REMCHO, JOHANSEN & PURCELL, LLP
ATTORNEYS AT LAW

201 DOLORES AVENUE
SAN LEANDRO, CA 94577
PHONE: (510) 346-6200
FAX: (510) 346-6201
EMAIL: mprinzing@rjp.com
WEBSITE: www.rjp.com

SACRAMENTO PHONE: (916) 264-1818

Joseph Remcho (1944-2003)
Robin B. Johansen
Kathleen J. Purcell (Ret.)
James C. Harrison
Thomas A. Willis
Karen Getman
Margaret R. Prinzing
Kari Krogseng

April 22, 2010

VIA HAND DELIVERY

Clerk of the Court
Court of Appeal, Third Appellate District
621 Capitol Mall, 10th Floor
Sacramento, CA 95814

Re: *Professional Engineers in California Government, et al. v. John Chiang, as State Controller, etc.; Arnold Schwarzenegger, as Governor, etc., et al.*, No. C061011

Dear Clerk of the Court:

Pursuant to the Court's order dated January 29, 2010, defendant and appellant John Chiang respectfully submits his supplemental reply brief in response to the Court's questions.

1. Whether the legislative history of Government Code section 19851 indicates that the Legislature intended to allow workweeks of less than 40 hours.

The Governor argues that section 19851's phrase "a different number of hours" gives the Governor discretion to establish workweeks that are both greater and less than 40 hours. (Governor's Supp. Letter Br. at 5.)[1] As described in previous briefs, if viewed in isolation, the phrase "a different number of hours" could mean more than

[1] Unless otherwise noted, all citations to the papers in this case are to the papers filed in *Professional Engineers in California Government, et al. v. Arnold Schwarzenegger, et al.*, No. C061011.

40 hours, less than 40 hours, or it could mean both. (*See, e.g.*, Controller's Opening Supp. Letter Br. at 1.) Yet the phrase's statutory context and legislative history make clear that it means only more than 40 hours, because the Legislature never intended to permit the Governor to force workers to work less than full-time for less than full-time pay. The Governor's arguments to the contrary are not persuasive.

First, the Governor argues that the "plain meaning" of the phrase "a different number of hours" includes workweeks of less than 40 hours. In fact, although the word "different" in this context *can* mean less than 40, it does not necessarily embrace that meaning. Had the Legislature chosen an unambiguous phrase such as "a reduced number of hours," there could be no mistaking its intent. The same cannot be said for the words actually chosen by the Legislature. Accordingly, nothing in the phrase "a different number of hours" plainly leads to the Governor's interpretation.

Second, the rest of section 19851 contradicts the Governor's interpretation. Although other provisions of section 19851 refer to overtime, and so expressly contemplate workweeks of more than 40 hours, no provision refers to workweeks of less than 40 hours. Thus, the textual evidence demonstrates that the Legislature contemplated longer workweeks, while providing no indication that it contemplated shorter workweeks. The meaning of "different" in this context is, at best, ambiguous.

The Governor wrongly claims that the Controller's interpretation of section 19851 renders some of that section's language "surplusage." (Governor's Supp. Letter Br. at 4-5.) Specifically, the Governor suggests that the Controller, by reading the first sentence to authorize only workweeks of more than 40 hours, renders that language "mere surplusage in light of the last sentence," which allows overtime under certain circumstances. (*Id.* at 4.) The Governor misreads section 19851.

The relevant subdivision – (a) – addresses two distinct aspects of the State's overtime policy. The first sentence addresses how many hours constitute the "regular" workweek, while the second and third sentences address the extent to which the employer may demand that workers work hours in excess of that regular workweek.[2] The

[2] Section 19851(a) provides that:

> It is the policy of the state that the workweek of the state employee shall be 40 hours, and the workday of state employees 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. It is the policy of the state to avoid the necessity for overtime

(continued . . .)

Controller has never suggested that the first sentence relates to overtime, which is required on an ad hoc, as-needed basis. That sentence relates to whether the State has the authority to set shorter, "regular" workweeks for state workers. The Controller's interpretation leaves no surplusage.

The Governor relies on the word "policy" in section 19851, which he believes he is free to ignore, as distinguished from a mandate, which he may be more inclined to follow. (Governor's Supp. Letter Br. at 3, 9.) The Governor cites no case law granting him the authority to flout legislative "policy," which is no surprise, given that legislative policy *is* the law. (*See* Controller's Reply Br. at 6-7 and cases cited therein.) Nor does the Governor even try to justify his actions under his own interpretation of the significance of "policy." If the Legislature has declared the 40-hour workweek to be one of the "general principles by which" the State of California is to be "guided in its management," how can the Governor flatly ignore that principle for a full 18-month period?

The Governor also relies on his "discretion" to implement section 19851. (Governor's Supp. Letter Br. at 5.) But no member of the executive branch has the "discretion" to violate statutes, as the Governor has done here. Under section 19851(a), the Governor may depart from the established 40-hour workweek only "to meet the varying needs of the different state agencies." For all of the reasons already set forth by the Controller,[3] that phrase simply does not authorize the repeal of the 40-hour workweek rule in favor of an entirely different rule that applies to every state employee under the Governor's control. Simply put, administrative actions that violate statutory duties "are void and no protestations that they are merely an exercise of administrative discretion can sanctify them." (*Hunt v. Superior Ct.* (1999) 21 Cal.4th 984, 991, citations and internal quotations omitted.)

Third, the legislative history of section 19851 contradicts the Governor's interpretation. The Governor ignores the absence of any indication that anyone considered permitting workweeks of less than 40 hours throughout section 19851's half-century of legislative history. He also ignores the fact that time and again throughout that

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> work whenever possible. This policy does not restrict the extension of regular working-hour schedules on an overtime basis in those activities and agencies where it is necessary to carry on the state business properly during a manpower shortage.

[3] *See* Controller's Reply Br. at 3-8.

history, legislative and executive branch officials referred to the possibility of workweeks exceeding 40 hours. (Controller's Opening Supp. Letter Br. at 2-4.) Accordingly, the only evidence of what "a different number of hours" means is that the Legislature intended to authorize longer workweeks.

The Governor's own discussion of the legislative history reinforces the point, however inadvertently. He argues that "the original reason" for establishing a workweek with a fixed number of hours "was to establish a method for calculating overtime and not for the purpose of establishing a minimum workweek as Appellant and the Controller contend." (Governor's Supp. Letter Br. at 9.) This is partially correct. The 40-hour workweek *was* established to regulate overtime compensation, but it was established without any mention of workweeks of less than 40 hours.

Importantly, the Attorney General has interpreted the 40-hour workweek as a minimum workweek. In 1960, the Attorney General was asked whether state agencies had the "prerogative . . . to fix the workday hours of departmental employees, provided the required forty-hour minimum work week is observed[.]" (35 Ops.Cal.Atty.Gen. 239, 239 (1960).) The Attorney General answered the question in the affirmative. Citing Government Code sections 18020 and 18021, along with the State Personnel Board's rule-making authority over the "days, hours, and conditions of work" of state employees, the Attorney General concluded that:

> [I]t is within the prerogative of the head of the department to fix within reasonable bounds the workday hours of departmental employees, *provided the required forty-hour minimum work week is observed.*
>
> (*Id.* at 240, emphasis added.)

The Governor also argues that establishing "work hours for state employees has been at all times a matter entrusted to the state employer" rather than the Legislature, and that the relevant statutory language has evolved over time to give the state employer greater "flexibility" to establish the workweeks of state employees. (Governor's Supp. Letter Br. at 9, 10.) This is contrary to the facts. The Legislature has always reserved to itself the authority to set "normal" or "regular" workweeks. Prior to 1955, it set most workweeks at 40, 44, or 48 hours, and today it sets most workweeks at 40 hours. (Governor's RJN, Exh. 3; Gov. Code, § 19851.) The State employer has only limited authority to set exceptions, under circumstances prescribed by the Legislature.

The Governor's "flexibility" argument is largely based on two out-of-context quotes.[4] The first is drawn from correspondence sent to the Governor's Legislative Secretary in 1947.[5] The Governor uses the quote to suggest that the 1947 amendments provided the Personnel Board with the "'complete flexibility'" to reduce the workweeks of State employees. (Governor's Supp. Letter Br. at 10.) The letter and legislation themselves reveal otherwise. According to the letter:

> The California State Employees' Association caused legislation to be introduced . . . by which the forty hour week could be established for all employees where comparable work in other public agencies and private employment is already established on a forty hour week basis . . . [A] large number of State employees are working a number of hours in excess of the prevailing practices for like work.
>
> (Governor's RJN, Exh. 4.)

In other words, this individual believed that employee workweeks would need to be reduced, but only as necessary to prevent workers from being forced to work more than 40 hours without compensating overtime pay, not to force workers to work less than full-time at less than full-time pay.

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[4] The Governor also suggests that the 1947 amendments "dropped" the "concept of a 'normal' work week" and deleted the "nexus between an established work week and the calculation of overtime compensation." (Governor's Supp. Letter Br. at 10.) Although the Legislature did delete the word "normal," the characterization is inaccurate. Far from providing more flexibility, the amendments demonstrate the Legislature's intent to limit the Governor's discretion when it comes to setting employee workweeks. The term "normal" contemplates other types of workweeks that are exceptions to the "normal" rule. By dropping the word "normal" and leaving the requirement that the State Personnel Board "shall establish" the workweek "by allocating . . . each class or position to one of the following groups," all of which required workweeks of 40 hours or more, the Legislature established the 40-hour workweek as the minimum, not the "normal" workweek.

[5] The quoted passage is not from the letter itself, but seems to be drawn from an enclosure that was allegedly "used in presenting the bill on the floor of the Senate and Assembly." (Governor's RJN, Exh. 4 at PE-3.) It is unclear who wrote this document, let alone whether and when it was seen by any member of the Legislature voting on the measure. The Controller objects to the use of this unauthenticated document.

As for the legislation itself, it allowed the Board to do no more than sort state employees into one of four groups: those with (1) 40-hour workweeks; (2) 44-hour workweeks; (3) 48-hour workweeks; or (4) "unusual conditions or hours of work requiring . . . special provisions governing hours of work . . ." (Governor's RJN, Exh. 3.) There is no mention of forcing workers to work less than 40 hours.

The second quote is taken from a 1955 letter to the Governor from a Deputy Attorney General. According to the Governor, the Deputy Attorney General states that the amendment was intended to give "'broader work week classification authority to the Board.'" (Governor's Supp. Letter Br. at 12.) In fact, the letter describes a single example of the Board's new classification authority relating only to workers working under "unusual conditions" that require workweeks other than the 40, 44, or 48-hour workweeks generally proscribed by the Legislature. (Governor's RJN, Exh. 3.) With respect to that category of workers, the Deputy Attorney General explained that:

> [S]ome question has been raised as to the authority of the State Personnel Board to place higher paid managerial and journeymen employees in this work week group on the basis of higher salary alone, without any other "unusual" conditions. To obviate this, and probably other objections, these amendments are made by this bill.
>
> (*Id.*, Exh. 6.)

In other words, the Board's flexibility was limited to working within the categories proscribed by the Legislature. Today, the Legislature has defined two categories: workweeks of 40 hours and workweeks "of a different number of hours" needed to "meet the varying needs of the different state agencies." The Governor does not have the "flexibility" to ignore those categories.

Ultimately, the greatest weakness in the Governor's argument is his inability to square his interpretation with the fundamental rule of statutory construction that the "first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386.) The Governor has not even tried to explain how section 19851 can be interpreted to authorize a result the Legislature never even contemplated.

This point bears careful consideration. Although the Legislature is not expected to anticipate every possible application of every statute it enacts, the Legislature does anticipate and intend that its statutory enactments will accomplish specific goals and purposes. To twist the words inserted into those statutes to accomplish goals and

purposes entirely separate from those contemplated by the Legislature turns the rules of statutory construction on their head and violates the principle of the separation of powers.

We know beyond question that section 19851 evolved over time to establish a regular workweek of 40 hours for state employees – rather than 44 or 48 – and to provide state workers with the right to receive overtime pay when required to work a greater number of hours. The Governor wants to stretch that statutory language to justify a policy that forces all state workers to work less than full-time hours at less than full-time pay. The policy implications of the former policy, endorsed by the Legislature, have virtually nothing to do with the policy implications of the latter policy. Section 19851 simply does not allow the Governor to distort legislative intent.

2. Whether the DPA and a recognized bargaining unit may agree to include an involuntary furlough provision in an MOU.

The parties all agree that the DPA and a recognized bargaining unit may agree to include involuntary furlough provisions in their MOUs. The Governor is wrong, however, that the employees represented by PECG, CAPS, SEIU and CASE have agreed to any such thing, as described in the briefs of those appellants.

The Governor is also wrong to ignore the legislative mandates that constrain the content of MOUs. As previously described by the Controller, the provisions of MOUs must either be consistent with the state law in place at the time of the agreement, or receive the approval of the Legislature. (Controller's Opening Supp. Letter Br. at 5-7.)

There can be no doubt that the Governor's involuntary furlough provision conflicts with Government Code section 11020(a), which generally requires that "all offices of every state agency shall be kept open for the transaction of business from 8 a.m. until 5 p.m. of each day from Monday to Friday." In 1939, the California Attorney General issued an opinion letter relating to section 1030 of the Political Code, from which section 11020 derives. (Controller's Second Supp. Req. for Judicial Notice, Exh. 1.) Section 1030 required state offices to remain "open for the transaction of business from nine o'clock A.M. until five o'clock P.M. . . . other than legal holidays." (*Id.* at 1.) At that time, in addition to being open Monday through Friday, state offices were open on Saturday mornings, because those hours were not considered a holiday. (*Id.* at 1-2.) The administrator of a state agency asked the Attorney General if his employees could "work their prescribed hours during the first five days of each week in order that Saturday mornings may be taken off." The Attorney General said no:

> Such a procedure . . . would violate the provisions of the Political Code above mentioned. We are therefore of the opinion that offices must be kept open five and one-half days each week and that a skeleton crew on Saturday mornings would not answer this purpose. If such a change is desired, it should be accomplished by legislation and not by a strained construction of said provisions of the Political Code.
>
> (*Id.* at 2.)

For the same reasons, section 11020 forecloses the Governor's furloughs. Accordingly, the Governor and a union would have to seek legislative approval of this aspect of an involuntary furlough program before implementing it as part of an MOU.

3. Whether Government Code section 3516.5 gives the Governor the authority to impose involuntary furloughs on represented state employees during an emergency.

As described in the Controller's Opening Supplemental Letter Brief, section 3516.5 does not give the Governor the authority to impose involuntary furloughs on represented employees during an emergency. (Controller's Opening Supp. Letter Br. at 7-9.) The Governor agrees. He concedes that "Government Code section 3516.5 does not provide the Governor with any new substantive authority. . ." (Governor's Supp. Letter Br. at 21.) This brings all parties into agreement on this crucial point.[6]

The Governor nevertheless tries to avoid the consequences of that admission by cobbling together a new theory about the source of his substantive power to impose involuntary furloughs. Turning to two provisions of the Government Code virtually ignored elsewhere in the parties' briefs, the Governor claims that his power derives from reading section 3516.5 in conjunction with sections 3516 and 19816.10 of the Government Code. Taken together, he argues, these provisions empower him to unilaterally impose *any* rule on state workers in an emergency, as long as that rule falls within the scope of representation. (Governor's Supp. Letter Br. at 18-19.) These statutes do no such thing.

Section 3516 merely affirms that the scope of representation includes "wages, hours, and other terms and conditions of employment" and excludes "consideration of the merits, necessity, or organization of any service or activity provided

[6] *See* CASE's Supp. Letter Br. at 7; PECG's Supp. Letter Br. at 7; SEIU's Supp. Letter Br. at 14.

by law or executive order." Nothing in section 3516 gives the Governor any new substantive authority, or any new authority to take unilateral action over issues within the scope of representation. Because all parties already agree that furloughs are within the scope of representation, section 3516 does nothing to resolve the issues in this appeal.

Section 19816.10 merely provides that "the department may provide by rule for days, hours and conditions of work . . ."[7] In other words, the statute just refers to the process (rulemaking) through which the Department can exercise its regulatory functions, without conferring new substantive authority on the Governor. Because the Department does not have the statutory authority to enact involuntary furloughs in the first place, section 19816.10 adds nothing to the Governor's argument. Furthermore, the State could not promulgate a rule pursuant to section 19816.10 that conflicted with other statutes. (*See Agricultural Labor Relations Bd. v. Superior Ct.* (1976) 16 Cal.3d 392, 419 [no agency may adopt a regulation that conflicts with a statute passed by the Legislature].) Because involuntary furloughs do conflict with other statutes, such as Government Code sections 19851 and 11020, any such regulation would be void.

In short, neither of these provisions renders section 3516.5 any more useful to the Governor because they do not allow the Governor to do what he did: unilaterally shorten the workweeks of state employees in violation of various laws and MOUs.

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[7] The statute provides in full:

> (a) In order to secure substantial justice and equality among employees in the state civil service, the department 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 services in other public employment and in private business.
>
> (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.

The Controller addresses the Governor's cases considering the definition of "emergency" in response to Question 5 below.

4. Whether section 3516.5 is designed to override the terms of an MOU in case of an emergency.

As described in the Controller's Opening Supplemental Letter Brief, section 3516.5 does not allow the Governor to do anything in a time of emergency that he cannot do in non-emergency times, except temporarily postpone his meet and confer obligations. (Controller's Opening Supp. Letter Br. at 9-13.) Thus, he cannot impose new rules in emergency times – either before or after meeting and conferring – if those rules violate the law, and he cannot override the terms of an existing MOU because doing so would violate his contractual obligations under the MOU.

The Governor complains that this interpretation renders section 3516.5 "ineffective as a mechanism by which the Governor can respond quickly during an emergency." (Governor's Supp. Letter Br. at 20.) The flaw in this line of reasoning is its assumption that section 3516.5 was enacted for the purpose of shaping the Governor's authority during an emergency. That assumption is contradicted by the provision's legislative history. Section 3516.5 is a narrow statute with a modest purpose, as evidenced by the fact that it attracted virtually no attention when it was added to the Dills Act. (Controller's Opening Supp. Letter Br. at 8-9.) The only known substantive reference to the provision in the legislative history reveals that it was introduced at the request of a labor organization to address "the obligation of the state with respect to notifying recognized employee organizations . . . of proposed changes to be adopted which are within the scope of representation." (Controller's Supp. RJN, Exh. 7 at 146.) Viewed within its actual context, section 3516.5 is perfectly effective to accomplish its limited purpose: it ensures that represented employees get to meet and confer with their employer before new rules are introduced, or in case of emergency, shortly after the adoption of new rules.

The Governor urges the Court to give a broad interpretation to the word "adopted" in section 3516.5, and to conclude that the rule "provides the Governor with the authority to impose . . . a standard for state employment of general application not otherwise set forth in an existing law, rule, or regulation." (Governor's Supp. Letter Br. at 21-22.) Those principles are entirely consistent with the Controller's interpretation. In other words, the parties agree that section 3516.5 applies to new rules not otherwise set forth in existing law. The disagreement arises from the Governor's insistence that section 3516.5 applies to new rules *that conflict with existing law and contractual obligations*.

To support that interpretation, the Governor argues that he can override state statutes and ignore his contractual obligations in emergencies because nothing in section 3516.5 says he cannot do so. (*Id.* at 23.) This argument is absurd. The Legislature is under no obligation to remind the Governor that his discretion must be exercised in a way that does not violate other laws. Nothing in section 3516.5 prohibits the Governor from adopting a rule that violates the state's anti-discrimination laws, but no one would assume that the omission allows the Governor to adopt a rule that discriminates against workers based on race. The same logic applies to other worker protections, including collective bargaining laws, which remain firmly in place.

The Governor is also wrong to suggest that section 3516.5 is ineffective unless it allows him to re-write MOUs. This argument does not survive *Internat. Assn. of Fire Fighters Union v. City of Pleasanton* (1976) 56 Cal.App.3d 959, a case the Controller has previously discussed. (*See* Controller's Opening Supp. Letter Br. at 12-13.) There, the court considered whether the City of Pleasanton was required to meet and confer with represented employees before implementing various personnel changes. For example, the City had a longstanding practice concerning the classification of certain middle management employees which was apparently not addressed in the employees' MOU. The City wanted to change the policy unilaterally, but the Court determined it had to first meet and confer with represented employees over the newly proposed rule. (56 Cal.App.3d at 973-976.) As this case illustrates, there are countless issues and details that can affect the terms and conditions of a workforce, and they cannot all occur to the parties during contract negotiations. Section 3516.5 addresses what must occur when those unaddressed issues arise during the term of an MOU, and that is all it does.

It is important to remember that when emergencies of any kind arise, the Governor has alternatives besides section 3516.5. If he wants relief from the operation of a provision in an MOU during an emergency, he has the authority to negotiate with represented employees to secure the terms he believes he needs. If he wants relief from the operation of a particular statute or statutes, he is free to seek amendments from the Legislature. What he is not free to do under section 3516.5 is ignore contractual obligations and legislative mandates.

5. Whether the legislative history of Government Code section 3516.5 discloses that the statute intended to include California's chronic budget crises within the meaning of the term "emergency."

The Governor and Controller agree that the definition of emergency contained in Government Code section 3523 – another provision of the Dills Act – is directly relevant to the meaning of emergency in section 3516.5. At issue is whether the state's fiscal and cash crisis fits within that definition, which includes "an act of God, natural disaster, or other emergency or calamity affecting the state, [ ] which is beyond

the control of the employer or recognized employee organization." (Gov. Code, § 3523(d).)

The Governor assumes that the inclusion of the language "other emergency" in section 3523 embraces any severe crisis, regardless of how dissimilar that crisis may be to an act of God or natural disaster. The rules of statutory construction say otherwise. When the Legislature inserts a general term after specific terms, the interpretation of the "general term or category is restricted to those things that are similar to those which are enumerated specifically." (*Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1013, citation and internal quotations omitted.) For example, the Supreme Court applied this rule to determine that the Unruh Civil Rights Act did not outlaw economic discrimination along with other forms of discrimination that were expressly listed in the statute. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1160-1161 & fn. 7.)[8] The Court decided that "[t]he Legislature's decision to enumerate personal characteristics, while conspicuously omitting financial or economic ones, strongly suggests a limitation on the scope of the Unruh Act." (*Id.* at 1161, footnote omitted.)

Here, the Legislature inserted the general terms "other emergency or calamity" after the more specific terms "act of God" and "natural disaster." Accordingly, the interpretation of "other emergency" is restricted to those things that are similar to an "act of God" or "natural disaster." A chronic fiscal and cash crisis bears virtually no resemblance to the earthquakes, tsunamis and floods that are readily classified as "acts of God" and "natural disasters." The latter emergencies are sudden and unexpected, and involve a clear and imminent danger to the public health and safety. The state's ongoing budget crisis is chronic and widely anticipated. Indeed, it is hard to describe as an emergency a situation that the Governor proclaims will end on June 30 2010, (PECG JA 533-534), given that one defining characteristic of emergencies is that they are of uncertain duration. Moreover, although indisputably serious, the budget crisis poses no clear or imminent danger to the public health and safety.

One of the most relevant distinctions appears in the second half of section 3523's definition, which is that the emergency must be "beyond the control of the employer or recognized employee organization." That is hardly the case with a man-made fiscal and cash crisis. In this case, the Governor could have proposed many ways to address the cash crisis besides involuntary furloughs, such as raising taxes or cutting other programs. The fact that the State did not wish to take other, more politically risky

[8] *Abrogated by* Civil Code section 51(f) *on other grounds, as recognized in Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 664-665, 668-669.

steps to solve the cash emergency does not change the fact that, in a very real sense, this cash crisis was within the State's control in ways that natural disasters are not.

The Governor simply declines to acknowledge the definition of emergency long utilized by the California courts, presumably in recognition of the fact that the fiscal crisis does not meet that definition. (Controller's Opening Supp. Letter Br. at 14-15.) Instead, the Governor relies on cases interpreting the National Labor Relations Act ("NLRA"), but these cases are inapposite. California courts refer to federal NLRA precedents to interpret parallel statutory language, or when the federal decisions "effectively reflect the same interests as those" underscoring the relevant state law. (*Fire Fighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608, 616-617.) The NLRA cases do not involve parallel statutory language; they involve a judicially crafted exception to NLRA's collective bargaining requirements. Here the Legislature has defined emergency in a way that excludes "economic exigencies."

Nor do the NLRA cases involve the same, or even remotely similar, circumstances. Those cases address when "economic exigencies" relieve a private sector business from the duty to bargain to impasse before implementing unilateral changes. (*RBE Electronics of S.D., Inc.* (1995) 320 N.L.R.B. 80, 81; *Bottom Line Enterprises* (1991) 302 N.L.R.B. 373, 374; *Winn-Dixie Stores, Inc.* (1979) 243 N.L.R.B. 972, 974, fn. 9; *cf. Nat. Labor Relations Bd. v. Katz* (1962) 369 U.S. 736, 747-748 [leaving open the possibility that some circumstances could justify unilateral action without suggesting "economic exigencies" could constitute such a circumstance].) In other words, those cases relate to the procedural question of whether a private employer can implement an otherwise valid policy without first bargaining to impasse. That has nothing to do with whether the Governor can implement an unlawful policy under circumstances he describes as an emergency. And it says nothing about circumstances that would allow a public sector employer to jettison its collective bargaining duties because that employer believes it is politically preferable to cut state worker pay rather than use other methods of saving money.

Finally, even if it were appropriate to apply the NLRA's "economic exigencies" exception in these circumstances, California's fiscal and cash crisis would not fit within it. That exception imposes "a heavy burden" on an employer that seeks to justify its use. (*RBE Electronics of S.D., Inc.*, *supra*, 320 N.L.R.B. at 80, 81.) The employer must demonstrate that "its proposed changes were 'compelled'" and that the emergency "was caused by external events . . . beyond the employer's control" or which were "not reasonably foreseeable." (*Pleasantview Nursing Home, Inc. v. Nat. Labor Relations Bd.* (6th Cir. 2003) 351 F.3d 747, 756, citations omitted.) The fiscal and cash crisis does not meet these requirements for the same reasons that the crisis is unlike a natural disaster. The crisis was not beyond the Governor's control, and involuntary

furloughs were not compelled; they were simply deemed to be more politically palatable than other available options.

Particularly fatal to the application of the NLRA's "economic exigencies" exception is the requirement that the employer "show a need that the particular action proposed be implemented promptly.'" (*Pleasantview Nursing Home, Inc. v. Nat. Labor Relations Bd.*, *supra*, 351 F.3d at 756, citation omitted.) The *Pleasantview* court found that the exception does not apply to an employer who unilaterally implemented a wage increase in response to "intense labor market pressure" because those pressures existed for more than a decade, and because the employer delayed implementing the wage increase for two months after first requesting it. (*Id.*) The same reasoning governs this appeal. California's budget problems are long-standing. In addition, the Governor proposed implementing involuntary furloughs on November 6, 2008, but delayed implementing them until February 1, 2009. (CASE JA 306-307, 347.) The NLRA's "economic exigencies" exception does not apply here.

The Governor's fall-back position is to claim "the exclusive authority to determine when" an "emergency or calamity affecting the state is of such significance as to warrant" an emergency response. (Governor's Supp. Letter Br. at 25.) This vastly overstates matters. To begin with, the issue is one of statutory construction: to determine whether the type of emergency at issue is the type contemplated by the Legislature. For all the reasons outlined above, this one is not. But even if it were, the Governor does not have "exclusive" authority to classify an emergency. As discussed elsewhere, the courts have granted *deference* to *legislative* pronouncements of an emergency. (Controller's Reply Br. at 27-28.) The Governor is not the Legislature, and the proclamation of a single official does not constitute the considered judgment of a full representative body.

Finally, the Governor relies on his authority under article IV, section 10(f) of the Constitution to issue a proclamation declaring a fiscal emergency. No one has disputed his authority to issue such a proclamation, but that emergency does not justify this conduct. To begin with, section 10(f) authorizes the issuance of a proclamation whenever the Governor determines that General Fund revenues or expenditures will be "substantially" different than the revenue or expenditure assumptions upon which that year's budget bill was based. That is very different from the Dills Act's definition of emergency. Furthermore, section 10(f) only authorizes the Governor to issue a proclamation; it does not authorize his unilateral response. The California Legislature

must craft the response, which of course, was not the case with the Governor's involuntary furloughs.

Respectfully submitted,

REMCHO, JOHANSEN & PURCELL, LLP

Margaret R. Prinzing
Attorneys for Defendant and Appellant
John Chiang

MRP:NL

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 April 22, 2010, I served a true copy of the following document(s):

Supplemental Letter Reply Brief

on the following party(ies) in said action:

Please see attached service list.

☒ **BY UNITED STATES MAIL:** By enclosing the document(s) in a sealed envelope or package addressed to the person(s) at the address above and

- ☐ depositing the sealed envelope with the United States Postal Service, with the postage fully prepaid.
- ☒ placing the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the businesses' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, located in San Leandro, California, in a sealed envelope with postage fully prepaid.

☐ **BY OVERNIGHT DELIVERY:** By enclosing the document(s) in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

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I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on April 22, 2010, in San Leandro, California.

Michael Narciso

SERVICE LIST

Gerald A. James
Professional Engineers in California Government
455 Capitol Mall, Suite 501
Sacramento, CA 95814-4433
Phone: (916) 446-0400
Fax: (916) 446-0489

Attorneys for Plaintiffs and Appellants Professional Engineers in California Government, et al.

David W. Tyra
Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814
Phone: (916) 321-4500
Fax: (916) 321-4555

Attorneys for Defendants and Respondents Governor Arnold Schwarzenegger and Department of Personnel Administration

Will M. Yamada
Chief Counsel
Department of Personnel Administration
1515 "S" Street, Suite 400
Sacramento, CA 95811-7246
Phone: (916) 324-0512
Fax: (916) 323-4723

Attorneys for Defendant and Respondent Department of Personnel Administration

Richard Chivaro
State Controller's Office
Chief Counsel
300 Capitol Mall, Suite 1850
Sacramento, CA 95814
Phone: (916) 445-6854
Fax: (916) 322-1220

Attorneys for Defendant and Appellant State Controller John Chiang

Jeffrey Ryan Rieger
Reed Smith LLP
101 Second Street, Suite 1800
San Francisco, CA 94105
Phone: (415) 543-8700
Fax: (415) 391-8269

Attorneys for Amicus Curiae as Appellant Teachers Retirement Board of the California State Teachers' Retirement System

Patrick James Whalen
Law Office of Brooks Ellison
1725 Capitol Avenue
Sacramento, CA 95811
Phone: (916) 448-2187
Fax: (916) 448-5346
(courtesy copy)

Attorneys for Plaintiff and Appellant California Attorneys, Administrative Law Judges and Hearing Officers in State Employment in California Attorneys, etc. v. John Chiang, as State Controller, etc.; Arnold Schwarzenegger, as Governor, etc., et al., No. C061009

Anne M. Giese
Service Employees International Union, Local 1000
Legal Department
1808 – 14th Street
Sacramento, CA 95811
Phone: (916) 554-1200
Fax: (916) 554-1292
(courtesy copy)

Attorneys for Appellant Service Employees International Union, Local 1000 in Service Employees International Union, Local 1000 v. John Chiang, as State Controller, etc.; Arnold Schwarzenegger, as Governor, etc., et al., No. C061020

Clerk to the
Honorable Patrick Marlette
Sacramento County Superior Court
720 Ninth Street, Department 19
Sacramento, CA 95814

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