IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT et al.,	)	Supreme Court Case No. S183411
Plaintiffs and Appellants,	)	
v.	)	
ARNOLD SCHWARZENEGGER, as Governor, etc. et al.,	)	
Defendants and Respondents;	)	
JOHN CHIANG, as State Controller, etc.,	)	
Defendant and Appellant.	)	

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF IN SUPPORT OF PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT et al.

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III. QUESTION 2(a):

What effect, if any, does the provision of the revised 2008 Budget Act which reduced the appropriation for employee compensation for the 2008-09 fiscal year in an amount comparable to the savings sought to be achieved by the Governor's furlough order, passed by the Legislature and approved by the Governor on Feb. 20, 2009 have on the validity of the Governor's executive order?

IV. SHORT ANSWER

The simplest way to answer the question above is to respond with a question.

If the Legislature can change the terms and conditions of fixed compensation as ratified by the Legislature and enacted into law by the Executive by merely reducing or eliminating appropriations, why are these amounts ever negotiated, ratified, and subject to veto?

IV. INTRODUCTION

The reduced appropriations in the 2008 Budget Act to correspond with the salary reductions mandated by the Executive Order have no effect on the validity of the Executive's purported lawmaking power to reduce fixed wages by furloughs. This is true because California Government Code section 19824[1], subdivision (a) encumbers the General Fund on a monthly basis for salary expenditures as fixed by law. As such, the Controller is authorized to draw monthly warrants because salary is specific and capable of exhaustion pursuant to section 12440. Since unexhausted appropriations still remain (due to the furlough reductions to salaries), the Controller is authorized to draw warrants up to the original salary amounts as established by law.

As "employee" is interchangeable to "officer" for the purposes of Civil Service, employees are entitled to receive a fixed salary as defined by law pursuant to section 18000. The Legislature cannot defeat the legal obligation of the Controller to pay fixed

[1] All further statutory references are to the Government Code unless otherwise indicated.

salaries pursuant to section 19824, subdivision (a) by doing nothing and/or by reducing or eliminating lawful appropriations. The Legislature also cannot legislate by appropriation to change the legal effect of "salary" by merely reducing appropriations.

Section 19824, subdivision (a) is not defeated by section 9610 because section 19824, subdivision (a) is not a salary fixing statute because salaries are ultimately fixed by the Legislature upon ratifying employment contracts. Section 3517.6 does not require Legislative approval for salary expenditures in the annual Budget Act because section 3517.6, subdivisions (a)(1)-(4) merely reinforce the controlling effect of MOU salary provisions relating to section 19824. Section 19824, subdivision (a) is not controlled by subdivision (b) requiring Legislative approval in the annual Budget Act for expenditures since subdivision (a) is specific to salary, and specific subdivisions always control over general subdivisions like (b).

Neither the Executive Order reducing fixed salaries as defined by law nor subdivision (b) of section 19824 can defeat section 19824, subdivision (a) because the "Unless otherwise provided by law" provision in subdivision (a) only refers to named funds for encumbrance.

Most important, a finding of continuing appropriations will promote the efficient continuation of government by eliminating the costly uncertainty in the law which harms the workforce, public, fee payers, and license holders. The result is sound because people are supposed to get paid for working. Such a ruling also does not divest any Branch of its lawful authority because the Legislature agrees to the fixed salaries in the bargaining agreements after ratifying the agreements subject to the veto of the Executive. Defeating continuing appropriations serves no government purpose since earned salary is beyond dispute. Accordingly, this Court should hold that continuing appropriations invalidate the Executive Order and provide the remedy for back wages.

V. ARGUMENT

A. Given that employee salaries are continuously appropriated when earned pursuant to section 19824[2], subdivision (a), any appropriations for salary in the 2008 Budget Act are superfluous and, therefore, have no effect on the validity of the Executive Order.

1. Section 19824, subdivision (a) establishes continuous appropriations for monthly payments of earned salary from the General Fund pursuant to section 16304 because (1) the fund to be encumbered is clearly named as the "General Fund," (2) the frequency of encumbrance is defined as "monthly," (3) and salaries encumber the fund when earned.

The inclusion of the Executive Order in the revised 2008 Budget Act is superfluous as earned employee wages are continuously appropriated by section 19824, subdivision (a) as it clearly provides: "Unless otherwise provided by law, the salaries of state officers[3] shall be paid monthly out of the General Fund." Further, section 16304, in defining appropriations, only requires that an "appropriation shall be available for encumbrance during the period specified therein" and that an "appropriation shall be deemed to be encumbered at the time and to the extent that a valid obligation against the appropriation is created." In addition, this Court in *People ex rel. McCauley & Tevis v. Brooks* (1860) 16 Cal. 11, 28 (*McCauley*) defined an appropriation as:

> To an appropriation within the meaning of the Constitution, nothing more is requisite than a designation of the amount, and the fund out of which it shall be paid. It is not essential to its validity that funds to meet the same should be at the time in the treasury. As a matter of fact, there have seldom been in the treasury the necessary funds to meet the several amounts appropriated under the general appropriation acts of each year. The appropriation is made in anticipation of the receipt of the yearly revenues.

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[2] All further statutory references are to the Government Code unless otherwise indicated.
[3] "Officer" and "Employee" are interchangeable for the purposes of Civil Service; Section C of this brief provides clarification.

First, section 19824 names the fund for encumbrance as the "General Fund." Second, section 19824, subdivision (a) clearly meets the requirements of section 16304 because the General Fund is available for future encumbrances to pay monthly salaries even though the General Fund may not have enough money to cover all future obligations at the time of the appropriation. Section 16304 provides ". . . appropriation shall be available for encumbrance during the period specified therein. . ." As such, the General Fund is always available for encumbrance since "It is well settled in this state that revenues may be appropriated in anticipation of their receipt just as effectually as when such revenues are physically in the treasury." (*Riley v. Johnson* (1933) 219 Cal. 513, 520; *Cal. Teachers Ass'n v. Cory* (1984) 155 Cal.App.3d 494, 513, fn. 17 ["appropriation of money not yet in the treasury for future disbursements in installments is permitted"] citing *McCauley, supra,* 16 Cal. at page 28.)

Third, California has always paid its employees full salary for services rendered at least on a monthly basis.[4] For example, while equally relying on the predecessor statute to Section 19824, subdivision (a) [5] and the 138-year practice of California paying its employees at least on a monthly basis, this Court held, "[t]he payment of salaries to

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[4] In 1990 and 1992, some State employees, entitled to receive bi-monthly payments of salary, were illegally denied full salary by roughly two weeks. (*Biggs v. Wilson* (9th Cir. 1993) 1 F.3d 1537; *Caldman v. Cal.* (E.D.Cal. 1994) 852 F.Supp. 898, 900.

[5] Enacted in 1872, Political Code (Pol. Code) section 1029, the near identical predecessor to section 19824, subdivision (a), required: "Unless otherwise provided by law, the salaries of officers must be paid out of the general fund in the state treasury, monthly, on the last day of each month." *The Political Code of the State of California.* Deering, James Henry. Bancroft-Whitney Company. San Francisco, CA (1906). In 1945, Pol. Code section 1029 inched a tiny step closer to its current form when the Legislature reorganized it under "Salaries for State personnel" in section 18001. (Stats. 1945, ch. 123, § 1.) Section 18001 read: "Monthly payment. Unless otherwise provided by law, the salaries of state officers shall be paid monthly out of the General Fund." (*Ibid.*) In 1978, the Legislature added current subdivision (b) to section 18001. (Stats. 1978, ch. 776, § 9.) Section 19824 received its current form in 1981 when it was added to Part 2.6 Personnel Administration, Chapter 2 Administration of Salaries (Stats. 1981, ch. 230, § 55.)

public officers monthly, where not otherwise provided by law, is universal in this State." (*Jenks v. Council of Oakland* (1881) 58 Cal. 576, 577; See *Stephens v. Clark* (1940) 16 Cal.2d 490, 491 [investigator for the Department of Motor Vehicles received a monthly salary before and after his inclusion into State Civil Service]; and *Broyles v. State Personnel Bd.* (1941) 42 Cal.App.2d 303, 305 [interviewer for the Dept. of Employment of the Unemployment Reserves Commission received a salary of $ 160 per month].)

Fourth, defined salary becomes a valid obligation against the General Fund when earned. (*White v. Davis* (2003) 30 Cal.4th 528, 564 (*Davis*) relying on *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 853 [contract clause of the Constitution protects "the right to the payment of salary which has been earned"].)

Section 16304 requires that an "appropriation shall be deemed to be encumbered at the time and to the extent that a valid obligation against the appropriation is created." For example, Memoranda of Understanding (MOU) as ratified by the Legislature and as enacted by the Executive, define the actual amount of salary for particular services rendered. Given that California's Constitution protects the right to payment of earned salary, such salary is both a valid and defined obligation against the General Fund as required by section 16304. As a result, the General Fund becomes encumbered and is available for payment of earned salaries on a monthly basis as appropriated by section 19824, subdivision (a).

Finally, appropriations for earned salary outside the annual Budget Act are proper when done so through section 19824, subdivision (a) because appropriations are not limited in form or by specifically named fiscal years. "The intention of the legislature is to be ascertained from the language of the act and the provisions of other statutes relating to the same subject and the nature of the claim for which the appropriation is made. If it clearly appears from these things that the legislature intended to pay a certain amount at a certain time, or in installments at certain times, and has designated the fund from which the money is to be paid, the appropriation is complete, and payment will be enforced by

mandate, regardless of form in the wording of the appropriation act." (*Irelan v. Colgan* (1892) 96 Cal. 413, 415 (*Irelan*), relying on *Humbert v. Dunn* (1890) 84 Cal. 57.)

Thus, a designation for salary in an annual Budget Act which limits the encumbrance to particular fiscal years cannot defeat a valid appropriation outside those named fiscal years pursuant to section 19824, subdivision (a). In *Irelan*, the Legislature appropriated funds in the budget to pay for a duly appointed position limited in duration to two years by specifying two fiscal years from which the appropriations should be drawn. (*Irelan, supra*, 96 Cal. at pages 413-415.) When the actual performance for the position overlapped into another fiscal year not named in the original appropriation in the budget, the controller refused to pay the earned salary because there was no specific appropriation made for the fiscal year in which the employee rendered services. (*Id.* at page 414.)

In following California's history of paying its employees, this Court held an employee was still entitled to receive full payment of salary because the predecessor statute to section 19824, subdivision (a) provided the necessary authority for the payment of monthly salary not specifically covered in the original appropriation. (*Irelan, supra,* 96 Cal. at page 416.)

Therefore, while the Legislature *can* make appropriations for salaries in the annual Budget Act, there is no requirement to do so because appropriations for salaries are not limited in form or limited to specific fiscal years.

Just as the Legislature in *Irelan* fixed and approved the salary, the current Legislate also fixes and approves the salary (by ratifying the Memoranda of Understanding, which includes defined salary). Thus, as long as the salary is ultimately fixed by the Legislature, section 19824, subdivision (a) evidences the Legislative intent to pay defined salaries for particular services, at certain times, and from a certain fund. Therefore, this Court should find that continuing appropriations already exist outside the 2008 Budget Act to fully satisfy all legal salary obligations.

Such a holding will contribute to the efficient continuance of government because the State requires a stable workforce to perform the necessary services for the People of California at the lowest possible cost.

For example, a stable workforce with institutional knowledge results in lower operating costs due to decreased expenditures needed for recruiting, hiring, and training. However, the quest for a stable workforce to ensure the continuance of government is undermined by California's yearly budget impasses where employees are expected to keep working months on end without certainty of contracted wages. Due to the fact most individuals cannot afford to bear the costs of government which should be borne by society as a whole, many of these civil servants will no longer be able to indenture themselves to State service.

Thus, the uncertainty of the receipt of wages not only hinders recruitment and retention of skilled and educated workers, but current employees with institutional knowledge will eventually leave State service just to avoid the risk of being unable to provide for food, shelter, health care, and pets. Accordingly, an unstable workforce hinders the efficient continuance of government because a high-cost, transient workforce cannot consistently provide quality services and protections that the People of California rely and depend upon. Therefore, this Court should hold that Section 19824, subdivision (a) clearly meets the requirements for continuing appropriations pursuant to section 16304 seeing how the General Fund is available to pay salary obligations on a monthly basis and especially since such a holding will promote the efficient continuance of government.

2. Section 12440 authorizes the Controller to draw monthly warrants from the General Fund for the payments of earned salary pursuant to section 19824 subdivision (a) because salaries are specific and capable of exhaustion.

The Controller is authorized by section 12440 to pay monthly salaries from the General Fund pursuant to Section 19824, subdivision (a) because expenditures for employee salaries are specific and capable of exhaustion. Section 12440 requires the

Controller to pay valid appropriations: "The Controller shall draw warrants on the Treasurer for the payment of money directed by law to be paid out of the State Treasury; but a warrant shall not be drawn unless authorized by law, and unless . . . unexhausted specific appropriations provided by law are available to meet it." Further, "Where the appropriation is made by the legislature and the money is to be paid out of the general fund there seems to be no conflict in the cases and the appropriation must be specific both as to purpose and amount; neither of these requisites can be left indefinite nor uncertain." (*Ryan v. Riley* (1924) 65 Cal.App. 181, 187-88.)

This Court held that the predecessor to Section 19824, subdivision (a) is a valid appropriation for earned salary even if the monthly amount is not definite and even if the total salary amount is not limited. (*Meyer v. Riley* (1934) 2 Cal.2d 39, 43-44 (*Meyer*).) In *Meyer*, the respondent challenged "salary" as a valid statutory appropriation because the amount was not specific as it was subject to increase by the director of finance as approved by the governor. (*Id.* at page 43.) As such, it could not meet "the first essential to an efficient appropriation" (according to *Ingram v. Colgan* (1895) 106 Cal. 113, 118 (*Ingram*)). (*Ibid.*) In *Ingram*, this Court held an appropriation from the general fund must be a "designated amount," that is, a "specific appropriation to be exhausted." (*Ingram*, 106 Cal. at page 118.) The Court in *Meyer* acknowledged the Legislature did not set a limit to total amount of salary that could be paid. (*Meyer*, 2 Cal.2d at page 44.) Even so, the Court held the appropriation was specific since the Legislature did provide a method where the amount could be made certain by authorizing the director of finance and the governor to fix the salary. (*Ibid.*)

Likewise, State employee salaries are proper appropriations pursuant to section 19824, subdivision (a) and the Controller is authorized to draw monthly warrants from the General Fund according to section 12440 because salaries are specific and capable of exhaustion. This is true since the Legislature retains the ultimate authority to fix salaries when it ratifies MOUs even though the responsibility to fix employee salaries lies with the governor and the Department of Personnel Administration. Therefore, since State

salaries are fixed by law as in *Meyer*, section 12440 authorizes the Controller to draw warrants from the General Fund to pay earned employee salaries, each and every month.

In closing, given that employee salaries are continuously appropriated when earned pursuant to California Government Code section 19824 subdivision (a), any appropriations for salary in the 2008 Budget Act are superfluous and, therefore, have no effect on the validity of the Executive Order.

First, section 19824, subdivision (a) establishes continuous appropriations for monthly payments of earned salary from the General Fund pursuant to section 16304 due to the fact (1) the fund to be encumbered is clearly named as the "General Fund," (2) because the frequency of encumbrance is defined as "monthly," and (3) because salaries encumber the fund when earned.

Second, Section 12440 authorizes the Controller to draw monthly warrants from the General Fund for the payments of earned salary pursuant to section 19824 subdivision (a) because salaries are specific and capable of exhaustion.

Moreover, continuing appropriations contribute to an efficient government because paying wages later than when due is more costly to employees as well as to society who depends upon the continuance of government. In addition, not fully paying loyal workers for services rendered when such wages are due will morph this State's once-stable workforce into a nightmarish temp service.

B. The reduced appropriations in the 2008 Budget Act as ratified by the Legislature did not validate the legality of the Executive Order due to the fact that section 18000 makes furloughs illegal.

Reductions to already ratified and enacted salaries are illegal because State employees are entitled to receive full compensation, paid at regular intervals, for all services rendered to the People of California pursuant to section 18000. This is absolute because Section 18000 requires "compensation in full" as "[t]he salary fixed by law for each state officer, elective or appointive, is compensation in full for that office and for all

services rendered in any official capacity or employment whatsoever, during his or her term of office. . ." (E.g. *Swepston v. State Pers. Bd.* (1987) 195 Cal.App.3d 92, 95 [applying § 18000, "historically the term 'salary' has been used in the State Civil Service Act to denominate compensation of a fixed sum for all services rendered"]; and see also *Proctor v. S.F. Port Authority* (1968) 266 Cal.App.2d 675, 680 ["'Salary' is defined as a fixed compensation paid at regular intervals."].)

Further, section 18000 stands for the proposition that State employees are entitled to receive their exact salaries as defined by law when said employees perform services as required by the duties of their respective offices. This Court held "that a person accepting a public office with a fixed salary is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of these duties, even though the salary may be a very inadequate remuneration for the services." (*Martin v. Henderson* (1953) 40 Cal.2d 583, 589.) In *Martin*, police officers claimed overtime compensation even though their salaries were defined by law with no provision for overtime payments. (*Id.* at page 585.) Referencing the State Personnel Board rules for compensation, this Court noted, "'The rates of pay set forth in the pay schedules, unless otherwise indicated in such schedules, represent the total compensation in every form.'" (*Id.* at page 587.) The Court held that the officers were entitled to receive the exact compensation as provided by law when they fulfilled their duties as required by law. (*Id.* at pages 589-90; and see also *Alfred v. County of L.A.* (1980) 101 Cal.App.3d 260 [no taking pursuant to Cal. Const., art. I, § 19 if paid salary set by statute; public employee entitled to compensation expressly provided by statute regardless of the extent of services actually rendered].)

Even though the public employees in *Martin* could not receive more than their salaries as defined by law, those employees were still entitled to receive their full salaries as defined by law. As long as they performed and rendered services as requested, the law required that those employees receive their full salaries and nothing less.

Likewise, as long as State employees fulfill job duties as required by law, these employees must also receive the salary as defined by law. Most important, paying less than contracted salary jeopardizes the continuance of government because nurturing an unstable workforce is costly and unjust. For example, if the Executive could just reduce negotiated salaries via Executive Order to avoid paying full compensation for services rendered as requested, the Executive could just furlough employees into either constructive termination or into accepting MOUs with deep concessions just to avoid financial ruin since furloughs are not limited in scope or duration. Furthermore, what point is served by the entire process of Collective Bargaining if one party can just drag in the back door what could not be brought in through the front door via good-faith bargaining?

Restoring certainty in the law will end costly litigation[6] and repair employee confidence in the merit system. For instance, public policy is not served by the Executive paying elevated hourly rates for the use of private-sector attorneys only to avoid paying the considerably lower State attorney wages. For example, only two months after State attorneys were furloughed in February 2009, the Executive amended the contract between the State and private attorneys to increase their hourly rate. (fn. 4.) Even more shocking, while new State attorneys were receiving a wage of $26[7] per hour, the Executive paid $195 per hour for the use of similarly skilled private-sector attorneys. (*Ibid.*)

The Executive also obligates the taxpayers to fund reimbursements for actual lodging and travel costs, *Ibid.*, for the private attorneys whereas the State limits other

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[6] The Executive's Department of Personnel just released its private-sector attorney contract for $475,000 to litigate for the option to pay rank and file employees federal minimum wage and State attorneys absolutely nothing during the annual Budget Impasses. The taxpayers even front $100-$130 per hour for the use of a paralegal. http://blogs.sacbee.com/the_state_worker/100726%20liebert%20contract.pdf.

[7] The State contract to initiate, defend, and appeal on-going lawsuits from November 2008 through June 30, 2011 has escalated to $1,750,000. http://blogs.sacbee.com/the_state_worker/100723%20Kronick%20joined.pdf

private-sector vendors of the State to the employee rate of $84 (excluding Los Angeles and San Francisco) per night for lodging while on State business.[8] No restrictions for lodging and travel costs imposed by the State for contracted attorneys is an affront to all State employees especially since only the Legislature is entitled to fly first class. (§ 9132 (s).) Most important, since State attorney salary is supposed to be tied to merit and not anchored to ongoing budget deficits, politics, and lawsuits, this Court should follow section 18000 and require that the State simply meet its legal obligation to pay its employees full compensation for services rendered pursuant to contract, justice, and for the continuance of government.

1. The Legislature cannot defeat the legal obligation of the Controller to pay fixed salaries pursuant to section 19824, subdivision (a) by doing nothing and/or by reducing or eliminating appropriations.

Standing alone, section 19824, subdivision (a) is a valid appropriation which authorizes the Controller to draw warrants against the General Fund to pay fixed employee salaries and the Legislature cannot defeat this legal obligation by merely reducing or eliminating appropriations for fixed salaries established by law. This Court held in *Riley v. Johnson* (1936) 6 Cal.2d 529, 532-533:

> It has long been the accepted law in this jurisdiction that when the state, through its legislature, makes a legal appropriation of so much money as will be necessary to pay the warrants from the general fund, as such moneys are received, the legislature cannot thereafter repeal or render ineffectual such appropriation as against the warrant holders. Therefore, the lapse of the present biennium presents an immaterial element for consideration in the case.

In short discussion, the court in *Gilb v. Chiang* dismissed any idea that the predecessor to Section 19824, subdivision (a), as decided in *Meyer, supra*, 2 Cal.2d 39,

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[8] http://www.dot.ca.gov/hq/asc/travel/ch12/1consultant.htm

authorized warrants for monthly payments of earned salary during a budget impasse, "This says nothing about employees for whom appropriations are otherwise provided by law but are delayed by budget gridlock." (*Gilb v. Chiang* (2010) 186 Cal.App.4th 444, fn. 13.) The court also attempted to make a distinction by noting that the Budget Bill in *Meyer*, 2 Cal.2d at page 41 specifically excluded the salary from appropriation. (*Ibid.*)

First, distinguishing *Meyer* due to the fact the Court in *Meyer* made no holding as to preventing otherwise lawful payments during a budget impasse is likely without merit because California did not have budget impasses in 1933. In fact, this State bypassed the impasse for close to 120 years.

More on point, section 19824, subdivision (a) clearly authorizes the Controller to draw monthly warrants for earned salary regardless of whether the Legislature passes a law prohibiting or reducing it, or whether the Legislature does nothing. As a result, the Court in *Meyer* did not need to address the issue of whether an appropriation for employee salary was authorized by the predecessor to section 19824, division (a) despite not having a subsequent appropriation by the Legislature in the annual Budget Act. This is especially true because the Court in *Meyer* held the Legislature could not prohibit the appropriation since section 19824, division (a) authorized lawful payment. (*Meyer, supra*, 2 Cal.2d at page 41.)

Since the Legislature could not defeat the appropriation by an affirmative act of passing a law in the Budget Bill prohibiting payment of the earned salary as fixed by law, certainly the Legislature cannot defeat such payments by doing nothing. Likewise, if the Legislature cannot change the amount of legal obligations for earned salary as fixed by law by reducing appropriations, it follows the Legislature cannot also change the amount of fixed salary going forward just by reducing appropriations in the annual Budget Act As such, section 19824, subdivision (a) is a continuing appropriation which authorizes the Controller, pursuant to section 12440, to draw monthly warrants against the General Fund for earned salaries, as fixed by law, regardless of any affirmative action or inaction by the Legislature.

2. The Legislature can neither validate the legality of the Executive Order by its inclusion in the 2008 Budget Act nor change the laws relating to fixed salaries by reducing appropriations regardless of whether this Court finds continuing appropriations.

"The budget bill may deal only with the one subject of appropriations to support the annual budget," and, thus, it "may not constitutionally be used to. . . substantively amend[] and [change] [existing] statute law." (*Planned Parenthood Affiliates v. Swoap* (1985) 173 Cal.App.3d 1187, 1199 relying on *Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 394 quoting 64 Ops.Cal.Atty.Gen. 910, 917 (1981).)

In *Planned Parenthood*, this Court found an appropriation provision constitutionally invalid in the 1985-1986 Budget Act when the provision restricted funding for abortions otherwise authorized by the Family Planning Act (Welf. & Inst. Code, section 14500 et seq.). This is so because the purpose and subject of the Budget Act is to merely appropriate expenditures and not to amend or change laws. The purpose of the Budget Act is defined in California Constitution, art. IV, section 12 as creating "a budget for the ensuing fiscal year containing itemized statements for recommended state expenditures and estimated state revenues." Accordingly, this Court found the added provision violated the single-subject rule because the provision revised the existing law relating to funding for programs which advertised abortion services and that provision did not fall into the subject matter of appropriating expenditures pursuant to the purpose of the Budget Act.

Likewise, the mere mention of furloughs in the Executive Order within the Expenditure Solutions provision in the 2008 Budget Act is constitutionally invalid as an amendment or change to an existing law because it too violates the single-subject rule. This is true because the dubious power of the governor to usurp the lawmaking function of the Legislature via Executive Order to add the ability to furlough through Government Code section 3516.5 amends the existing law by adding "furlough power" to the meet-

and-confer notice statute and because this additional power to furlough is not the same subject-matter as expenditures pursuant to the purpose of the Budget Act.

Similarly, its inclusion by the Legislature to explain the coinciding reduction in employee compensation appropriations is also constitutionally invalid even if the Legislature intended to adopt the Executive Order as law because reducing the amount of salaries fixed by law also violates the single-subject rule by the same reasoning above. Using the same analysis, the Legislature cannot change the amount of fixed salaries as defined by law because the Legislature cannot amend or change laws through appropriations. As such, the mere reduction in appropriations in the 2008 Budget Act neither lends validity to the Executive Order nor restricts the Controller from drawing warrants against the unexhausted appropriations in order to return the monies taken from individual employees to fund State services.

Accordingly, the inclusion of the Executive Order for furloughs in the 2008 Budget Act and the corresponding reductions to appropriations for employee salaries did not validate the Executive Order and the reduced appropriations did not change the laws relating to fixed salaries just by reducing appropriations. This stands regardless of whether this Court holds that continuing appropriations exist as a matter of law.

C. State employees are "officers" as used in sections 19824, subdivision (a) and 18000 due to the historical meaning and statutory use of "officer" in California's Civil Service laws.

State employees are "officers" as used in sections 19824, subdivision (a) and 18000 due to the historical meaning and statutory use of "officer" in State Civil Service in California. According to this Court in *Patton v. Bd. of Health* (1899) 127 Cal. 388, 395-396 (*Patton*):

> The term 'officer,' in its common acceptation, is sufficiently comprehensive to include all persons in any public station or employment conferred by government. The definition given in 4 Jacob's Law Dictionary, 433, was quoted as follows: "It is said every man is a public officer who hath any duty

> concerning the public, and he is not the less a public officer where his authority is confined to narrow limits, because it is the duty of his office and the nature of that duty which makes him a public officer, and not the extent of his authority."

Moreover, in *Vandegrift*, this Court acknowledged that an "officer," as defined by the predecessor to section 19824, subdivision (a) is a person appointed to serve the functions of government with defined compensation as fixed by law. (*Vandegrift v. Riley* (1934) 220 Cal. 340, 356-357.) "An officer duly appointed to that office and acting as such, and with compensation for his services fixed as provided by law. He is a *de jure* officer and as such is entitled to compensation for his services as fixed by law." (*Ibid.*) In *Bennett v. Super. Ct. of Placer County* (1955) 131 Cal.App.2d 841, 843 relying on *Patton, supra*, 127 Cal. at page 398 defined the historical use of "officer" in government service:

> It seems to be reasonably well settled that where the legislature creates the position, prescribes the duties, and fixes the compensation, and these duties pertain to the public and are continuing and permanent, not occasional or temporary, such position or employment is an office and he who occupies it is an officer. In such a case, there is an unmistakable declaration by the legislature that some portion, great or small, of the sovereign functions of government are to be exercised for the benefit of the public, and the legislature has decided for itself that the employment is of sufficient dignity and importance to be deemed an office.

Similarly, since State employees are also appointed with fixed salaries in order to serve the functions of the State for the benefit of the public, they are "officers" for the purposes of requiring that full salary shall be paid monthly for services rendered to the State. In clear support, the entire chapter under Division 5 for Personnel subscribing the rules for employment is titled, "Appointments." In addition, Section 19050 requires, with little exception, that all positions shall be filled by *appointment* [emphasis added] further clarifying that "appointments to vacant positions shall be made from employment lists."

Due to the use of "officer" in State Civil Service and because of its meaning ascribed by this Court, employees are officers entitled to receive complete, timely payments of fully contracted salary.

Additionally, since both sections 19824 and 18000 were reenacted after this Court's decision in *Patton, supra*, 127 Cal. at page 398, this Court should apply the presumption that the Legislature intended the definition for "officer" as set forth in *Patton* to include "employees" appointed to Civil Service positions. This is true because "there is strong presumption that when legislature re-enacts statute which has been judicially construed it adopts construction placed on statute by courts." (*Armstrong v. Armstrong* (1948) 85 Cal App 2d 482, 485.)

In further support, the modern-day statute appropriating payments for salaries (§ 19824(a).) and the current statute requiring full payment for services rendered (§ 18000.) both have their origins deeply rooted in laws pertaining to civil service. When the predecessor to section 18000 (Pol. Code § 1033.) was enacted in 1905 (Stats. 1905, ch. 229, § 1, page 212.), it was placed along side the predecessor to section 19824, subdivision (a) (Pol. Code § 1029.). Then when the civil service laws were later changed in 1945, these two statutes again found themselves together in laws pertaining to personnel in sections 18000 (Stats. 1945, ch. 123, § 1.) to 18001 (Stats. 1945, ch. 123, § 1, amended to section 19824, Stats. 1978, ch. 776, § 9.) Given the presumption and the history of the above two statutes, this Court should hold that "officer" means "employee" for the purposes of employment in State service.

Finally, section 19824, subdivision (b) references the MOUs used for civil service employees. As such, section 19824, subdivision (a) would be rendered completely meaningless if "officer" were not synonymous with "employee."

Given the historical meaning of "officer" as a civil servant of the State, its placement in the Personnel section of State Civil Service, and the presumption that the Legislature adopted the definition of "officer" in *Patton*, "officer" and "employee" is, thus, interchangeable for the purposes of sections 19824, subdivision (a) and 18000. As a

result, since "officers" are employees, then employees are entitled to receive full salary, as fixed by law, on a monthly basis without the need to have the Legislature "re-appropriate" the appropriation again in the annual Budget Act.

Equally important, no legitimate government purpose is served to suspend or reduce fixed salaries for any reason because the appropriations required for earned salary are not subject to debate or negotiation as such compensation is defined by law. In addition, a finding of continuous appropriations by statute contributes to the efficient, continuance of government. This is true because delaying or reducing fixed salary is more costly to the State and to society than paying salary when legally owed due to the following costs and harms: endless litigation, interest payments, loss of employee morale (which often results in decreased production in quantity and quality), harm to the private sector when critical services are reduced, harm to fee and license holders when they do not receive the benefits which attach to their fees and licenses, harm to the private sector when State employees cannot risk entering into contracts due to uncertainty of wages, financial and emotional harms to individual State employees and their families, costs to the credit rating of the State, and harm to recruitment and retention of skilled and educated employees over time, and harm caused by the draining of institutional knowledge and turnover costs associated by employee flight.

In contrast, there is little to no tangible or constitutional benefit to the State to avoid paying its legal obligations to its working employees. As mentioned above, there can be no legitimate debate over amounts of salary owed. Thus, continuous appropriations do not divest the Legislature of its constitutional authority to make appropriations especially because the Legislature already agreed to the amounts for salary once it ratified MOUs.

As a consequence of already enacting into law the fixed salary amounts, all that is left for the Legislature to do is the ministerial task of writing a few sentences in the annual Budget Act. "The critical question in determining if an act required by law is

ministerial in character is whether it involves the exercise of judgment and discretion." (*Jenkins v. Knight* (1956) 46 Cal.2d 220, 223-224.)

Since performance is not excused upon failure of a ministerial condition precedent, good policy supports finding continuing appropriations especially since budget impasses are now a way of life in California and because the enactment of the budget does not depend upon a discussion whether the Legislature will pay earned wages. (See also *American Federation of State, County & Municipal Employees v. Metropolitan Water Dist.* (2005) 126 Cal.App.4th 247, 261 [Code of Civil Procedure section 1085 is a method for compelling a public entity to perform a legal and usually ministerial duty].

Accordingly, if the only benefit to the State is the performance of a ministerial task and the harms to society and to government are seemingly endless, then no legitimate governmental purpose or public policy is served by not paying employees their contracted wages for services rendered towards the continuance of government.

Due to the fact employees are entitled to receive fix salaries as defined by law on at least a monthly basis without further legislation, the reduced appropriations in the 2008 Budget Act, as ratified by the Legislature and enacted by the Executive, are merely superfluous because there remains unexhausted funds to pay what still remains owing to satisfy complete salary obligations because the monthly encumbrances to the General Fund were never fully realized due to the furloughs. Therefore, there are unexhausted appropriations to pay the salaries as fixed by law for services rendered. Most important, the requirement of the State to fully compensate employees for services rendered invalidates any possible legal effect of the Executive Order.

D. Continuous appropriations for monthly payments of earned salary from the General Fund pursuant to section 19824, subdivision (a) are not defeated by section 9610 because section 19824, subdivision (a) is not a statute merely fixing or authorizing the fixing of salary; it is a proper appropriation because it defines the amount appropriated, its frequency, and the fund intended for encumbrance.

Because section 19824, subdivision (a) is a lawful appropriation as defined by section 16304, it does not conflict with section 9610. Section 9610 merely states: "The fixing or authorizing the fixing of the salary of a State officer or employee by statute is not intended to and does not constitute an appropriation of money for the payment of the salary. The salary shall be paid only in the event that moneys are made available therefore by another provision of law."

For example, in *Cal. State Employees' Assn. v. Flournoy* (1973) 32 Cal.App.3d 219, 223 (*CSEA*), salary fixing functions were delegated by the Legislature to the trustees of California's State colleges and universities. When the trustees determined the employees should receive raises, the employees were not automatically entitled to an appropriation to pay for those raises because the Legislature still retained all power to make appropriations, thus, *approve* the payments for the raises. Consequently, the court held that any authorization given by the Legislature to fix salaries does not divest itself of its constitutionally granted powers to appropriate money. (*Id.* at page 234.)

In support, according to *Davis*, section 9610 "sets forth the basic understanding that statutes or other measures that set salaries for state employees are not themselves appropriations for such salaries, and further makes clear that the payment of a salary to a state employee depends upon the availability of an appropriation to pay the salary." (*Davis, supra,* 30 Cal. 4th at page 567.)

The situation here is unlike the one in *CSEA* because here, the earned State salaries have already been approved for payment and lawfully appropriated by section 19824, subdivision (a) whereas the raises requested by the authority appointed to fix salaries in *CSEA* had not been approved or even ratified by the Legislature. Therefore, while just the fixing or authority to fix salaries alone is not sufficient to create a lawful appropriation, Section 19824, subdivision (a) is much more than a salary fixing statute.

E. Section 3517.6 does not require Legislative approval for salary expenditures in the annual Budget Act because section 3517.6, subdivisions (a)(1)-(4) merely reinforce the controlling effect of MOU salary provisions relating to section 19824.

Regarding the controlling effect of salary provisions in MOUs over section 19824, section 3517.6, subdivisions (a)(1)-(4)[9] all similarly state: "In any case where the provisions of Section . . .19824. . . are in conflict with the provisions of a memorandum of understanding, the memorandum of understanding shall be controlling *without further legislative action* [emphasis added]."

For instance, section 3517.6, subdivision (a)(1) plainly requires that salary provisions in Bargaining Unit 2 ("BU2") control over any conflicts with section 19824, subdivision (a) without need for further legislation. Not surprising, the "Supersession" provision 4.4 in the MOU for BU2 clearly establishes "monthly pay periods" pursuant to and by referencing sections 19824 and 3517.6. Since both the MOU for BU2 and section 19824 call for monthly payments of salary and because the MOU requires payments pursuant to section 19824, there is no need for further action by the Legislature to effect an appropriation.

This Court previously rejected an argument that the Legislature's act of merely ratifying an MOU creates a continuing appropriation to pay salaries based on the provisions in the Ralph C. Dills Act ("Dill's Act") (§ 3512 et. seq.) (*Davis, supra,* 30 Cal. 4th at pages 572-573.)

However, this Court relied upon the statutory construction of section 3517.6 from *Dept. of Personnel Admin. v. Super. Ct.* (1992) 5 Cal.App.4th 155, 180-181 (*DPA*), without noting the change to the statute's formation in 1995 (Stats. 1990, ch. 1522, § 3 and Stats. 1995, ch. 768, § 2.) and without the benefit of section 19824, subdivision (a) as

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[9] Section 19824 is exempted from further Legislative action in the following subdivisions in 3517.6, subdivision (a): subdivision (1) applies to all units; subdivision (2) applies to BU 5; subdivision (3) applies to BU 8; and subdivision (4) applies to BUs 12 & 13.

providing the necessary authority for an appropriation. Without such benefit, this Court held that section 3517.6 requires Legislative approval in the annual Budget Act for nearly all expenditures created in MOUs. (*Id.* at page 572.)

Drawing from *DPA*, this Court noted: "'a memorandum of understanding requiring the expenditure of funds does not become effective unless it is approved by the Legislature in the annual Budget Act (§ 3517.6); under this provision, virtually all salary agreements are subject to prior legislative approval.'" (*Davis, supra,* 30 Cal. 4th at page 572 quoting *DPA , supra,* 5 Cal.App.4th at pages 180-181.)

While true "virtually all salary agreements are subject to prior legislative approval," this does not mean the same as requiring further legislation action to effect appropriations to fund the salary agreements once the Legislature ratifies the agreements and after enactment by the Executive. For example, all agreements in MOUs, including terms for salary and other non-compensation issues, always require approval by the Legislature since the Legislature must ratify all MOUs.

In concluding all expenditures require an appropriation in the annual Budget Act, *Davis, supra,* 30 Cal. 4th at page 572, fn. 9, noted the "relevant" part of Section 3517.6 as:

> If any provision of the memorandum of understanding requires the expenditure of funds, those provisions of the memorandum of understanding shall not become effective unless approved by the Legislature in the annual Budget Act. If any provision of the memorandum of understanding requires legislative action to permit its implementation by amendment of any section not cited above [i.e., specified statutory provisions that may be superseded by a conflicting provision of a memorandum of understanding], those provisions of the memorandum of understanding shall not become effective unless approved by the Legislature.

However, the above cited portion of section 3517.6 omits reference to the provisions susceptible to supersession by terms in the MOUs. The omission includes section 19824 which states: "In any case where the provisions of Section . . .19824. . . are

in conflict with the provisions of a memorandum of understanding, the memorandum of understanding shall be controlling *without further legislative action* [emphasis added]." Also missing from the above portion of section 3517.6 are the statutes relating exclusively to the merit system and layoffs[10] immediately preceding "If any provision of the memorandum of understanding requires the expenditure of funds, those provisions of the memorandum of understanding shall not become effective unless approved by the Legislature in the annual Budget Act." As such, the "If any provision of the memorandum of understanding requires the expenditure of funds . . ." sentence only modifies the layoff statutes immediately preceding it. Therefore, this Court may have overstated the reach of section 3517.6 without the benefit of section 19824, subdivision (a) and by not noting that only the statutes directly preceding section 3517.6 are modified by the provision requiring further Legislative action for expenditures the annual Budget Act.

Furthermore, even if one could argue that "If any provision of the memorandum of understanding requires the expenditure of funds . . ." also applies to section 19824 as referenced in section 3517.6, the change to section 3517.6 in 1995 makes clear that the above provision is not applicable to section 19824. For the differences, refer to Stats. 1990 ch. 1522 section 3 and Stats. 1995 ch. 768 section 2. The year 1995 is important because *DPA* was decided in 1992 while this Court decided *Davis* in 2003.

Worth nothing, while the change to section 3517.6 in 1995 created subdivisions from one single paragraph; the Legislature did not change the order of the referenced statutes and modifiers discussed here. For example, in 1995, the layoff statutes modified by "If any provision of the memorandum of understanding requires the expenditure of funds . . ." broke off into their own subdivision away from the provisions susceptible to supersession by terms in MOUs which specifically required *no further legislation* to effect. Given that the Legislature could have modified the subdivisions referencing

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[10] Sections 19997.2, 19997.3, 19997.8, 19997.9, 19997.10, 19997.11, 19997.12, 19997.13, or 19997.14

section 19824, but did not, this Court should not assume the Legislative intent is contrary to the plain words as used in the current version of section 3517.6 as amended in 1995:

> (a)(1) In any case where the provisions of Section . . .19824. . . are in conflict with the provisions of a memorandum of understanding, *the memorandum of understanding shall be controlling without further legislative action* [emphasis added].
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> (2) Notwithstanding paragraph (1), this paragraph shall apply only to state employees in State Bargaining Unit 5. In any case where the provisions of Section . . .19824. . . are in conflict with the provisions of a memorandum of understanding, *the memorandum of understanding shall be controlling without further legislative action* [emphasis added].
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> (3) Notwithstanding paragraph (1), this paragraph shall apply only to state employees in State Bargaining Unit 8. In any case where the provisions of Section . . .19824. . . are in conflict with the provisions of a memorandum of understanding, *the memorandum of understanding shall be controlling without further legislative action* [emphasis added].
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> (4) Notwithstanding paragraph (1), this paragraph shall apply only to state employees in State Bargaining Unit 12 or 13. In any case where the provisions of Section . . .19824. . . are in conflict with the provisions of a memorandum of understanding, *the memorandum of understanding shall be controlling without further legislative action* [emphasis added].
>
> (b) In any case where the provisions of Section 19997.2, 19997.3, 19997.8, 19997.9, 19997.10, 19997.11, 19997.12, 19997.13, or 19997.14 are in conflict with the provisions of a memorandum of understanding, the terms of the memorandum of understanding shall be controlling unless the State Personnel Board finds those terms to be inconsistent with merit employment principles as provided for by Article VII of the California Constitution. *Where this finding is made, the provisions of the Government Code shall prevail until those affected sections of the memorandum of understanding are renegotiated to resolve the inconsistency. If any provision of the memorandum of understanding requires the expenditure of*

> *funds, those provisions of the memorandum of understanding may not become effective unless approved by the Legislature in the annual Budget Act.* [emphasis added] If any provision of the memorandum of understanding requires legislative action to permit its implementation by amendment of any section not cited above, those provisions of the memorandum of understanding may not become effective unless approved by the Legislature.

Only subdivision (b) appears modified by "If any provision of the memorandum of understanding requires the expenditure of funds . . ." because this subdivision is dedicated to conflicts in the merit system which may result in renegotiating terms in an MOU. Since renegotiating new terms may result in an expenditure requiring an appropriation, this subdivision is worth requiring Legislative approval for both new provisions *and* resulting expenditures. Since conflicts between the provisions in MOUs and layoff statutes may run afoul the merit system, the Legislature chose not to give the terms in an MOU controlling effect over the statutes in subdivision (b).

In other words, the Legislature determined the statutes in subdivision (a) do not implicate the merit system. As a result, no further legislative action is necessary to effect the provisions referenced in subdivision (a) once the Legislature ratifies and the Executive enacts the provisions of MOUs into law. Regardless of any intent, the plain words are clear enough to see the distinction. Thus, section 3517.6 supports the proposition that the controlling provisions relating to salary in an MOU, combined with section 19824, are sufficient to satisfy the statutory requirement for defining continuing appropriations pursuant to section 16304 as to authorize the Controller according to sections 12440 and 18000 to draw warrants for earned salary as fixed by law.

F. Section 19824, subdivision (a) is not controlled by subdivision (b) requiring Legislative approval in the annual Budget Act for expenditures since subdivision (a) is specific, and specific subdivisions always control over general subdivisions like (b).

Section 19824, subdivision (a):

> Unless otherwise provided by law, the salaries of state officers shall be paid monthly out of the General Fund.

Section 19824, subdivision (b):

> If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Section 3517.5, the memorandum of understanding shall be controlling without further legislative action, except that if such provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

If both subdivisions conflict, subdivision (a) is the exception to (b) because subdivision (a) is specific whereas subdivision (b) is general. "Specific provisions of a statute relating to a particular subject govern in respect to that subject, as against general provisions in other parts of the statute, although the latter, standing alone, are broad enough to include the subject to which the more particular provisions relate." (*Frandzen v. County of San Diego* (1894) 101 Cal. 317, 321-322 quoting *Endlich on Interpretation of Statutes*, page 288.)

Subdivisions (a) and (b) conflict since subdivision (a) provides for continuing appropriations for salary expenditures whereas subdivision (b) requires Legislative approval for all expenditures. Therefore, subdivision (b) is broader than (a) since it requires Legislative approval in the annual Budget Act for *all* expenditures while subdivision (a) makes an exception to all expenditures referenced in subdivision (b).

In addition, subdivision (b) is general because in 1978, the Legislature added this identical language to nearly one hundred statutes relating to the Dill's Act. (Stats. 1995 ch. 768.) The Legislature even added this provision to a statute purely comprised of definitions not capable of needing expenditures. (Stats. 1978 ch. 776 § 131.) Moreover,

out of nearly one hundred statutes[11], only section 19824 had language effecting an appropriation by naming a purpose, frequency, and fund to encumber.

Analogizing to conflicting statutes, this Court held, "[W]here two statutes treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although latest in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject matter, so far as coming within its particular provisions." (*Bateman v. Colgan* (1896) 111 Cal. 580, 586.) As a result, subdivision (b) does not control over (a) just because (b) came later in time.

Therefore, since subdivision (a) is specific to the particular subject of salary and subdivision (b) is general in that it is repeated near one hundred times and it applies to all expenditures, subdivision (a) is the exception to subdivision (b). Thus, section 19824, subdivision (a) controls as a proper continuing appropriation.

1. Neither the Executive Order reducing fixed salaries as defined by law nor subdivision (b) of section 19824 can defeat section 19824, subdivision (a) because the "Unless otherwise provided by law" provision in subdivision (a) only refers to named funds for encumbrance.

Subdivision (b) cannot be the "Unless otherwise provided by law" provision in subdivision (a) because that reference only refers to a named fund. In construing the predecessor to section 19824, subdivision (a), this Court held "that section plainly and rightfully assumes that the salary of a state officer shall be paid from some source, and unquestionably means that if payment thereof be not otherwise provided for, it shall be made from the general fund." Accordingly, the only other provision of law which can defeat Section 19824, subdivision (a) is a provision of law specifying another fund for encumbrance. Therefore, the Executive Order, which reduced fixed salaries, also cannot be the "law" in "Unless otherwise provided by law" in subdivision (a). As a result, since

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[11] *I read though every statute in Stats. 1995 ch. 768.*

salaries are certain and fixed by law, the Executive Order reducing such salaries cannot defeat the requirement that "salaries" are paid monthly. This is most certainly true when sections 19824, subdivision (a) and 18000 are read in harmony to require full payments of monthly salary.

CONCLUSION

This Court should hold that 19824, subdivision (a) encumbers the General Fund on a monthly basis for earned salary as fixed by law. As such, the Controller is authorized to draw monthly warrants because salary is specific and capable of exhaustion pursuant to section 12440. This Court should also hold that section 18000 requires full payments for salaries which cannot be reduced or delayed by Executive Order or by any Legislative inaction or action by the Legislature to legislate through appropriations. If the Executive wants to reduce wages, the Executive must do so at the bargaining table because the Executive is not vested with the ultimate authority to fix wages.

Most vital to the efficient continuance of government, such a holding will end the current uncertainty in the law and put to rest millions of dollars already spent by the State of California just to avoid paying its workers for working.