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June 23, 2010

VIA HAND DELIVERY

Honorable Chief Justice Ronald M. George
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: S183411 - *Professional Engineers in California Government v. Schwarzenegger*
California Attorneys, etc. v. Schwarzenegger
Service Employees International Union, Local 1000 v. Schwarzenegger

To the Honorable Chief Justice and the Associate Justices
of the California Supreme Court:

Defendant and appellant John Chiang respectfully provides the following additional briefing in response to the Court's order dated June 9, 2010 and the Clerk's request dated June 15, 2010:

1. What effect, if any, does Government Code section 19996.22 – which provides in part that "[a]ny employee . . . who has been required, by the appointing power, . . . to involuntarily reduce his or her worktime contrary to the intent of this article . . . may file a grievance with the department" – have on the validity of the Governor's executive order instituting a mandatory furlough on state employees?

Section 19996.22 confirms that the Governor's furlough orders are invalid. It demonstrates the Legislature's clear intent that (1) any deviation from the legislatively prescribed 40-hour workweek must also be legislatively prescribed, and (2) under current law, deviations below the 40-hour workweek cannot be imposed on workers against their will.

As the Controller has described in other briefs, section 19851 of the Government Code establishes the 40-hour workweek as the policy of the State. (Appellant State Controller's Opening Br. at 17-24; Appellant State Controller's Reply Br. at 2-9; Supplemental Letter Br. at 1-4; Supplemental Letter Reply Br. at 1-7.) The Governor and the Department of Personnel Administration ("DPA") can increase that workweek "to meet the varying needs of the different state agencies," but they can only decrease those hours under conditions set by the Legislature in other statutes, each of which requires the affirmative consent of state workers. Thus, under section 3517.6(a) of the Government Code, the Governor may seek consent for the reduced workweeks of represented employees through collective bargaining. (*See generally* Supplemental Letter Br. at 6 [discussing the fact that MOUs may supersede section 19851].) Similarly, under the Reduced Worktime Act, which contains section 19996.22, the Governor may seek consent for reduced workweeks from the individual workers themselves. (Gov. Code, §§ 19996.19 et seq.)

The Governor has argued that the provisions of the Reduced Worktime Act "demonstrate the Governor's inherent authority as the state employer to establish varying schedules for state employees." (Respondents' Combined Br. in Resp. to Opening Brs. at 26.) The argument defies plain English and common sense. It is impossible to read the Reduced Worktime Act without understanding that a worker's voluntary consent is an essential prerequisite to any worktime reduction. The Act is replete with references to voluntary arrangements, but it is silent about authorizing any other kind of arrangement. (*See, e.g.*, Gov. Code, §§ 19996.19(a)(5), (6) & (8); 19996.19(b)(3), (5) & (6); 19996.21; 19996.24.) Indeed, "reduced worktime" is defined to include only those arrangements that are "consistent with maximum employment opportunity to employees *desiring* other than a standard worktime." (*Id.*, § 19996.20, emphasis added.) Most compellingly, the Legislature gave employees the right to file a grievance if any employee is forced to "involuntarily reduce his or her worktime contrary to the intent of this article." (*Id.*, § 19996.22(a).) The Governor cannot claim the right to do something the Legislature has classified as an offense justifying the filing of a grievance. A "grievance," after all, is "[a]n injury, injustice, or wrong that gives ground for a complaint." (Black's Law Dict. (7th ed., abridged 2000) p. 563, col. 1.) It should go without saying that the Governor does not have the "inherent authority" to injure state workers, subject them to injustices, or commit wrongs against them.

The only remaining question, then, is whether section 19996.22 affects the remedies available to those who have been forced to "involuntarily reduce" their worktime contrary to the intent of the Reduced Worktime Act. The answer is yes, but that effect is limited. While an injured employee "*may* file a grievance with the department" concerning the imposition of an involuntary furlough (Gov. Code, § 19996.22(a), emphasis added), that worker need not do so before pursuing other remedies, particularly under these circumstances. It is well established that there is no

need to exhaust administrative remedies when it is clear that pursuing those administrative remedies would be futile. (*See, e.g., Twain Harte Associates, Ltd. v. County of Tuolumne* (1990) 217 Cal.App.3d 71, 89-90.) In particular, there is no need to exhaust administrative remedies "when the aggrieved party can positively state what the administrative agency's decision in his particular case would be." (*Ogo Associates v. City of Torrance* (1974) 37 Cal.App.3d 830, 834 [exhaustion of administrative remedies was unnecessary where it would have been futile to require plaintiff to apply for variance from zoning regulation when plaintiffs' own project had led to the disputed zoning].) That is plainly the case here, where section 19996.22 requires employees to file grievances with the DPA, the very agency that has been ordered by the Governor to "adopt a plan to implement a furlough of represented state employees . . ." (CASE JA 347, 350.)

Furthermore, in this case, the imposition of an exhaustion requirement would do more than force a single futile act. It would force approximately 210,000 futile acts, as each of the 210,000 or so state workers who has been furloughed files their grievances with the DPA. Such a large scale and costly bureaucratic exercise would make no sense under the best of circumstances, let alone as a response to a workforce-trimming measure taken to address a dire budget shortfall.

In short, the fact that the Reduced Worktime Act prohibits unilateral worktime reductions by the Governor underscores the illegality of the Governor's furlough program.

2. 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 (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 2, § 36 (SBX3 2, § 36), passed by the Legislature and approved by the Governor on Feb. 20, 2009) have on (1) the validity of the Governor's executive order, and/or (2) the remedy, if any, to which the petitioning labor organizations may be entitled in these actions?

At its core, this case is about the separation of powers and whether the executive branch has the authority to implement unilateral furloughs across the state workforce without legislative approval. A related issue which flows from that question is how the Legislature has responded to the Governor's assertion of authority over this traditional area of legislative power. As this Court has noted, the Legislature included a provision in the revised 2008 Budget Act that reduces the appropriation for employee compensation in an amount comparable to the savings the Governor sought to achieve through furloughs. The questions presented are whether this reduced appropriation has any effect on the validity of the Governor's executive order or the remedies available to the furloughed workers.

The answer to the first question is yes. Like Government Code section 19996.22, section 3.90 of the 2008 Budget Act confirms the *invalidity* of the Governor's executive order because the plain language of the Budget Act requires the Governor to achieve the required savings within the framework of existing law. The reduced appropriations in section 3.90 must be considered alongside the Legislature's directives about the reductions:

> Sec. 3.90. (a) Notwithstanding any other provision of this act, each item of appropriation in this act, . . . shall be reduced, as appropriate, to reflect a reduction in employee compensation achieved through the collective bargaining process for represented employees or through existing administration authority and a proportionate reduction for nonrepresented employees (utilizing existing authority of the administration to adjust compensation for nonrepresented employees) in the total amounts of $385,762,000 from General Fund items and $285,196,000 from items relating to other funds. It is the intent of the Legislature that General Fund savings of $1,024,326,000 and other fund savings of $688,375,000 in the 2009-10 fiscal year shall be achieved in the same manner described above. . . .
>
> (b) The Department of Personnel Administration shall transmit proposed memoranda of understanding to the Legislature promptly and shall include with each such transmission estimated savings pursuant to this section of each agreement.
>
> (c) Nothing in this section shall change or supersede the provisions of the Ralph C. Dills Act (Chapter 10.3 (commencing with Section 3512) of Division 4 of Title 1 of the Government Code).
>
> (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 2, § 36 [SBX3 2, § 36].)[1]

As this text reveals, the Legislature not only failed to authorize the Governor's furloughs, it affirmatively required him to negotiate reductions with

[1] The full text is set forth at page 31 of Exhibit C of Appellant State Controller's Request for Judicial Notice, filed on July 21, 2009 in the Court below.

represented employees and to achieve reductions for unrepresented employees "through existing administration authority . . . ." (*Id.*) It reinforced that directive by requiring DPA to "transmit proposed memoranda of understanding to the Legislature promptly" and to "include with each such transmission estimated savings pursuant to this section of each agreement." (*Id.*) Achieving reductions "through the collective bargaining process" is the very antithesis of a unilateral furlough program.

Nor was there any "existing administration authority" to impose furloughs on unrepresented employees. In *Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, which involved a similar budget crisis and section 3.90 of the 1991-92 Budget Act, the Court of Appeal described the scope of the "existing administration authority" to which section 3.90 referred:

> There are limited means by which employee compensation can be reduced so as to stay within employee compensation budget allotments. The available means fall into the broad categories of reducing the size of the work force, reducing the compensation payable on a per-employee basis, or some combination thereof.
>
> (*Id.* at 1324.)

Thus, the administration's authority to reduce the work force can be found in Government Code section 19997, which provides:

> Whenever it is necessary because of lack of work or funds, or whenever it is advisable in the interests of economy, to reduce the staff of any state agency, the appointing power may lay off employees pursuant to this article and department rule. All layoff provisions and procedures established or agreed to under this article shall be subject to State Personnel Board review pursuant to Section 19816.2.

The administration's authority to reduce salary ranges for unrepresented employees can be found in Government Code section 19826, subdivision (a), which provides:

> The department shall establish and adjust salary ranges for each class of position in the state civil service subject to any merit limits contained in Article VII of the California Constitution. The salary range shall be based on the principle that like salaries shall be paid for comparable duties and

> responsibilities. In establishing or changing these ranges, consideration shall be given to the prevailing rates for comparable service in other public employment and in private business. The department shall make no adjustments that require expenditures in excess of existing appropriations that may be used for salary increase purposes. The department may make a change in salary range retroactive to the date of application of this change.[2]

In addition to sections 19997 and 19826, the administration can reduce costs by imposing a hiring freeze and eliminating positions through attrition. And, as demonstrated above, it can *request* employees to take voluntary reductions in their hours of work, but it cannot require them to do so.

Even if section 3.90 could be read to give the Governor substantive authority to impose furloughs, the Legislature could not have done so as part of the Budget Act without violating the single subject rule. Under article IV, section 9 of the Constitution, "[a] statute shall embrace but one subject," and the case law is clear that the Budget Act cannot be used to make substantive changes in existing law. (*Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1101, fn. 23; *Planned Parenthood Affiliates v. Swoap* (1985) 173 Cal.App.3d 1187, 1199, citing *Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 394 and 64 Ops.Cal.Atty.Gen. 910, 917 (1981).) More specifically, the single subject rule prohibits the Legislature from using "the Budget Act to expressly or impliedly amend or repeal existing substantive statutes." (*Cal. Labor Federation, AFL-CIO v. Occupational Safety & Health Stds. Bd.* (1992) 5 Cal.App.4th 985, 990 [Legislature may not cap fee awards through the Budget Act].) Thus, even if the Legislature had sought to authorize furloughs in the Budget Act (it did not), the attempt would have been void due to its violation of the single subject rule.

In addition, even if section 3.90 could be read to authorize involuntary furloughs, such a reading must overcome the well-settled rule that disfavors implied repeals. As discussed above and in the Controller's other briefs, Government Code sections 19851, 19996.22, 11020 and, for represented employees, section 19826, all prevent the Governor from imposing involuntary furloughs of the sort that have occurred

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[2] By contrast, subdivision (b) of section 19826 prohibits DPA from adjusting or even recommending adjustments to salary ranges for represented employees:
"(b) 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."

here. Those sections have not been expressly repealed by section 3.90 or any other statute, and their implied repeal is strongly disfavored. (*Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557, 573, citations omitted.)

The doctrine of implied repeal only applies where there is no rational basis for harmonizing two potentially conflicting statutes that are irreconcilable and inconsistent. (*Schatz v. Allen Matkins Leck Gamble & Mallory LLP*, 45 Cal.4th at 573.) """In order for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first."""" (*Id.*, quoting *Prof. Engineers in Cal. Gov. v. Kempton* (2007) 40 Cal.4th 1016, 1038, added italics omitted.) Thus, "Courts 'will infer the repeal of a statute only when . . . a subsequent act of the legislature clearly is intended to occupy the entire field covered by a prior enactment.'" (*Id.* at 573-574, quoting Sutherland, Statutory Construction (6th ed. 2002) § 23.9, p. 461.) Under this standard, a vague reference to the Governor's "existing authority" to reduce nonrepresented employee compensation is not sufficient to infer that the Legislature sought to repeal anything by implication.

Furthermore, "[t]he doctrine disfavoring repeals by implication 'applies with full vigor when . . . the subsequent legislation is an appropriations measure.'" (*Tenn. Valley Authority v. Hill* (1978) 437 U.S. 153, 190, quoting *Com. for Nuclear Responsibility v. Seaborg* (D.C. Cir. 1971) 463 F.2d 783, 785, original emphasis omitted [repeated appropriations made for dam did not repeal Endangered Species Act's protection of habitat affected by the building of the dam].) Indeed, "the policy applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act." (*Id.*, emphasis in original; *see also Robertson v. Seattle Audubon Society* (1992) 503 U.S. 429, 440, citations omitted ["[A]lthough repeals by implication are especially disfavored in the appropriations context, [citation], Congress nonetheless may amend substantive law in an appropriations statute, as long as it does so clearly."].) Accordingly, any attempt to interpret the Legislature's explanatory language in the revised Budget Act as an implied repeal must fail.

Turning to the remedy question, it is important to note as a threshold matter that the parties' briefing has focused almost exclusively on the validity of the Governor's furlough program, and not on the availability of any particular remedy. Absent subsequent legislation, section 3.90's reductions are binding not only on the Governor and DPA, but on the Controller, who cannot issue any warrant "unless authorized by law, and unless . . . unexhausted specific appropriations provided by law are available to meet it." (Gov. Code, § 12440.) The Controller therefore respectfully suggests that this Court resolve the pressing question of the legality of the furlough program and remand any remaining questions concerning remedies for further briefing in the courts below.

3. Were the documents set forth in the Joint Appendix in *California Attorneys, etc. v. Schwarzenegger* at pages 311-324 included in any bill or bills that formally were introduced in the Legislature? If so, what is the bill number or bill numbers? If not, were the documents included in any material that the Governor submitted or provided to the Legislature?

The Governor, through the Department of Finance, submitted the proposed legislation set forth at pages 311-324 of the Joint Appendix in *California Attorneys, etc. v. Schwarzenegger* to the Legislature on or around December 1, 2008 during the 2008-09 December Special Session. (*See* Declaration of Craig Cornett, ¶ 2 & Exhs. A & B.) The Controller has been unable, however, to find any indication that this proposed legislation was ever enacted or taken up by the Legislature. (*See, e.g.*, Cornett Decl., ¶ 3.)

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to the within cause or action. My business address is 201 Dolores Avenue, San Leandro, CA 94577.

On June 23, 2010, I served a true copy of the following document(s):

Supplemental Letter Brief in Response to Court's Order Dated June 9, 2010 and Clerk's Request Dated June 15, 2010

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I declare, under penalty of perjury, that the foregoing is true and correct. Executed on June 23, 2010, in San Leandro, California.

Michael Narciso

(00114869.5)