

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

**PROFESSIONAL ENGINEERS IN
CALIFORNIA GOVERNMENT, et al.,**

Plaintiff and Appellant,

v.

S180643

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

Defendants and Respondents.

AND RELATED CASES

**OPPOSITION TO PETITION TO TRANSFER AND
CONSOLIDATE APPEALS**

California Courts of Appeal,
First Appellate District Case Nos. A127775, A127776, A127777
Third Appellate District Case Nos. C061009, C061011, C061020,
C061648

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INTRODUCTION

California Attorneys, Administrative Law Judges and Hearing Officers in State Employment (“CASE”)¹ hereby opposes the petition² to transfer and consolidate seven different cases pending in different courts of appeal. The seven identified cases challenge the furlough of various groups of state employees, on various grounds, and in various contexts. CASE opposes the petition because none of the cases, singly or collectively, present issues that are so important as to justify deviating from the normal course of appellate review. Moreover, the cases present distinct legal issues such that consolidation in this Court (or in any court) would only complicate their adjudication. Furthermore, the cases are in dramatically different postures procedurally, such that consolidation will inevitably delay cases that are nearing decision.

The furloughs at issue will end in only three months, and there is little this Court could do in that brief period that would warrant upsetting the judicial process that is already underway in the lower courts. Moreover, based on the arguments made by the petitioners in the lower courts that are inconsistent with the arguments in the petition, it is doubtful whether transfer and consolidation is being sought for a proper purpose.

The petition also requests, in the alternative, that the cases be consolidated in the Court of Appeal, Third Appellate District. CASE

¹ Petitioner California Attorneys, Administrative Law Judges and Hearing Officers in State Employment (“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. The vast majority of CASE members are attorneys, administrative law judges, and hearing officers.

²The petition was filed in this Court on March 2, 2010.

opposes that request as well, for the reasons stated above. Finally, the petition requests this Court stay 14 cases currently pending in various superior courts across the state. CASE takes no position on that request, but notes that this Court may lack jurisdiction to issue such a stay.³

The cases that are the subject of the petition to transfer are as follows. Three consolidated cases are pending in the Court of Appeal, Third Appellate District:

CASE v. Schwarzenegger, et al., Case No. C061009;
PECG, et al. v. Schwarzenegger, et al., Case No. C061011;
SEIU Local 1000 v. Schwarzenegger, et al., Case No.
C061020.

Three additional cases are pending in the Court of Appeal, First Appellate District:

UAPD v. Schwarzenegger, et al., Case No. A127775;
SEIU Local 1000 v. Schwarzenegger, et al., Case No.
A127776;
CASE v. Schwarzenegger, et al., Case No. A127777.

³ Article VI, section 4 of the California Constitution establishes the superior courts of California and vests jurisdiction in the trial courts. (*People v. Ellison* (2003) 111 Cal.App.4th 1360, 1366.) Article VI, section 10 of the Constitution provides that, besides certain limited enumerated cases, “[s]uperior courts have original jurisdiction in all other causes.” Section 11 of the same article specifies that “courts of appeal have appellate jurisdiction when superior courts have original jurisdiction” and specifically excludes the supreme court from having appellate jurisdiction of such cases. Thus, the Constitution appears to specifically refrain from giving this Court the power to exercise jurisdiction over trial court matters. The petition cites no authority for the proposition that this Court has the power to interfere in the various pending trial court matters, and CASE is not aware of any.

A seventh case is pending in Court of Appeal, Third Appellate District, which is not consolidated with the others pending in that court:

Schwarzenegger, et al. v. Chiang, et al., Case No. C061648.

This opposition will primarily focus on those pending cases in which CASE is a party. However, many of the arguments against transfer and consolidation apply with equal force to the other cases as well.

The petition also argues in the alternative for all of the aforementioned cases to be transferred to the Court of Appeal, Third Appellate District. CASE opposes that request as well. Finally, the petition argues without citation to any authority that this Court should stay 14 cases currently pending in various superior courts within the state. CASE takes no position on this request, but notes it is likely not within this Court's power to grant the requested relief.

STATEMENT OF THE CASE

A. The CASE action Pending in the Third Appellate District

On January 5, 2009, Petitioner CASE filed a petition for writ of mandate in the Sacramento County Superior Court, case # 34-2009-80000134. The named respondents were Governor Arnold Schwarzenegger, Director David Gilb of the Department of Personnel Administration ("DPA") and State Controller John Chiang. The petition sought a writ commanding respondents to ensure full payment of salaries and to set aside those portions of Executive Order S-16-08 calling for furloughs of CASE members. The petition also sought a declaration that the Governor had no authority to unilaterally impose furloughs on represented employees, and an injunction prohibiting the Governor or any state officer from implementing the furloughs.

On January 16, 2009, the trial court consolidated this case with similar actions filed by other employee representatives.⁴ After an expedited briefing schedule, the matter was heard on January 29, 2009. Later that day, the trial court issued an order denying the writs in the consolidated cases. An amended minute order was filed the following day. Judgment was formally entered on February 11, 2009.

Appellant timely filed a notice of appeal on February 3, 2009, and the Court of Appeal, Third Appellate District assigned the case number C061009. The case was initially deemed fully briefed on November 24, 2009. On December 21, 2009, the court granted CASE's request for calendar preference pursuant to California Rule of Court 8.240. On January 4, 2010, the court ordered the case consolidated with two other cases, C061011 and C061020 (the PECG/CAPS case and the SEIU case, respectively.) On January 29, 2010, the court ordered the parties to submit supplemental letter briefs on five detailed questions. Pursuant to that order, CASE filed its supplemental brief on March 1, 2010. The respondents' supplemental brief is due on April 1, 2010, and a reply is to be filed 20 days thereafter. At that point, the case will be fully briefed.

B. The CASE action pending in the First Appellate District

On May 22, 2009, CASE filed a petition for writ of mandate in the Alameda County Superior Court, case # RG 09-453982. The named respondents were Governor Arnold Schwarzenegger, Director David Gilb

⁴ The case filed by Professional Engineers in California Government ("PECG") and the California Association of Professional Scientists ("CAPS") was case # 34-2008-80000126. The case filed by Service Employees International Union, Local 1000 ("SEIU") was case #34-2009-80000135.

of the Department of Personnel Administration (“DPA”), State Controller John Chiang, and approximately 60 different directors or secretaries of various California government agencies. The petition sought a writ commanding respondents to stop the furloughs of employees at state agencies and departments that are funded by sources other than the General Fund.

Two other petitions challenging the furloughs at “special fund” agencies were filed in Alameda by other employee organizations, and they were assigned to the same trial court as the CASE petition. Those cases were *UAPD v. Schwarzenegger*, RG 09-456684 and *SEIU v. Schwarzenegger*, RG 09-456750. Although the court did not formally consolidate all three cases, all of the subsequent briefing and argument was coordinated and subject to the same schedule.

On August 17, 2009, respondents filed a demurrer based on the doctrine of exclusive concurrent jurisdiction in which they argued that the case should be stayed in light of the earlier action in Sacramento County Superior Court. The court overruled that demurrer on October 14, 2009.

While their demurrer was pending in Alameda County Superior Court, on August 31, 2009, respondents filed a motion to coordinate cases in Sacramento County Superior Court pursuant to Code of Civil Procedure section 403. The motion sought to transfer and coordinate five different furlough cases pending in different courts within the state to Sacramento on the theory that they shared common issues of law or fact. Among the cases sought to be transferred were the three cases pending in Alameda County

Superior Court. On October 30, 2009, the Sacramento County Superior Court denied the motion. (Attachment A.)⁵

After briefing and oral argument, the Alameda County Superior Court granted the petitions in all three cases on December 31, 2009. After additional briefing and argument on the form and scope of the judgment, judgment was entered on February 25, 2010. Respondents filed a notice of appeal the following day. All three cases are pending in the Court of Appeal, First Appellate District, but are assigned to different divisions. To date, the record has not been prepared or filed, and no briefing schedule has been set.

C. The “Constitutional Officers” case pending in the Third Appellate District

After the trial court ruled in the consolidated cases in Sacramento County Superior Court, the Governor instituted a separate action against the civil executive officers seeking to impose the furloughs upon employees of those departments. The case was assigned to the same trial court that had heard the earlier Sacramento cases. CASE was not a party to this action. The case presented the issue of whether, under California’s system of divided executive power, the Governor had authority to furlough employees of other constitutional officers. The trial court again ruled in favor of the Governor, and the civil executive officers appealed. That case is currently pending in the Court of Appeal, Third Appellate District, in case # C061648. As of December 9, 2009, the case has been fully briefed. However, no calendar preference has been granted, and no oral argument has been set.

⁵ Attachment A is a trial court order submitted pursuant to California Rules of Court, rule 8.504(e)(1)(B).

STANDARD OF REVIEW

Pursuant to Article VI, section 12 of the California Constitution, this Court has the authority to transfer to itself a cause in the court of appeal, and to transfer a cause from one court of appeal to another. Pursuant to California Rule of Court 8.552, this Court will not order such a transfer “unless the cause presents an issue of great public importance that the Supreme Court must promptly resolve.”

ARGUMENT

I. THE FURLOUGH CASES ARE NOT SUFFICIENTLY IMPORTANT TO MERIT TRANSFER AND CONSOLIDATION

The petition in the instant case does not present the types of issues that merit deviating from the normal and deliberate process of appellate review. There is a dearth of case law interpreting California Rule of Court 8.552 or analyzing the propriety of transferring causes from the courts of appeal to this Court. However, the scant authority that does exist counsels against granting the instant petition.

The petition cites *Brosnahan v. Brown* (1982) 32 Cal.3d 236, as authority for the proposition that a transfer to this Court is appropriate when the cause presents an issue of great public importance. In *Brosnahan*, this Court reviewed constitutional challenges to Proposition 8, an initiative matter that appeared on the June 1982 statewide ballot. (*Id.* at pp. 240-241.) Although the petition in that case had been filed in the Court of Appeal, this Court noted that “[i]t is uniformly agreed that the issues are of great public importance and should be resolved promptly.” (*Id.* at p. 241.)

On that basis, and without further analysis, this Court granted the motion to transfer, citing *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208. In *Amador*, this Court reviewed constitutional challenges to Proposition 13, which made sweeping changes to California's tax system. The opinion declared that "[t]he issues herein presented are of great public importance and should be resolved promptly."

However, the *Amador* was not a case involving a transfer; rather, that case involved the original jurisdiction of this Court, and did not purport to address the standard for transferring cases from courts of appeal. In *Brosnahan*, this Court also cited *Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 808-809, but that case also did not involve a transfer; rather, it was an original mandamus proceeding in this Court. And it relied upon a different constitutional provision for original jurisdiction (Article VI, section 10), rather than section 12 which deals with transfers. Accordingly, it is of little relevance in the instant case. Thus, *Brosnahan* is the only case that truly involves a transfer.

From the foregoing authorities, two factors emerge which militate against transfer. First, the justification offered by this Court in *Brosnahan* is absent, because there is no uniform agreement among the parties that the issues are of such importance that transfer is warranted. Not only is CASE opposed, but a number of constitutional officers are also opposed to transfer in this matter. Thus, to the extent the transfer in *Brosnahan* was based on a lack of disagreement over the propriety of transfer, the case provides little guidance to question before this Court presently, as there is disagreement on that very question.

Second, *Brosnahan* and the other cases previously cited by this Court are of a fundamentally different character than the furlough cases

sought to be transferred by the instant petition. *Brosnahan* involved a statewide initiative which made fundamental changes to the California criminal justice system. *Amador* presented constitutional challenges to Proposition 13, which made drastic and far-reaching changes to California's tax system.

Unlike those cases, which impacted every voter (and indeed, every citizen of the state) and made sweeping changes to the law, the instant petition involves a number of cases adjudicating the legality of the Governor's orders directing furloughs for state employees. While it is true that the issue of furloughs is of great importance to state employees, they make up only a small fraction of California's citizenship. Thus, the furlough cases are not of the same magnitude in terms of the impact they have on the state.

Moreover, the furloughs are a temporary situation. By the terms of the Governor's Executive Orders, the furloughs end on June 30, 2010. Their temporary nature distinguishes them from the permanent changes to the state constitution that were at issue in *Brosnahan* and *Amador*. The Governor's orders did not purport to change the law as do initiatives. Rather, they sought to take action which the Governor believes is authorized under existing law. And, that action, if unlawful as alleged by CASE and others, can be remedied through the normal course of appellate review.

Interestingly, there is one published opinion which references Rule 8.552. In *Nguyen v. Superior Court* (2007) 150 Cal.App.4th 1006, the court was deciding the propriety of expedited writ review of a local election contest. The court acknowledged that transfer was available under the rule, but determined that the normal course of considered, deliberative appellate

review was appropriate. The same is true here. “This case does not warrant departing from that norm.” (*Ibid.*) It is well recognized that our system of justice benefits from cases percolating up to the Supreme Court through the “laboratories of the lower courts.” (See, e.g., *Knight v. Florida* (1999) 528 U.S. 990, 120 S.Ct 459, 461.) As will be explained more fully below, the various furlough cases identified for potential transfer each present significantly different issues. Consolidating all of the cases in this Court would not simplify the issues; rather, it would confuse them. The appellate courts should be allowed to adjudicate these matters in due course, and, upon the completion of that normal process, this Court can exercise its discretion to hear one or more of the furlough cases upon a timely filed petition for review or upon this Court’s own motion. (Cal. Rules of Court, rule 8.512(c).)

II. THE VARIOUS FURLOUGH CASES PRESENT DIFFERENT LEGAL ISSUES

The CASE action pending in the Third Appellate District, and the two companion cases with which it is consolidated, present the question of whether the Governor has the legal authority to furlough state employees at all. The CASE action pending in the First Appellate District, and the two related cases out of the same trial court which are also now pending in that district, present the question of whether, assuming the Governor does have authority to implement furloughs, the manner of implementing the furloughs was proper. As the Alameda County Superior Court explained, the first cases in Sacramento (and now pending in the Third Appellate District) were analogous to a facial constitutional challenge, whereas the cases in Alameda (and now pending in the First Appellate District) are

analogous to an “as applied” constitutional challenge. And, the constitutional officers case presents a significantly different question concerning the Governor’s authority vis-a-vis other civil executive officers.

The Governor has disputed that the issues in the cases are different, but he has repeatedly been proven wrong. In Alameda County Superior Court, he filed a demurrer to the “special funds” petitions, arguing that the cases should be stayed under the doctrine of exclusive concurrent jurisdiction. That doctrine is designed to avoid conflicting decisions when cases presenting the same issue are filed in different trial courts. (*Franklin & Franklin v. 7-Eleven Owners for Fair Franchising* (2000) 85 Cal.App.4th 1168, 1176.) However, the Alameda County Superior Court overruled the demurrer finding that the issues in the cases were distinct from those in Sacramento. (Attachment B.)⁶

The Governor also tried to convince a Sacramento trial court that the issues in the cases were so similar as to warrant transfer under Code of Civil Procedure section 403. However, that court found that:

aside from sharing the same basic premise that the Governor’s furlough orders are unlawful, there are few similarities between the allegations in the Special Fund cases and the *Psychiatric technicians* case.

(Attachment A, p. 2.)

The order of the Sacramento trial court denying the motion to transfer is significant because it provides a thorough analysis of the factors relevant to transferring and consolidating cases at the trial court level, and that analysis is instructive on the questions raised by the instant petition.

⁶ Attachment B is a trial court order submitted pursuant to California Rules of Court, rule 8.504(e)(1)(B).

Specifically, the court found that because the cases were in different procedural postures, no judicial economy would be achieved by consolidation. (Attachment A, p. 3.) Similarly, the court found no danger of inconsistent rulings between the cases. (*Ibid.*)

Thus, two different trial courts have reviewed the issue of whether the cases in question present similar issues, and each has concluded that they do not. Specifically, as to the argument regarding the danger of conflicting decisions (see Petition at p. 20), the Alameda court has already determined that no such danger exists. As to the argument that the cases present common issues of fact and law (see Petition at p. 26), both the Sacramento and the Alameda courts were faced with that question, and concluded that the cases were different. (Attachments A and B.) In other words, the Governor has been asking courts across the state to consolidate these cases, but each time the courts have found there was no basis for the request. The trial courts were in the best position to evaluate the question in the first instance, and had the benefit of full briefing and oral argument on the subject, which this Court does not.⁷ This Court should be reluctant to take the extraordinary step of transferring cases when every other court to review the issue has decided it was inappropriate.

⁷ CASE is not aware that this Court has copies of all of the extensive trial court briefing on the issue of exclusive concurrent jurisdiction and transfer pursuant to Code of Civil Procedure section 403. Nor is CASE aware that this Court has available the various transcripts of the hearings in which these issues were argued by the parties.

III. THE VARIOUS FURLOUGH CASES ARE IN DIFFERENT PROCEDURAL POSTURES

The cases pending in the First Appellate District just arrived there several weeks ago. No record has been prepared, no mediation statement has been filed, and no briefing schedule has been set. They are truly in their infancy as appellate cases go. Conversely, the consolidated cases pending in the Third Appellate District are nearly fully briefed. In fact, they were originally deemed fully briefed, and after that court granted CASE's motion for calendar preference, the Court ordered supplemental briefing on five very detailed questions. (See Attachment C.)⁸ The level of detail in the order for supplemental briefing suggests that the court has already spent a significant amount of time reviewing the cases and analyzing the issues.⁹ The order for supplemental briefing set a short briefing schedule and directed that no extensions of time would be granted.

Based on the court's obvious desire to avoid delays in briefing, its detailed questions, and the fact that the motion for calendar preference was granted, there is every indication that that case will be set for oral argument in the spring or early summer of 2010. It is also apparent that the court has already spent a substantial amount of its finite judicial resources in

⁸ Attachment C is an order of the Court of Appeal submitted pursuant to California Rules of Court, rule 8.504(e)(1)(B).

⁹ It is worth noting that the order directing supplemental briefing set forth five additional "issues" in which the Third Appellate District is interested, and which presumably would become issues in this Court if the motion were to be granted. However, in the normal course of review, this Court has the authority to specify which issues are to be argued pursuant to California Rules of Court, rule 8.516(a)(1). The fact that another court has already broadened the issues suggests that this Court should wait until the conclusion of those cases to determine which, if any issues, it may wish to review.

reviewing the case so as to formulate the detailed questions in its order for supplemental briefing. Transferring those cases to this Court would mean most of those resources had gone to waste.

Moreover, because the cases pending in the Third Appellate District are so near to argument and decision, transferring them to this Court and consolidating them with the cases pending in the First Appellate District would unjustifiably delay the more advanced cases. Briefing could not possibly begin in this Court until the record was prepared by the Alameda County Superior Court Clerk. Even with an expedited briefing schedule, it is likely a transfer to this Court would delay the decisions in the more advanced cases by months or years.

IV. THE FURLOUGHS WILL END SOON

The Executive Orders implementing the furloughs specifically directed that they would end on June 30, 2010. That date is only a few months away. Despite the suggestion that furloughs may recur (see Petition, p. 17), the Governor has already publicly announced that the furloughs will end on that date. In a press release dated January 8, 2010, the Governor declared that the “furlough program will end on June 30th as scheduled.”¹⁰ Thus, the need for immediate action to stop the furloughs – assuming they are in fact illegal – will soon pass. The only questions remaining after June 30, 2010 will be whether and how to remedy the wrong done by the illegal furloughs. And that is a matter that can and should be dressed in thorough, deliberate fashion via the normal appellate process.

¹⁰ The press release is available on the internet at the Governor’s website: <http://www.gov.ca.gov/press-release/14154/>

The notion that this Court should take the furlough cases might be more persuasive if they had arrived at this Court prior to the implementation of the furloughs via a petition invoking this Court's original jurisdiction. At least in that context, there would have been an arguable imminent crisis in need of immediate resolution. But that time has long since passed. There is nothing that this Court can do in adjudicating the furlough cases that cannot be done by the lower courts in due course.

V. THE PETITION DOES NOT SEEK REVIEW OF ALL OF THE PENDING FURLOUGH CASES

The instant petition specifically excludes from its request three other furlough cases on appeal in the First Appellate District. (See Petition, p. 4 fn. 1.) The Governor argues in that footnote that those cases are different. However, this assertion is disingenuous and suggests the Governor has ulterior motives for the instant petition.

One of the three excluded cases, *CASE, etc., et al. v. Schwarzenegger, etc. et al.*, case no. A125292, involves the legality of the Governor's order to furlough employees of the State Compensation Insurance Fund. Despite the statement in the instant petition that the case presents a different legal issue, the Governor argued just the opposite in the briefing filed in the First Appellate District. Specifically, in that case, the Governor argued that under the doctrine of exclusive concurrent jurisdiction, case A125292 was similar to the cases arising out of Sacramento County and which are now pending in the Third Appellate District. The First Appellate District recently issued a published opinion in case no. A125292 in which the Governor's arguments were rejected. (See *California Attorneys, Administrative Law Judges and Hearing Officers in*

State Employment, et al., v. Arnold Schwarzenegger (2010) ___ Cal.Rptr.3rd ___ 2010 WL 987129 (March 19, 2010). The published opinion found that “the present action neither threatened nor produced a conclusion that is irreconcilable with the judgment in the Sacramento action.” (*Ibid.*)

Since the appellate court has already reached a decision in case no. A125292, transfer of that case may not be appropriate. (Compare Cal.Const. Art. VI, sec. 12(a) with Cal. Rules of Court Rule 8.552(b).) However, the published decision is relevant because it demonstrates that while the Governor argues to this Court that the case was different, the Governor argued to the both the appellate court and the trial court that the cases were identical. These two irreconcilable arguments cast grave doubts on the credibility of the Governor’s other arguments regarding the propriety of transfer. Rather, it appears the Governor is attempting to cherry pick which cases he wants this Court to review, which in turn suggests that he simply believes this Court is a better forum for his arguments.

If indeed the Governor truly believed that the furlough cases were suitable for transfer to this Court, there would be no reason to exclude some of the furlough cases, especially when he has previously argued that those excluded cases present similar legal issues. This Court should not be in a hurry to grant the request of a petitioner who changes his arguments simply to suit his present purposes. For all of the foregoing reasons, the motion to transfer cases to this Court should be denied.

VI. THE REQUEST TO TRANSFER THE CASES TO THE THIRD APPELLATE DISTRICT SHOULD BE DENIED

As an alternative form of relief, the petition asks this Court to transfer some of the cases pending in the First Appellate District to the

Third Appellate District. (Petition, p. 27.) For all of the reasons mentioned previously, this request should also be denied. Because the cases present different legal issues, and are in significantly different procedural postures, there would be no judicial economy achieved by such a transfer. Indeed, the move would almost certainly create confusion. The Alameda County Superior Court clerk, who is only now beginning to prepare the record, does not commonly interact with the Third Appellate District, as Alameda County lies within the jurisdiction of the First Appellate District. CASE believes there is a strong likelihood of documents and files being sent to the wrong court merely out of habit or a lack of familiarity with the different procedures employed by the Third Appellate District. While such errors would likely not be insurmountable, they would almost certainly delay resolution of all the cases.

The petition argues that transfer to the Third Appellate District is necessary to secure uniformity in the decisions. (Petition, p. 28.) However, this argument overlooks the fact that one of the most common grounds for granting a petition for review in this Court is “to secure uniformity of decision.” (Cal. Rules of Court, rule 8.500(b)(1).) Thus, in the unlikely event that different appellate districts reach conflicting decisions, any party will have an opportunity to petition this Court for review of those decisions. And that would be the time when this Court would be in the best position to assess whether review was appropriate, as it would have available to it the allegedly conflicting decisions, rather than the mere threat of the *possibility* of conflicting decisions.

CONCLUSION

For the foregoing reasons, plaintiff and appellant CASE respectfully submit that the petition to transfer and consolidate appeals should be denied.

DATE

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