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CERTIFICATE OF INTERESTED PARTIES

There are no interested entities or persons that must be listed in this certificate. (Cal. Rules of Court, rule 8.208(e)(3).)

DATED: December 4, 2015

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I. INTRODUCTION

Litigation enforcing geographic restrictions on charter schools – specifically challenging whether charter schools have lawfully opened in locations outside the jurisdictional boundaries of their authorizing school districts – is growing throughout California. Cases from Shasta County in the north to San Diego County in the south are focused on the requirements and meaning of the 2002 amendments to the Charter Schools Act of 1992 ("CSA" or "Act"), which added geographic restrictions on charter schools in sections 47605 and 47605.1 of the Education Code.[1] [2]

This is the first of those cases to reach the Court of Appeal for a decision on the merits, and Amicus urges reversal of the trial court's order below.[3] The existence of charter schools in California is only constitutional

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

[2] In addition to the instant action, cases around the state include: *San Diego Unified School District v. Alpine Union School District, et al.,* San Diego Superior Court No. 37-2014-00021153-CU-MC-CTL; *Los Angeles Unified School District v. Acton-Agua Dulce Unified School District ("Acton-Agua Dulce"), et al.*, Los Angeles Superior Court No. BS149062; *Newhall School District v. Acton-Agua Dulce, et al.*, Los Angeles Superior Court No. BS149061; *Pasadena Unified School District v. Acton-Agua Dulce, et al.*, Los Angeles Superior Court No. BS150159; *Tehachapi Unified School District v. Morongo Unified School District, et al.,* Kern Superior Court No. BCV15-100926; *La Mesa-Spring Valley School District v. Mountain Empire Unified School District, et al.*, San Diego Superior Court No. 37-2015-00019227-CU-MC-CTL; *Sweetwater Union High School District v. Julian Union Elementary School District, et al.*, San Diego Superior Court No. 37-2015-00021033-CU-MC-CTL; and *Grossmont Union High School District v. Julian Union Elementary School District et al.,* San Diego Superior Court No. 37-2015-00033720-CU-WM-CTL.

[3] *Newhall School District v. Acton Agua Dulce, et al.* was pending in the Second Appellate District, Case No. B260731; however, the court dismissed the appeal as moot after the charter school "closed" under the challenged charter and reopened in the same place under a new charter from the same out-of-district authorizer. *San Diego Unified School District v. Alpine Union School District, et al.* was pending in the Fourth Appellate District, Case No. D067488; however, the appellant charter school withdrew its appeal after closing its infringing charter.

insofar as they strictly comply with the explicit statutory scheme found in the Act. That scheme acknowledges and enforces the constitutional principle of local control over public education within the boundaries of the local electorate through geographic restrictions designed to promote oversight by local public school officials. (Cal. Const., art. IX, § 14; Ed. Code, §§ 35010, subd. (a), 47605, subd. (a)(1), 47605.1, subd. (a).) To give geographic restrictions meaning, the Act requires that charter school petitioners identify the location of their charter school in the charter petition and thereafter limits operations at locations approved by the authorizing district board. (§§ 47605, subd. (a)(1), (g), 47605.1, subd. (a).)

Respondent's arguments, which the trial court incorrectly accepted in its ruling below, turn the Act on its head and read geographic restrictions and local control out of the law by allowing charter schools to operate outside the jurisdictional boundaries of their authorizing districts without approval of the authorizer and without regard to the statutory scheme. Indeed, the statutory scheme precludes the operation of resource centers, meeting spaces, and satellite facilities within the county of the charter's authorizer.[4] (§ 47605.1, subd. (c).) Contrary to Respondent's claim, charter schools do not have permissive authority to commit *ultra vires* acts because charter schools are strictly creatures of statute. (*Wilson v. State Bd. of Educ.*

[4] In limited and prescribed circumstances, a charter school may operate a resource center, meeting space, or satellite facility "in a county adjacent to that in which the charter school is authorized." (§ 47605.1, subd. (c).) In order to invoke this limited exception, the resource center, meeting space, or satellite facility must be "used exclusively for the educational support of pupils who are enrolled in nonclassroom-based independent study of the charter school" and the charter school must "provide[] its primary educational services in, and a majority of the pupils it serves [must be] residents of, the county in which the school is authorized." (*Ibid.*) As the parties admit, the exception does not apply in this case because no "adjacent county" is involved. The Legislature's decision to include this limited exception, *see infra*, in no way supports Respondent's position here.

(1999) 75 Cal.App.4th 1125, 1136 ("*Wilson*").) Legislative history and the addition of county-wide charters in 2002 confirm that out-of-authorizer resource centers may only operate in adjacent counties, provided statutory prerequisites have been satisfied. (§§ 47605, subd. (a)(1), 47605.1, subd. (a), (c), 47605.6, subd. (a)(1).)

There is nothing absurd about the Legislature's decision to allow the very limited exception of out-of-county resource centers, while reserving county-wide charter operations (i.e., those that operate outside of a single authorizing school district but within a single county) to county boards of education. (§ 47605.6, subd. (a)(1).) What Respondent really means when it characterizes the scheme as "absurd" is that it disagrees with the Legislature's choice. The Court should not be swayed by Respondent's attempt to color its disagreement as a legal defense. Accordingly, for the reasons set forth here and in Appellant's papers, the Court should reverse the trial court's order and remand with directions to enter Judgment in favor of Anderson Union High School District ("Anderson Union").

II. DECISIONS CONCERNING CHARTER SCHOOLS ARE SUBJECT TO THE PRINCIPLES OF THE STRICT, EXPLICIT STATUTORY SCHEME FOUND IN THE CHARTER SCHOOLS ACT

A. Charter Schools Are Constitutional Only When They Hew to the Strict Letter of the Charter Schools Act

The California Constitution provides for the provision of public education through "a system of common schools." (Cal. Const., art. IX, § 5.) It specifies the creation and organization of school districts at the local level. (*Id*., art. IX, § 14.) "[U]nder the Constitution, the public schools themselves exist at the district level and are governed by the school districts." (*Mendoza v. State* (2007) 149 Cal.App.4th 1034, 1041.)

The Education Code builds on this, requiring that "[e]very school district shall be under the control of a board of school trustees or a board of education." (§ 35010, subd. (a).)

The "system of common schools" includes charter schools, but only so long as those schools are properly authorized and overseen. The CSA 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. As such, charter schools are public schools that "operate independently from the existing school district structure," but "are part of the Public School System." (§§ 47601, 47615 (a)(1).)

In the wake of the 1998 amendments to the Act, a taxpayer suit was filed to challenge the constitutionality of charter schools. (*Wilson*, *supra*, 75 Cal.App.4th 1125.) That 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.) The *Wilson* court held the Act to be constitutional based upon the statutory requirements that maintained control under the 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.

(*Wilson, supra,* 75 Cal.App.4th at p. 1136; emphasis added.)

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 p. 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. (I., subd. (c).)

(*Wilson, supra,* 75 Cal.App.4th at 1139-40; 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 "so long as they administer charter schools according to the law and their charters"; 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 Boards Association v. State Board of Education* ("*CSBA v. SBE*") (2010) 186 Cal.App.4th 1298, 1326.) It is this explicit statutory scheme and its strict requirements which make the Act constitutional.[5] Where the requirements of the Act are not met, an illegal delegation outside the constitutionally required "system of common schools" exists. (Cal. Const., art. IX, §§ 5, 6.)

B. The Constitutional Principle of Local Control Is Embedded in the Charter Schools Act

The decision whether to authorize the creation of a charter school to operate within its boundaries is one of the powers granted to a school district's elected governing board. (§ 47605; *Wilson*, *supra*, 75

[5] In contrast to the First Appellate District's opinion in *Wilson*, the Washington Supreme Court recently held that Washington's Charter School Act violated the Washington state constitution because charter schools under that scheme were not "common schools" under Washington law, i.e., they were run by appointed boards or nonprofit organizations and not subject to local voter control. (*League of Women Voters of Wash. v. State of Washington* (Wash. 2015) 355 P.3d 1131, 1137.) Thus, the Washington Charter School Act further violated the state's constitution by diverting funds dedicated to common schools to charters. (*Id*. at p. 1140.) The decision in *League of Women Voters of Washington v. State of Washington* demonstrates that the constitutionality of charter schools is not obvious. In California, *Wilson* explained how and why charter schools are constitutional here, and thus strict adherence to the statutory scheme is imperative to the integrity of the Public School System.

Cal.App.4th at 1139-40 ["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).)"].) In detailing how charter schools may come into existence, the Act allows school districts to approve a charter petition and thereby authorizes the operation of a charter school within the district's boundaries. (§ 47605, subd. (a)(1), (g); 47605.1, subd. (a)(1).) Section 47605 calls upon the educational expertise of the local school district to evaluate, among other things, whether the charter petition presents a sound educational program, whether petitioners are demonstrably likely to successfully implement the program, whether the charter petition sets forth a reasonably comprehensive description of the 16 elements reflecting the educational and operational program of the proposed charter school, and whether the charter petitioner has a viable fiscal plan for the proposed school(s). (§ 47605, subd. (b)(5)(A)-(P), (g).)

The board evaluates these factors in the context of the local school district and, through the public hearing process, considers "the level of support for the petition by teachers employed by the district, other employees of the district, and parents." (§ 47605, subd. (b); see also subd. (b)(5)(G) [requiring racial and ethnic balance to be "reflective of the general population residing within the territorial jurisdiction of the school district to which the charter petition is submitted"].) These, among several other provisions of CSA, establish that the charter petition is to be considered in conjunction with the educational programs offered within the authorizing district. Notably, even where a charter school is authorized by the county or state board of education on appeal,

it must still operate within the district boundaries where it first submitted its charter petition:

> A charter school that receives approval of its petition from a county board of education or from the state board on appeal shall be subject to the same requirements concerning geographic location to which it would otherwise be subject if it received approval from the entity to which it originally submitted its petition. A charter petition that is submitted to either a county board of education or to the state board shall meet all otherwise applicable petition requirements, including the identification of the proposed site or sites where the charter school will operate.

(§§ 47605, subd. (j)(1).)

In this way, the local community has input regarding whether it supports the proposed charter school operating within its school district and the voices of local electors are heard. As the Legislative History of Assembly Bill 1994 (2001-2002 Regular Session) ("AB 1994") explains, school boards generally do not have authority to take actions affecting persons outside that district's territory. (Legislative Counsel of California March 1, 2002 Opinion attached as Exhibit 1 to Amicus Curiae's Motion for Judicial Notice ("Amicus's MJN").)[6] "To conclude otherwise would yield the result that school district officials may take far reaching actions affecting voters who have not submitted to be governed by those officials, and subject voters to the consequences that may arise

[6] Under Evidence Code section 452, subdivisions (c) and (h), the Court may take judicial notice of legislative history. (See generally, *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 31–37 [including different versions of a bill and bill analysis worksheets of Assembly Committee].) Indeed, in *CSBA v. SBE*, the First Appellate District took judicial notice of the legislative history of AB 1994 on its own motion to aid its interpretation of the geographic restrictions at issue in this appeal. (*CSBA v. SBE*, *supra*, 186 Cal.App.4th at p. 1307 fn. 4.) Amicus respectfully submits that the Court should likewise take judicial notice of the legislative history of AB 1994 as set forth herein.

therefrom." (*Ibid*.) Such a system would violate the principle of local control and deprive affected citizens of any recourse at the ballot box for decisions of elected officials with which they disagree.[7] (§§ 35012, subd. (a), (c) [governing board members are elected at large from the territory comprising the district], 35107, subd. (a) [only "a resident of the school district" may be elected to the governing board of a school district].) Indeed, it is this very principle that led the Washington Supreme Court to rule charter schools unconstitutional in that state. (*League of Women Voters of Wash. v. State of Washington*, *supra*, 355 P.3d at p. 1137 ["because charter schools … are run by an appointed board or nonprofit organization and thus are not subject to local voter control, they cannot qualify as 'common schools' within the meaning of article IX"].)

Respondent insists that school districts like Anderson Union overstate their sovereignty over public education within their boundaries. But Anderson Union did not create the concept. It is the language of both the Legislature and the courts in evaluating geography and geographic restrictions applicable to charter schools in the state. (*CSBA v. SBE*, *supra*, 186 Cal.App.4th at pp. 1308, 1320-21 ["as we have already noted, the 2002 amendments were specifically designed to encourage locally chartered schools and to impose geographic restrictions on charter school

[7] "[T]he members of the governing board of a school district are elected officials who serve at the pleasure of the voters within that district (citations omitted), and act on their behalf in carrying out the business of the school district. All qualified voters residing within a school district may vote at the election for the governing board of that district (citations omitted), and elections for school district governing board members generally are held within the territory that the member will represent (citations omitted). It is generally understood that once the voters have participated in and voted at an election for a school board member, they have submitted to be governed in all matters relating to the management of public schools within that district (citations omitted)." (Exhibit 1 to Amicus's MJN.)

operations that would help to 'clarify a district's *sovereignty* over public education provided within its boundaries and to enhance oversight of charter schools.' (Sen. Finance Analysis of Assem. Bill No. 1994, supra, p. 1.) Having chosen to impose such restrictions, it would make no sense for the Legislature to simultaneously create 'a mechanism for charter school operators to *avoid* ... local school district approval.'"], first emphasis added, second emphasis in original.) Furthermore, the statutory provisions cited by Respondent that supposedly challenge the concept of local sovereignty in fact do no such thing. (See Brief of Respondent at 67-68.) For example, section 17217 does not allow one school district to operate within the boundaries of another. Instead, under very specific circumstances, a school district can annex an adjacent piece of land to open a school and the land becomes a part of the annexing school district. Thus, section 17217 confirms that public education has an important nexus to local geographic territory. Similarly, sections 47605.5, 47650.6, and 47605.8 do not infringe local sovereignty because the county and state boards to which they apply likewise answer to the same constituents as the local school district: all local districts are located within their respective counties, and all counties are located within the State. This is not the same thing as a distant school district placing a school in another district. In that situation, the voices of local voters are silenced because they have no power at the ballot box and cannot run for seats on governing boards of districts where they are not residents. (§§ 35012, 35107.)

C. Geographic Restrictions Are a Critical Part of the Strict Statutory Scheme Governing Charter Schools

The issue of geographic restrictions for charter schools is not new. It goes back to the beginning of charter schools in California. (See, e.g., Sen. Rules Comm., Bill Analysis on Assem. Bill No. 1994, Aug. 28, 2002 (2001-2002 Reg. Sess.) attached as Exhibit C to Appellant's Motion for Judicial Notice ["The Legislative Counsel notes the lack of any explicit authorization for a school district governing board to approve the charter of a school that would operate outside the district, but this is a common practice among charter schools."].) And although it was intended to be fixed by the Legislature years ago with the enactment of AB 1994, history has been forgotten – or perhaps ignored – bringing us to present where the problem has begun to repeat itself. (See, *supra*, fn. 2.)

The Charter Schools Act of 1992 did not include express geographic restrictions on charter school operations, causing problems throughout the state with the charter school scheme. For example, before geographic restrictions, "charter schools learned of particular school districts that would approve charter schools for a 'bounty' …. In these cases, the charter was charged a percentage of their revenue limit, on the average of 15%, in exchange for the authorization." (Sen. Comm. On Educ., Staff Rep. on Assem. Bill No. 1994 (2001-2002 Reg. Sess.) attached as Exhibit 2 to Amicus's MJN.) Such practices ran afoul of the statutory scheme – the Legislature did not enact the CSA to create a revenue generating stream for districts – as well as the Constitution – authorization without oversight violates the constitutional requirement that public education be under the control of the officials of the Public School System in California.

As a step toward remedying the problem, the law was amended in 1998 to include a statutory appeals process "to stop the 'shopping' around for friendly charters, but charters continued to shop the state for friendly school districts rather than use the appeal process." (*Ibid*.) Then, in 2002, the Legislature amended the Act again, this time to require that charter schools locate within the boundaries of the authorizing school district. (See §§ 47605 (a)(1), 47605.1.) It did so at the behest of Assemblymember Sarah Reyes, who explained:

> One case that particularly concerns me is the Gateway Academy Charter School (Gateway) in my district. The Fresno Unified School District approved the charter with Gateway in 1998 and the school started operating in September 1999, according to the Department of Education. However, the charter was revoked by the Fresno Unified School District Board last month after it learned that the 600-student statewide school had accumulated a $1.3 million debt in one year, hired teachers without credentials, and employed individuals who did not pass criminal background checks. The large debt triggered many questions including how Gateway used state and federal funding and questions about enrollment. Inquiries suggested that one of Gateway's satellites, the Silicon Valley Academy, was providing sectarian studies and charging tuition. Numerous other accounts involving Gateway have been alleged over the last several months.

(Ex. 2 to Amicus's MJN.)

The Department of Finance recommended approval of the geographic restrictions bill, stating:

> We believe that district-approved charter schools should generally be limited to operating within the geographic boundaries of the district that approved their charter. To allow otherwise infringes on a local school board's prerogative to determine public instructional policy within its boundaries-as noted in a recent Legislative Counsel opinion-and greatly

> complicates educational and fiscal oversight. By placing a geographic restriction on a charter school's operations, the bill clarifies district's responsibilities over public education provided within their boundary and enhances oversight of charter schools.

(Dept. of Fin., Enrolled Bill Rept. On Assem. Bill No. 1994 (2001-2002 Reg. Sess.) attached as Exhibit 3 to Amicus's MJN.)

Later, the First Appellate District in *California School Boards Association v. State Board of Education* explained in addressing the 2002 amendments, "[s]ignificant among the amendments was the addition of *stringent geographical restrictions* for the operation of charter schools. (See §§ 47605 (a)(1), 47605.1; Stats. 2002, ch. 1058, §§ 6, 7, No. 12 West's Cal. Legis. Service.)" (*CSBA v. SBE, supra,* 186 Cal.App.4th at p. 1308, emphasis added.) This was in response to the lack of oversight over remote sites and in recognition of local district control over public education within its boundaries:

> As stated in a comment to another analysis, "[b]y placing a geographic restriction on a charter school's operations, this bill would help clarify a district's sovereignty over public education provided within its boundaries and [would] enhance oversight of charter schools." (Sen. Com. on Appropriations, Dept. of Finance, Analysis of Assem. Bill No. 1994 (2001-2002 Reg. Sess.) as amended Aug. 15, 2002, p. 1 (Sen. Finance Analysis of Assem. Bill No. 1994).)

(*Ibid*.) "[T]he statutory scheme reflects an intent to promote district chartered schools and local oversight while allowing for limited exceptions." (*Id*. at 1320.)[8] (*Ibid*.)

The problem today is that charter schools are once again submitting charter petitions and obtaining charters that do not identify where they will operate while purporting to allow them to operate *sub silentio* outside the jurisdictional boundaries of the school district that grants the charter. This in turn leads to distant charter operations – whether characterized as "seat-based," "blended," "nonclassroom-based" or otherwise – lacking in legally required authorizer oversight and myriad infractions of law.

D. Charter Locations Must be Approved by the Authorizing District Board and Included in the Charter Petition Lest the Charter Evade the Exclusive Control of Public School Authorities and Statutory Geographic Restrictions

The identification of a charter school's location within its authorizing school district is a fundamental requirement for a party seeking the establishment of any charter school, however characterized, described, or denominated: "A petition for the establishment of a charter school *shall* identify a single charter school that will operate *within the geographic boundaries of that school district*." (§ 47605, subd. (a),

[8] Respondent's attempt to distinguish *CSBA v. SBE* is unpersuasive and misses the point. Although the court there was tasked with interpreting section 47605.8 (i.e., establishment of state charter schools), it determined it could only do so in the context of the geographic restrictions in sections 47605 and 47605.1 as explained in the legislative history of the statutes. (Section 47605.8 was enacted by AB 1994, the same bill that amended section 47605 and enacted section 47605.1. The court took judicial notice of the legislative history of geographic restrictions and discussed that history extensively in its analysis. (*CSBA v. SBE*, *supra*, 186 Cal.App.4th at p. 1308 fn. 4.)) Because an understanding of the entire statutory scheme was essential to understanding section 47605.8's place within it, the court's interpretation of the geographic restrictions in sections 47605 and 47605.1 forms the basis for the legal ruling and guides the legal analysis here.

emphasis added; see also §§ 47605.1, subd. (a), ["a charter school that is granted a charter … shall locate in accordance with the geographic and site limitations of this part"], 47605, subd. (g) ["The description of the facilities to be used by the charter school shall specify where the school intends to locate."].) When it was added, this language was specifically understood to "[r]equire new information to be included in the charter petition, specifically: … 3) an identification of all the sites that the petitioner wishes to operate and a description of the facilities." (Ex. 3 to Amicus's MJN.) This is reinforced by the appeal language in section 47605, subdivision (j)(1): "A charter petition that is submitted to either a county board of education or to the state board [on appeal] shall meet all otherwise applicable *petition requirements, including the identification of the proposed site or sites where the charter school will operate*." (Emphasis added.) The only charter schools that are per se exempt from jurisdictional restrictions are those related to federal partnerships and statewide programs set forth in section 47605.1, subdivision (g), none of which has application here.[9]

Respondent argues that, because it calls its schools "resource centers" and not "schoolsites," it is somehow exempt from this fundamental aspect of the Act. This is without merit, and the trial court prejudicially erred by adopting this reasoning. The point of oversight and the ultimate vesting of exclusive control in the officers of the Public

[9] I.e., charter schools that provide instruction exclusively in partnership with (1) the federal Workforce Investment Act of 1998; (2) federally affiliated Youth Build programs; (3) federal job corps training or instruction provided pursuant to a memorandum of understanding with the federal provider; (4) the California Conservation Corps or local conservation corps certified by the California Conservation Corps; and (5) instruction provided to juvenile court school pupils or for individuals who are placed in a residential facility. (§ 47605.1, subd. (g).)

School System dictates that the charter absolutely may not unilaterally locate at will without compliance with the CSA and approval of its authorizer. The fact that Cottonwood Resource Center is not currently used for classroom-based instruction is of no matter because it could be used for such instruction at any time in the future. Importantly, however, what matters is that Respondent's charter petition did not identify the Cottonwood Resource Center, and therefore its authorizer never approved it as a location for charter school operations. This violated the fundamental precepts of geographic restrictions and the statutory scheme for approval and oversight of charter schools. (See *CSBA v. SBE*, *supra*, 186 Cal.App.4th at pp. 1320-21 ["Having chosen to impose such restrictions, it would make no sense for the Legislature to simultaneously create 'a mechanism for charter school operators to *avoid* ... local school district approval.'"].)

The correct analysis can be found in the judgment of the Superior Court for San Diego County, the Honorable Jeffrey L. Gunther presiding, in *San Diego Unified School District v. Alpine Union School District et al.* ("*San Diego Unified*").[10] There, charter operator Albert

[10] As set forth above, the *San Diego Unified* Judgment is final and not subject to any further appeal. (See, *supra,* fn. 3.) A copy of the decision is attached as Exhibit 4 to Amicus's MJN. Under Evidence Code section 452, subdivision (d), judicial notice may be taken of records of any court of this state. (*In re A.B.* (2008) 164 Cal.App.4th 832, 839 ["[U]nder Evidence Code section 452, subdivision (d) we may take judicial notice of a record of any court of this state."]; *Aaronoff v. Martinez-Senftner* (2006) 136 Cal.App.4th 910, 918 ["Judicial notice may be taken of any court record."].) It is important for this Court to be aware of and to consider the *San Diego Unified* decision as a similar case reaching a different result. Amicus respectfully submits that it is evidence of the statewide importance of the issues presented in this appeal and demonstrates the legal error in the analysis of the trial court below. (*Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1750 [courts may take judicial notice that another court made a particular ruling].)

Einstein Academy for Letters, Arts and Sciences ("Einstein") obtained a charter but never opened a school within its authorizer's boundaries, opening and operating instead within the boundaries of San Diego Unified School District ("SDUSD"). (Ex. 4 to Amicus's MJN at 1, 4.) SDUSD sought a writ of mandate under Code of Civil Procedure section 1085 to compel compliance with the geographic restrictions found in section 47605, subdivision (a)(1). (*Id.* at 4.) As Respondent does here, Einstein argued that relief should be denied because its charter school was "a non-classroom based charter school that operates only out of 'resource centers,' as opposed to 'schoolsites,' and, as such, they are not limited by the geographical limitations set forth in Education Code § 47605.1." (*Id.* at 5.) Further, Einstein argued "that its operation of 'resource centers' outside Alpine's boundaries but within SDUSD's boundaries is not a violation of the charter or the Charter School (sic) Act, as there are no restrictions on in-county resource centers." (*Ibid.*)

The *San Diego Unified* court rejected the charter school's arguments – the same arguments the trial court here incorrectly accepted:

> The Respondents' contentions presume the validity of the charter and bypass any analysis of the core issue presented in the Petition. Education Code § 47605(g) states the governing board of a school district "shall require" during the petition process that the petitioners provide information regarding "the facilities to be used by the school" and the description "shall specify where the school intends to locate." … The petition must identify the facilities at "each location." (Educ. Code, §47605(a)(1).) In this respect, the petition is deficient.
>
> …
>
> Without a lawful charter, which includes a physical location, subsequent "resource centers" or satellite facilities are unlawful and no material revisions can overcome these foundational prerequisites. … Respondents contend that such

> facilities are nonclassroom-based and thus are outside the "geographical restrictions" set forth in Education Code §§ 47605 and 47605.1. Not only is there no basis in the law for this contention, the evidence presented in this case thus far indicates the facilities are in fact classroom-based. … Even if the Court were to ignore the problems with this premise, the Respondents have failed to present any legal authority to suggest that resource centers are exempt from the foundational requirements set forth in Education Code §§ 47605 and 47605.1.
>
> Respondents cannot get around the fact that a charter school cannot exist without first petitioning pursuant to this provision, and the clear language of the provisions pertaining to the "petition for establishment of charter school within school district" are set forth in Education Code §§ 47605 and 47605.1. *Nowhere* in the CSA is there any indication that these initial prerequisites can be disregarded by a chartering authority, or by the petitioning charter school itself. Respondents' arguments that these provisions somehow do not apply to them finds no basis in the law. Education Code §§ 47605 and 47605.1 apply to all charter schools, regardless of whether they are "nonclassroom-based," "blended," etc. Until the legislature makes such distinctions, there is no legal basis on which to reach Respondents' conclusions.

(Ex. 4 to Amicus's MJN at 5-6, emphasis in original.)

The legislative history likewise confirms that the 2002 amendments were enacted in large part to require the inclusion of a charter location in the initial petition itself: "Among other things, this bill attempts to rein in perceived problems by inserting increased information into the initial charter petition and by providing geographic limits as to where authorized charters have the right to operate." (Ex. 3 to Amicus's MJN.) Thus, the result reached by the trial court here based on the arguments advanced by Respondent is untenable as a matter of law and should be reversed.

III. THE STATUTORY SCHEME PRECLUDES THE OPERATION OF RESOURCE CENTERS OR SATELLITE FACILITIES WITHIN THE COUNTY OF THE CHARTER'S AUTHORIZER.

The solution to the problem here is adherence to the fundamental elements of the CSA necessary to maintain it as a constitutional scheme, as well as mindful attention to past wrongs that the Legislature intended to correct. An interpretation of the Act that allows charter schools to obtain charters that are untethered to an in-district location and that allows them to unilaterally open new locations outside the authorizer's boundaries without a material amendment to the operative charter documents unconstitutionally divorces the charter from the "exclusive control of the officers of the public schools." (Cal. Const., art. IX, § 8; see also §§ 47605, subd. (a)(4) [material revision required for additional sites], 47607, subd. (a)(2) [material revisions governed by standards and criteria in § 47605].) Yet this is the essential component allowing for the constitutional operation of charter schools in California. (*Mendoza v. State, supra,* 149 Cal.App.4th at p. 1041; *Wilson, supra,* 75 Cal.App.4th at p. 1139.)

A. Respondent Does Not Have Permissive Authority to Commit *Ultra Vires* Acts

"[I]t bears underscoring that charter schools are strictly creatures of statute." (*Wilson, supra,* 75 Cal.App.4th at p. 1136.) It is only through adherence to the statutory scheme that charter schools maintain the constitutional mooring of Article IX, section 8, that public moneys only flow to schools "under the exclusive control of the officers of the public schools." (*Ibid.*) Respondent's citation to section 35160 (i.e., the permissive authority statute) is therefore inapposite. Not only does the plain language of section 35160 limit its application to "the governing board of any school

district," of which Respondent is not one, but its grant of permissive authority to the officers of the public schools established under Article IX of the Constitution does not and cannot apply to a charter entity which by necessity must conform its actions strictly to the statutory scheme designed for the existence of charter schools in the State. (*Wilson*, *supra*, 75 Cal.App.4th at p. 1136.)

As Respondent concedes, the only statutory authority for a charter school to establish a resource center or satellite facility is found in section 47605.1, subdivision (c). That authority is expressly limited on its face to resource centers, meeting spaces, and other facilities "located in a county adjacent to that in which the charter school is authorized." (§ 47605.1, subd. (c).) Section 47605.1, subdivision (c), is a limited exception to the geographic restrictions required by sections 47605, subdivision (a), and 47605.1, subdivision (a), i.e. "[n]ot withstanding any other law."[11] "Having chosen to impose such restrictions, it would make no sense for the Legislature to simultaneously create 'a mechanism for charter school operators to *avoid* ... local school district approval.'" (*CSBA v. SBE*, *supra*, 186 Cal.App.4th at p. 1321, emphasis in original.)

B. The Legislative History Confirms Out-of-Authorizer Resource Centers May Only Operate in Adjacent Counties

The legislative history of AB 1994, including the addition of section 47605.6, confirms the limited nature of the exception in section 47605.1,

[11] Respondent attempts to distinguish the interpretation and application of the introductory phrases in subdivisions (c) and (d) of section 47605.1, but the distinction fails. Although subdivision (d) may only refer to subdivisions (a) and (b) of section 47605, subdivision (c) refers to "any other law," which certainly includes subdivisions (a) and (b) of section 47605.

subdivision (c). For example, the Legislature declined to adopt proposed language that would have "[d]eclared that a 'schoolsite' or 'facility,' as used in the bill, does not include any resource center, meeting space, or other satellite facility located in a county adjacent to that in which the charter school is authorized" under certain conditions. (Sen. Comm. on Educ., Bill Summary for Assem. Bill 1994 [June 19, 2002] (Reg. Sess. 2001-2002) attached as Exhibit 5 to Amicus's MJN.) This omission is strong evidence that an interpretation that resource centers, meeting spaces, and satellite facilities are not "schoolsites" or "sites," as Respondent argues and the trial court found, is incorrect and that the final language should *not* be construed in this manner.[12] (*WDT-Winchester v. Nilsson* (1994) 27 Cal.App.4th 516, 534 ["The Legislature's omission of a provision from the final version of a statute which was included in an earlier version 'constitutes strong evidence that the act as adopted should not be construed to incorporate the original provision. [Citation.]'"] .) Instead, the language of the geographic restrictions ultimately adopted applied broadly to all charter petitions approved for the establishment of a charter school under sections 47605 and 47605.1, subject only to *limited* exceptions that have no application here. (*CSBA v. SBE, supra,* 186 Cal.App.4th at p. 1320.) It is precisely because there is no statutory authority for the establishment of Respondent's "resource center" within the boundaries of Anderson Union that Respondent seeks to contort the statutory scheme to allow it to open wherever it wants to open. But that contortion directly contradicts the Act and the constitutional analysis in *Wilson* and therefore cannot be sustained by this Court.

[12] Even if this language had survived, it would not have saved Respondent here as the "resource center" in question is not located in an adjacent county.

C. The Addition of Section 47605.6 Through AB 1994 Confirms Out-of-Authorizer Resource Centers May Only Operate in Adjacent Counties

The language of section 47605.6 is also helpful to this analysis. In enacting section 47605.6, the Legislature authorized county boards of education to approve charter petitions "for the operation of a charter school that operates at one or more sites within the geographic boundaries of the county and that provides instructional services that are not generally provided by a county office of education." (§ 47605.6, subd. (a)(1).) In order to invoke this statutory authority, the county board must specifically find "that the educational services to be provided by the charter school will offer services to a pupil population that will benefit from those services and that cannot be served as well by *a charter school that operates in only one school district in the county*." (*Ibid*, emphasis added.) Thus, the statutory presumption is that district-based charters will "operate" – a broad term without regard to how a "schoolsite" or "site" is defined – "in only one school district in the county." Were it the case that district-based charters could already operate anywhere "within the geographic boundaries of the county," as Respondent argues and the trial court found, section 47605.6 would be superfluous. Courts "do not presume that the Legislature performs idle acts, nor do [they] construe statutory provisions so as to render them superfluous." (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22.) Thus, the Legislature's inclusion of section 47605.6 in the statutory scheme for approval and operation of charter schools throughout a single county shows that Respondent's arguments and the trial court's ruling below are erroneous and cannot stand.

D. The Legislature's Choices Were Not Absurd

The Legislature consciously added geographic restrictions to the CSA in 2002 to curb rampant abuses of the charter school scheme. (Ex. 2 to Amicus's MJN.) As demonstrated, that scheme requires charter schools to locate within the boundaries of their authorizers, subject to limited exceptions. (§§ 47605, subd. (a)(1), 47605.1, subd. (a).) One narrow exception allows the establishment of a resource center, meeting space, or satellite facility in an adjacent county, provided certain mandatory conditions are met. (§ 47605.1, subd. (c).) In creating explicit limited exceptions, the Legislature recognized the vital importance of reining in the proliferation of charter schools outside of their authorizer's boundaries, while at the same time providing for some flexibility to locate outside those boundaries where absolutely necessary and subject to controls. Nowhere does the scheme provide an exception for an out-of-district resource center in the same county as the charter school's authorizer. Indeed such an exception is unnecessary because charter schools that seek to serve students at locations throughout the same county may do so through a county-wide charter under section 47605.6 authorized and overseen by the county office of education, an entity charged with authority throughout the county.

What Respondent really means by calling this "absurd" is that it disagrees with the reasoned choice. But disagreement is not a defense, and this line of argument does nothing more than distract from the underlying reality: the Cottonwood Resource Center is not identified in Respondent's charter and was not approved by Respondent's authorizer pursuant to a valid exception allowing location outside of the authorizer's boundaries.

(JA:3:68:624:23-26, 3:68:625:7-10, 3:68:713:3-7, 3:68,732-63.)[13] Its operation is therefore *ultra vires* and a violation of the law. The geographic restrictions in the Act – including limiting resource centers, meeting spaces, and satellite facilities to adjacent counties under specified circumstances – must be enforced as they were intended. To do this, Appellant must be granted the relief it seeks.

IV. CONCLUSION

In this case, Respondent essentially argues that its "resource center" exists as a matter of convenience for students who would otherwise attend its charter school anyway and, because there is currently no classroom instruction going on there, it's not really hurting anything. It builds a house of legal cards around this premise in an attempt to show compliance with the CSA, but that house of legal cards must fall. Not only do the history of geographical restrictions and the resulting legislative amendments demonstrate the problem with Respondent's arguments, those arguments push the entire statutory scheme regarding charter schools beyond the bounds of constitutionality. The trial court overlooked history and misapplied the law, resulting in an unconstitutional interpretation of the Act and prejudicial error that should be corrected by this Court. Accordingly the

[13] Citations to the record conform to Appellant's citation formula. (See Appellant's Opening Brief at 5 fn. 2.)

Court should reverse and remand with direction to the trial court to enter Judgment in favor of Anderson Union High School District.

DATED: December 4, 2015

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(b)(4) of the California Rules of Court, that this Amicus Brief was produced using 13-point Roman type including footnotes and contains approximately 8,059 words, which is less than the total words permitted by the rules of court. Counsel has relied on the word count of the computer program used to prepare this brief.

DATED: December 4, 2015

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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: 115 Pine Avenue, Suite 500, Long Beach, CA 90802.

On the date set forth below I served the foregoing document described as **APPLICATION OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION EDUCATION LEGAL ALLIANCE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF AND APPELLANT ANDERSON UNION HIGH SCHOOL DISTRICT 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.

☒ **(VIA OVERNIGHT MAIL)** I caused such envelope to be deposited at an authorized "drop off" box on that same day with delivery fees fully provided for at 115 Pine Avenue, Suite 500, Long Beach, CA 90802, in the ordinary course of business.

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

Dated: December 4, 2015 at Long Beach, California.

Ila Friend

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