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**Exempted from Fees  
(Gov. Code § 6103)**

17 SUPERIOR COURT OF CALIFORNIA

18 CITY AND COUNTY OF SAN FRANCISCO

19 CALIFORNIA ATTORNEYS,  
ADMINISTRATIVE LAW JUDGES AND  
20 HEARING OFFICERS IN STATE  
EMPLOYMENT, GLEN GROSSMAN,  
21 MARK HENDERSON, GEOFFREY SIMS,  
and DOES 1-500,

22 Petitioners/Plaintiffs,

23 v.

24 ARNOLD SCHWARZENEGGER, et al.,

25 Defendants/Respondents.  
26

CASE NO. CPF-09-509205

**RESPONDENTS' BRIEF RE: EXCLUSIVE  
CONCURRENT JURISDICTION**

**Date: April 15, 2009**

**Time: 9:30 a.m.**

**Dept.: 301**

**Action Filed: February 10, 2009**

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RESPONDENTS' BRIEF RE: EXCLUSIVE CONCURRENT JURISDICTION

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1 I.

2 **INTRODUCTION**

3 The Court has asked the parties to brief the question of whether the doctrine of  
4 exclusive concurrent jurisdiction applies to the present action filed by Petitioners California  
5 Attorneys, Administrative Law Judges and Hearing Officers in State Employment (“CASE”),  
6 Glen Grossman, Mark Henderson and Geoffrey Sims (collectively, “Petitioners”) as a result of  
7 the action previously filed by CASE in the Sacramento County Superior Court, being fully and  
8 finally adjudicated by that Court on January 30, 2009.

9 As the discussion to follow will demonstrate, all of the necessary elements for  
10 applying exclusive concurrent jurisdiction to this action are present. The Sacramento County  
11 Superior Court was the first court to assume jurisdiction over the subject matter of this action, *i.e.*,  
12 the applicability Governor Schwarzenegger’s December 19, 2008 Executive Order (the  
13 “Executive Order”) furloughing the state workforce two days a month. This action involves the  
14 same parties and same issues as the action decided by the Sacramento County Superior Court.  
15 Finally, the resolution of this case in a court other than the Sacramento County Superior Court  
16 creates a risk of contradictory decisions relating to the same controversy.

17 For all of these reasons, Respondents Governor Arnold Schwarzenegger and David  
18 Gilb, Director of the Department of Personnel Administration, urge this Court to apply the  
19 doctrine of exclusive concurrent jurisdiction to this action. “The rule of exclusive concurrent  
20 jurisdiction ... is mandatory. ... [I]f the conditions are met, the issuance of a stay order is a matter  
21 of right.” (*People ex rel. Garamendi v. American Autoplan, Inc.* (1993) 20 Cal.App.4th 760,  
22 772.) Accordingly, Respondents respectfully request that this Court issue an order staying the  
23 present action based upon application of the doctrine of exclusive concurrent jurisdiction.

24 II.

25 **ANALYSIS**

26 **A. General Principles of Exclusive Concurrent Jurisdiction.**

27 “Under the rule of exclusive concurrent jurisdiction, when two California superior  
28 courts have concurrent jurisdiction over the subject matter and all parties involved in the

1 litigation, the first to assume jurisdiction has exclusive and continuing jurisdiction over the  
2 subject matter and all parties involved until such time as all necessarily related matters have been  
3 resolved. (*Consumer Advocacy Group, Inc. v. ExxonMobil Corp.* (2008) 168 Cal.App.4th 675,  
4 682; *Garamendi, supra*, 20 Cal.App.4th 760, 769-70.) “The rule is based on the public policies  
5 of avoiding conflicts that might arise between courts if they were free to make contradictory  
6 decisions or awards relating to the same controversy, and preventing vexatious litigation and  
7 multiplicity of suits. [Citations.]” (*Plant Insulation Company v. Fiberboard Corporation* (1990)  
8 224 Cal.App.3d 781, 787.) “The rule is established and enforced not ‘so much to protect the  
9 rights of parties as to protect the rights of Courts of co-ordinate jurisdiction to avoid conflict of  
10 jurisdiction, confusion, and delay in the administration of justice.’ [Citation.]” (*Id.*)  
11 “Justification for the rule ... rests on practical considerations. If the identical cause of action is  
12 asserted by the same plaintiff in two suits, there is no doubt that the first court has priority, but  
13 this can rarely happen. What does happen is that parties to the same controversy or transaction ...  
14 file separate suits on their individual causes of action, usually against each other. *Although their*  
15 *claimed rights and therefore their alleged causes of action are distinct, the issues are*  
16 *substantially the same, and individual suits might result in conflicting judgments.* The rule of  
17 priority is designed to avoid the unfortunate results of these conflicts by requiring, in effect, a  
18 *consolidation* of the separate actions in the court in which jurisdiction of the parties first  
19 attached.” (*Franklin & Franklin v. 7-Eleven Owners for Fair Franchising* (2000) 85 Cal.App.4th  
20 1168, 1175, citing 2 Witkin, Cal. Procedure (4th ed. 1996) *Jurisdiction*, § 420, p. 1031; emphasis  
21 in original.)

22           The rule of exclusive concurrent jurisdiction is similar in effect to the statutory  
23 plea in abatement. However, exclusive concurrent jurisdiction “has been interpreted and applied  
24 more expansively, and therefore may apply where the narrow grounds required for a statutory  
25 plea in abatement do not exist.” (*Garamendi, supra*, 20 Cal.App.4th at 770.) Thus, “[u]nlike the  
26 statutory plea in abatement, the rule of exclusive concurrent jurisdiction does not require absolute  
27 identity of parties, causes of action or remedies sought in the initial and subsequent actions. If the  
28 court exercising original jurisdiction has the power to bring before it all necessary parties, the fact

1 that the parties in the second action are not identical does not preclude application of the rule.  
2 Moreover, the remedies sought in the separate actions need not be precisely the same so long as  
3 the court exercising original jurisdiction has the power to litigate all the issues and grant all the  
4 relief to which any of the parties might be entitled under the pleadings.” (*Garamendi, supra*, 20  
5 Cal.App.4th at 770; *Plant Insulation Co. v. Fiberboard Corp., supra*, 224 Cal.App.3d at 788.)  
6 “In keeping with both the practical nature of the rule, and the historically flexible remedial  
7 powers of equity, exactitude [is] not required. That the parties in the two actions ‘are not entirely  
8 identical’ and ‘that the remedies sought in the two actions are not precisely the same’ is not  
9 controlling. *It is sufficient for the exercise of a protective equitable jurisdiction that the ... issue*  
10 *in both suits is the same and arises out of the same transaction or events.”* (*Franklin & Franklin,*  
11 *supra*, 85 Cal.App.4th at 1175.)

12           Where the requirements for exclusive concurrent jurisdiction are present,  
13 application of the doctrine is mandatory. “Thus, if the conditions are met, the issuance of a stay  
14 order is a matter of right.” (*Garamendi, supra*, 20 Cal.App.4th at 772.)

15           The doctrine of exclusive concurrent jurisdiction is not unique to California.  
16 While other jurisdictions call the doctrine by different names, a number of different states have  
17 versions of the rule similar to that followed in California. (See e.g., *Ras Family Partners, LP v.*  
18 *Onnam Biloxi, LLC* (Miss. 2007) 968 So.2d 926, 929, doctrine of “priority jurisdiction” requires  
19 that “[w]here two suits between the same parties over the same controversy are brought in courts  
20 of concurrent jurisdiction, the court which first acquires jurisdiction retains jurisdiction over the  
21 whole controversy to the exclusion or abatement of the second suit”; *Estates in Eagle Ridge, LLP*  
22 *v. Valley Bank & Trust* (2005) 141 P.3d 838, 844, following doctrine of exclusive concurrent  
23 jurisdiction, citing *Plant Insulation Co. v. Fiberboard Corp., supra*; *In re Gaebler’s Estate* (Mo.  
24 1952) 248 S.W.2d 12, 15, “[i]t is a well established rule that when a court of competent  
25 jurisdiction becomes possessed of a cause, its authority continues, ... until the matter is finally  
26 and completely disposed of; and no court of concurrent jurisdiction may interfere with its  
27 action.”) In *Cruz v. FTS Construction, Inc.* (2006) 140 N.M. 284, 287-88, 142 P.2d 365, 368-69,  
28 the plaintiff brought suit and successfully obtained a judgment against a builder alleging defects

1 in her newly constructed home. Later, she brought a second suit in a different court alleging a  
2 different set of defects. The New Mexico Court of Appeals followed that State’s rule of “priority  
3 jurisdiction” to affirm the trial court’s abatement of the second suit. On appeal, the plaintiff  
4 argued that the second action should not be abated because it involved “new claims and new  
5 theories of law” versus those raised in the first action. (*Id.*) In rejecting this argument, the *Cruz*  
6 court, relying on the California case of *Plant Insulation Co. v. Fiberboard Corp.*, *supra*, stated,

7 We disagree with this argument, and instead we agree with courts  
8 from other jurisdictions that have chosen to ask whether the two  
suits arise out of the same transaction.

9 (*Id.*)

10 In this case, all of the elements necessary for applying exclusive concurrent  
11 jurisdiction are present: (1) the two actions involve the same parties; (2) the issues in the two  
12 actions arise from the same transaction, *i.e.*, the Governor’s issuance of the Executive Order on  
13 December 19, 2008; and (3) this Court’s exercise of jurisdiction over the present case creates a  
14 risk of conflicting rulings. Accordingly, this Court should apply the doctrine of exclusive  
15 concurrent jurisdiction and stay this action.

16 **B. The Elements Necessary for Applying Exclusive Concurrent Jurisdiction to this**  
17 **Action Are Present and, Therefore, the Action Should Be Stayed.**

18 **1. The Parties in Both Actions Are the Same.**

19 As noted above, application of the doctrine of exclusive concurrent jurisdiction  
20 “does not require absolute identity of parties” between the first action and the subsequent action  
21 to be abated. (*Garamendi, supra*, 20 Cal.App.4th 760, 769-70.) “If the court exercising original  
22 jurisdiction has the power to bring before it all necessary parties, the fact that the parties in the  
23 second action are not identical does not preclude application of the rule.” (*Id.*)

24 It is undisputed that CASE was a party to the Sacramento action and is a party here  
25 as well. In the Sacramento action, CASE brought its petition on behalf of its members alleging  
26 that “[a]ll CASE members would be directly impacted if the executive order were to be  
27 implemented.” (Petition in CASE I, at p. 2:18-19, **Exhibit 2** to Request for Judicial Notice  
28 submitted with Respondent’s Opposition.) In this case, petitioner CASE alleges that it brings this

1 action on behalf of “[a]ll CASE members employed by SCIF,” including the individually named  
2 petitioners. (Petition, at p. 2:23-24.) In language strikingly reminiscent of the allegations made  
3 in the Sacramento action, Petitioners allege in this case that “[a]ll CASE members employed by  
4 SCIF would be directly impacted if the executive order were to be implemented. . . .” (*Id.*)

5           The mere fact that the individually named petitioners here were not specifically  
6 named parties in the Sacramento action does not preclude application of exclusive concurrent  
7 jurisdiction to this case.<sup>1</sup> This conclusion is fully supported by the decision in *Plant Insulation*  
8 *Co. v. Fiberboard Corporation* discussed above. In that case, the plaintiff, an industrial  
9 insulation contractor who regularly installed and distributed defendant’s products, sued for  
10 indemnity and breach of contract. Both the plaintiff and defendant were co-defendants in  
11 multiple asbestos-related lawsuits filed in other courts. In response to the action, defendant  
12 demurred on the ground of exclusive concurrent jurisdiction. The trial court sustained the  
13 demurrer and dismissed the action. On appeal, the plaintiff argued, in part, that exclusive  
14 concurrent jurisdiction should not apply because the two parties were not adverse to each other in  
15 any of the other, earlier cases. In rejecting this argument, the *Plant Insulation* court stated: “The  
16 mere fact that appellant and respondent are not designated by the plaintiffs as adverse parties in  
17 the pending actions does not preclude application of the rule.” (*Plant Insulation Co. v.*  
18 *Fiberboard Corporation, supra*, 224 Cal.App.3d at 788.)

19           Here, the interests of the individually named petitioners were represented in the  
20 Sacramento action and they had a beneficial interest in the outcome of that case as admitted by  
21 CASE in its pleadings in the prior action. The facts here establish that the individually named  
22 petitioners were at all times in privity with CASE with respect to the claims raised in the prior  
23 action. “In the final analysis, the determination of privity depends upon the fairness of binding [a  
24 party] with the result obtained in earlier proceedings in which it did not participate.” (*Citizens for*  
25 \_\_\_\_\_

26 <sup>1</sup> Similarly, the mere fact that SCIF President Jan Frank has been named as a defendant and  
27 respondent does not detract from a finding of sufficient identity of parties between the two actions for  
28 application of exclusive concurrent jurisdiction. Neither Ms. Frank, nor SCIF, are parties seeking relief  
from this Court and Petitioners do not seek any relief uniquely directed against Ms. Frank as a defendant  
and respondent to this action.

1 *Open Access to Sand and Tide, Inc. v. Seadrift Association* (1998) 60 Cal.App.4th 1053, 1070,  
2 *citing Miller v. Superior Court* (1985) 168 Cal.App.3d 376, 384-385.) The concept for privity  
3 requires “an identity or community of interest with, and adequate representation by, the ... party  
4 in the first action [citations omitted]. The circumstances must also have been such that the  
5 nonparty should reasonably have expected to be bound by the prior adjudication...” (*Id.*, quoting  
6 *Victa v. Merle Norman Cosmetics Inc.* (1993) 19 Cal.App.4th 454, 464; see also *Evans v. Celotex*  
7 (1987) 194 Cal.App.3d 745-746; *Helfand v. National Union Fire Insurance Company of*  
8 *Pittsburgh, PA* (1992) 10 Cal.App.4th 869, 902; *Gottlieb v. Kest* (2006) 141 Cal.App.4th 110,  
9 150). There is no dispute that the individually named petitioners in this case are all members of  
10 CASE. As such, they were not only implicitly parties to the prior action due to the fact that  
11 CASE brought the prior action in its representational capacity on behalf of *all* its members, they  
12 also are bound by the ruling by the Sacramento County Superior Court in the prior action. In his  
13 decision, Judge Patrick Marlette of the Sacramento County Superior Court stated that his ruling  
14 applied to “state employees represented by all of the petitioners under the Dills Act.” (**Exhibit A**  
15 to Tyra Declaration filed with Respondents’ Opposition, at p. 10.) The scope of this ruling  
16 undeniably includes the individually named petitioners in this case since it is undisputed that they  
17 are members of CASE, who was a petitioner in the prior action.

18 Accordingly, this element of exclusive concurrent jurisdiction is satisfied.

19 **2. The Issues in Both Actions Are the Same.**

20 As also noted above, the causes of action and remedies sought in this action need  
21 not be identical with those raised in the prior action for exclusive concurrent jurisdiction to apply.  
22 It is sufficient for the purpose of applying the rule if the claims in this action “arise out of the  
23 same transaction or events” as those at issue in the prior action. (*Franklin & Franklin, supra*, 85  
24 Cal.App.4th at 1175.)

25 The issues in both cases arise out of the same transaction or event, *i.e.*, the  
26 Governor’s issuance of the Executive Order on December 19, 2008. Repeatedly throughout the  
27 oral argument before this Court on March 20, 2009, Petitioners argued that this case was based on  
28 “new issues” versus those presented to the Sacramento County Superior Court. Petitioners argue

1 that because they have raised the allegedly unique status of the State Compensation Insurance  
2 Fund, a matter not before the Sacramento Superior Court, this case raises “new issues” and,  
3 therefore, exclusive concurrent jurisdiction does not apply. This case does not raise “new issues,”  
4 however, but simply a new theory to vindicate the same primary right at stake in the Sacramento  
5 litigation.

6 To define a claim or cause of action, California follows the primary right theory,  
7 by which a claim or cause of action consists of “(1) a primary right possessed by the plaintiff, (2)  
8 a corresponding primary duty devolving upon the defendant, and (3) a delict or wrong done by  
9 the defendant which consists in a breach of such primary right and duty. Thus two actions  
10 constitute a single cause of action if they both affect the same primary right.” (*Citizens for Open*  
11 *Access to Sand and Tide, Inc. v. Seadrift Association, supra*, (1998) 60 Cal.App.4th 1053, 1067,  
12 quoting *Acuna v. Regents of University of California* (1997) 56 Cal.App.4th 639, 648.) A  
13 “primary right” has been defined as “the plaintiff’s right to be free from the particular injury  
14 suffered.” (*Mycogen v. Monsanto Company*, (2002) 28 Cal.4th 888, 904, quoting *Crowley v.*  
15 *Katleman* (1994) 8 Cal.4th 666, 681-682.) “The most salient characteristic of a primary right is  
16 that it is indivisible: the violation of a single primary right gives rise to but a single cause of  
17 action. [Citation omitted.] A pleading that states the violation of one primary right in two causes  
18 of action contravenes the rule against ‘splitting’ a cause of action. [Citation omitted.]” (*Le Parc*  
19 *Community Ass’n v. Workers’ Compensation Appeals Bd.* (2003) 110 Cal.App.4th 1161, 1169,  
20 quoting *Crowley v. Katleman* (1994) 8 Cal.4th 666, 681.) “[I]f two actions involve the same  
21 injury to the plaintiff and the same wrong by the defendant, then the same primary right is at  
22 stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different  
23 forms of relief and/or adds new facts supporting recovery.” (*Id.*, at p. 1170, quoting *Tensor*  
24 *Group v. City of Glendale* (1993) 14 Cal.App.4th 154; emphasis added.) Petitioners cannot  
25 seriously contend that the two actions do not involve the same alleged injury, *i.e.*, the claim that  
26 the Executive Order cannot be applied to all or, as in this case, some of CASE’s members.

27 The requirement of identity of issues for purposes of exclusive concurrent  
28 jurisdiction is even broader than the “primary right” analysis, which is most directly applicable to

1 res judicata consideration. For instance, in *Plant Insulation Co. v. Fiberboard Corporation*,  
2 *supra*, the court stated that “the res judicata test is not required for application of the rule  
3 exclusive concurrent jurisdiction. Instead, we adopt the more expansive subject matter test  
4 applied in recent cases and by the trial court herein, which considers whether the first and second  
5 actions arise from the ‘same transaction.’” (*Plant Insulation Co. v. Fiberboard Corporation*,  
6 *supra*, 224 Cal.App.3d at 789.)

7 Here, the subject matter underlying Petitioners’ claims for relief is the same as that  
8 in the Sacramento action, *i.e.*, the Governor’s issuance of the Executive Order, which Petitioners  
9 contend cannot properly be applied to them. It simply is beyond dispute that there is a  
10 transactional relationship between the claims raised in the Sacramento action and the claims  
11 raised here: both actions seek relief from the Executive Order. Accordingly, this element of  
12 exclusive concurrent jurisdiction also is satisfied.

13 **3. This Court’s Adjudication of this Action Creates a Risk of Conflicting**  
14 **Decisions.**

15 Finally, as also noted above, Judge Marlette’s January 30, 2009 Final Decision in  
16 the prior litigation ruled that the Executive Order was applicable to state employees represented  
17 by the Petitioners before him at the hearing of January 29, 2009. That group includes the SCIF  
18 attorneys on whose behalf the present action is brought. If this Court were to rule that the  
19 Executive Order did not apply to SCIF attorneys, such a ruling would directly contradict Judge  
20 Marlette’s Final Decision. The rule of exclusive concurrent jurisdiction exists precisely to  
21 “avoid[] conflicts that might arise between courts if they were free to make contradictory  
22 decisions.” (*Plant Insulation Co. v. Fiberboard Corporation, supra*, 224 Cal.App.3d at 786-87.)  
23 Accordingly, that rule should be applied here.

24 All of the elements necessary for application of exclusive concurrent jurisdiction  
25 are present here. Because “[t]he rule of exclusive concurrent jurisdiction ... is mandatory ... if  
26 the conditions are met, the issuance of a stay order is a matter of right.” (*Garamendi, supra*, 20  
27 Cal.App.4th at 772.) Accordingly, Respondents respectfully submit that this Court should stay  
28

1 this action in favor of the jurisdiction possessed by the Sacramento Superior Court over disputes  
2 involving the Executive Order.

3 **C. None of the Issues Raised During the March 20, 2009 Hearing Before This Court**  
4 **Serve as an Impediment to the Application of Exclusive Concurrent Jurisdiction to**  
5 **this Action.**

6 During the colloquy between the Court and counsel at the hearing on this matter  
7 held on March 20, 2009, three issues were raised as potential obstacles to the application of  
8 exclusive concurrent jurisdiction to this action. Two issues were raised by the Court: (1) footnote  
9 10 to Judge Marlette's January 30, 2009 Final Decision and (2) Judge Marlette's  
10 February 4, 2009 Minute Order and the subsequent action brought by Governor Schwarzenegger  
11 against Controller John Chiang. A third issue was raised by Petitioners: unspecified public policy  
12 considerations. An examination of these three issues, however, demonstrates that none of them  
13 serves as an impediment to the application of exclusive concurrent jurisdiction to this action.

14 **1. Footnote 10 to Judge Marlette's Final Decision Does Not Weigh Against**  
15 **Applying Exclusive Concurrent Jurisdiction to this Action.**

16 Footnote 10 to Judge Marlette's January 30, 2009 Final Decision reads as follows:

17 At oral argument on these matters, counsel for CASE and PECG  
18 argued that many of their members work in so-called "special fund"  
19 agencies, and that the Governor's order, which was designed to deal  
20 with a looming General Fund deficit, was not reasonably related to  
21 the fiscal emergency insofar as it orders furloughs for those  
22 employees. (CASE also raised this issue in its reply brief.) This  
23 contention was not raised in any of the petitions or complaints for  
24 declaratory relief, and petitioners did not submit any evidence to  
25 support it. The Court therefore makes no findings on it.

26 In this case, Petitioners base their argument that the Executive Order is  
27 inapplicable to them, in large part, on the contention that SCIF is one of the "special fund"  
28 agencies referenced in footnote 10. Thus, the argument raised is that since Judge Marlette  
expressly made "no findings" as to whether the Executive Order applied to such agencies the  
identity of issues between this action and the Sacramento litigation necessary for application of  
exclusive concurrent jurisdiction is missing. Two points serve to refute any such contention.

First, as discussed in detail above, exclusive concurrent jurisdiction does not  
require complete identity of issues in order for the rule to be applicable. It merely requires a

1 transactional subject matter relationship between the prior action and the present one for the  
2 present action to be subject to abatement. It simply is beyond dispute that there is a transactional  
3 subject matter relationship between the present action and the one litigated in Sacramento County  
4 Superior Court.

5 Second, it is clear from footnote 10 itself that the reason Judge Marlette did not  
6 make an express finding on the applicability of the Executive Order to special fund agencies was  
7 the result of a failure of both pleading and proof on the part of Petitioner CASE. Thus, CASE  
8 cannot be heard to take advantage of the fact that Judge Marlette made no express finding on the  
9 applicability of the Executive Order to special fund agencies when the absence of such a finding  
10 was the direct result of CASE's failure to either plead the issue in the Sacramento action or to  
11 prove it to Judge Marlette's satisfaction.

12 **2. Neither Judge Marlette's February 4, 2009 Minute Order, Nor the**  
13 **Subsequent Action by Governor Schwarzenegger Against Controller Chiang**  
14 **in any way Implicate the Applicability of Exclusive Concurrent Jurisdiction**  
**to this Action.**

15 Following the issuance of the January 30, 2009 Final Decision, State Controller  
16 John Chiang sent a letter to Judge Marlette seeking clarification of whether that decision applied  
17 to the employees of the elected civil executive officers of the State of California. In response,  
18 Judge Marlette issued a Minute Order dated February 4, 2009, which reads as follows:

19 The Court has received and reviewed a letter dated  
20 February 3, 2009 from Richard J. Chivaro, Chief Counsel of the  
21 California State Controller's Office, requesting clarification of the  
22 Court's ruling in these matters, specifically, on the issue of whether  
23 the ruling is applicable to employees of independently elected  
24 Constitutional Officers and other elected state-wide officials,  
25 including the Lieutenant Governor, Office of the Attorney General,  
26 Secretary of State, State Treasurer, Superintendent of Public  
27 Instruction and Insurance Commissioner. The letter to the Court  
28 attaches copies of letters to the State Controller from those officers  
or their representatives raising issues regarding the Governor's  
authority to order furloughs of their employees.

The Court's ruling in the above-captioned matters addressed  
petitions for writ of mandate and complaints for declaratory relief  
brought by four recognized employee organizations, raising issues  
regarding the Governor's authority to order furloughs of their  
members, as employees of executive branch agencies. The  
independently elected Constitutional Officers and other elected

1 state-wide officials referenced above were not parties to these  
2 matters. The petitions and complaints upon which the Court ruled  
3 did not raise any issues regarding the Governor's authority to order  
4 furloughs for the employees of those officers and officials. The  
5 Court's ruling therefore did not address, or make any ruling  
6 regarding, the Governor's authority to order furloughs for the  
7 employees of those officers and officials. Accordingly, the Court  
8 expresses no views regarding that issue.

9 Following this Minute Order, several of the elected civil executive officers<sup>2</sup> made  
10 public statements to the effect that they would not comply with the Governor's Executive Order.  
11 (See Declaration of David W. Tyra submitted with this Brief and the exhibits thereto.) In order to  
12 obtain compliance with the Executive Order it became necessary for Governor Schwarzenegger  
13 to initiate a new action before Judge Marlette, which was heard and decided on March 12, 2009.<sup>3</sup>  
14 In that ruling, Judge Marlette found that the Executive Order was fully applicable to the  
15 employees of the elected civil executive officers.

16 It is undisputed that the vast majority of the civil executive officers' employees are  
17 members of employee organizations, including Petitioner CASE, that were parties to the action  
18 heard by Judge Marlette on January 29, 2009. Thus, the question now being raised is whether  
19 because a second action was required to obtain a ruling that the Executive Order was applicable  
20 to the civil executive officers, even though the employees of those officers are members of the  
21 employee organizations that were parties to the first action, the ruling in that action is limited in  
22 effect and, therefore, does not cover the claims raised in this action.

23 Such an argument, however, overlooks the reason for Judge Marlette's  
24 February 4, 2009 Minute Order and the necessity for the action by Governor Schwarzenegger  
25 against the elected civil executive officers. In his February 4, 2009 Minute Order, Judge Marlette  
26 specifically states that the elected civil executive officers and their claims had not been part of the  
27 prior action. In contrast, Petitioners in this case *were* parties to that prior action and their claims  
28 *were* before the Court in that action. Thus, Petitioners in this action cannot take advantage of

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29 <sup>2</sup> The elected officials identified in Judge Marlette's February 4, 2009 Minute Order are statutorily  
30 defined at Government Code section 1001 as "civil executive officers."

31 <sup>3</sup> A copy of Judge Marlette's March 12, 2009 ruling was provided to this Court at the hearing on  
32 March 20, 2009.

1 arguments raised by parties who *were not* before the Court in the prior action precisely because  
2 they *were* parties to that prior action. Furthermore, the fact that it became necessary for Governor  
3 Schwarzenegger to initiate an action to secure the elected civil officers' compliance with the  
4 Executive Order in light of their defiance of it also fails to benefit Petitioners. This action was  
5 necessary precisely because the elected civil officers, as opposed to Petitioners here, were not  
6 parties to the prior action. Once again, these arguments fail to impact the applicability of  
7 exclusive concurrent jurisdiction to this action.

8 **3. There Are No Public Policy Considerations Preventing the Application of**  
9 **Exclusive Concurrent Jurisdiction to this Action.**

10 Finally, Petitioners argue that unspecified public policy considerations render the  
11 rule of exclusive concurrent jurisdiction inapplicable here. Petitioners rely on the following  
12 statement in *Garamendi, supra*, in support of their argument: "However, the rule of exclusive  
13 concurrent jurisdiction is a rule of policy and countervailing policies may make the rule  
14 inapplicable." (*Garamendi, supra*, 20 Cal.App.4th at 770.)

15 *Garamendi* involved an action by the Insurance Commissioner seeking a  
16 preliminary injunction preventing defendants from transacting insurance business without taking  
17 certain actions. Prior to that action being filed in the Los Angeles Superior Court, defendants had  
18 filed an action in Riverside County Superior Court seeking declaratory relief in connection with a  
19 cease and desist order issued by the Insurance Commissioner. Based on this prior action,  
20 defendants opposed the request for injunctive relief in the Los Angeles County Superior Court on  
21 the ground of exclusive concurrent jurisdiction. In rejecting this argument, the trial court found  
22 that "the policy considerations behind the rule of exclusive concurrent jurisdiction were  
23 outweighed by the countervailing policy considerations in favor of trying the matter in Los  
24 Angeles" based on a prior stipulated judgment entered into by the parties in Los Angeles Superior  
25 Court. (*Id.*, at pp. 773-74, fn. 10.) On appeal, the appellate court found it unnecessary to  
26 "determine whether the trial court erred" in making this determination because the appellate court  
27 found that defendants had failed to properly raise the issue in the trial court.

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1 In this case, the policy considerations supporting the application of exclusive  
2 concurrent jurisdiction to this case are in no way outweighed by any policy considerations  
3 supporting adjudication of this action by this Court. In fact, there are no policy considerations  
4 supporting adjudication of this case by this Court as opposed to the Sacramento County Superior  
5 Court. A question which Petitioners have yet to answer is why they chose to file this action in  
6 this Court when all prior litigation related to the Executive Order has been filed and resolved in  
7 the Sacramento County Superior Court. In any event, there are no policy considerations  
8 preventing the application of exclusive concurrent jurisdiction to this action.


9 **III.**

10 **CONCLUSION**

11 Based on the foregoing, Respondents urge this Court to apply the doctrine of  
12 exclusive concurrent jurisdiction to this action. Respondents respectfully request that this Court  
13 stay this action in favor of the assertion of jurisdiction by the Sacramento Superior Court over  
14 claims and controversies arising out of the Governor's December 19, 2009 Executive Order.

15 Dated: March 30, 2009

16 KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD  
17 A Law Corporation

18 By:   
19 David W. Tyra  
20 Kristianne T. Seargeant  
21 Attorneys for Defendants/Respondents  
22 ARNOLD SCHWARZENEGGER, as Governor of the  
23 State of California; DAVID GILB as Director of the  
24 Department of Personnel Administration  
25  
26  
27  
28

1 **PROOF OF SERVICE**

2 I, Bao Xiong, declare:

3 I am a citizen of the United States and employed in Sacramento County, California. I am  
4 over the age of eighteen years and not a party to the within-entitled action. My business address  
5 is 400 Capitol Mall, 27th Floor, Sacramento, California 95814. On March 30, 2009, I served a  
6 copy of the within document(s):

6 **RESPONDENTS' BRIEF RE: EXCLUSIVE CONCURRENT JURISDICTION**

- 7  by transmitting via facsimile the document(s) listed above to the fax number(s) set  
8 forth below on this date before 5:00 p.m.
- 9  by transmitting via e-mail or electronic transmission the document(s) listed above  
10 to the person(s) at the e-mail address(es) set forth below.

11 Patrick J. Whalen, Esq.  
12 THE LAW OFFICE OF BROOKS  
13 ELLISON  
14 1725 Capitol Avenue  
Sacramento, CA 95814  
Fax: (916) 448-5346  
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Ronald B. Turovsky  
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11355 West Olympic Blvd.  
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15 I am readily familiar with the firm's practice of collection and processing correspondence  
16 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same  
17 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on  
18 motion of the party served, service is presumed invalid if postal cancellation date or postage  
19 meter date is more than one day after date of deposit for mailing in affidavit.

20 I declare under penalty of perjury under the laws of the State of California that the above  
21 is true and correct. Executed on March 30, 2009, at Sacramento, California.

22   
23 \_\_\_\_\_  
24 Bao Xiong