

IN THE COURT OF APPEAL, FIRST APPELLATE DISTRICT

Court of Appeal Case No. A125292

CALIFORNIA ATTORNEYS, et al.
Petitioners and Respondents

v.

ARNOLD SCHWARZENEGGER, as Governor, etc. et al.,
Defendants and Appellants;
JOHN CHIANG, et al.,
Defendant;

On Appeal from the San Francisco County Superior Court
Judge: The Honorable Peter J. Busch
San Francisco County Case No. CPF-09-509205

**OPENING BRIEF OF APPELLANTS
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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, First APPELLATE DISTRICT, DIVISION Three	Court of Appeal Case Number: <div style="border: 1px solid black; padding: 2px; text-align: center;">A125292</div>
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APPELLANT/PETITIONER: Arnold Schwarzenegger, as Governor, etc., et al RESPONDENT/REAL PARTY IN INTEREST: California Attorneys, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE	
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2. a. There are no interested entities or persons that must be listed in this certificate under rule 8.208.
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Full name of interested entity or person	Nature of interest (Explain):
(1) Please see attached list	
(2)	
(3)	
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(5)	

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The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: September 18, 2009

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Attachment to Certificate of Interested Entities or Persons, 2b.

Full Name of Interested Entity or Person	Nature of Interest
Bill Lockyer, as State Treasurer of California	Intervenor and Appellant in related case filed in Third District Court of Appeal.
Board of Administration of California Public Employees' Retirement System	Petitioner in related case filed in San Francisco County Superior Court.
California Association of Professional Scientists	Petitioner in related case filed in Sacramento County Superior Court.
California Association of Psychiatric Technicians	Petitioner in related case filed in Sacramento County Superior Court.
California Board of Equalization	Intervenor and Appellant in related case filed in Third District Court of Appeal.
California Correctional Peace Officers Association	Petitioner in related case filed in Alameda County Superior Court.
California Professional Public Employees' Association	Petitioner in related case filed in Sacramento County Superior Court.
CDF Firefighters	Petitioner in related case filed in Sacramento County Superior Court.
Debra Bowen, as Secretary of State of California	Intervenor and Appellant in related case filed in Third District Court of Appeal.
Edmund G. Brown, Jr., as Attorney General of the State of California	Intervenor and Appellant in related case filed in Third District Court of Appeal.
Jack O'Connell, as Superintendent of Public Instruction for the State of California	Intervenor and Appellant in related case filed in Third District Court of Appeal.
John Chiang, as Controller of the State of California	Respondent and Appellant in related case filed in Third District Court of Appeal.
John Garamendi, as Lieutenant Governor of the State of California	Intervenor and Appellant in related case filed in Third District Court of Appeal.
Kenneth Hamidi	Petitioner in related case filed in Sacramento County Superior Court.
Professional Engineers in California Government	Petitioner and appellant in related cases filed in Sacramento County Superior Court and Third District Court of Appeal
Service Employees International Union, Local 1000	Petitioner and appellant in related cases filed in Sacramento County Superior Court, Third District Court of Appeal, San Francisco County Superior Court, and Alameda County Superior Court.
Union of American Physicians and Dentists	Petitioner in related case filed in Alameda County Superior Court

Yvonne Walker	Petitioner in related case filed in Alameda County Superior Court and Sacramento County Superior Court.
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I.

INTRODUCTION

This appeal is from the judgment of the San Francisco County Superior Court entered on June 4, 2009 in favor of California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment (“CASE”), Glen Grossman, Mark Henderson, and Geoffrey Sims (hereinafter collectively “Respondents”) and against Governor Arnold Schwarzenegger and Director of Department of Personnel Administration (“DPA”) David Gilb, among others (hereinafter collectively, “Appellants”). The trial court entered judgment granting Respondents’ request for a writ of mandate and permanent injunctive relief to prevent state employees in State Bargaining Unit 2 (“BU2”), who are employed by the California State Compensation Insurance Fund (“SCIF”), from being furloughed twice monthly pursuant to Governor Schwarzenegger’s Executive Order S-16-08 (hereinafter, “Executive Order”). (Appellants’ Appendix [“AA”], Vol. II, Tab VV, p. AA0339 – AA00349.)

Appellants appeal from this judgment on the grounds that the trial court’s judgment should be reversed as a result of the trial court’s failure to stay this action based on the doctrine of exclusive concurrent jurisdiction. This case (hereinafter, “CASE II”) is based on the same transaction and events at issue in an earlier action filed by CASE in the Sacramento County Superior Court challenging the legality of the same Executive Order

(hereinafter "CASE I"). Exclusive concurrent jurisdiction should have applied and CASE II should have been stayed until the completion of the appeal in CASE I. Since the requirements of exclusive concurrent jurisdiction were met, it was mandatory that the CASE II trial court apply the doctrine in that case. The trial court's failure to apply exclusive concurrent jurisdiction resulted in a miscarriage of justice and prejudiced Appellants because it resulted in the trial court issuing a judgment in direct conflict with the prior ruling of the Sacramento County Superior Court in CASE I.

Appellants also appeal from the judgment of the trial court on the ground that, even if the trial court appropriately rendered a decision on the merits, the judgment should be reversed because the trial court erred in finding the phrase "staff cutbacks" as used in Insurance Code section 11873, subdivision (c), to include a proscription on the Governor's authority as the state employer to set the working hours of state employees, including the imposition of furloughs on them. The proper construction of the term "staff cutbacks" in Insurance Code section 11873(c) refers to cutbacks in the actual number of staff at SCIF, and not cutbacks in staff hours.

For the foregoing reasons, and based on the arguments below, the judgment of the San Francisco County Superior Court should be reversed.

II.

STATEMENT OF THE CASE

A. Statement of Facts.

On July 31, 2008, Governor Arnold Schwarzenegger issued Executive Order S-09-08 directing the State of California to take various emergency measures in light of the State's budget impasse. (AA, Vol. I, Tab P, p. AA0130 – AA0133) This Executive Order directed all state agencies and departments "to cease and desist authorization of all overtime for employees effective July 31, 2008." (*Id.*)

On September 23, 2008, Governor Schwarzenegger signed into law a new budget for the 2008-2009 fiscal year. (AA, Vol. I, Tab Q, p. AA0134 – AA0137.) However, the downturn in the national economy shortly thereafter resulted in an unanticipated and significant reduction in revenues from those forecasted in the 2008-2009 budget. (AA, Vol. I, Tab R, p. AA0138 – AA0162.) The State's Department of Finance determined the shortfalls in the budget compromise would cause a budget deficit of approximately \$11.2 billion. (*Id.*) The Department of Finance also initially determined that revenue for the 2009-2010 fiscal year would be \$13 billion lower than projected. (*Id.*) The Department of Finance 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." (*Id.*) The Department of Finance issued an October 2008 Finance Bulletin that stated, "Preliminary General

Fund agency cash for October was \$923 million below the 2008-09 Budget Act forecast of \$10.667 billion.” (AA, Vol. I, Tab S, p. AA0164 – AA0165.) The Department of Finance also concluded, “year-to-date revenues are \$1.06 billion below the \$22.58 billion that was expected.” (*Id.*)

In response to the unanticipated budget deficit, the Governor issued a special session proclamation on November 6, 2008 calling for an emergency session of the Legislature to address this budget crisis. (AA, Vol. I, Tab T, p. AA0166 –AA0170) On the same day, the Governor issued a letter to all state workers informing them of the potential impact of some of the cost-savings plans he was considering. (AA, Vol. I, Tab U, p. AA0171 –AA0172.) He also informed state employees of the emergency session of the Legislature. (*Id.*)

The Legislature failed to reach a resolution of the pending budget crisis in the November 2008 special session. On December 1, 2008, the Governor issued a special proclamation reconvening the Legislature for another emergency session to address the fiscal emergency and the fact that “this fiscal year’s deficit will cause the State to miss payroll and school payments at the beginning of 2009.” (AA, Vol. I, Tab V, p. AA0173 – AA0175.) The Department of Finance recalculated its estimates and found that actual revenues for the 2008-2009 fiscal year were expected to be \$14.8 billion below the estimated revenues at the time the 2008-2009 budget was passed. (AA, Vol. I, Tab I, p. AA0061.) The Department of

Finance simultaneously determined that the deficit would increase to \$41.6 billion by the end of the 2009-2010 fiscal year. (*Id.*)

Faced with the unresolved and mounting fiscal crisis, the Governor issued Executive Order S-16-08 on December 19, 2008. (AA, Vol. I, Tab W, p. AA0176 – AA0178.) This Executive Order directed the implementation of two-day a month furloughs for all state employees commencing in February 2009 and ending in June 2010. (*Id.*) As a result of the proclaimed fiscal emergency, the Governor issued the Executive Order pursuant to his authority under Government Code section 3516.5 before meeting and conferring with public employee unions. (*Id.*)¹

Less than one month following the Governor's issuance of the Executive Order, 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 ("petition") was filed in Sacramento County Superior Court by petitioners Professional Engineers in California Government ("PECG") and California Association of Professional Scientists ("CAPS"), Case No. 2008-80000126, against the same Respondents named here. PECG and CAPS represent, and filed their petitions on behalf of, all state employees in Bargaining Units 9 and 10.

¹ Since the Governor's issuance of the Executive Order, the Legislature passed, and the Governor signed, budget compromises and revisions in both February and June 2009. Neither, however, has impacted

On January 5, 2009, Respondent CASE filed CASE I in the Sacramento County Superior Court, Case No. 2009-80000134. CASE represents, and filed its petition on behalf of, *all* state employees in Bargaining Unit 2. (AA Vol. I, Tab L, p. AA0085- AA0109.) In this regard, CASE's petition in CASE I alleged as follows:

“CASE is the exclusive collective bargaining representative of legal professionals in State Bargaining Unit 2 pursuant to Government Code section 3520.5. CASE represents approximately 3400 legal professionals in more than 80 different state departments, boards and commissions... All CASE members would be directly impacted if the executive order were to be implemented.”

(AA, p. Vol. I, Tab L, p. AA0087) In the prayer in the CASE I petition, CASE requested, “[t]he Court issue a peremptory writ in the first instance ordering Respondents/Defendants Governor Schwarzenegger and Director Gilb to comply with their mandatory duties under Article III, section 3 and Article V, section 1 of the California Constitution and Government Code section 19826, and to set aside the portions of the Governor's Executive Order S-16-08 calling for a furlough and salary reduction for *state employed legal professionals* because the Executive Order is unlawful.” (AA, p. Vol. I, Tab L, p. AA0098. [emphasis added].)

the implementation of furloughs per the Executive Order.

On January 7, 2009, a third petition was filed against Respondents in Sacramento County Superior Court by Service Employees International Union, Local 1000 (“SEIU”), Case No. 2009-80000135. SEIU represents, and filed its petition on behalf of, all state employees in Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20, and 21.

On January 9, 2009, the parties in Case No. 2008-80000126 (PECG/CAPS), Case No. 2009-80000134 (CASE) and 2009-80000135 (SEIU) appeared and stipulated that a hearing on the merits in those cases would be heard on January 29, 2009. (AA, Vol. I., Tab N, p. AA0115-AA0116.) On January 29, 2009, the Sacramento County Superior Court heard oral argument on the three cases. (AA, Vol. I., Tab N, p. AA0115 – AA0116.) All parties were present and appeared at the hearing. (*Id.*) On January 30, 2009, the Sacramento trial court issued an amended and final order denying all three of the petitions and entering judgment for Respondents. (AA, Vol. I, Tab N, p. AA0113 – AA0126.) The Sacramento 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.

(AA, Vol. I, Tab N p. AA0123.) The court also held the provisions of the Governor's Executive Order constitute "a rule in that they establish a standard of *general application to state employees.*" (AA, Vol. I, Tab N p. AA0120.)

Following the issuance of the January 30, 2009 order, State Controller John Chiang, along with other civil executive officers, sent *ex parte* letters to the CASE I trial court asking it to clarify whether the decision applied to the employees of the elected civil officials of the State of California. The CASE I court issued a Minute Order on February 4, 2009. (AA, Vol. II, Tab JJ p. AA0238 –AA0241.) That order stated,

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 state-wide officials referenced above were not parties to these matters. The petitions and complaints upon which the Court ruled did not raise any issues regarding the Governor's authority to order furloughs for the employees of those officers and officials. The Court's ruling therefore did not address, or make any ruling regarding, the Governor's

authority to order furloughs for the employees of those officers and officials. Accordingly, the Court expresses no views regarding that issue.

(Id.)

B. Procedural History.

On February 10, 2009, Respondents CASE, Glen Grossman, Mark Henderson, and Geoffrey Sims filed a Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief against Appellants in San Francisco County Superior Court. (AA, Vol. I, Tab A, p. AA0001 – AA0016) This petition asked for a peremptory writ of mandate directing Appellants to set aside the portion of the Executive Order directing the furloughing of BU2 employees employed at SCIF. (*Id.*, at AA0012.) The petition contended the furloughs of those employees violated Insurance Code section 11873(c). (*Id.* at AA0012.) Respondents averred the exemption from “staff cutbacks” in that code section included furloughs. (*Id.*, at AA0008.)

On March 20, 2009, the San Francisco County Superior Court held a hearing on the merits of the petition. (Reporters Transcript of Proceedings [RT], March 20, 2009 hearing.) The San Francisco trial court ruled res judicata did not bar Respondents action, but also determined more briefing was required on the issue of exclusive concurrent jurisdiction and ordered the parties to provide supplemental briefing on that issue for a continued hearing on April 15, 2009. (RT, March 20, 2009 hearing, p. 4-5, 50.) A

hearing was held on April 15, 2009. (RT, April 15, 2009 hearing.) At this hearing, the Court ruled exclusive concurrent jurisdiction did not apply. (RT, April 15, 2009 hearing, p. 48.) The Court then granted the petition in its entirety. (RT, April 15, 2009 hearing, p. 49.) Judgment was entered in favor of Respondents on June 4, 2009. (AA, Vol. II, Tabs RR and SS, p. AA0329 – AA0334.)

Appellants filed a notice of appeal on June 10, 2009. (AA, Vol. II, Tab UU, p. AA0335 – AA0338.) Respondents sought relief from automatic stay on June 18, 2009. (AA, Vol. II, Tab WW, p. AA0350 – AA0351.) Relief from automatic stay of the judgment was granted on July 9, 2009. (AA, Vol. II, Tab EEE, p. AA0389 – AA0390)

III.

ISSUES ON APPEAL

1. Whether the trial court erred by not applying the doctrine of exclusive concurrent jurisdiction and thus created a miscarriage of justice prejudicing Appellants because it resulted in a judgment in this action in direct conflict with the judgment of the Sacramento County Superior Court in CASE I.

2. Whether the trial court erred in finding that the phrase “staff cutbacks” in Insurance Code section 11873, subdivision (c), proscribes the Governor’s authority as the state employer to set the working hours and

schedules of state employees, including those employed at SCIF, by directing the furloughing of those employees.

IV.

STATEMENT OF APPEALABILITY

This appeal is from a final judgment entered on June 4, 2009 granting a peremptory writ of mandate for Respondents that is made appealable by California Code of Civil Procedure section 904.1. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1029.)

V.

ARGUMENT

A. **The Trial Court's Judgment in Favor of Respondents Should Be Reversed Because the Trial Court Failed to Stay the Action Based on the Doctrine of Exclusive Concurrent Jurisdiction.**

The trial court erred in not staying this action based on the doctrine of exclusive concurrent jurisdiction. As a result, its judgment in favor of Respondents should be reversed.

At the hearing held on April 15, 2009 regarding the applicability of exclusive concurrent jurisdiction, the trial court commented,

The more time I spend with the February --- I'm sorry the February 4, 2009 clarification order issued by Judge Marlette, the more I focus on, rightly or wrongly, his statement that what was before him in CASE I was a dispute with respect to the furlough's application to CASE's members as employers of executive branch agencies, which raises the question of whether SCIF is properly considered an executive

branch agency and whether, if it is not, it's fair to conclude that in Judge Marlette's view at least this dispute wasn't within what he was doing.

(RT, April 15, 2009 hearing, p. 4.) The trial court in CASE II misinterpreted the February 4, 2009 Minute Order issued by the trial court in CASE I. After an extensive hearing, the CASE II trial court stated,

Whether to consider it [the petition] in my view is a close call, as I think I've indicated. But for the clarification order, I think the exclusive concurrent jurisdiction argument would be rather strong indeed, but I am in the somewhat rare if not totally enlightened position of having the first judge stating in the form of an order what the scope of his view of the first action was. I'm not aware that the clarification order has been appealed or that there's any doubt that it is a governing order. It, as I read it, limits the scope of what was before Judge Marlette in CASE I to the effect of the furlough order on employees of executive agencies. It is certainly true that it is issue in response to a letter expressing concern on behalf of a group of independently elected state officers who by-and-large at least were not themselves parties to CASE I. Undoubtedly, that's not something to be ignored, but that also does not seem to have been the rationale of the clarification order. Even in addressing that and in a preface to addressing their nonparty status, the judge said, "Your employees were not governed by my order," not that "You weren't." Given that reading – and I don't know why, for purposes of exclusive concurrent jurisdiction, the second court shouldn't give substantial sway to the first court's statement concerning what the first court had before it. So given the first court's statement that it did not have before it the claims of CASE members who weren't

employees of executive agencies, and given that SCIF is not an executive branch agency, that limited point being conceded today – and I think that in any event – I reach the conclusion that the premise of exclusive concurrent jurisdiction isn't there. Court one did not have before it, did not consider itself to have before it the claims made by those who are before me here today.

(RT, April 15, 2009 hearing, p. 47 – 48.)

The lower court's refusal to stay this case based on the doctrine of exclusive concurrent jurisdiction resulted in a miscarriage of justice to Appellants' prejudice. It led to a decision entirely inconsistent with the decision rendered by the Sacramento County Superior Court in CASE I. The CASE II trial court's interpretation that the February 4, 2009 Minute Order by the trial court in CASE I constituted a limitation of the January 30, 2009 Final Decision rendered by the CASE I trial court is in error. The error in interpreting the CASE I trial court's January 30, 2009 Final Decision and February 4, 2009 Minute Order led the CASE II trial court to issue a decision in direct conflict with the final decision in CASE I. The prevention of contradictory judgments of this type is at the very heart of the rationale underlying the doctrine of exclusive concurrent jurisdiction. Accordingly, the trial court's judgment in CASE II should be reversed.

1. **The Standard of Review Applicable to the CASE II Court's Decision Regarding Exclusive Concurrent Jurisdiction Requires Its Reversal Because It Resulted in a Miscarriage of Justice.**

A trial court's error in failing to apply the doctrine of exclusive concurrent jurisdiction is reversible when it results in a miscarriage of justice or prejudice to the party asserting the rule. (*People ex rel. Garamendi v. American Autoplan, Inc.* (1993) 20 Cal.App.4th 760, 772, citing Cal. Const. art. VI, § 13; Code Civ. Proc. §475; *Stearns v. Los Angeles City School District* (1966) 244 Cal.App.2d 696, 717-718; *Bank of American etc Assn v. Cohen* (1937) 21 Cal.App. 2d 510, 512-513; *Collins v. Ramish* (1920) 182 Cal. 360, 367-369.) A miscarriage of justice occurs when the court, after an examination of the entire case, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*Cassim v. Allstate Insurance Company* (2004) 33 Cal.4th 780, 800, citing, *People v. Watson* (1956) 46 Cal.2d 818, 836.) A "reasonable probability" in this context does not mean more probable than not, but rather a "reasonable chance" of a more favorable outcome, something more than a mere abstract possibility. (*Cassim, supra*, 33 Cal.4th at 800, quoting *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

In this case, the trial court's failure to apply exclusive concurrent jurisdiction to stay the CASE II action resulted in a miscarriage of justice and prejudiced Appellants. The miscarriage of justice and prejudice to

Appellants is demonstrated by the fact (1) the ruling in CASE II directly conflicts with the ruling in CASE I; (2) the conflicting rulings create irreconcilable adjudications of the Governor's authority to furlough BU 2 employees at SCIF; and (3) the statements of the trial court in CASE II establish that it erroneously interpreted the CASE I trial court's February 4, 2009 Minute Order.

A comparison of the San Francisco County Superior Court's ruling in CASE II demonstrates that it is in direct conflict with the Sacramento County Superior Court's ruling in CASE I. The ruling in CASE I, on its face, is applicable to all BU2 employees, including those employees employed at SCIF. CASE should have included a cause of action for violation of Insurance Code section 11873(c) in CASE I if it intended to pursue such an argument. There is no way now to reconcile the judgment of the trial court in CASE I, which found that the Executive Order was properly applied to *all* BU2 employees subject to the Dills Act, with the judgment of the trial court in CASE II, which found that certain BU2 employees subject to the Dills Act, those employed at SCIF, are exempt from the furloughs. The CASE I ruling encompasses the subset of BU2 employees at SCIF at issue in CASE II and, therefore, the two rulings are in direct conflict.

A miscarriage of justice is further demonstrated because the policy reasons behind exclusive concurrent jurisdiction were violated here. The

policy behind exclusive concurrent jurisdiction is to avoid inconsistency and conflicting judgments. The CASE I and CASE II judgments are inconsistent and apply different rulings to the same subset of employees. As such, the CASE II ruling is a miscarriage of justice and should be reversed by this Court.

Finally, the existence of a miscarriage of justice is evident in the statements made by the CASE II trial court in rendering its ruling on exclusive concurrent jurisdiction. Specifically, the CASE II trial court commented that but for its (erroneous) interpretation of the CASE I trial court's February 4, 2009 Minute Order, its decision regarding the application of exclusive concurrent jurisdiction to this case likely would have been different. Even with that erroneous interpretation of the February 4, 2009 Minute Order, the decision was still a "close call." Thus, the record on this appeal demonstrates that but for the error committed by the CASE II trial court, Appellants would have obtained a more favorable result in this action, *i.e.*, a stay of the action pending the final resolution of CASE I and, therefore, the judgment of the trial court in CASE II should be reversed.

2. **The First Court to Assume Jurisdiction Over the Subject Matter of, And Parties to, A Claim Retains that Jurisdiction under the Doctrine of Exclusive Concurrent Jurisdiction.**

Exclusive concurrent jurisdiction is applied "when two California Superior Courts have concurrent jurisdiction over the subject matter and all

parties involved in the litigation, the first to assume jurisdiction has exclusive and continuing jurisdiction over the subject matter and all parties involved until such time as all necessarily related matters have been resolved.” (*Consumer Advocacy Group, Inc v. ExxonMobil Corp.* (2008) 168 Cal.App.4th 675, 682, quoting *People ex rel. Garamendi v. American Autoplan, Inc.* (1993) 20 Cal.App.4th 760, 772.) California courts have stated, “[t]he rule is based on the public policies of avoiding conflicts that might arise between courts if they were free to make contradictory decisions or awards relating to the same controversy, and preventing vexatious litigation and multiplicity of suits. [Citations]” (*Plant Insulation Company v. Fibreboard Corporation* (1990) 224 Cal.App.3d 781, 787.) “The rule is established and enforced not ‘so much to protect the rights of parties as to protect the rights of Courts of co-ordinate jurisdiction to avoid conflict of jurisdiction, confusion, and delay in the administration of justice.’ [Citation.]” (*Id.*) “Justification for the rule ... rests on practical considerations. If the identical cause of action is asserted by the same plaintiff in two suits, there is no doubt that the first court has priority, but this can rarely happen. What does happen is that parties to the same controversy or transaction ... file separate suits on their individual causes of action, usually against each other. *Although their claimed rights and therefore their alleged causes of action are distinct, the issues are substantially the same, and individual suits might result in conflicting*

judgments. The rule of priority is designed to avoid the unfortunate result[s] of these conflicts by requiring, in effect, a *consolidation* of the separate actions in the court in which jurisdiction of the parties first attached.[Citations]” (*Franklin & Franklin v. 7-Eleven Owners for Fair Franchising* (2000) 85 Cal.App.4th 1168, 1175, internal citations omitted; emphasis in original.)

The rules regarding the application of exclusive concurrent jurisdiction are much more relaxed than those that courts apply for res judicata, or collateral estoppel. “[T]he rule of exclusive concurrent jurisdiction does not require absolute identity of parties, causes of action or remedies sought in the initial and subsequent actions. [Citations] If the court exercising original jurisdiction has the power to bring before it all necessary parties, the fact that the parties in the second action are not identical does not preclude application of the rule. Moreover, the remedies sought in the separate actions need not be precisely the same so long as the court exercising original jurisdiction has the power to litigate all the issues and grant all the relief to which any of the might be entitled under the pleadings.” (*Garamendi, supra*, 20 Cal.App.4th at 770; *Plant Insulation Co. v. Fibreboard Corp, supra*, 224 Cal.App.3d at 788.) It is sufficient for the application of exclusive concurrent jurisdiction, that the issue in “both suits is the same and arises out of the same transaction or events.” (*Franklin & Franklin, supra*, 85 Cal.App.4th at 1175.)

CASE I was filed on behalf of *all* California state employees in State Bargaining Unit 2 as admitted in the petition filed in that action. (AA, Vol. I, Tab L p. AA0087.) In CASE I, petitioner argued that Governor Schwarzenegger was prohibited from issuing an Executive Order furloughing state employees because furloughs constituted a *de facto* reduction in salary ranges prohibited by based on Government Code section 19826, subdivision (b)². (AA, Vol. I, Tab L p. AA0089 – AA0092.) CASE further argued that the Memorandum of Understanding (“MOU”) between it and the State prohibited the Governor from furloughing BU2 employees. (*Id.*) Finally, CASE argued Government Code section 3516.5³,

² California Government Code section 19826(b) states, “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 representation pursuant to Section 3520.5.”

³ California Government Code section 3516.5 states.

Except in cases of emergency as provided in this section, the employer shall give reasonable written notice to each recognized employee organization affected by any law, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the employer, and shall give such recognized employee organizations the opportunity to meet and confer with the administrative officials or their delegated representatives as may be properly designated by law. In cases of emergency when the employer determines that a law, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the administrative officials or their delegated representatives as may be properly designated by law shall provide such notice and opportunity to meet and confer in good faith at

a part of the Ralph C. Dills Act, did not grant the Governor emergency authority to impose furloughs without meeting and conferring with state employee unions, including CASE. (*Id.*)

On January 29, 2009, the Sacramento County Superior Court held a hearing on the merits in CASE I, along with the actions filed by SEIU and PECG/CAPS. (AA, Vol. I, Tab N, p. AA0113 – AA0126.) On January 30, 2009, the Sacramento trial court issued its Amended Final Ruling in which the court denied the relief sought by all petitioners, including CASE, and granted judgment in favor of Governor Schwarzenegger and the other respondents/defendants. (*Id.*) The court in CASE I specifically found that Governor Schwarzenegger had inherent authority to establish the working hours and schedules of state employees pursuant to Government Code sections 19849 and 19851⁴:

The Court finds that these two statutes, taken together, provide the Governor with authority to

the earliest practical time following the adoption of such law, rule, resolution, or regulation.

⁴ California Government Code section 19849 (a) states in relevant part that the Department of Personnel Administration, "...shall adopt rules governing hours of work and overtime compensation and the keeping of records related thereto, including time and attendance records. Each appointing power shall administer and enforce such rules."

California Government Code section 19851(a) states, "It is the policy of the state that the workweek of the state employee shall be 40 hours, and the workday of the state employee 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."

reduce the workweek of state 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. Under the circumstances of the current fiscal crisis, the reduction in the workweek of state employees under the furlough order is indisputably related to the needs of the various state agencies, which, from the evidence respondents have submitted to the Court, run the imminent risk of running out of money and thus being unable to carry out their missions, if immediate action is not taken to reduce expenditures.

(AA, Vol. I, Tab N p. AA0120.)

The court in CASE I also specifically held the Governor had the authority to furlough state employees in BU2 pursuant to the MOU between CASE and the State. (AA, Vol. I, Tab N, p. AA0120 – AA0122.)

The court in CASE I stated,

The Court further finds, on two separate bases, that the Governor has authority to reduce the work hours of the state employees represented by the petitioners in these actions pursuant to the terms of the MOUs the State entered into with the petitioner employee organizations, which remain in effect, although technically expired, pursuant to Government Code section 3517.8(a.). First, each of the petitioners' MOUS expressly incorporates the terms of section 18949 [sic] and 19851 into the agreement between the parties, and the terms of the MOU do not conflict with these statutes, notwithstanding that the MOUs call for a normal work week of 40 hours. Thus, these provisions of law are not superseded by the MOUs, and the Governor retains the authority, pursuant to law and contract, to take any actions

he would be permitted to take pursuant to Government Code section 19849 and 19851 as described above. (AA, Vol. I, Tab N, p. AA0120.)

Specifically in reference to the MOU for BU2, the court in CASE I noted Article 10.3 of the CASE MOU, which appears under the heading "Layoff", further provides: "The 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." (AA, Vol. I, Tab N, p. AA0121.)

Thus, the court in CASE I concluded,

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. In essence, state employees are subject to a temporary deduction from the total pay under the established ranges, and not to being paid under a new or adjusted salary range.

(AA, Vol. I, Tab N, p. AA0122.)

Based on these findings, the court in CASE I ruled as follows:

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 PEEG 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.*

(AA, Vol. I, Tab N, p. AA0123, emphasis added.)

As a result of the fact that the ruling in CASE I specifically found the Governor had the inherent executive authority, both pursuant to statute and pursuant to specific language in the MOU between CASE and the State, to direct the furloughs of all BU2 employees represented by CASE, the ruling by the Sacramento County Superior Court necessarily included BU2 employees employed by SCIF. Accordingly, the San Francisco Superior Court should have stayed the CASE II action until the CASE I action was completely resolved in the Third District Court of Appeal.

The trial court erred in not staying the CASE II action based on exclusive concurrent jurisdiction because all of the elements required for applying exclusive concurrent jurisdiction exist: 1) the two actions involve the same parties; 2) the issues in both CASE I and CASE II arise out of the same transaction or events; and 3) public policy requires the application of

exclusive concurrent jurisdiction because the failure to apply exclusive concurrent jurisdiction *created inconsistent and conflicting rulings*.

3. **The Parties to Both CASE I and CASE II Are Sufficiently Related For the Purposes of Exclusive Concurrent Jurisdiction.**

It is not necessary that the parties to both actions be identical in order for exclusive concurrent jurisdiction to apply. (*Garamendi, supra*, 20 Cal.App.4th at 769-770.) However, in this case, all the parties to the current action, CASE II, were either parties to the previous action, CASE I, or are in privity with parties in the CASE I action.

CASE does not dispute it was a party to the prior action. (AA, Vol. II, Tab HH, p. AA0232.) The individually named petitioners in this case, while not parties to CASE I, had their interests represented by CASE in that action as a result of CASE filing its petition on behalf of *all* BU2 employees. (AA, Vol. I, Tab L, p. AA0087.) As members of CASE, the individually named Respondents here also are in privity with CASE.

The concept of “privity” requires “an identity or community of interest with, and adequate representation by, the party in the first action [citations omitted]. The circumstances must also have been such that the nonparty should reasonably have expected to be bound by the prior adjudication....” (*Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Association* (1998) 60 Cal.App.4th 1053, 1070, quoting *Victa v. Merle Norman Cosmetics, Inc.* (1993) 19 Cal.App.4th 454, 465; *see also*

Helfand v. National Union Fire Insurance Company of Pittsburgh Insurance Company of Pittsburgh, PA (1992) 10 Cal.App.4th 869, 902; *Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 150).

A party is “adequately represented” for the purposes of the privity rule if “his or her interests are so similar to a party’s interests that the latter was the former’s virtual representative in the earlier action.” (*Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Association, supra*, (1998) 60 Cal.App.4th 1053, 1070, quoting *Helfand v. National Union Fire Insurance Company of Pittsburgh, PA* (1992) 10 Cal.App.4th 869, 902.) “We measure the adequacy of ‘representation by inference, examining whether the ... party in the suit which is asserted to have a preclusive effect had the same interest as the party to be precluded, and whether that ... party had a strong motive to assert that interest. If the interests of the parties in question are likely to have been divergent, one does not infer adequate representation and there is no privity.’” (*Id.*, at p. 1071, quoting *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 864, 877.)

To determine adequate representation, the court must examine whether the losing party in the prior suit had the same interest as the party to be precluded, and whether the same losing party had a “strong motive” to assert that interest. (*California Physicians’ Service v. Aoki Diabetes Research Institute* (2008) 163 Cal.App.4th 1506, 1523.)

In CASE I, CASE specifically brought its petition on behalf of all of its members, including those employed by SCIF, specifically alleging, “*all CASE members* would be directly impacted if the executive order were to be implemented.” (AA, Vol. I, Tab L, p. AA0087.) Thus, had CASE prevailed in CASE I, and the State refused to apply the order to BU 2 employees at SCIF, it is inconceivable CASE would not have contended the decision was sufficiently broad enough to apply to apply to its members employed at SCIF. In CASE II, CASE alleged, that it brought the action on behalf of “all CASE members employed by SCIF,” including the individually named petitioners. (AA, Vol. I, Tab A, p. AA0002.) In nearly identical language to the CASE I petition, Respondents allege here that “*all CASE members employed by SCIF* would be directly impacted if the executive order were to be implemented.” (AA, Vol. I, Tab A, p. AA0002, [emphasis added].)

The individually named petitioners’ interests, and the interests of all individual CASE members were adequately represented in CASE I. In both petitions, CASE alleged that its members had a beneficial interest in the outcome that was identical to the interest espoused by CASE. No credible evidence was raised at the trial court level by CASE that CASE’s individual members would not believe that they would be bound by the decision in CASE I. CASE has presented no evidence, and no evidence exists, that the interests of individual petitioners Glen Grossman, Mark Henderson and

Geoffrey Sims were even remotely likely to be divergent from the interests of CASE in either action. Therefore, individual petitioners were in privity at all times, and the court in CASE II should have stayed the CASE II action until the CASE I action was fully resolved under the doctrine of exclusive concurrent jurisdiction.

4. **Both Actions Arose Out of the Same Transaction Or Events.**

The rule of exclusive concurrent jurisdiction applies if the claims in CASE I and CASE II arise out of the same transactions or events. (*Franklin & Franklin, supra*, 85 Cal.App.4th at 1175.) Other courts have defined the phrase “same transaction or occurrence” as occurring when the factual or legal issues are *logically related*. (*Currie Medical Specialties, Inc. v. Bowen* (1982) 136 Cal.App.3d 774, 777; emphasis added.) The two causes of action need not be absolutely identical. (*Id.*)

The issues in both CASE I and CASE II arise out of the same transaction or event: the Governor’s issuance of the Executive Order directing the furloughing of state employees, including those in BU2 represented by CASE. The transactional relationship between the claims in the two actions in order for exclusive concurrent jurisdiction to apply is a significantly broader concept than the standard required for res judicata. In fact, “the res judicata test is not required for application of the rule of exclusive concurrent jurisdiction. Instead, we adopt the more expansive

subject matter test applied in recent cases and by the trial court herein, which considered whether the first and second actions arise from the ‘same transaction.’” (*Plant Insulation Co. v. Fibreboard Corporation, supra*, 224 Cal.App.3d at 786-787.) Therefore, the more stringent test applied for the purposes of res judicata does not apply for the purposes of exclusive concurrent jurisdiction. All that is required here is that CASE I and CASE II have a transactional nexus to one another. Given this is indisputably the case, it was improper for the trial court not to apply exclusive concurrent jurisdiction here.

Even if the more stringent test did apply, exclusive concurrent jurisdiction should still have been applied since the causes of action in CASE I and CASE II seek to vindicate the same “primary right.” A cause of action is defined under California based on the primary right concept, which defines a cause of action as follows: “(1) a primary right possessed by the plaintiff, (2) a corresponding primary duty devolving upon the defendant, and (3) a delict or wrong done by the defendant which consists in a breach of such primary right and duty. Thus two actions constitute a single cause of action if they both affect the same primary right.” (*Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Association, supra*, 60 Cal.App.4th at 1067, quoting *Acuna v. Regents of University of California* (1997) 56 Cal.App.4th 639, 648.)

California courts have further defined a “primary right” as “the plaintiff’s right to be free from the particular injury suffered.” (*Mycogen v. Monsanto Company* (2002) 28 Cal4th 888, 904, quoting *Crowley v. Katleman* (1994) 8 Cal.4th 666, 681-682.) Courts also have forbidden “splitting” a cause of action into multiple forms of relief by stating, “The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. [Citation omitted.] A pleading that states the violation of one primary right in two causes of action contravenes the rule against ‘splitting’ a cause of action. [Citation omitted.]” (*Le Parc Community Ass’n v. Workers’ Compensation Appeals Bd.* (2003) 110 Cal.App.4th 1161, 1170, quoting *Crowley v. Katleman* (1994) 8 Cal.4th 666, 681.)

In both this action and the action in CASE I, the singular issue presented by CASE was the lawfulness of the Governor’s Executive Order as applied to BU2 employees. In CASE I, Petitioner sought “to set aside the portions of the Governor’s Executive Order S-16-08 calling for a furlough and salary reduction for state employed legal professionals because the Executive Order is unlawful.” (AA, Vol. I, Tab L, p. AA0098.) In CASE II, the petition at issue in this litigation, Petitioners sought a writ of mandate compelling Appellants to “set aside the portions of the Governor’s Executive Order S-16-08 calling for a furlough and salary reduction for SCIF employees because the Executive Order is unlawful in

that respect.” (AA, Vol. I, Tab A, p. AA0012.) The nearly identical language in the two petitions show that in both CASE I and this case, the alleged injury to CASE members is the furloughing of state employees pursuant to the Governor’s Executive Order.

As further indication of the identity of the issues between CASE I and CASE II, the final ruling by the CASE I trial court provides that it applies to all state employees subject to the Dills Act. (AA, Vol. I, Tab N, p. AA0123.) This includes, by definition, BU2 employees at SCIF. (See Gov. Code §§ 3513(b), 3515.5.) While different theories are asserted in CASE I and CASE II regarding why furloughs allegedly are inapplicable to BU2 employees (or some segment of that workforce such as that employed at SCIF), the decision to “split” those theories of relief between two separate actions does not provide a means of avoiding the reality that the two actions seek to vindicate the same primary right: relief for all, or some segment of, state employees in BU2 from furloughs implemented pursuant to the Executive Order. “[I]f two actions involve the same injury to the plaintiff and the same wrong by the defendant, then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery.” (*Le Parc Community Ass’n v. Workers’ Compensation Appeals Bd.*, *supra*, 110 Cal.App.4th 1161, 1170, quoting *Tensor Group v. City of Glendale* (1993) 14 Cal.App.4th 154.)

For exclusive concurrent jurisdiction purposes, it is not relevant that CASE I involved a challenge to the Governor's authority to issue the Executive Order pursuant to Government Code section 19826, while CASE II involved a challenge to the Governor's authority to issue the Executive Order pursuant to Insurance Code section 11873(c). The relevant point is that both actions involved challenges to the Governor's authority to issue the Executive Order. The claims asserted in CASE I and CASE II involve the same primary right, *i.e.*, relief from an allegedly improper Executive Order imposing furloughs on BU2 employees. The fact that CASE chose to pursue different legal *theories of relief* does not detract from this critical point. As the California Supreme Court stated, "Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief. The primary right must also be distinguished from the remedy sought: "The violation of one primary right constitute a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other." (*Mycogen v. Monsanto Company, supra*, 29 Cal.4th at 904, quoting *Crowley v. Katleman* (1994) 8 Cal.4th 666, 681-682.)

Having satisfied the more exacting "primary rights" test, it is evident the broader transactional relationship test for applying exclusive concurrent jurisdiction has been met. Accordingly, the trial court committed reversible

error resulting in a miscarriage of justice when it failed to apply exclusive concurrent jurisdiction to stay the present action until final resolution of CASE I.

5. **The Trial Court Erred in Deciding That the February 4, 2009 Minute Order Prevented the Court from Staying CASE II Based on Exclusive Concurrent Jurisdiction.**

The sole basis for the CASE II trial court's decision not to apply exclusive concurrent jurisdiction, in what the court termed a "close call," was the February 4, 2009 clarification order issued by the trial court in CASE I. (RT, April 15, 2009 hearing, p. 47) The genesis of the clarification order was an *ex parte* letter that State Controller John Chiang sent to the trial judge in CASE I following the court's January 30, 2009 issuance of its Final Amended Ruling. (AA, Vol. II, Tab JJ, p. AA0240.) In that letter, Controller Chiang sought clarification as to whether the January 30, 2009 minute order applied to the employees of the elected civil executive officers of California, who had not been parties before the court in CASE I and the other cases heard by the court on January 29, 2009. (*Id.*) In response, the CASE I trial court issued a Minute Order dated February 4, 2009 which specifically stated,

The Court has received and reviewed a letter dated February 3, 2009 from Richard G. Chivaro, Chief Counsel of the California State Controller's Office, requesting clarification of the Court's ruling in these matters, specifically, on the issue of whether the ruling is applicable to employees of independently elected

Constitutional Officers and other elected state-wide officials including the Lieutenant Governor, Office of the Attorney General, Secretary of State, State Treasurer, Superintendent of Public Instruction and Insurance Commissioner. The letter to the Court 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 independent elected Constitutional officers and other elected state-wide officials referenced above were not parties to these matters. The petitioners and complaints upon which the Court ruled did not raise any issues regarding the governor's authority to order furloughs for the employee's of those officers and officials. The Court's ruling therefore did not address, or make any ruling regarding, the Governor's authority to order furloughs or the employees of those officers and officials. Accordingly, the Court expresses no views regarding that issue." (*Id.*)

The plain language of this Order states the January 30, 2009 Final Order does not apply to employees of "independently elected Constitutional officers and other elected state-wide officials."⁵ (*Id.*) It also states "the independently elected Constitutional officers and other elected state-wide officials referenced above were not parties to these matters." (*Id.*) Most

⁵ The elected official identified in Judge Marlette's February 4, 2009 Minute Order are statutory defined at Government Code section 1001 as

importantly, the February 4, 2009 Minute Order does *not* specifically state that “it did not have before it the claims of CASE members who weren’t employees of executive agencies,” as found by the CASE II trial court. (*Id.*) Rather, the February 4, 2009 Minute Order commented that the January 30, 2009 Final Amended Order did not address claims by the civil executive officers because they were not parties in the actions adjudicated by that ruling.

Respondents cannot take advantage of the CASE I trial court’s February 4, 2009 Minute Order to avoid the application of exclusive concurrent jurisdiction. In CASE I, CASE expressly stated it was seeking relief from the furloughs for *all* of its members. (AA, Vol. I, Tab L, p. AA0087.) That request for relief was denied for *all* CASE members. There is no reason to believe, and certainly no evidence, that the CASE I trial court intended to exclude SCIF from the January 30, 2009 Final Order.

Interpreting the CASE I trial court’s February 4, 2009 order to state that the court’s decision was that furloughs were *only* applicable to executive branch agencies is a mistaken interpretation of the CASE I trial court’s final ruling. As the CASE II trial court was forced to acknowledge, “everything else aside – I mean if we didn’t have the clarification order my gut would have told me, well, you may not have thought to raise these arguments in CASE I, but they sure were arguments that affected whether

“civil executive officers.”

or not the furlough plan affected some CASE employees, and therefore, either were or needed to have been brought, and the failure to have brought them would be under normal analysis a foreclosing event.” (Record) The error the CASE II court made was to interpret the February 4, 2009 Order by the CASE I trial court as some limitation on its January 30, 2009 Final Ruling that the Executive Order applies to all state civil service employees subject to the Dills Act as expressly stated in that ruling. To find, as the CASE II trial court did, that the CASE I trial court’s January 30, 2009 ruling was somehow limited by the February 4, 2009 Minute Order ignores the plain language of both. The CASE I trial court expressly ruled in its January 30, 2009 Final Ruling that the Governor’s Executive Order applied to all employees represented by the petitioner unions who are covered by the Dills Act. (AA, Vol. I, Tab N, p. AA0123.) There is nothing in the February 4, 2009 Minute Order limiting the scope of this ruling. Accordingly, it was error for the CASE II trial court to rely on this order to prevent the proper application of exclusive concurrent jurisdiction here.

6. **The San Francisco County Superior Court’s Adjudication of CASE II Created Confusion and Conflicting Judgments.**

The January 30, 2009 final decision by the court in CASE I ruled the Governor has the authority to issue the Executive Order and, as a result, furloughs were properly implemented for *all state employees* represented by Petitioners. (AA, Vol. I, Tab N, p. A0123.) That group of *all state*

employees represented by CASE in CASE I included employees in BU2 employed at SCIF. The June 4, 2009 judgment by the trial court in CASE II that BU2 employees employed at SCIF were not subject to furloughs is in direct conflict with the ruling in CASE I. The ruling in CASE I and the ruling in CASE II cannot be reconciled in this regard. Exclusive concurrent jurisdiction should have been applied to stay CASE II in order to “avoid[] conflicts that might arise between courts if they were free to make contradictory decisions.” (*Plant Insulation Co. v. Fiberboard Corporation, supra*, 224 Cal.App.3d at 786-87.) The doctrine of exclusive concurrent jurisdiction was formed to avoid the exact situation of conflicting judgments in which all parties to both CASE I and CASE II now find themselves.

All of the elements for the application of exclusive concurrent jurisdiction are met here. Appellants request that this court reverse the judgment of the San Francisco Superior Court as a result of its failure to properly apply the doctrine of exclusive concurrent jurisdiction. After all, “the rule of exclusive concurrent jurisdiction ... is mandatory ... [i]f the conditions are met, the issuance of a stay order is a matter of right.” (*People ex rel. Garamendi v. American Autoplan, Inc., supra*, 20 Cal.App.4th 760, 772.) The court’s failure to apply this mandatory rule, and the miscarriage of justice that ensued from that failure, warrant reversal of the judgment in CASE II.

B. Insurance Code Section 11873 Does Not Preclude the State Employer From Regulating the Hours of Work of SCIF Employees.

1. Standard of Review.

A review of a judgment determining the proper interpretation of a statute, or a pure question of law, is reviewed *de novo*. (*People ex. Rel Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.) The application of an interpreted statute or law to undisputed facts is reviewed *de novo* as well. (*Crocker Nat'l Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888; *International Enginer Parts, Inc. v. Feddersen & Co.* (1995) 9 Cal.4th 606, 611.) Here, the underlying facts – the implementation of furloughs as a result of the Executive Order- are undisputed, and, as such, this matter should be reviewed independently by the appellate court.

2. The Plain Language of Insurance Code section 11873(c) Does Not Bar The Application of the Executive Order to SCIF Employees.

Respondents alleged in their petition that BU2 employees at SCIF were specifically exempted from any hiring freezes or staff cutbacks as a result of California Insurance Code section 11873(c.) (AA, Vol. I, Tab A, p. A0008.) Respondents alleged, “Whatever emergency powers the Governor may have as a result of the deficit in the General Fund, he has no authority to usurp the power of the SCIF Board of Directors, which has been delegated to the Board by the Legislature itself, nor does he have the

power to usurp the power of the Legislature itself with regard to the management of the operations of SCIF.” (*Id.*)

However, Insurance Code section 11873 does not prohibit the Governor from directing furloughs of SCIF employees through the Executive Order because that code section does not limit the Governor’s broad power as the state employer to regulate all state employees’ working hours.

Insurance Code section 11873 states:

(a) *Except as provided by subdivision (b), the fund shall not be subject to the provisions of the Government Code made applicable to state agencies generally or collectively, unless the section specifically names the fund as an agency to which the provision applies.*

(b) The fund shall be subject to the provisions of Chapter 10.3 (commencing with Section 3512) of Division 4 of Title 1 of, Chapter 6.5 (commencing with section 8543) of Division 1 of Title 2 of, Article 9 (commencing with Section 11120) of Chapter 1 of Part 1 of Division 3 of Title 2 of, the Government Code, and Division 5 (commencing with Section 18000) of Title 2 of the Government Code, with the exception for all of the following provisions of that division:

(1) Article 1 (commencing with Section 19820) and Article 2 (commencing with Section 19823) of Chapter 2 of Part 2.6 of Division 5.

(2) Sections 19849.2, 19849.3, 19849.4, and 19849.5.

(3) Chapter 4.5 (commencing with Section 19993.1 of Part 2.6 of Division 5.

(c) Notwithstanding any provision of the Government Code or any other provision of law, the positions funded by the State Compensation Insurance Fund are exempted from any hiring freezes and staff cutbacks otherwise required by law. This subdivision is declaratory of existing law. [Emphasis added.]

Insurance Code section 11873 does not prohibit the Governor from directing furloughs of SCIF employees because this section does not limit the Governor's broad power as the state employer to regulate all state employees' working hours. CASE mistakenly interprets Insurance Code section 11873 as exempting SCIF employees from any modification of their working hours, including the imposition of furloughs. However, this section should properly be interpreted to mean that employees of SCIF are exempted from *layoffs*. Any other interpretation would, in effect, render BU 2 employees at SCIF exempt from the Dills Act and DPA's authority to administer the nonmerit aspects of state employment. (*Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1322.)

The statutory interpretation issue before the court in this case is whether the phrase "staff cutbacks" in Insurance Code section 11873, subdivisions (c), exempts BU2 employees at SCIF from being furloughed pursuant to the Governor's Executive Order.

The plain meaning of “staff cutbacks” is an actual *cutback* in *number of staff*, not in staff hours. Under California law, if the words of a statute establish a clear and unambiguous meaning, there is no need for judicial construction. (See *Estate of Griswald* (2001) 25 Cal.4th 904, 910-911; *People v. Howard* (2002) 100 Cal.App.4th 94, 97.) This court must give the words of Insurance Code section 11873(c) the usual, ordinary meaning. (*Phelps v. Stostad* (1997) 16 Cal.4th 23, 32; *City of Pasadena v. AT & T Communications of California, Inc.* (2002) 103 Cal.App.4th 981, 984.) This court must not rewrite the law to give the words the effect Respondents have ascribed to them, as that interpretation differs from the plain and direct meaning of the words. (*Id.*)

The first step in statutory construction is to analyze the language of the statute, giving all relevant words their usual, ordinary and common-sense meaning. (*Smith v. Rhea* (1977) 72 Cal.App.3d 361, 365; *Santa Ana Unified School Dist. v. Orange County Development Agency* (2001) 90 Cal.App.4th 404, 409.) The established rules of statutory construction, as set forth above, require this Court to interpret “staff cutback” according to the usual, ordinary and common-sense meaning of the phrase. Webster’s *New Collegiate Dictionary* defines “cutback” as a “reduction.” Thus, the plain meaning of “staff cutback” in Insurance Code section 11873(c) is a reduction in staff, *not* a reduction in the staff’s work schedules, which is the interpretation the statute would have to be given to find it prohibits

furloughs of SCIF employees. If the Legislature had intended Insurance Code section 11873(c) to apply to the hours worked by SCIF employees, it could have so indicated by including an exemption in the statute from reductions in working hours. The code section does not contain such an exemption, however. To interpret the exemption from “staff cutbacks” in Insurance Code section 11873(c) as including an exemption from reductions in working hours adds a concept to the phrase “staff cutbacks” beyond the plain meaning of the words used.

In addition to being given their ordinary and common-sense meaning, words in a statute must be read in context. (*Phelps v. Stostad, supra*, 16 Cal.App.4th at 23.) A court must not read a single sentence of a longer statutory provision in isolation. (*Los Angeles Times v. Alameda Corridor Transit Authority* (2001) 88 Cal.App.4th 1381, 1387.) Insurance Code section 11873 (c) cannot be interpreted without considering the meaning of subsection (b) Insurance Code section 11873(b) states, “The fund [SCIF] shall be subject to the provisions of Chapter 10.3 (commencing with Section 3512)” [the Dills Act]. The purpose of the Dills Act is, “to provide a reasonable method of resolving disputes regarding wages, *hours*, and other terms and conditions of employment between the state and public employee organizations.” (Gov. Code § 3512.)

It is undisputed BU2 employees are covered by an MOU negotiated between the State and CASE pursuant to the Dills Act. If the phrase “staff

cutbacks” in Insurance Code section 11873(c) is defined to include any reduction in work hours, the State would be impeded in its ability to negotiate working hours through the collective bargaining process established under the Dills Act. This result would put section 11873(c) in direct conflict with the language in section 11873(b). If this court were to interpret subdivision (c) as prohibiting the state employer from altering the working *hours* of SCIF employees, this court would effectively nullify the provision of subdivision (b) specifically applying the Dills Act to SCIF employees. Conversely, if this Court interprets Insurance Code section 11873(b), and (c) as allowing the state employer to alter the work hours of SCIF employees but *not* to effect cutbacks, such as layoffs and terminations, the *entirety* of the statutory enactment is internally harmonized.

Statutory principles must be considered in context. Therefore, subsection (c) cannot be considered without also considering the meaning of subsection (b). This court is bound to harmonize “the various parts of the statutory enactment ... by considering the particular cause or section in context of the statutory framework as a whole.” (*Moyer v. Workmen’s Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230; see also *Woods v. Young* (1991) 53 Cal.3d 315, 323; *Title Ins & Trust co. v. County of Riverside* (1989) 48 Cal.3d 84, 91; *Dyna-med, Inc. v. Fair Employment & Housing Comm.* (1987) 43 Cal.3d 1379, 1387.) Interpreting the phrase “staff

cutbacks” in Insurance Code section 11873(c) to include furloughs is contrary to the plain meaning of the phrase and puts subsection (c) in direct conflict with subsection (b) of that same code section. Accordingly, this Court should reverse the trial court’s judgment finding that Insurance Code section 11873(c) exempts BU2 employees at SCIF from being furloughed.

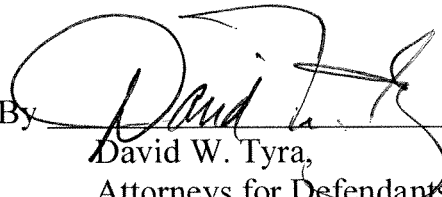
VI.

CONCLUSION

For all of the foregoing reasons, Appellants request that this Court reverse the judgment of the San Francisco County Superior Court in this action.

Dated: September 18, 2009

KRONICK, MOSKOVITZ, TIEDEMANN &
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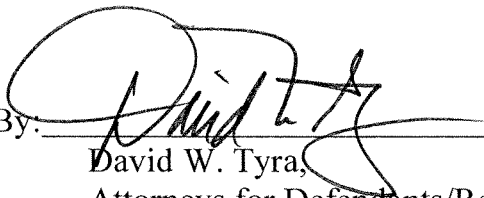
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CERTIFICATE OF WORD COUNT

I, David W. Tyra, Attorney for Defendants/Respondents GOVERNOR ARNOLD SCHWARZENEGGER and DAVID A. GILB, hereby declare under penalty of perjury that the number of words in Opening Brief of Appellants Governor Arnold Schwarzenegger and David A. Gilb equals 10, 395 words, as per the word count feature in Microsoft Word.

Dated: September 18, 2009

KRONICK, MOSKOVITZ, TIEDEMANN &
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A Law Corporation

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PROOF OF SERVICE

I, Sherry Ramirez, 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 September 18, 2009, I served the within documents: **APPELLANTS' OPENING BRIEF**

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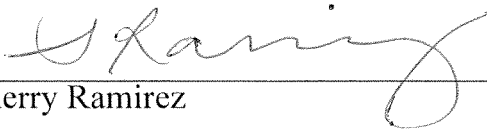
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September, 2009, at Sacramento, California.



Sherry Ramirez