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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000,

Plaintiff/Appellant,

vs.

ARNOLD SCHWARZENEGGER, et al.,

Defendants/Respondents.

Court of Appeal Case No. C061020

(Superior Court Case No. 34-2009-80000135 CU-WM-GDS)

FILED

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COURT OF APPEAL - THIRD DISTRICT
DEENA C. FAWCETT

BY _____ Deputy

Appeal from the Superior Court, Sacramento County
Honorable Patrick Marlette

OPPOSITION TO PETITION FOR WRIT OF SUPERSEDEAS OR OTHER APPROPRIATE STAY ORDER/REQUEST FOR TEMPORARY STAY ON APPEAL

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000, Plaintiff/Appellant, vs. ARNOLD SCHWARZENEGGER, et al., Defendants/Respondents.	Court of Appeal Case No. C061020 (Superior Court Case No. 34-2009-80000135 CU-WM-GDS)

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Court of Appeal
Third Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

California Rules of Court, rules 8.208, 8.490(i), 8.494(c), 8.496(c), or 8.498(d)

Court of Appeal Case Caption: SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 10000
v.
ARNOLD SCHWARZENEGGER, ET AL.

Court of Appeal Case Number: C061020

Please check here if applicable:
☐ There are no interested entities or persons to list in this Certificate as defined in the California Rules of Court.

Name of Interested Entity or Person (Alphabetical order, please.)	Nature of Interest
1. Professional Engineers in California Government	Petitioner in related case filed in Sacramento County Superior Court
2. California Association of Professional Scientists	Petitioner in related case filed in Sacramento County Superior Court
3. CDF Firefighters	Petitioner in related case filed in Sacramento County Superior Court
4. California Association of Psychiatric Technicians	Petitioner in related case filed in Sacramento County Superior Court
5. California Attorneys, Administrative Law Judges, and Hearing Officers	Petitioner in related case filed in Sacramento County Superior Court

Please attach additional sheets with Entity or Person Information, if necessary.

Signature of Attorney or Unrepresented Party

Date: February 23, 2009

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Party Represented: Governor Arnold Schwarzenegger and Department of Personnel Administration

ATTACH PROOF OF SERVICE ON ALL PARTIES WITH YOUR CERTIFICATE

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MISCELLANEOUS

I.

INTRODUCTION

Petitioner Service Employees International Union (SEIU) raises numerous arguments in its petition to this Court, which it did not raise in its briefs and arguments in the trial court. It is a well-settled rule that parties may not raise arguments in the appellate court for the first time that were not raised in the trial court. Therefore, because most of the arguments raised by SEIU were not raised in the trial court, SEIU has waived its right to raise these matters and its petition for writ of supersedeas should accordingly be denied. However, even if these arguments were not barred, they are meritless and do not support the present petition.

The State of California has been experiencing an unprecedented and continuing financial disaster.[1] Over the past six months, the State's fiscal crisis escalated. The national economic recession, driven in large part by crises in the banking and housing sectors, deepened significantly after the current State budget was enacted on September 23, 2008. This recession had a direct impact on California's budget. The budget enacted on September 23, 2008 was predicated on anticipated revenues that fell well below the levels estimated at the time the budget was signed.

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[1] On February 19, 2009, the Legislature agreed on a new State budget which, in relevant part, includes a spending reduction of $1.4 billion in state employee payroll. This reduction will be achieved through furloughs, layoffs, elimination of two state holidays, and overtime reform. Employees represented by Service Employees International Union, Local 1000 ("SEIU") will continue to be furloughed two days a month until a tentative agreement reached with the State, which includes one day a month furloughs, is ratified by its membership and approved by the Legislature. All other represented employees continue to be subject to the furloughs implemented per the Governor's Executive Order. The State expects to meet and confer with other state employee unions to achieve necessary spending reductions.

In response to the deepening economic crisis, Governor Arnold Schwarzenegger called emergency legislative sessions in November and December 2008 to address the impact of the revenue shortfall on the State budget. However, those legislative sessions did not produce a solution to the State budget crisis. Thus, on December 19, 2008, Governor Schwarzenegger issued Executive Order S-16-08 (the "Executive Order"), directing that state employees be temporarily furloughed two days a month over a 17-month period as a step "to reduce [the State's] current spending." (Exhibit K.)

Even with the pending budget deal, the furloughs remain a critical element of overall cost savings that are absolutely necessary to regaining the State's fiscal stability. The new budget does not change the fact that the State still requires the furloughs to achieve necessary savings.

Both the California Constitution, as well as relevant provisions of the California Government Code, grant the Governor the executive authority to impose furloughs on state employees. In the present case, the Governor also has the authority to impose furloughs under the terms of the Memorandum of Understanding ("MOU") between Petitioner SEIU and the State. The furloughs are a necessary spending reduction measure. If the furloughs are stayed pending appeal, the State will lose millions of dollars of needed savings every month.

II.

STATEMENT OF FACTS

A. Efforts to Address the State Budget Crisis Prior to Issuance of the Subject Executive Order.

On September 23, 2008, the Governor signed into law a new budget for the 2008-2009 fiscal year. (Exhibit A.) However, shortly after the budget was signed, the national economy began to decline, creating an unanticipated and significant reduction in revenues from those forecasted in

the 2008-2009 budget. (Exhibit B.) Initially, the California Department of Finance ("DOF") determined that revenue for the 2008-2009 fiscal year would be $13 billion lower than projected in the original September 2008 budget. (Exhibit C.) Besides the revenue shortfall, DOF also determined that by the end of the 2008-2009 fiscal year, the State would amass a budget deficit of $11.2 billion based on the shortfalls in the September budget compromise. (*Id.*) The DOF concluded the "state will run out of cash in February and be unable to meet all of its obligations for the rest of the year," absent immediate intervening action. (*Id.*) Specifically, in its October 2008 Finance bulletin, DOF determined that the "Preliminary General Fund agency cash for October was $923 million below the 2008-09 Budget Act forecast of $10.667 billion." DOF further concluded in the October 2008 bulletin that "year-to-date revenues are $1.06 billion below the $22.58 billion that was expected." (Exhibit D.)

On November 6, 2008, the Governor responded to the unanticipated budget deficit by issuing a special session proclamation calling for an emergency session of the Legislature to immediately address this statewide crisis. (Exhibit E.) On the same day, the Governor sent a letter to all state workers informing them of proposed spending reduction measures impacting state workers. (Exhibit F.) In the letter, the Governor also informed state employees he would be convening the Legislature to attempt to seek a comprehensive solution to the budget crisis. (*Id.*)

In an attempt to resolve part of the budget crisis, the Department of Personnel Administration ("DPA") put forth proposals to the labor unions in early November of 2008 including, but not limited to, a proposed one-day furlough and elimination of two holidays per year. None of the labor unions, including Petitioner SEIU, agreed to either proposal. However, the state employee unions, including Petitioner SEIU,

acknowledged that the State of California faced a serious and immediate fiscal crisis. (Exhibits G, H, and I.)

The Legislature convened in special session in early November 2008 in an effort to resolve the pending budget crisis, but failed to reach any resolution. On December 1, 2008, the Governor issued a proclamation addressing the deepening financial crisis and the likelihood that "this fiscal year's deficit will cause the State to miss payroll and school payments at the beginning of 2009." (Exhibit J.) The Governor also reconvened the Legislature for another special session to address the fiscal emergency. (*Id.*)

DOF recalculated its estimates and found revenues for the 2008-2009 fiscal year were expected to be $14.8 billion below the estimate at the time the 2008-2009 budget was enacted. (Exhibit B, ¶ 4.) The deficit had increased by more than $3 billion in the span of approximately two months. DOF also determined that the State's inability to reach a solution on the State's deficit had caused the deficit to increase and the State would now have a $41.6 billion deficit by the end of the 2009-2010 fiscal year. (Exhibit B, ¶ 5.) As a result of the devastating budget deficit, DOF concluded in December 2008 that the State would run out of funds by February 2009. (Exhibit B, ¶ 8.)

B. The Executive Order Imposing the Furloughs.

In response to the unprecedented financial catastrophe existing at the time, and because a solution acceptable to both the Governor and the Legislature proved elusive, the Governor, by virtue of his constitutional and statutory authority, issued the Executive Order on December 19, 2008, directing the implementation of a temporary two-day a month furlough plan for all state employees commencing in February 2009 and ending in June 2010. (Exhibit K.) Contrary to Petitioner's contention here, the furloughs are not a "doubling of the 'pay cut' to the salaries of

thousands of represented state workers," (see Petitioner's Petition for Writ of Supersedeas, p. 12.), but rather a reduction in the hours worked by state employees. Based on the fiscal crisis, the Governor utilized the authority granted him under the Ralph C. Dills Act ("Dills Act"), Government Code section 3512, *et seq.*, to issue the Executive Order in advance of meeting and conferring with affected public employee unions, including Petitioner. (See Gov. Code § 3516.5; Exhibit K.) In the Executive Order, the Governor reiterated the fact that absent immediate action, the State would run out of cash in February of 2009 and would not be able to meet its obligations. (*Id.*)

C. Confirmation of State Fiscal Crisis Since Issuance of the Executive Order.

Events occurring since the furlough announcement confirmed the very real nature of California's worsening economic situation at the time of the hearing in the trial court. On December 19, 2008, the California State Controller, John Chiang, released a statement urging the Governor and Legislature to reach a resolution in order to prevent the State from running out of cash in late February. (Exhibit L.) On December 22, 2008, the State Controller sent a letter to the Governor and the Legislature, reiterating the severity of the fiscal crisis the State was facing, if no agreement on a solution was reached. (Exhibit M.) In this letter, Controller Chiang stated,

> [I]f current projections hold true, the State is less than seventy days from running out of cash. Worse, my office's analyses indicate there will be no shelter from the storm as the State's cash position will remain negative throughout the remainder of the fiscal year. As I indicated during the recent Legislative Budget Session, the failure of the Governor and the Legislature to quickly arrive at an agreement to responsibly

> address the State's $41 billion budget crisis would begin a cascading series of regrettable actions necessary to conserve the State's dwindling case reserves. (*Id.*)

On January 13, 2009, DOF Director Michael Genest issued a special report titled, "California at the Brink of Financial Disaster," detailing the State's financial crisis and the immediate harm that will be caused when the State runs out of cash. (Exhibit N.)

III.

STATEMENT OF THE CASE

Within a few weeks of the Governor's issuance of the Executive Order, multiple state employee organizations filed suit in Sacramento County Superior Court challenging the Governor's authority to furlough state employees.

On December 22, 2008, the first petition for writ of mandate and complaint for injunctive and declaratory relief was filed in Sacramento County Superior Court by Professional Engineers in California Government ("PECG") and California Association of Professional Scientists ("CAPS"), Case No. 2008-80000126, against the current Respondents as well as the Controller.

On January 5, 2009, a second petition was filed in Sacramento County Superior Court by State of California and California Attorneys, Administrative Law Judges and Hearing Officers in State Employment ("CASE"), Case No. 2009-80000134, against the current Respondents as well as the Controller.

On January 7, 2009, a third petition was filed in Sacramento County Superior Court by Petitioner SEIU, Case No. 2009-80000135, against the current Respondents as well as the Controller.

On January 12, 2009, a fourth petition was filed in Sacramento County Superior Court by California Correctional Peace Officers Association ("CCPOA"), Case No. 34-2009-80000137, against the current Respondents as well as the Controller.

On January 23, 2009, a fifth petition was filed in Sacramento County Superior Court by CDF Firefighters ("CDFF"), Case No. 34-2009-00032732, against the current Respondents as well as the Controller.

On January 23, 2009, a sixth petition was filed in Sacramento County Superior Court by California Association of Psychiatric Technicians ("CAPT"), Case No. 34-2009-80000148.

On January 27, 2009, SEIU filed a second petition, the seventh one in these related cases, in Sacramento County Superior Court, Case No. 34-2009-80000150, against the Governor and DPA.

On Thursday, January 29, 2009, the trial court heard oral argument on Case Nos. 2008-80000126, 2009-80000134 and 2009-80000135.[2] All parties were present and appeared at the hearing. On January 30, 2009, the trial court issued an amended and final order denying all of Petitioners' writs and entering judgment for the Respondents. (Exhibit O.) The trial court's Final Order states in relevant part:

> The Court accordingly rules that, with regard to the issues raised by all petitioners regarding the Governor's authority to make the challenged order, the petitions for writ of mandate are denied and judgment shall be entered for the defendants (respondents) on the complaints for declaratory relief. This ruling applies to both state employees represented by all of the petitioners under the Dills Act and to those state employees represented by petitioners PECG and CAPS who are excluded from the Dills Act by law, as the authorities on which the Court has

[2] At a scheduling hearing on January, 9, 2009, all parties stipulated to the joint hearing on January 29, 2009.

> relied in finding that the Governor has the authority to take the challenged action apply to both classes of employees.

(Exhibit O, p. 10.)

The trial court also found that the provisions of the Governor's Executive Order constitute "a rule in that they establish a standard of general application to state employees." (*Id.*) Finally, the trial court's Final Order states that the State Controller was obligated to comply with its order.

Petitioner SEIU filed a notice of appeal from the judgment and order denying the Petition for Writ of Mandate and Complaint for Declaratory Relief on February 4, 2009. (See Petitioner's Exhibit C.) On February 6, 2009 (the day the furloughs began), Petitioner SEIU filed a petition for writ of supersedeas and immediate stay of the trial court's order and the Governor's Executive Order.

IV.

ARGUMENT

A. Standard for Writs of Supersedeas.

A writ of supersedeas is an extraordinary writ used to "protect the appellate court's jurisdiction," only when absolutely necessary. (*Nuckolls v. Bank of California, National Association* (1936) 7 Cal.2d 574, 578.) A petition for writ of supersedeas should only be granted when "denial of a stay would result in depriving an appellant of the fruits of his appeal should he be successful in securing a reversal of the judgment." (*Deepwell Homeowner's Protective Association v. City Council of the City of Palm Springs* (1965) 239 Cal.App.2d 63, 65.) The power to grant a writ of supersedeas should be "sparingly employed and reserved for the exceptional situation." (*People ex rel San Francisco Bay Conservation and*

Development Commission v. Town of Emeryville (1968) 69 Cal.2d 533, 537.)

Petitioner's burden here is twofold: (1) to demonstrate a likelihood of success on appeal by raising substantial questions of probable error by the trial court and (2) to show that the balance of the equities weighs in favor of granting the requested writ. (*Deepwell Homeowner's Protective Association, supra,* 239 Cal.App.2d at 65-67; *West Coast Home Improvement Company v. Contractor's State License Board of Department Professional and Vocational Standards* (1945) 68 Cal.App.2d 1, 6; *Mills v. County of Trinity* (1979) 98 Cal.App.3d 859, 861; *Nuckolls v. Bank of California, National Association, supra,* 7 Cal.2d 574, 578.) Petitioner has failed to meet its burden with respect to either of these elements.

Petitioner has failed to demonstrate a likelihood of success on appeal. The trial court's decision upholding the Governor's authority to furlough state employees is well supported by relevant provisions in the California Constitution, California Government Code, and relevant provisions of the MOU between the parties. It is Petitioner's burden to prove substantial questions will be raised in its appeal. Based on the absence of any showing by Petitioner of probable error by the trial court, this Court should refuse to issue the requested writ. (*Saltonstall v. Saltonstall* (1957) 148 Cal.App.2d 109, 114.)

Petitioner also has the burden to show it will suffer irreparable injury if the writ of supersedeas is not granted. (*Mills v. County of Trinity, supra,* 98 Cal.App.3d 859, 861; *Deepwell Homeowner's Protective Association v. City Council of the City of Palm Springs, supra,* 239 Cal.App.2d 63, 66.) Petitioner fails to meet its burden to prove irreparable injury if the writ is not granted. Petitioner is required to show that the harm to it and its members outweighs any potential for harm to the Respondent if the petition for writ of supersedeas *is* granted. An appellate

court should *not* grant a petition for writ of supersedeas when the petition will destroy rights that would clearly belong to the respondent if affirmed. (*Sacramento Newspaper Guild v. Sacramento County Board of Supervisors* (1967) 255 Cal.App.2d 51, 53.) "[I]f a stay can be granted only at the risk of destroying rights which would belong to the respondent if the judgment is affirmed, it cannot be said to be necessary or proper to the complete exercise of appellate jurisdiction." (*Nuckolls v. Bank of California, National Association, supra,* 7 Cal.2d 574, 578.) Here, the relative harm to the State of California in not achieving the expense reduction resulting from the Governor's furlough plan substantially outweighs any harm to Petitioner.

Based upon the discussion to follow, Respondents Governor Arnold Schwarzenegger and the Department of Personnel Administration respectfully request that this Court deny the present petition for writ of supersedeas.

B. Several of Petitioner's Arguments in Support of the Requested Writ are Impermissibly Raised for the First Time in its Brief to this Court.

Some of Petitioner's arguments in its petition were not raised at the trial court level and are impermissibly raised for the first time here. Those arguments raised for the first time here, which were not raised before the trial court, are (1) furloughs violate Petitioner's members' due process rights (Petitioner's Petition, pp. 21-23) and (2) furloughs constitute an impairment of contract and are thus unconstitutional (Petitioner's Petition, pp. 23-31).

These arguments should not be considered by this Court because they constitute new theories impermissibly raised for the first time in this Court. Petitioner may not "change [its] position on appeal and assert a new theory," because "[t]o permit this change in strategy would be unfair

to the trial court and the opposing litigant." (*Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1317; *see also The People ex rel. Department of Transportation* (2003) 105 Cal.App.4th 39, 46; *Richmond v. Dart Industries* (1987) 196 Cal.App.3d 869) Appellants may not raise a factually novel legal theory on appeal. (*Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 498, fn.9.) Therefore, because Petitioner did not raise these theories at the trial court level, it is barred from raising them now. Accordingly, this Court should disregard these arguments in assessing this petition. However, as the discussion below will demonstrate, even were this Court to consider these arguments, they are lacking in merit and do not provide a basis for granting the requested writ.

C. The Appeal in This Case Has No Merit Because the Trial Court Did Not Err in Determining the Governor Has Authority to Issue the Executive Order.

Petitioner has failed to demonstrate that its appeal of the trial court's judgment has merit. The trial court upheld Governor Schwarzenegger's authority to impose furloughs on multiple grounds, all of which are fully supported by applicable constitutional and statutory provisions, as well as provisions of the MOU between the parties.

1. The Governor's Executive Order Does Not Improperly Interfere with the Legislature's Authority.

Contrary to Petitioner's argument, the Governor's Executive Order does not violate the separation of powers between the Executive and the Legislature, or interfere with the Legislature's authority. (See Petitioner's Petition for Writ of Supersedeas, p. 5.)

The California Constitution grants the Governor "supreme executive power" and requires the Governor to see that the law is faithfully executed. (Cal. Const., Art. V, § 1.) Article V, section 1, of the California Constitution grants the Governor the authority to issue directives to

subordinate civil executive officers concerning the enforcement of the law. (63 Ops.Cal.Atty.Gen. 583 (1980) WL 96881 (Cal.A.G.).) The Governor is charged with supervising the official conduct of all executive and ministerial officers. (Gov. Code, § 12010.) The subject Executive Order constitutes a proper exercise of the Governor's executive authority, as the state employer, to set the work hours of state employees. Thus, the Executive Order in no way infringes on the Legislature's prerogatives.

The constitutional and statutory provisions cited above, as well as additional code sections in the Government Code including, but not limited to, Government Code sections 19851 and 19849 more fully discussed below, establish the Governor's authority to issue the Executive Order in question. As such, the Executive Order does not violate the notion of separation of powers between the executive branch and the legislative branch. (See e.g., *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52-53; *Marine Forests Society v. California Coastal Com.* (2005) 36 Cal.4th 1, 24-25.)

The Executive Order was issued to alleviate part of the State's fiscal crisis existing at the time of the Executive Order. In the absence of immediate action, the State was in imminent danger of running out of money. (Exhibit M.) By issuing the Executive Order, the Governor was abiding by his constitutional mandate to ensure the State's financial solvency. To that end, the Executive Order directed the DPA to implement a two-day furlough in order to realize immediate necessary savings to the State Treasury. (Exhibit P, ¶ 7.) As such, the Executive Order falls squarely within the authority delegated to the Governor by the California Constitution and the cited sections from the Government Code to address the fiscal crisis and solvency of the State, in part, by adjusting the work hours of state employees. Therefore, the Executive Order is a constitutional exercise of the Governor's executive power.

Petitioner has failed to demonstrate any likelihood that it can prevail on its appeal here by making any showing to the contrary. Accordingly, its petition for writ of supersedeas should be denied.

2. The Executive Order Does Not Violate the Due Process Rights of Civil Service Employees.

Aside from the fact that this argument was not raised by Petitioner in the trial court and is thus impermissibly introduced by Petitioner for the first time here, it is apparent that the Executive Order does not violate the due process rights of state employees because the furlough is a non-merit based hours reduction, and not a deprivation of property interest as Petitioner contends. (See Petitioner's Petition, p. 22.)

The state employer has jurisdiction over management of nonmerit aspects of the civil service system. In 1981, the Legislature created the Department of Personnel Administration ("DPA") "for the purpose of managing the nonmerit aspects of the state's personnel system." (*Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1322.) As noted by the court in *Tirapelle*, "[i]n general, the DPA has jurisdiction over the state's financial relationship with its employees, including matters of salary, layoffs and nondisciplinary demotions." (*Id.*)

There is no basis for the proposition that the furloughs are even remotely merit based. Petitioner argues that, "[t]he loss of salary is tantamount to discipline in violation of the merit principle and thus the Constitution itself." (Petitioner's Petition for Writ of Supersedeas, p. 23.) Yet, such a claim completely ignores the across-the-board application of furloughs to state employees without regard to performance-based criteria as would be the case if the furloughs were in any way "disciplinary" in nature. Thus, there is no basis for Petitioner's claim that furloughs are somehow disciplinary because the Executive Order was in no way based on the merit, or lack thereof, of state employees.

The Government Code provides several statutory bases for the state employer's discretionary authority to establish the working hours of state employees, including the imposition of furloughs. Among these statutes, as the trial court correctly concluded, are sections 19851 and 19849.

a. Government Code Sections 19851 and 19849 Provide the State with the Authority to Establish the Work Hours of State Employees.

(1) Section 19851 Provides the State With Authority to Establish Work Schedules to Meet the Varying Needs of Different State Agencies.

The trial court was correct in ruling that the Governor, acting as the state employer, has the statutory authority to reduce the hours of state employees pursuant to Government Code sections 19851 and 19849. As the trial court stated,

> The Court finds that these two statutes [Government Code section 19851 and 19849], taken together, provide the Governor with authority to reduce the workweek of state of employees to meet the needs of state agencies, and to do so by adopting a rule. The provisions of the Executive Order regarding the furlough are a rule in that they establish a standard of general application to state employees."

(Exhibit O, p. 7.)

Government Code section 19851(a) states in relevant part as follows:

> It is the policy of the state that the workweek of the state employee shall be 40 hours and the workday of state employees shall be eight hours, *except that* workweeks and workdays of a different number of hours may be established

> in order to meet the varying needs of the different state agencies.

(Emphasis added.)

Section 19851 provides that the *policy* of the State is that workweeks are 40 hours and workdays are 8 hours. The term "policy" is defined in Black's Law Dictionary, 4th Ed., as "[t]he *general principles* by which a government is *guided in its management* of public affairs, or the legislature in its measures. This term, as applied to a law, ordinance or rule of law, *denotes its general purpose or tendency* considered as directed to the welfare or prosperity of the state or community." (Emphasis added.) Thus, the term "policy" is not synonymous with "mandate" or "obligation" and, as used in section 19851(a), does not impose on the State an absolute, unequivocal duty to establish or maintain 40-hour workweeks for state employees.

More important, however, section 19851 grants the State the discretion to establish workdays and workweeks of a "different number of hours," *i.e.,* less than 40 hours a workweek, to meet the varying needs of different state agencies. The fact that section 19851 was intended to provide the State with flexibility to establish work schedules of differing hours depending on operational needs is well established in the legislative history of the code section.

(2) Section 19849(a) Provides the State With Authority to Promulgate Rules Regarding Work Hours.

Whereas section 19851 provides the State with the overall flexibility to establish work schedules of varying numbers of hours, Government Code section 19849(a) provides the State with authority to promulgate rules regarding work hours that must be enforced by the varying agencies of the State. That code section provides in relevant part:

> The department [DPA] shall adopt rules governing hours of work ... Each appointing power shall administer and enforce such rules.

Read together, sections 19851 and 19849 establish the Governor's authority, acting as the state employer, to issue the Executive Order furloughing state employees two days a month. This conclusion also is consistent with the language of Government Code section 19816.10(a), which provides:

> In order to secure substantial justice and equality among employees in the state civil service, the department [DPA] may provide by rule for days, hours and conditions of work, taking into consideration the varying needs and requirements of the different state agencies and the prevailing practices for comparable service in other public employment and private business.

These statutes provide the Governor with the authority to issue the subject Executive Order furloughing state employees. Accordingly, Petitioner's appeal has no merit and this petition for writ of supersedeas should be dismissed.

b. The Governor's Issuance of the Executive Order Does Not Implicate Government Code Section 19826.

Furthermore, the temporary twice monthly furloughs ordered by the Governor in his Executive Order do not violate Government Code section 19826(b). That code section provides as follows:

> Notwithstanding any other provision of law, the department shall not establish, adjust, or recommend *a salary range* for any employees in an appropriate unit where an employee organization has been chosen as the exclusive representative pursuant to Section 3520.5.

(Emphasis added.)

As has been repeatedly demonstrated throughout this litigation, and as the trial court fully agreed, furloughs are not equivalent to reductions in *salary ranges*. A furlough only constitutes a reduction in *hours worked*, not a reduction in the wage rate paid for that work. The corresponding rate of pay is not affected by the furloughs and employees will be paid. They will simply be paid for fewer hours at that rate. There is no evidence in this case that the State has any intention of paying state employees at a lesser rate, or to impact state employee salary ranges, for the hours actually worked.

As the trial court stated in its final order,

> This case, however, does not involve the establishment, adjustment or recommendation of a salary range for represented state employees. This case involves a temporary reduction in the hours worked by certain state employees, which will result in a loss of pay for the hours not work. The order does not change established salary ranges at all; state employees will continue to receive their normal pay according to established ranges in weeks that do not include a furlough day.

(Exhibit O, p. 9.)

This conclusion is supported by applicable regulations adopted by DPA. The DPA regulations define "salary range" as the "minimum and maximum rate currently authorized for the class." (2 C.C.R. § 599.666.1.) "Rate" for hourly employees is "any one of the dollar and cents amounts found within the salary range." (*Id.*) In this respect, "[m]onthly or hourly rates of pay may be converted from one to the other when the Director of [DPA] considers it advisable." (2 C.C.R. § 599.670.) In other words, "salary range" concerns the hourly rate an employee is paid. "Salary range" does not refer to the employee's "total compensation." Accordingly, the Governor's Executive Order establishing temporary two-

day a month furloughs for state employees does not fall within the ambit of section 19826(b), as was determined correctly by the trial court.

c. The Cases and Statutes Cited by Petitioner Are Easily Distinguishable and, As Such, Do Not Provide Support for Petitioner's Theory that the Furloughs Violate State Employees' Due Process Rights.

Petitioner cites *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 206 for the proposition that a "permanent public employee is afforded due process protection when the state deprives the employee of his or her property interest in continued employment." (Petitioner's Petition for Writ of Supersedeas, p. 22.) However, *Skelly* is distinguishable from the case at hand. In *Skelly,* the employee was *terminated* for *performance* reasons, including absence without leave, intemperance, and other bad behavior. (*Skelly, supra,* 15 Cal.3d at 197.) *Skelly solely* discusses the rights of state employees when punitive measures are taken against them. (*Id.* at 215.) In *Skelly*, the court held "that the provisions of the State Civil Service Act, including in particular section 19574, *governing the taking of punitive action* against a permanent civil service employee violate the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and of article I, sections 7 and 15 of the California Constitution." (*Id.*, at 215, emphasis added.) *Skelly* does not stand for the proposition that the state employer, exercising its constitutional and statutory authority over the working hours of state employees, somehow violates employees' due process rights when it imposes furloughs.

Petitioner also cites *Cleveland Board of Education v. Loudermill* (1985) 470 U.S. 532, 541 for the proposition that, "[t]he California legislature cannot elect to provide a property interest to their public employees, only to have a court order the state to divest its employees of such an interest without appropriate procedural safeguards."

(Petitioner's Petition for Writ of Supersedeas, p. 22.). However, *Loudermill*, like *Skelly*, was an employee discipline case and has no applicability to the issue before this Court, *i.e.*, whether the Governor, acting as the state employer, has the constitutional and statutory authority to impose non-disciplinary furloughs to address a state fiscal crisis.

Finally, Petitioner also argues that Government Code 1231, which governs reduction in salaries as a result of the Legislature's inability to pass a budget, does not allow furloughs. (Petitioner's Petition for Writ of Supersedeas, p. 23.) In making this argument, Petitioner grossly mischaracterizes the code section. Section 1231 provides that the failure of the Legislature to pass a budget shall not, in and of itself, affect a change in employee salary. This code section is applicable where there is a budget impasse, i.e., no budget in place and therefore no appropriation authority. Here, there has been a budget in place since September 23, 2008, but the fiscal crisis required revisions to that budget. Thus, on its face, the section 1231 is inapplicable. ["No state ... employee shall be deemed ... to have incurred any change in ... his or her salary ... *solely* because of the failure to enact a budget act for a fiscal year prior to the beginning of that fiscal year." Emphasis added.] Petitioner's misplaced reliance on section 1231 ignores the present economic realities as recited in the Governor's Executive Order.

In sum, Petitioner's due process argument, impermissibly raised for the first time before this Court, is based on inapplicable cases and statutes. The argument ignores the facts of the present situation and the stated bases for the Executive Order. In short, Petitioner's due process argument is wholly lacking in merit and does not provide a basis for overturning the trial court's decision upholding the Governor's authority to furlough state employees.

3. The Executive Order Does Not Impair the Contract Rights of Petitioner or its Members.

Once again, Petitioner's impairment of contract argument was not raised in the trial court and, therefore, is impermissibly raised for the first time here. As such, it should be disregarded. If considered, however, this argument also is lacking in merit and does not provide a basis for overturning the trial court's decision. Petitioner argues that the furlough "impairs the contracts" between SEIU and the State because it, "prohibits the State Controller from paying to state employees the wages set forth in the MOUs for the various bargaining units." (Petitioner's Petition for Writ of Supersedeas, p. 26.) However, the trial court specifically found that, in addition to the Governor's constitutional and statutory authority to furlough state employees, the Governor had the specific contractual right to do so here based upon relevant provisions of the MOU between Petitioner and the State.

For instance, Article 4.B of each of the SEIU MOUs states that "[c]onsistent with this Contract, the rights of the State shall include, but not be limited to, the right... *to take all necessary action to carry out its mission in emergencies*." (Emphasis added.) This section of the MOU provides the Governor with the express contractual right to take measures, such as ordering the furloughs here, to deal with emergency situations or simply to relieve employees from their duties due to lack of funds, the very situation at issue in this case. (Exhibit Q.)[3]

Petitioner relies on *Sonoma County Organization of Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 305-06, for the proposition that a legislative impairment of rights conferred on employees pursuant to a collective bargaining agreement constitutes an

[3] SEIU covers numerous bargaining units. One of the representative SEIU MOUs has been attached as a sample to show the relevant language that appears in all SEIU MOUs.

unconstitutional impairment of contract. (Petitioner's Petition for Writ of Supersedeas, p. 28.) Yet, Petitioner fails to demonstrate to this Court how the contractual rights of its members have been impaired and thus this case is inapposite. Petitioner's glaring omission is for obvious reasons. The parties' MOU provides the State with the authority, as the trial court correctly found, to take measures, like imposing furloughs, to address emergency conditions. The Executive Order is fully consonant with the parties' MOU and, therefore, there is no impairment of contract.

Petitioner also makes the argument that "[a] public employee's salary is part of the employee's compensation and is earned immediately upon the performance of services for a public employer and cannot be destroyed without impairing a contractual obligation of the employing entity." (Petitioner's Petition for Writ of Supersedeas, p. 24.) Again, Petitioner fails to recognize that state employees will be paid all wages for hours that they work, as the furloughs reduce employee *hours,* not wages.

Petitioner inappropriately relies upon *University of Hawaii Professional Assembly, et al v. Benjamin Cayetano, et al* (9th Cir. 1999) 183 F.3d 1096, a case inapposite to the present situation. In *University of Hawaii Professional Assembly ("UHPA"),* the court held that a Hawaiian statute that allowed "pay lags," allowing the state to postpone by one to three days the pay date of state employees, violated the contract rights of affected employees. *UHPA*, however, is entirely irrelevant here. In *UHPA,* the state was delaying employee pay checks for up to three days. In this case, employees will be paid timely for all hours worked; their hours simply will be reduced. Contrary to Petitioner's conclusion the imposition of furloughs does not mean that employees will be paid less than the wages negotiated in the applicable MOUs. Instead, as has been repeatedly demonstrated in these cases, and as the trial court correctly concluded,

employees will continue to be paid at the negotiated rate, but will be paid for fewer hours worked. Because the state employer retains the right to establish employee working hours, including cutting those hours through the imposition of furloughs as fully demonstrated above, Petitioner's impairment of contract claim, improperly raised here for the first time, lacks merit and does not provide a basis for overturning the trial court's decision upholding the Executive Order.

4. The Executive Order Does Not Violate the Administrative Procedures Act.

Petitioner argues that the Executive Order violates the Administrative Procedures Act ("APA") because the trial court found the Executive Order to be a rule of general application. Petitioner's misguided attempt to apply the APA to this case ignores the fact that the adoption of "rules" governing the employment relationship between the state employee and its represented employees, such as Petitioner's members, is governed by the Ralph C. Dills Act ["Dills Act"], Government Code section 3512, *et seq.*, not the APA.

Labor relations between the State and its employees are governed by the Dills Act. The purpose of the Dills Act includes, among other things, "to foster peaceful employer-employee relations" and "to promote full communication between the state and its employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between the state and public employee organizations." (Gov. Code. §3512.) The Dills Act provides that the terms and conditions of employment will be established through a good faith bargaining process. (See Gov. Code § 3517.) The rule making process established under the APA has no application whatsoever in this process.

In the present case, however, the State was excused from meeting and conferring in advance of imposing furloughs due to the emergency situation necessitating the furloughs. (Gov. Code § 3516.5, see also *Sonoma County Organization v. County of Sonoma* (*Sonoma County*) (1991) 1 Cal.App.4th 267.) Government Code section 3516.5 provides, in relevant part:

> *Except in cases of emergency* as provided in this section, the employer shall give reasonable written notice to each recognized employee organization affected by any law, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the employer, and shall give such recognized employee organizations the opportunity to meet and confer...
>
> In cases of emergency when the employer determines that a law, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the [employer] ... shall provide such notice and opportunity to meet and confer in good faith at the earliest practical time following the adoption of such law, rule, resolution, or regulation. (Emphasis added.)

In *Sonoma County*, the court interpreted the same language contained in Government Code section 3516.5, in the Meyers Milias Brown Act (MMBA) (Gov. Code § 3504.5). The court held a municipal employer was not required to bargain with the union before implementing a new work rule giving local supervisors authority to put employees on unpaid leave of absence in the wake of job actions by union members. The court held that irrespective of the county's possible managerial right to implement the new work rule, the county's *obligation to meet and confer*

was excused by an emergency. (Emphasis added; *Sonoma County*, *supra*, 1 Cal.App.4th at p. 274.)

The court further held that since the county had already determined there was an emergency, as reflected in the emergency ordinance, the burden shifted to the union to demonstrate there was not a bona fide emergency. (*Id.*, at p. 275-76, citing Evid. Code, § 663 - presumption that public officers have properly exercised their duties.) The California Supreme Court, approving the holding in *Sonoma County*, has held that courts review public employer declarations of an emergency under an abuse of discretion standard. (See *San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 652, 669.)

Here, the State of California faced an undeniable fiscal crisis of unprecedented dimension. On December 1, 2008, the Governor declared a fiscal emergency pursuant to Article VI, section 10, subdivision (f) of the California Constitution. (Exhibit J.). The Governor's declaration of fiscal emergency created a rebuttable presumption that an emergency in fact exists. (See *Sonoma County*, *supra*, 1 Cal.App.4th at p. 275-276 and Evid. Code, § 664.) The burden shifted to the Petitioner in the trial court to demonstrate there was not an emergency justifying the Governor's action. Petitioner failed to present any evidence demonstrating the absence of an emergency. Furthermore, Petitioner did not present any evidence to rebut the Governor's declaration of fiscal emergency.

The Governor's Executive Order made several findings specific to the extreme fiscal crisis. (See Exhibit K.) Specifically, the Executive Order states, "due to developments in the worldwide and national financial markets, and continuing weak performance in the California economy, there is an approximately $15 billion General Fund deficit for the 2008-09 fiscal year, which without effective action, is estimated to grow to a $42 billion General Fund budget shortfall over the

next 18 months" and that "without effective action to address the fiscal and cash crisis, the cash reserve in the State Treasury is estimated to be a negative $5 billion in March 2009." (*Id.*) The Executive Order further states that "it [is] likely that the State will miss payroll and other essential services payments at the beginning of 2009." (*Id.*) The State's recognized employee organizations, including Petitioner here, admitted that an unprecedented fiscal crisis existed. (See Exhibits G, H, and I.)

In addition, both the Department of Finance and the State Controller's Office agreed an unprecedented fiscal crisis existed. On December 19, 2008, the California State Controller, John Chiang, released a statement urging the Governor and Legislature to reach a resolution in order to prevent the State from running out of cash in late February. (Exhibit L.) On December 22, 2008, the State Controller sent a letter to the Governor and the Legislature, reiterating the severity of the fiscal crisis the State was facing, if no agreement on a solution was reached. (Exhibit M.) In this letter, Controller Chiang stated,

> [I]f current projections hold true, the State is less than seventy days from running out of cash. Worse, my office's analyses indicate there will be no shelter from the storm as the State's cash position will remain negative throughout the remainder of the fiscal year. As I indicated during the recent Legislative Budget Session, the failure of the Governor and the Legislature to quickly arrive at an agreement to responsibly address the State's $41 billion budget crisis would begin a cascading series of regrettable actions necessary to conserve the State's dwindling case reserves. (*Id.*)

On January 13, 2009, DOF Director Michael Genest issued a special report titled, "California at the Brink of Financial Disaster," detailing the State's financial crisis and the immediate harm that will be caused when the State runs out of cash. (Exhibit N.)

The Dills Act, specifically Government Code section 3516.5, grants the Governor the power to take measures to address such emergencies, which is precisely what the Governor did here by issuing the Executive Order. A requirement that the Governor go through the extended rule making process set out in the APA prior to issuing the Executive Order is directly contrary to the authority granted the Governor pursuant to section 3516.5 to expedite matters affecting labor relations in the face of an emergency. The APA is inapplicable here and does not serve as a basis for reversing the trial court's decision upholding the Governor's authority to issue the Executive Order.

5. Petitioner is Judicially Estopped From Arguing That PERB Had Exclusive Jurisdiction over the Matter.

Petitioner argues that "[o]nce the Court determined (however incorrectly) that is [sic] was necessary to delve into the terms of the MOU between the Union and the State – by finding no other constitutional or statutory defect invalidating the Executive Order – it necessarily should have deferred the matter to PERB's exclusive jurisdiction." (Petitioner's Petition for Writ of Supersedeas, p. 32.) Petitioner is judicially estopped from making this argument in that it is directly contrary to the position it took in the trial court.

In the trial court, Petitioner argued that because its "petition [in the trial court] does not expressly or impliedly allege conduct proscribed in the Dills Act, PERB does not have jurisdiction over this dispute." (Exhibit T, p. 10.) Petitioner further argued in the trial court that "jurisdiction in PERB cannot be created merely because a party contends that the Dills Act may be implicated in the resolution of a claim." (*Id.*) These arguments are directly contrary to the position Petitioner is now taking before this Court that PERB possessed exclusive jurisdiction over this case.

The fact that the jurisdictional arguments Petitioner makes in its Petition are in *direct contradiction* to the arguments it made at the trial court level means that Petitioner is barred from raising this argument under the principle of judicial estoppel. "Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181, *quoting Cleveland v. Policy Management Systems Corp.* (5th Cir. 1997) 120 F.3d 513, 517.) Under *Jackson v. County of Los Angeles,* judicial estoppel applies when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the positions are totally inconsistent and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Id.* at 183.) The *Jackson* test was specifically affirmed as the test for the application of judicial estoppel in 2006. (*Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1473.)

Under the *Jackson* test, Petitioner is barred from raising its jurisdictional argument by judicial estoppel. First, as amply described above, Petitioner has taken two distinctly different positions as to whether PERB has jurisdiction over the matter at hand. Second, both positions were taken in judicial or quasi-judicial proceedings. Third, Petitioner was successful in asserting its position at the trial court level. Fourth, these positions are totally inconsistent, as the trial court is unable to simultaneously have *and* not have jurisdiction over a dispute. Fifth, and last, there is no evidence that Petitioner's first position was taken as a result of ignorance, fraud or mistake. Therefore, Petitioner is judicially estopped

from raising the argument that PERB has exclusive jurisdiction over the matter at hand.

6. The Trial Court Correctly Determined that Petitioner's Claims of FLSA Violations Are Hypothetical and Speculative and Therefore, Not Ripe for Review.

Petitioner argues that the "Executive Order failed to adequately address the Controller's obligations to adhere to the Fair Labor Standards Act ("FLSA"). (29 U.S.C. § 201, *et seq.*)." (Petitioner's Petition for Writ of Supersedeas, pp. 37-38.) Petitioner argues the furloughs violate the FLSA with respect to exempt employees because the furlough results in impermissible deductions from exempt employees' salaries, thereby defeating the "salary basis test" for these employees and resulting in a permanent loss of their exempt status. (Petitioner's Petition for Writ of Supersedeas, p. 39) Petitioner also contends the Executive Order violates the FLSA because it does not provide a mechanism for payment of overtime for the work Petitioner believes will be necessary to provide the public services for which these exempt employees were hired. (Petitioner's Petition for Writ of Supersedeas, p. 40.)

Petitioner mischaracterizes the applicable FLSA regulations and bases its arguments on pure speculation that exempt employees will work overtime during a workweek in which they have been furloughed and not be properly compensated.

a. The FLSA Permits Budget-Related Furloughs of Exempt Employees of Public Agencies.

In 1992 the Department of Labor (DOL) issued FLSA regulations that modified the "salary basis test" as it applied to state and local governments. Included in the new regulations was Title 29 of the Code of Federal Regulations section 541.710[4]. Pursuant to section

[4] In 1992, this regulation was originally numbered Title 29 of the Code of Federal Regulations section 541.5d. The 1992 amendments were re-

541.710(b), exempt employees of a public agency "may be furloughed for budget-related reasons without affecting their exempt status, except for the workweek in which the furlough occurs". The intent of this new rule was to permit public sector employers facing financial difficulties from budget shortfalls to be empowered to make appropriate decisions on how best to implement furloughs without risking additional retroactive overtime liabilities and even higher potential deficits because of the furloughs. (57 Fed.Reg. 37,674-37,675 (Aug. 19, 1992).)

The State of California has been in an unprecedented fiscal crisis and in order to reduce the number of layoffs necessary to continue operation of state services, the Governor lawfully ordered the furlough of state employees two days per month, including those exempt under FLSA. Although these employees will lose their exempt status for the workweeks in which a furlough day occurs, these employees will continue to be exempt during the workweeks in which a furlough day is not taken and will remain exempt once the furlough period is completed in June of 2010. (29 C.F.R. § 541.710.)

Petitioner argues the primary effect of the loss of the exemption will be a significant amount of overtime compensation which might be owed to these otherwise exempt employees. They allege these exempt employees will necessarily have to work overtime to complete their assignments and fulfill their responsibilities. However, these claims are hypothetical, speculative and lacking any actual factual support. Petitioner cites to no evidence that any employee has actually been required to work overtime, and no evidence that the State employer has failed to pay for any earned overtime.

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numbered in 2004; however the 1992 version of Title 29 of the Code of Federal Regulations section 541.710 along with the DOL's reasons for its promulgation remain consistent with the 2004 version.

The potential for overtime liability only arises during the two workweeks per month in which the furlough day occurs. During the remaining workweeks, these employees continue to be exempt from the overtime provisions of the FLSA. Where an employee does in fact work overtime, during a workweek in which he has been furloughed, he or she will be compensated consistent with the FLSA. (See Exhibit S, ¶ 16.) Notwithstanding the temporary loss of the FLSA exemption, section 541.710(b) makes it explicitly clear that FLSA exempt employees may be furloughed by their state employer for budget-related reasons.

b. The "Self Directed Furlough Plan" Does Not Run Afoul to the Requirements of the FLSA.

Petitioner argues that there are certain kinds of furloughs that have employees accrue two furlough days to be taken when feasible, rather than taking off alternative Fridays, and that this type of furlough violates 29 C.F.R. section 778.106 because it requires certain employees to lose ten percent of their salary each month despite the fact the employee worked every day without being furloughed. (Petitioner's Petition for Writ of Supersedeas, p. 42.) However, Petitioner has grossly mischaracterized section 778.106. Section 778.106 deals exclusively with the payment of overtime compensation and establishes the general rule that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends. However, when the correct amount of overtime cannot be determined until some time after the regular pay day, the requirements of the Act will be satisfied if the employer pay the excess overtime compensation as soon as is practicable. (29 C.F.R. § 778.106.)

Petitioner argues that *Biggs v. Wilson* (9th Cir. 1993) 1 F.3d 1537 stands for the proposition that late payment of wages is the same as a failure to pay wages under the FLSA. (Petitioner's Petition for Writ of

Supersedeas, p. 42 – 43.) This case is inapposite as the State will continue to pay employees their wages consistent with federal and state law. Even with a reduction in the number of hours worked, no state employee will be paid wages that are inconsistent with the requirements of those laws. (See Exhibit R, ¶ 4.) Accordingly, the "Self Directed Furlough Plan" does not run afoul to section 778.106 or any other provision dealing with the minimum amount of wages required to be paid on an employee's regular pay day.

D. The Petition for Writ of Supersedeas Should Not Be Granted Because Petitioner Fails to Meet Its Burden of Showing Irreparable Harm or that the Balance of the Equities Weighs in Favor of Issuing the Requested Writ.

1. Petitioner Fails to Meet Its Burden of Proof That It Will Suffer Irreparable Injury If the Petition Is Not Granted.

As noted above, in a petition for writ of supersedeas the petitioner bears the burden of showing both that it will suffer irreparable injury if the writ of supersedeas is not granted and that respondent will not suffer irreparable harm if the requested writ *is* granted. (*Deepwell Homeowner's Protective Association, supra,* 239 Cal.App.2d at 65-67; *West Coast Home Improvement Company v. Contractor's State License Board of Department Professional and Vocational Standards* (1945) 68 Cal.App.2d 1, 6; *Mills v. County of Trinity* (1979) 98 Cal.App.3d 859, 861; *Nuckolls v. Bank of California, National Association, supra,* 7 Cal.2d 574, 578.) In this case, Petitioner fails entirely to meet its burden on this point. In fact, Petitioner makes no evidentiary showing that it will suffer irreparable harm if the furloughs are instituted while its appeal from the trial court's judgment is pending.

A writ of supersedeas is *only* granted when it "is reasonably necessary to protect appellant or plaintiff in error from irreparable or serious injury in case of a reversal, and it does not appear that appellant or

defendant in error will sustain irreparable or disproportionate injury in case of affirmance." (*Halsted v. First Savings Bank* (1916) 173 Cal. 605, 610; see also *California Table Grape Commission v. Bruno Dispoto* (1971) 14 Cal.App. 3d 314, 316; see also *Mills, supra,* 98 Cal.App.3d at 861.)

Petitioner cites *Goodall v. Brite* (1934) 1 Cal.2d 583, to attempt to bolster its argument that it would be irreparably harmed by the furloughs. (Petitioner's Petition for Writ of Supersedeas, p. 17.) However, in *Goodall*, defendants alleged that they were being harmed as a result of a hospital "chang[ing] their plans, policies and methods of conducting the hospital in such manner as to disrupt the organization thereof, reduce the staff of physicians, nurses and other employees, permit extensive [equipment] to remain idle, and deny the benefits of the hospital and its organization to many persons believed by Petitioners to be entitled to such benefits." (*Id.* at 585.) Petitioner audaciously states, "[h]ere, as in *Goodall,* not only do the same considerations apply, but they are greatly magnified. Hundreds of thousands of civil servants will suffer irreparable harm by the implementation of an unlawful executive order during the pendency of the appeal." (Petitioner's Petition for Writ of Supersedeas, p. 17.) However, in *Goodall,* the injury was, in fact, severe, pervasive, and irreparable whereas in this case it is not. Denying citizens hospital access cannot be repaired later. The use of extensive equipment cannot be recouped later. Any financial injury to Petitioner's members can be adequately addressed through available legal remedies. The two situations are not remotely analogous.

Irreparable injury is the type of injury that cannot be adequately compensated in damages. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1352.) Petitioner claims irreparable harm here based on its hyperbolic contention that employees, "will be deprived of a significant portion of their wages effective beginning February 1, 2009." (Petitioner's

Petition for Writ of Supersedeas, p. 5, ¶ 11.) However, losing wages cannot be considered irrevocable harm in this case because the loss of wages is a matter for which there is an adequate legal remedy. Petitioner then makes the exaggerated and speculative claim that employees will "incur the wrath of their creditors, suffer unmitigated decline in their credit ratings during a time of unprecedented pre-existing financial chaos, generate losses in their social security status, suffer impairments in meeting living expenses, and may, by the injunction's conversion of their FLSA status from "exempt" to "hourly" choose not to go to work because of the confusion from the arbitrary implementation of the furlough, wreaking havoc for the citizens of the state who rely on the regular employment of state civil servants." (Petitioner's Petition for Writ of Supersedeas, p. 18.) These claims by Petitioner are entirely speculative. Petitioner provides no specific example. Petitioner's overblown rhetoric does not *prove* irreparable harm. Merely making a doomsday list of terrible things that *might* occur does not constitute a showing of irreparable harm.

Petitioner claims that the "temporary conversion of 215,000 skilled state employees to volunteers will severely limit their purchasing power and severely change their consumption patterns and adversely impact and disrupt the state's economy." (Petitioner's Petition for Writ of Supersedeas, p.18.) This claim has no basis in fact. There is no basis for the claim that state workers will be "converted" to volunteers. State employees will remain state employees, and be paid for their hours of work. The *only* function of the furlough is to reduce employees' hours by 10 percent. Also, far from disrupting the state's economy, the furlough is a necessary spending reduction measure in order to preserve the State's currently fragile economy.

Petitioner has made no affirmative showing of irreparable harm, and therefore, its petition should be denied.

2. Respondents' Will Be Irreparably Injured If the Petition For Writ of Supersedeas Is Granted.

Petitioner states, "...the State can point to no irreparable harm that they will suffer if the writ of supersedeas and temporary stay are issued. If the Court permits and continues the status quo, the State will still, ultimately get its determination on the legal issues." (Petitioner's Petition for Writ of Supersedeas, p. 18.) Petitioner is incorrect. A writ of supersedeas that would irreparably harm Respondents' right should not be granted. (*Sacramento Newspaper Guild v. Sacramento County Board of Supervisors, supra,* 255 Cal.App.2d 51, 53; *Nuckolls v. Bank of California, National Association, supra,* 7 Cal.2d 574, 578.) If Petitioner's petition is granted, the furloughs will be stayed until the appellate case can be heard, which could take months. During those months, employees will return to their duties on furlough days and the corresponding cost savings to the State will have been lost. The savings to the General Fund from the furlough plan is estimated at $75,075,787 per month. (Exhibit P., ¶ 7.) If this money is paid to state employees, and the furloughs are upheld, the State cannot get the money back from the state employees, no matter if the legal issues are determined in the State's favor. If the trial court's decision upholding the Governor's right to furlough state employees is stayed pending appeal, it would impair the State's ability to achieve spending reductions of approximately $75 million a month.

Petitioner cites *Food & Grocery Bureau v. Garfield* (1941) 18 Cal.2d 174, for the proposition that a writ of supersedeas should be granted when the respondent is not directly injured by the grant. However, *Food & Grocery Bureau* is inapplicable here because, as demonstrated, Respondent will be irreparably injured by a grant of the writ of supersedeas.

Petitioner's petition for writ of supersedeas should not be granted because Petitioner fails to meet its burden to show irreparable

injury without the stay. Furthermore, even if Petitioner had *attempted* to make a showing of irreparable injury, it would have been unsuccessful, as any damages that Petitioner sustains during the pendency of the appeal can be rectified by the payment of damages. Lastly, the writ of supersedeas should not issue because Respondents would be substantially impaired by its issuance.

V.

CONCLUSION

Petitioner has not met its burden to prove that there is a substantial probability that the trial court erred and there will be a successful appeal in this case. Furthermore, Petitioner has not met its burden of proving that it would suffer irreparable injury if the petition was not granted. The State of California has been facing an unprecedented fiscal crisis that required unprecedented actions in order to ensure the continuing financial solvency of the State. The continuation of the trial court's order upholding the Governor's Executive Order furloughing state employees is necessary for California's fiscal well being. It is imperative that the trial court's order, and Governor Schwarzenegger's Executive Order, be allowed to continue during the pendency of the appeal. If the furloughs are stayed, the State will be deprived of millions of dollars of needed savings.

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Accordingly, for the foregoing reasons, Respondents respectfully request that this Court deny the petition for writ of supersedeas.

Dated: February 23, 2009

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Law Corporation

By: _____
David W. Tyra,
Attorneys for Defendants/Respondents
GOVERNOR ARNOLD SCHWARZENEGGER and
DEPARTMENT OF PERSONNEL ADMINISTRATION

CERTIFICATE OF WORD COUNT

I, David W. Tyra, Attorney for Defendants/Respondents GOVERNOR ARNOLD SCHWARZENEGGER and DEPARTMENT OF PERSONNEL ADMINISTRATION, hereby certify that the number of words in Defendants/Respondents' Opposition to Petition for Writ of Supersedeas and Emergency Temporary Stay equals 9,908 words, as per the word count feature in Microsoft Word.

Dated: February 23, 2009

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Law Corporation

By: _____
David W. Tyra,
Attorneys for Defendants/Respondents
GOVERNOR ARNOLD SCHWARZENEGGER and
DEPARTMENT OF PERSONNEL ADMINISTRATION

PROOF OF SERVICE

I, May Marlowe, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 400 Capitol Mall, 27th Floor, Sacramento, CA 95814-4416. On February 23, 2009, I served the within documents:

OPPOSITION TO PETITION FOR WRIT OF SUPERSEDEAS OR OTHER APPROPRIATE STAY ORDER/REQUEST FOR TEMPORARY STAY ON APPEAL

☐ by transmitting via facsimile from (916) 321-4555 the above listed document(s) without error to the fax number(s) set forth below on this date before 5:00 p.m. A copy of the transmittal/confirmation sheet is attached.

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below.

☒ by causing personal delivery by Messenger of the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.

☐ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

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Sacramento County Superior Court
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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the 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.

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

Executed on February 23, 2009, at Sacramento, California.

May Marlowe
May Marlowe