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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

CALIFORNIA ATTORNEYS, ADMINISTRATIVE LAW JUDGES AND HEARING OFFICERS IN STATE EMPLOYMENT,

Plaintiffs/Appellants,

vs.

ARNOLD SCHWARZENEGGER, et al.,

Defendants/Respondents.

Court of Appeal Case No. C061009

(Superior Court Case No. 34-2009-80000134)

Appeal from the Superior Court, Sacramento County
Honorable Patrick Marlette

OPPOSITION TO PETITION FOR WRIT OF SUPERSEDEAS AND EMERGENCY TEMPORARY STAY

DAVID W. TYRA,
State Bar No. 116218
KRISTIANNE T. SEARGEANT
State Bar No. 245489
KRONICK, MOSKOVITZ,
TIEDEMANN & GIRARD
A Law Corporation
400 Capitol Mall, 27th Floor
Sacramento, California 95814
Telephone: (916) 321-4500
Facsimile: (916) 321-4555
E-mail: dtyra@kmtg.com

K. WILLIAM CURTIS
Chief Counsel, State Bar No. 095753
WARREN C. STRACENER
Deputy Chief Counsel, State Bar No. 127921
LINDA A. MAYHEW
Assistant Chief Counsel, State Bar No. 155049
WILL M. YAMADA
Labor Relations Counsel, State Bar No. 226669
DEPARTMENT OF PERSONNEL ADMINISTRATION
1515 S Street, North Building, Suite 400
Sacramento, CA 95811-7258
Telephone: (916) 324-0512
Facsimile: (916) 323-4723
E-mail: WillYamada@dpa.ca.gov

Attorneys for Defendants/Respondents
GOVERNOR ARNOLD SCHWARZENEGGER
and DAVID GILB

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Sacramento, California 95814
Telephone: (916) 321-4500
Facsimile: (916) 321-4555
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DEPARTMENT OF PERSONNEL ADMINISTRATION
1515 S Street, North Building, Suite 400
Sacramento, CA 95811-7258
Telephone: (916) 324-0512
Facsimile: (916) 323-4723
E-mail: WillYamada@dpa.ca.gov

Attorneys for Defendants/Respondents
GOVERNOR ARNOLD SCHWARZENEGGER
and DAVID GILB

State of California
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)

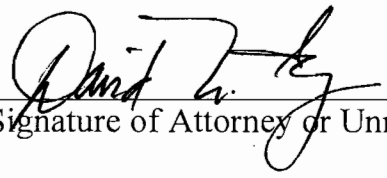
Court of Appeal Case Caption: CALIFORNIA ATTORNEYS, ADMINISTRATIVE LAW JUDGES AND HEARING OFFICERS IN STATE EMPLOYMENT
v.
ARNOLD SCHWARZENEGGER, ET AL.

Court of Appeal Case Number: C061009

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. Service Employees International Union, Local 1000	Petitioner in related case filed in Sacramento County Superior Court
4. CDF Firefighters	Petitioner in related case filed in Sacramento County Superior Court
5. California Association of Psychiatric Technicians	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 19, 2009

Printed Name: David W. Tyra
State Bar No: 116218
Firm Name & Address: Kronick, Moskovitz, Tiedemann & Girard, 400 Capitol Mall, 27th Floor, Sacramento, CA 95814

Party Represented: Governor Arnold Schwarzenegger and David Gilb

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I.

INTRODUCTION

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 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.

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.)

Both the California Constitution, as well as relevant provisions of the California Government Code, grant the Governor the

[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 SEIU and approved by the Legislature. All other bargaining unit employees continue to be subject to the furloughs implemented per the Governor's Executive Order. The State will meet and confer with other state employee unions to reach agreements to achieve necessary spending reductions.

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 California Attorneys, Administrative Law Judges and Hearing Officers in State Employment ("CASE") 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 2009-2009 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 some proposed spending reduction measures he was proposing which would impact 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 CASE, agreed to either proposal. However, the state employee unions, including Petitioner CASE, 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 an express "10 percent pay cut for all state employees," (see Petitioner's Petition for Writ of Supersedeas, p. 4.), 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

Ignoring the overwhelming evidence to the contrary, Petitioner refers to the dire financial straits of the California economy as a "perceived fiscal cash crisis." (See Petitioner's Petition for Writ of

Supersedeas, p. 4.) However, 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 Petitioner 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 Service Employees International Union ("SEIU"), Local 1000, 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 or about 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 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 CASE filed a notice of appeal from the judgment and order denying the Petition for Writ of Mandate and Complaint for Declaratory Relief on February 3, 2009. (See Petitioner's Exhibit B.) On February 5, 2009 (the day before the furloughs were to begin) at 2:00 p.m., Petitioner CASE filed a petition for writ of supersedeas and immediate stay of the trial court's order and the Governor's Executive Order. Petitioner's

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

request for immediate stay was denied by the this Court because this Court was "unable to determine at this point whether there is a likelihood that CASE will prevail on the merits or that, on balance, respondent will not sustain as much irreparable injury if the stay issues as CASE will sustain if the stay does not issue." (Exhibit P.)

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, 66.) 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 has failed to demonstrate, or even meaningfully raise the issue, of irreparable harm to it or its members if this writ does not issue. Even had Petitioner addressed this subject in its petition, it would have had 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 clearly belonging 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, the State of California, and the Department of Personnel Administration respectfully request that this Court deny the present petition for writ of supersedeas.

B. The Appeal in This Case Has No Merit Because the Trial Court Did Not Err in Determining That Governor Arnold Schwarzenegger 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. Government Code Sections 19851 and 19849 Provide the State with the Authority to Establish the Work Hours of State Employees

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

Despite Petitioner's rhetoric repeated nearly verbatim from its failed petition below, 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.

As early as 1945, at the time of the statute's adoption, the Legislature demonstrated a clear intent to create a flexible policy surrounding the adoption of workday and workweek schedules for state employees and expressly provided for exceptions to the 40-hour workweek when the operational demands of the various state agencies required it. Government Code section 19851 has an extensive legislative history. The predecessor code section to 19851, Government Code section 18020, was adopted in 1945. Section 18020 was amended several times from the time of its enactment until 1981 when section 19851 was adopted as a replacement statute.

Former section 18020's history evidences the Legislature's intent regarding flexibility in scheduling workweeks other than 40-hour workweeks. For instance, in 1955, the Legislature sought to amend former section 18020. This amendment focused on the abolition of the State Personnel Board's four-tiered employee classification system for determination of workweeks. The Office of Legislative Counsel summarized the applicable legislation, Assembly Bill 1464, in the following manner:

> Recasts existing sections and deletes provisions establishing four work week groups and requiring overtime compensation for first three groups. Provides it is state policy that work week shall be 40 hours, *but work weeks with different number of hours may be established to meet needs of state agencies.*

(Emphasis added.)

The Office of the Attorney General also summarized Assembly Bill 1464 as setting forth "a statement of State policy that State workers shall be employed forty hours a week, *except that to meet the varying needs of the different State agencies workweeks of a different number of hours may be established.*" (Emphasis added.)

Finally, section 19851 was adopted by the Legislature in 1981. As noted above, the plain language of the code provides the State the discretion and flexibility to adopt work schedules other than traditional 40-hour weeks to meet the "varying needs" of differing state agencies. By 1981, the inclusion of this provision in section 19851 was consistent with a near 40-year legislative history of providing the state employer with this sort of discretion and flexibility. In this case, the reduction in the work hours of state employees is indisputably related to the "varying needs of the different state agencies."

b. 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.

c. Section 19851 and 19849 are not superseded by CASE's MOU

Petitioner makes the illogical argument that both sections 19851 and 19849 are expressly incorporated into the MOU and, *at the same time*, are superseded by the MOU. Petitioner concedes that both sections 19851 and 19849 are specifically and expressly incorporated into the terms of its MOU with the State. (Petitioner's Petition for Writ of Supersedeas, p. 15.) Furthermore, none of the provisions of the MOU are in conflict with section 19851 and 19849, as correctly determined by the trial court. Petitioner relies upon section 3.1.B of its MOU for the proposition that employees will average a forty hour work week. Section 3.1.B states as follows; "Employees are expected to work all hours necessary to accomplish their assignments and fulfill their responsibilities. Employees will normally average forty (40) hours of work per week including paid leave; however, work weeks of a longer duration may occasionally be necessary." (Petitioner's Petition for Writ of Supersedeas, p. 15.)

This MOU language does not conflict with section 19851. In fact, it is consistent with the statutory flexibility to establish work hours granted to the state in section 19851. Neither the MOU nor section 19851 mandate a forty hour workweek. In fact, the quoted MOU provision specifically provides for a work week *shorter* than forty hours by stating that employees will *average* forty hour weeks. If employees are to average forty hour weeks, it is implicit that some workweeks will be shorter than forty hours.

Furthermore, section 19849 is not superseded because it merely allows DPA to make rules. Nothing in the MOU conflicts with statutory authority granted the Governor by sections 19851 and 19849 to establish the work schedules and hours of state employees, an authority which carries with it the right to furlough employees in the manner at issue here. Thus, sections 19851 and 19849 are not superseded by the parties' MOU as Petitioner erroneously claims.

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

Petitioner argues that Government Code section 19826(b) prevents the state employer from reducing the salaries of represented employees. (See Petitioner's Petition for Writ of Supersedeas, p. 9.) The two-day 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.)

Petitioner argues that "[e]ven if the sections [19851 and 19849] could be interpreted to allow the Governor to reduce hours, they do not permit a reduction in pay." Petitioner then makes the unsupported leap of logic that furloughs constitute a reduction in salary ranges in violation of section 19826(b) and, therefore, violate the proscriptions of that code section. (See Petitioner's Petition for Writ of Supersedeas, p. 15.)

As has been repeatedly demonstrated throughout this litigation, and as the trial court concluded, 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 their normal rate of pay for hours worked. 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 worked. 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.

3. 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, pp. 8-11.) Petitioner's argument that the Executive Order usurps the legislative prerogative misapplies the concept of separation of powers. (*Id.*) Petitioner's reliance on *Methodist Hospital of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691, for the proposition that the Legislature is the seat of virtually all *legislative* power is irrelevant to the issues here. (See Petitioner's Petition for Writ of Supersedeas, p. 8.) The imposition of furloughs is not a legislative function; it is an executive one.

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, including Government Code sections 19851 and 19849, 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 in order 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 Q, ¶ 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 argues that the fact that the Government Code statutorily authorizes the Governor to institute layoffs (Gov. Code, § 19997), but does not specifically authorize furloughs somehow proves that the Governor is not permitted to institute furloughs. However, the mere fact that the Governor is statutorily authorized to lay off employees can in no way be interpreted as a limitation on his authority to adjust the work hours of state employees through furloughs. To the contrary, the California Constitution and the cited provisions from the Government Code grant the Governor the authority to establish the work hours of state employees, including the right to impose furloughs as was done here. 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.

4. Petitioner's Reliance on DPA v. Superior Court (Greene) is Misplaced

Petitioner cites *Dept of Personnel Admin. v. Superior Court (Greene)* (1992) 5 Cal.App.4th 155, 172, for the proposition that only the Legislature is allowed to adjust represented employees salaries. Putting aside the fact that furloughs do not constitute an adjustment of established salary ranges, *Greene* is inapposite and, as a consequence, Petitioner's reliance on it is misplaced.

In *Greene*, the Court held that DPA could not implement a final wage proposal containing a salary reduction after having bargained with an employee organization to impasse. In particular, the *Greene* court held that section 19826 was a specific delegation of authority to DPA to set the salaries of unrepresented employees, but not represented employees. (*Id.* at 177-8.) "As a consequence, the question of represented employees' wages at impasse must ultimately be resolved by the Legislature itself." (*Id.* at 178.)

Greene is inapplicable to this case for several reasons. First, *Greene* dealt with an across the board 5% salary reduction for employees. In *Greene*, employees were going to continue working their normal hours but receive 5% less pay, an actual reduction in their rate of pay. Here, no such reduction in state employees' rate of pay will occur. Rather, state employees' rate of pay will remain exactly the same; those employees will simply work fewer hours.

Second, in *Greene* the parties had bargained to impasse on their MOUs when the employer decided to adopt the pay reductions. Here, it is undisputed that the labor relations between the parties are defined by their MOUs, which legally remain in force and effect. (See Gov. Code, §

3517.8(a).) In fact, *Greene* was decided before the enactment of Government Code Section 3517.8, which provides that MOUs between the state employer and recognized employee organizations remain in effect past the expiration of the MOU as long as the parties continue to bargain in good faith for a successor MOU. Pursuant to section 3517.8(a), the current language in the MOUs remains in effect until the parties either reach impasse or agree to a new MOU. Section 3517.8(a) provides:

> If a memorandum of understanding has expired, and the Governor and the recognized employee organization have not agreed to a new memorandum of understanding and have not reached an impasse in negotiations, subject to subdivision (b), *the parties to the agreement shall continue to give effect to the provisions of the expired memorandum of understanding, including, but not limited to, all provisions that supersede existing law*, any arbitration provisions, any no strike provisions, any agreements regarding matters covered in the Fair Labor Standards Act of 1938 (29 U.S.C. Sec. 201 et seq.), and any provisions covering fair share fee deduction consistent with Section 3515.7. (Emphasis added.)

Third, in *Greene* the court held that section 19826 only prohibited the state employer from altering salary ranges. The *Greene* court was never asked to consider the legality of furloughs. In fact, the *Greene* court held the state employer was authorized to reduce and limit employee total compensation in other ways. (See *Greene*, *supra,* 5 Cal.App.4th at 187.) For example, the state employer has the authority to layoff employees which reduces the work force. (*See* Gov. Code § 19997.) The state employer is also authorized to reduce or eliminate overtime which directly reduces employees' total compensation. (See Gov. Code, § 19816.10.) None of these actions implicate section 19826. Indeed, although the *Greene* court held the state employer could not unilaterally

reduce employees' salaries, it nevertheless found the state employer could unilaterally reduce an employee's benefits, even though this would limit an employee's total compensation. (See *Greene*, *supra,* 5 Cal.App.4th at 187.)

In short, *Greene* is inapposite to the present situation and its holding does not serve as a legal impediment to the Governor's exercise of his executive authority to issue the Executive Order.

5. The Express Terms of the MOU Provide the Governor With Authority to Institute Furloughs

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 3.1.B of the parties' MOU, entitled "States Rights," provides that "[t]o the extent consistent with law and this MOU, the rights of the state include, but are not limited to, the exclusive right to ... *relieve its employees from duty because of lack of work, lack of funds, or for other legitimate reasons*... [and] *to take all necessary actions to carry out its mission in emergencies.*" (Exhibit R, Article 3.1.B. 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.

Furthermore, Article 10.3 of the MOU, entitled "Layoff," provides that "[t]he State may propose to reduce the number of hours an employee works as an alternative to layoff. Prior to implementation of this alternative to a layoff, the State will notify and meet and confer with the Union to seek concurrence of the usage of this alternative." (Exhibit R, Article 10.3.) Remarkably, Petitioner argues that this language in its MOU

prohibits furloughs. (Petitioner's Petition for Writ of Supersedeas, p. 17.) However, the plain language of the MOU provision permits the reduction in hours as an alternative to layoffs.[3] Furthermore, this section read in conjunction with the Article 3.1.B above grants the Governor with the express contractual authority to reduce employees' work hours through furloughs.

6. The Fact that Proposition 165 Did Not Pass Does Not Demonstrate that the Governor Lacks the Power to Institute Furloughs

Petitioner cites the fact that Proposition 165 did not pass as evidence of the Governor's lack of power to issue furloughs. (See Petitioner's Petition for Writ of Supersedeas, p. 12.) Proposition 165, the "Government Accountability and Taxpayer Protection Act" ("GATPA"), encompassed "a number of constitutional and statutory changes affecting the state budgetary process both procedurally and substantively." (*League of Women Voters v. Eu* (1992) 7 Cal.App.4th 649, 653.) Further, GATPA, if passed, would have "modif[ied] the way the annual state budget is adopted and implemented and would establish mechanisms for assuring the budget remains in balance. (*Id.*, at 653.) GATPA would have created a specific scheme for a "fiscal emergency," the remedies for which, *among many other things*, could include a 5% furlough. However, the fact that GATPA did not pass does not mean the Governor does not have the power to institute furloughs. GATPA covered myriad subjects including the welfare system and the budget process. The mere fact that GATPA mentioned furloughs as a permissible remedy in a state of fiscal emergency does not signify that furloughs are illegal without the passage of GATPA.

[3] In this case, the State's obligation to meet and confer in advance of implementing the furloughs was excused due to the existence of the State's financial emergency. (See Gov. Code, § 3516.5.)

7. The Governor's Communications with State Employees Prior to Instituting the Furloughs Does Not Prove That the Governor Lacks the Authority to Institute Furloughs

Petitioner also argues that Governor Schwarzenegger "acknowledged that he needed legislative approval to impose his furlough plan," in a letter to state workers in November, 2008. (See Petitioner's Petition for Writ of Supersedeas, p. 12 and Exhibit C thereto.)

Petitioner mischaracterizes the Governor's letter to state employees. This letter merely informed state employees that the Governor had submitted a package of proposals to the Legislature, one aspect of which was furloughs for state employees. The Governor's letter does not constitute evidence that the Governor lacks the authority to impose furloughs. Petitioner attaches far greater importance to this letter than it is legally entitled to receive.

C. 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* 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.) The only *mention* of irreparable harm in Petitioner's petition is in the conclusion to the petition which states: "It is imperative that the trial court's order be stayed, or the portions of the Governor's Executive Order be stayed, so that irrevocable harm does not occur during the pendency of this appeal." (See Petitioner's Petition for Writ of Supersedeas, p. 17.) A conclusory statement that irrevocable harm may occur is not an affirmative showing of irreparable harm.

Furthermore, 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 it contention that "if [the furloughs] take effect, CASE members and all state employees will lose wages to which they are entitled by law." (See Petitioner's Petition for Writ of Supersedeas, p. 17.) However, merely 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 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

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 Q, ¶ 7.) 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. 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.)

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 did not even *attempt* to meet its burden to prove 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.

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

Dated: February 20, 2009

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Law Corporation

By: _____
David W. Tyra,
Attorneys for Defendants/Respondents
GOVERNOR ARNOLD SCHWARZENEGGER and DAVID A. GILB

CERTIFICATE OF WORD COUNT

I, David W. Tyra, Attorney for Defendants/Respondents GOVERNOR ARNOLD SCHWARZENEGGER and DAVID A. GILB, hereby certify that the number of words in Defendants/Respondents' Opposition to Petition for Writ of Supersedeas and Emergency Temporary Stay equals 7, 394 words, as per the word count feature in Microsoft Word.

Dated: February 20, 2009

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Law Corporation

By: _____
David W. Tyra,
Attorneys for Defendants/Respondents
GOVERNOR ARNOLD
SCHWARZENEGGER and
DAVID A. GILB

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 20, 2009, I served the within documents:

OPPOSITION TO PETITION FOR WRIT OF SUPERSEDEAS AND EMERGENCY TEMPORARY STAY

.. 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.

ý 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.

Clerk of the Court
Attn: Judge Patrick Marlette
Department 19
Sacramento County Superior Court
720 Ninth Street
Sacramento, CA 95814

(Original & 4 Copies)
Clerk of the Court
Third District Court of Appeals
914 Capitol Mall
Sacramento, CA 95814

Attorneys for Petitioners/Plaintiffs
California Attorneys, Administrative Law Judges and Hearing Officers in State Employment
Brooks Ellison, Esq.
Patrick J. Whalen, Esq.
THE LAW OFFICE OF BROOKS ELLISON
1725 Capitol Avenue
Sacramento, CA 95814
Fax: (916) 448-5346
Email: ccounsel@calattorneys.org

Attorney for Respondent/Defendant
State Controller John Chiang
Richard J. Chivaro, Esq.
Ronald V. Placet, Esq.
Shawn D. Silva, Esq.
Ana Maria Garza, Esq.
OFFICE OF THE STATE CONTROLLER
300 Capitol Mall, Suite 1850
Sacramento, CA 95814
Fax: (916) 322-1220
Email: rchivaro@sco.ca.gov

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

Executed on February 20, 2009, at Sacramento, California.

May Marlowe

May Marlowe