

ATTORNEY GENERAL--OFFICE COPY

In the Supreme Court of the State of California

PROFESSIONAL ENGINEERS IN
CALIFORNIA GOVERNMENT, et. al.,

Petitioner and Appellant,

v.

ARNOLD SCHWARZENEGGER, as
Governor or the State of California, etc.,
et. al.

Defendant and Respondent.

AND RELATED CASES.

Supreme Court Case
No. S180643

SUPREME COURT
FILED

MAR 22 2010

Frederick K. Ohlrich Clerk

Deputy

ANSWER OF THE CONSTITUTIONAL OFFICERS TO PETITION TO
TRANSFER AND CONSOLIDATE APPEALS

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INTRODUCTION

The petitioners seek to transfer to this Court seven appeals now pending in the First and Third District Courts of Appeal and to consolidate those appeals for briefing and hearing.¹ All of the appeals address some aspect of the Governor's executive orders imposing furloughs on California state employees in response to the state's fiscal crisis. Although the factual and legal issues raised by the appeals are undeniably matters of public significance, the petitioners have failed to establish that the appeals meet the test for transfer to this Court, particularly given that many of the appeals are in advanced stages of briefing and ready or nearly ready for oral argument. The constitutional officers filing this Answer therefore oppose the relief requested by the petitioners.²

Under the rules of court, the Supreme Court will not transfer an appeal "unless the cause presents an issue of great public importance that the Supreme Court must promptly resolve." (Cal. Rules of Court, rule 8.552(c).) The matters on appeal, while important, do not require this Court's intervention at this time. If the issues raised by one or more of the appeals ultimately reach this Court, all parties and this Court would benefit from intermediate appellate review. Further, the concerns expressed by the petitioners over the multiplicity of legal actions concerning the furloughs can be addressed by other procedures. Transfer would also disrupt an intermediate appellate process that is well underway. And the underlying

¹ Petitioners are the Governor of California, the Department of Personnel Administration, and various state agency and department heads.

² The constitutional officers filing this Answer are State Controller John Chiang, Secretary of State Debra Bowen, State Treasurer Bill Lockyer, Attorney General Edmund G. Brown Jr., Superintendent of Public Instruction Jack O'Connell, and the State Board of Equalization. For convenience, unless the context indicates otherwise, these parties will be collectively referred to as the constitutional officers.

executive orders, set to expire on June 30, 2010, will likely be superseded by other executive and legislative action before this Court would be in a position to hear and rule on the issues. Given these and other circumstances, the constitutional officers respectfully request that the petition be denied.

If this Court is inclined to grant the motion to transfer, the constitutional officers who are appellants in Third District Appellate Case No. C061648³ request that their appeal not be consolidated with the other actions. This appeal raises unique factual and legal issues that would benefit from separate briefing and oral argument.

The petitioners' alternative request to transfer the First District appeals to the Third District should also be denied. The petitioners have not advanced any valid reason to disrupt the appellate process in this manner.

SUMMARY OF PARTIES AND APPEALS

The constitutional officers who are submitting this brief are appellants or respondents in the appeals that are the subject of the petitioners' motion, as follows:

Arnold Schwarzenegger, et. al. v. John Chiang; John Garamendi, et. al., Intervenors, Third District Court of Appeal Case No. C061648, filed April 8, 2009. The appellants include State Controller John Chiang, Secretary of State Debra Bowen, State Treasurer Bill Lockyer, Attorney General Edmund G. Brown Jr., State Superintendent of Public Instruction Jack O'Connell and the State Board of Equalization.

California Attorneys, etc., in State Government v. Arnold Schwarzenegger, et. al., Third District Court of Appeal Case No. C061009,

³ *Arnold Schwarzenegger, et. al., v. John Chang; John Garamendi, et. al., Intervenors.*

filed February 3, 2009. State Controller John Chiang is an appellant in this proceeding.

Professional Engineers in California Government v. Arnold

Schwarzenegger, et. al., Third District Court of Appeal Case No. C061011, filed February 3, 2009. State Controller John Chiang is an appellant in this proceeding.

Service Employees Int'l Union, Local 1000 v. Arnold

Schwarzenegger, et. al., Third District Court of Appeal Case No. C061020, filed February 5, 2009. State Controller John Chiang is an appellant in this proceeding.

Union of American Physicians and Dentists v. Arnold

Schwarzenegger, et. al., First District Court of Appeal Case No. A127775, filed February 26, 2010. State Controller John Chiang is a defendant/respondent in the underlying action, Alameda Superior Court Case No. RG09453982, and would be a respondent in the appeal.

Service Employees Int'l Union, Local 1000, et. al. v. Arnold

Schwarzenegger, et. al., First District Court of Appeal Case No. A127776, filed February 26, 2010. State Controller John Chiang and Attorney General Edmund G. Brown Jr. are defendants/respondents in the underlying action, Alameda County Superior Court Case No. RG09456750, and would be respondents in the appeal.

California Attorneys, etc., in State Government v. Arnold

Schwarzenegger, et. al., First District Court of Appeal Case No. A127777, filed February 26, 2010. State Controller John Chiang, Secretary of State Debra Bowen and Attorney General Edmund G. Brown Jr. are defendants/respondents in the underlying action, Alameda County Superior Court Case No. RG09453982, and would be respondents in the appeal.

ARGUMENT

I. TRANSFER AND CONSOLIDATION IS UNWARRANTED AND WOULD LIKELY DELAY, NOT EXPEDITE, THE APPEALS.

“On a party’s petition or its own motion, the Supreme Court may transfer to itself, for decision, a cause pending in a Court of Appeal.” (Cal. Rules of Court, rule 8.552(a).) The standard for transfer of appeals to the Supreme Court is as follows: “The Supreme Court will not order transfer under this rule unless the cause presents an issue of great public importance that the Supreme Court must promptly resolve.” (Cal. Rules of Court, rule 8.552(c).)

In an early case, this Court declined to transfer a cause after an intermediate appellate court had already conducted proceedings on a writ of prohibition and had issued an alternative writ pursuant to a written opinion denying a demurrer to the petition. (*Yolo Water & Power Co. v. Superior Court* (1919) 181 Cal. 33, 34-35.) Noting the stage the proceedings had already reached, this Court declined to exercise the transfer power, rejecting arguments that the peculiar facts of the case presented an emergency requiring immediate decision by the state’s highest court. (*Ibid.*)

Although the seven appeals all present issues of public importance, and may warrant review by this Court following intermediate appellate review, they do not under present circumstances rise to a level requiring an immediate transfer to this Court. The cases cited by the petitioners in support of transfer involved challenges to ballot initiatives impacting statewide concerns, traditionally matters that this Court has looked upon favorably for purposes of consideration in the first instance. (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241 [Court transferred challenge to Proposition 8, the “Victims Bill of Rights” initiative, where it was “uniformly agreed that the issues are of great public importance and should be resolved promptly”]; *Amador Valley Joint Union High School Dist. v.*

State Bd. of Equalization (1978) 22 Cal.3d 208, 219 [Court exercised original jurisdiction to hear challenge to Proposition 13; issues were of great public importance and needed to be resolved promptly].) By contrast, these appeals do not involve deciding whether a statewide voter-approved initiative may be implemented. Rather, these appeals concern an issue that can effectively be heard, at least initially, at the intermediate appellate level.⁴

But even if the petitioners could overcome the hurdle of the first prong of Rule 8.552, these appeals simply do not require prompt intervention by this Court, at least not at the present time. Notably, the Governor's executive orders are about to expire. Both the Governor's initial order and his subsequent order run only through the end of the 2009-2010 fiscal year; i.e., through June 30, 2010. By the time these appeals could be briefed and then heard by this Court, the underlying orders will no longer be effective to mandate furloughs. And, in the time it would take this Court to render a decision, the Governor and the Legislature may have decided to address the state's fiscal problems without the use of furloughs. There is no reason to conclude that there is an immediate need for this Court to address one response to the fiscal crisis, implemented by the Governor more than one year ago, when the Governor and the Legislature may approve very different solutions for a new set of budget issues in the coming fiscal year. Moreover, it is unlikely that a decision of this Court could be issued in time to assist the Governor and the Legislature in crafting budget solutions for the next fiscal year.

⁴ For similar reasons, the petitioners' citation to *Perry v. Jordan* (1949) 34 Cal.2d 87 is also inapposite. In *Perry*, this Court exercised original jurisdiction in a proceeding that concerned placement of an initiative constitutional amendment on the ballot. (*Id.* at p. 90-91.)

This situation contrasts with that presented to this Court in *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, which addressed a challenge to voter-approved Proposition 103, an insurance measure. Among other things, the Court noted that a prompt resolution was required because certain contested provisions were effective for only one year. (*Id.* at p. 812.) Here, on the other hand, the Governor and the Legislature can make new decisions on the state budget, decisions that may obviate any need for immediate decision by this Court.

Further, a transfer now would likely delay, not expedite, the Third District appeals. In Third District Court of Appeal Case No. C061648 (*Schwarzenegger v. Chiang*), briefing was completed in December 2009 and the matter is ready for oral argument. The other three appeals before the Third District (nos. C061009, C061011, and C061020) are in the final stages of supplemental briefing requested by the appellate court. All of these appeals have been pending for close to or more than one year. At this point, the net result of transfer would be that the Third District appeals would be delayed, not expedited.

Further, transfer would deprive this Court and the parties of the benefits of intermediate appellate review. As the petition shows, the furloughs have raised a plethora of issues. (See Petition, pp. 7-8 [listing 7 proposed issues].) And this list of issues is not complete. The petitioners are the respondents, not the appellants, in the four Third District appeals. The appellants in these cases have defined the issues differently or more broadly than have petitions and all of these issues would be present in at least the initial appeal. (See e.g. discussion, *infra*, re *Schwarzenegger v. Chiang*, Third DCA Case No. C061648.) Deferring to the intermediate appellate process would allow all of these issues to be considered and honed before presentation to this Court, assuming that a subsequent stage of appellate proceedings would be sought by the parties.

Moreover, the advanced stage of the Third District appeals may assist in resolution of the First District cases. On the other hand, if the districts split in their approach to the issues, high court review would then be appropriate because the issues requiring resolution would be more clearly framed. (See Cal. Rules of Court, rule 8.500(b) [Supreme Court may order review when necessary to secure uniformity of decision or to settle an important question of law].)

For these reasons, the petitioners have not established that the standard of Rule 8.552 applies in this proceeding. In the absence of a demonstration that these appeals must be promptly resolved by the Supreme Court, the petition to transfer and consolidate should be denied.

II. THE PETITIONERS HAVE FAILED TO MOVE PROMPTLY FOR TRANSFER AND REVIEW IN THIS COURT

A party seeking transfer must “promptly” seek this relief. (Cal Rules of Court, rule 8.552(d).) Here, the petitioners have waited until the filing of the appeals in the First District to seek transfer. The delay of approximately one year in seeking transfer of the Third District appeals, or a stay of all pending trial court proceedings while these appeals progressed, militates against transfer to this Court.

The three Third District appeals filed by the unions (nos. C061009 [CASE], C061011 [PECG], and C061020 [SEIU]) have been pending since February 2009, more than one year. In January 2010, these cases were consolidated in the Court of Appeal for purposes of oral argument and decision. After initial briefing and amicus briefing were completed, the Third District sought supplemental briefing, due for completion in April 2010. (See Third DCA dockets, case nos. C061009, C061011, C061020.) Thus, the Third District and the parties have already invested significant time and effort in these matters.

Similarly, the constitutional officers' appeal was filed nearly a year ago and all briefing has been complete since December 2009. (See Third DCA docket, Case No. C061648.) The parties now await the scheduling of oral argument. Presumably, the Third District has also invested time and effort into review of the briefs and the record.

In short, the petition to transfer and consolidate has not been "promptly" presented to this Court. If the petitioners involved in the Third District appeals had promptly moved for transfer one year ago, a different analysis might be called for. At this stage of the proceedings, however, the one-year delay in bringing the petition has largely defeated any benefits that might have been achieved from an early transfer, if one had been deemed appropriate by this Court. The failure by the petitioners to promptly move for this relief weighs against ordering transfer of any of the appeals.

III. THE DANGER OF MULTIPLE ACTIONS AND CONFLICTING JUDGMENTS MAY BE ADDRESSED BY OTHER PROCEDURES.

The petitioners have additionally asked this Court to stay all pending trial court proceedings relating to the furloughs in cases that have not yet reached the appellate courts. They have cited the multiple actions filed throughout the state, and the danger of conflicting judgments, as justifying the transfer of the appeals to this Court. As parties to many of these actions, the constitutional officers are not unsympathetic to the petitioners' concerns. But other procedures, short of transfer to this Court, are available to the petitioners.

For example, the petitioners are free to avail themselves of procedures in the Court of Appeal, such as seeking a writ of supersedeas to stay enforcement of conflicting judgments. (See Cal. Rules of Court, rule 8.112.) The petitioners have not shown that this remedy is unavailable or insufficient to address their concerns. Many of the arguments they raise

concerning the potential effect of conflicting judgments can be just as easily raised in the intermediate appellate courts.

Moreover, the petitioners could seek expedited relief in the Court of Appeal, such as seeking calendar preference or expedited oral argument. (See Cal. Rules of Court, rule 8.240.) Yet the petitioners have never sought this relief in the Third District Court of Appeal. A prompt motion for expedited consideration in the Third District might have obviated their purported need for a transfer to this Court.

Further, in the trial courts themselves, the petitioners are not prevented from moving for a stay pending the outcome of the current appellate proceedings. The courts have “inherent power . . . to exercise reasonable control over all proceedings connected with pending litigation . . . in order to insure the orderly administration of justice.” (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967, second ellipsis in original, internal quote marks omitted].)

Given these alternative procedural remedies, the petitioners’ concerns with the multiple trial and appellate court proceedings fall short of justifying transfer to this Court.

IV. THE CONSTITUTIONAL OFFICERS’ APPEAL SHOULD NOT BE CONSOLIDATED WITH THE OTHER ACTIONS.

The constitutional officers’ appeal in the Third District presents a unique array of factual and legal issues that stand apart from many or all of the issues raised in the other appeals. If this Court grants the petition to transfer and consolidate, the constitutional officers submit that this appeal should not be consolidated with the other actions but should be separately briefed and heard.

A court may order consolidation “[w]hen actions involving a common question of law or fact are pending before the court.” (Code Civ. Proc., § 1048, subd. (a).) As this Court has recognized, it is improper to consolidate

appeals that raise fundamentally different issues. (*Pacific Legal Foundation v. California Coastal Comm.* (1982) 33 Cal.3d 158, 165 fn. 3.)

Although all of the appeals address some element of the Governor's power to order furloughs, the constitutional officers' appeal uniquely focuses on whether the Governor may extend that power, assuming it exists at all, to the employees of the other independent constitutional officers. Thus, even if some level of gubernatorial furlough power were recognized, this would not answer the separate question of whether the Governor could impose furloughs on officers independently elected by the voters, officers whose positions are independently established by the state Constitution.

In declining to seek transfer of the appeals relating to the State Compensation Insurance Fund and the California Correctional Peace Officers' Association, the petitioners seem to recognize a similar distinction. (See Petition, p. 4 fn. 1.) As described by petitioners, these appeals were not selected for inclusion in the transfer petition because they "affect only SCIF employees" and because they do not address the "threshold question of the Governor's executive authority to furlough state employees." (*Ibid.*) Similar observations could be made of the issues raised in the constitutional officers' appeal.

Moreover, the petitioners' summary of issues offered for this Court's consideration fails to adequately address the issues actually raised by the constitutional officers. Only one issue presented by the petitioners appears to be directed to the constitutional officers' appeal. As defined by the petition, this issue asks, "Does the Governor have the authority to order furloughs of employees working for elected state civil executive officers?" (Petition, p. 7 [Issue 2].)

Yet in the Third District, the constitutional officers have defined at least three factual and three legal issues in urging the appellate court to overturn the decision of the Sacramento County Superior Court upholding

the Governor's power to impose furloughs on the officers. For example, the three factual issues can be summarized as follows:

- (1) Did the Governor's Executive Order, which excluded state entities not under the Governor's "direct executive authority," apply by its own terms to the constitutional officers?
- (2) Was the question of the Executive Order's application to the constitutional officers rendered moot when the Legislature approved a new state budget and the Governor used line-item vetoes to cut the officers' budgets by an amount equivalent to the projected savings that would have been achieved through furloughs?
- (3) Did statements by the Governor's representatives that the constitutional officers were not subject to the Executive Order equitably estop the Governor from subsequently asserting that the order applied to the officers?

(See Appellants' Opening Brief, Case No. C061648, filed October 19, 2009, p. 1.)

In addition, the three legal issues raised in the appeal also present unique questions for the Court of Appeal:

- (1) Would the Governor's assertion of furlough power over the constitutional officers contravene the system of divided executive authority embodied in the California Constitution?
- (2) Would the Governor's assertion of the power to furlough the constitutional officers' employees usurp the power of the Legislature, which has never granted the Governor any authority to manage their day-to-day operations, thereby violating the doctrine of separation of powers between the executive and legislative branches?

(3) Would the constitutional officers, as the statutory appointing powers for their offices, and not the Governor, control furloughs in their offices, to the extent that any such power exists, just as they control such fundamental staffing and management decisions as hiring, firing and layoffs?

(Ibid., p. 2.)

It should be noted that any one of the three factual issues may resolve this appeal without reaching the deeper constitutional and statutory issues. As such, the underlying ground for consolidation urged by the petitioners may not even be reached by the appellate courts.⁵

The petitioners have not shown that the constitutional officers' appeal presents factual and legal issues in common with the other appeals. It follows that this part of the petition should be denied even if the request to transfer is granted.

V. THE ALTERNATIVE MOTION TO TRANSFER ALL APPEALS TO THE THIRD APPELLATE DISTRICT SHOULD BE DENIED.

With little analysis, the petitioners request in the alternative that this Court transfer the First District appeals to the Third District if transfer to this Court is not granted. The Court should decline this invitation to disrupt the appellate process.

This Court may transfer a cause between the courts of appeal. (Cal. Rules of Court, rule 10.1000(a)(1).) This authority is recognized in the state Constitution, which provides that this Court "may, before decision,

⁵ In their brief, the petitioners state that the constitutional officers "stopped applying furloughs to employees working in their departments" when the Sacramento Superior Court initially took no position on whether its ruling in the three union cases applied to the officers. (Petition, p. 13.) In fact, the officers have never implemented the furloughs.

transfer a cause . . . from one court of appeal or division to another.” (Cal. Const., art. VI, § 12, subd. (a).)

For example, transfer may be ordered where an appeal has been inadvertently filed in a district lacking jurisdiction. (*National Kinney v. Workers’ Comp. Appeals Bd.* (1980) 113 Cal.App.3d 203, 207.) And transfer may be ordered when one district recuses itself due to a potential conflict-of-interest. (*Zaremborg v. Superior Court* (2004) 115 Cal.App.4th 111, 114 fn. 4.)

None of these kinds of considerations apply here. The petitioners assert that the transfer would potentially avoid conflicting appellate adjudications. Not only is this speculative, but it ignores that the procedure to address conflicting decisions is a post-decision petition for review in this Court, not a pre-decision petition to transfer. Also, the petitioners suggest that transfer will be more efficient because the initial briefing in the Third District appeals is complete and those cases are closer to hearing and decision than those in the First District. Setting aside that this is actually an argument to deny the petition in its entirety, this factor would not support transfer to the Third District. The cases are not identical, and the petitioners have not shown that the Third District would be able to hear and decide these additional appeals more expeditiously than the First District.

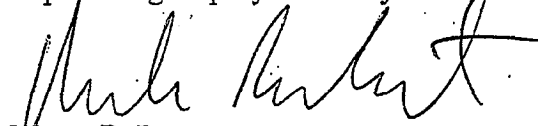
CONCLUSION

For the foregoing reasons, the constitutional officers filing this Answer respectfully request that the Petition to Transfer and Consolidate Appeals be denied. If transfer is ordered, however, it is requested that the appeal in Case No. C061648 not be consolidated with the remaining actions for the reasons state above. Further, this Court is respectfully requested to deny the petitioners' alternative motion to transfer the subject appeals now pending in the First District to the Third District.

Dated: March 22, 2010

Respectfully submitted,

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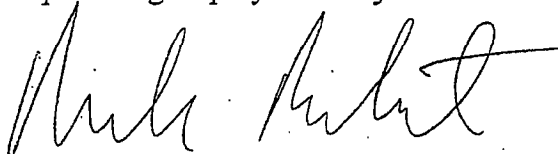
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CERTIFICATE OF COMPLIANCE

I certify that the attached Answer of the Constitutional Officers to
Petition to Transfer and Consolidate Appeals uses a 13 point Times New
Roman font and contains 3,568 words.

Dated: March 22, 2010

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DECLARATION OF SERVICE

Case Name: **Professional Engineers in California Government v. Schwarzenegger, et al.**

Case No.: **S180643**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, San Francisco, California 94102. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 22, 2010, I served the attached **ANSWER OF THE CONSTITUTIONAL OFFICERS TO PETITION TO TRANSFER AND CONSOLIDATE APPEALS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

(SEE ATTACHED SERVICE LIST)

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March, 22, 2010, at Sacramento, California.

Janet Wong
Declarant

Janet Wong
Signature

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<p>The Honorable Frank Roesch Supervising Judge Alameda County Superior Court U.S. Post Office Building 201 13th Street, Department 31 Oakland, CA 94612</p>	<p>The Honorable Patrick Marlette Judge Sacramento County Superior Court Gordon D. Schaber Downtown Courthouse 720 Ninth Street Department 19, Courtroom 3 Sacramento, CA 95814</p>
<p>The Honorable Peter J. Busch Judge San Francisco County Superior Court Civic Center Courthouse 400 McAllister Street Department 301 San Francisco, CA 94102</p>	<p>The Honorable Charlotte W. Woolard Judge San Francisco County Superior Court 400 McAllister Street, Department 302 San Francisco, CA 94102</p>
<p>The Honorable Timothy M. Frawley Judge Sacramento County Superior Court Gordon D. Schaber Downtown Courthouse 720 Ninth Street Department 29, Courtroom 4 Sacramento, CA 95814-1398</p>	<p>The Honorable Conrad Aragon Stanley Mosk Courthouse 110 North Grand Avenue, Dept. 49 Los Angeles, CA 90012</p>
<p>The Honorable David E. Hunter Judge Alameda County Superior Court Hayward Hall of Justice 24405 Amador Street Department 520 Hayward, CA 94544</p>	<p>The Honorable Michael P. Kenny Sacramento County Superior Court Gordon D. Schaber Downtown Courthouse 720 Ninth Street Department 31, Courtroom 4 Sacramento, CA 95814-1398</p>