IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000, and YVONNE WALKER, a taxpayer,

Plaintiffs/Respondents,

vs.

ARNOLD SCHWARZENEGGER, in his capacity as Governor of the State of California; JOHN CHIANG, Controller of the State of California; STEVE POIZNER, Insurance Commissioner of the State of California; DAVID GILB, as Director of the Department of Personnel Administration, et al.,

Defendants/Appellants.

Court of Appeal Case No. 127776

(Superior Court Case No. RG-09-456750)

Appeal from the Superior Court, Alameda County
The Honorable Frank Roesch, Department 31, (510) 268-5105

PETITION FOR WRIT OF SUPERSEDEAS AND REQUEST FOR TEMPORARY STAY

STAY REQUESTED OF DECEMBER 31, 2009 FINAL ORDER GRANTING WRIT OF MANDATE AND ORDER AFTER HEARING AND JUDGMENT IN FAVOR OF PETITIONER ON FEBRUARY 25, 2010

DAVID W. TYRA,
State Bar No. 116218
KRISTIANNE T. SEARGEANT
State Bar No. 245489
MEREDITH H. PACKER
State Bar No. 253701
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Law Corporation
400 Capitol Mall, 27th Floor
Sacramento, California 95814
Telephone: (916) 321-4500
Facsimile: (916) 321-4555
E-mail: dtyra@kmtg.com

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

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000, and YVONNE WALKER, a taxpayer,

Plaintiffs/Respondents,

vs.

ARNOLD SCHWARZENEGGER, in his capacity as Governor of the State of California; JOHN CHIANG, Controller of the State of California; STEVE POIZNER, Insurance Commissioner of the State of California; DAVID GILB, as Director of the Department of Personnel Administration, et al.,

Defendants/Appellants.

Court of Appeal Case No. 127776

(Superior Court Case No. RG-09-456750)

Appeal from the Superior Court, Alameda County
The Honorable Frank Roesch, Department 31, (510) 268-5105

PETITION FOR WRIT OF SUPERSEDEAS AND REQUEST FOR TEMPORARY STAY

STAY REQUESTED OF DECEMBER 31, 2009 FINAL ORDER GRANTING WRIT OF MANDATE AND ORDER AFTER HEARING AND JUDGMENT IN FAVOR OF PETITIONER ON FEBRUARY 25, 2010

DAVID W. TYRA,
State Bar No. 116218
KRISTIANNE T. SEARGEANT
State Bar No. 245489
MEREDITH H. PACKER
State Bar No. 253701
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Law Corporation
400 Capitol Mall, 27th Floor
Sacramento, California 95814
Telephone: (916) 321-4500
Facsimile: (916) 321-4555
E-mail: dtyra@kmtg.com

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

ARNOLD SCHWARZENEGGER, as Governor of the State of California; DAVID GILB, as Director of the Department of Personnel Administration

Court of Appeal
State of California
First Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: A127776 Division 2

Case Name: Service Employees International Union, Local 1000 v. Arnold Schwarzenegger, et al

Please check the applicable box:

☐ There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 8.208(d)(3).

☑ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1. See Attachment	
2.	
3.	
4.	

Please attach additional sheets with Entity or Person information if necessary.

Signature of Attorney/Party Submitting Form

Printed Name: Meredith H. Packer
Address: Kronick, Moskovitz, 400 Capitol Mall, 27th Floor
Sacramento, California 95814
State Bar No: 253701
Party Represented: Governor Schwarzenegger and David Gilb

IF SUBMITTED AS A STAND-ALONE DOCUMENT, SUBMIT A SEPARATE PROOF OF SERVICE ON ALL PARTIES WITH YOUR CERTIFICATE.

Attachment to Certificate of Interested Entities or Persons

Full Name of Interested Entity or Person	Nature of Interest
Board of Administration of California Public Employees' Retirement System	Petitioner in related case filed in San Francisco 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.
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.
Richard Newton	Plaintiff in related case filed in United States District Court, Northern District of California
Frank McNeal	Plaintiff in related case filed in United States District Court, Northern District of California
Sean Beaton	Plaintiff in related case filed in United States District Court, Northern District of California
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 cases filed in Alameda County Superior Court, First District Court of Appeal and Sacramento County Superior Court
California Correctional Supervisor's Organization	Plaintiff in related case in Sacramento County Superior Court
California Department of Corrections and Rehabilitation	Defendant in related case in Sacramento County Superior Court, Alameda County Superior Court and United States District Court, Northern District of California
California Medical Association	Petitioner in related case in San Francisco 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.
John Chiang, as Controller of the State of California	Respondent and Appellant in related case filed in Sacramento County Superior Court and 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.
Michael Genest	Respondent in related case in San Francisco County Superior Court
Kenneth Hamidi	Petitioner in related case filed in Sacramento County Superior Court.
Bill Lockyer, as State Treasurer 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.
Professional Engineers in California Government	Petitioner and appellant in related cases filed in Sacramento County Superior Court, Alameda County Superior Court and Third District Court of Appeal
Union of American Physicians and Dentists	Petitioner in related case filed in Alameda County Superior Court
California Attorneys, Administrative Law Judges and Hearing Officers in State Employment	Petitioner, Appellant and Respondent in related cases filed in Alameda County Superior Court, Third District Court of Appeals, First District Court of Appeals and Sacramento County Superior Court.
Association of California State Supervisors	Petitioner in related case filed in Alameda County Superior Court
International Union of Operating Engineers, Locals 3, 12, 39 and 501	Petitioner in related cases filed in Alameda County Superior Court, Los Angeles County Superior Court and San Francisco County Superior Court

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTRODUCTION 1

PETITION 5

REQUEST FOR WRIT OF SUPERSEDEAS AUTOMATIC STAY 11

REQUEST FOR TEMPORARY STAY 12

VERIFICATION 13

I. STATEMENT OF MATERIAL FACTS 14

- A. The Executive Orders Directing Furloughs of State Employees. 14
- B. Summary of Litigation Challenging the Governor's Executive Orders 16
  - 1. Initial Litigation in the Sacramento County Superior Court 16
  - 2. Petitions Challenging the Furloughs As Applied to the State Compensation Insurance Fund. 18
  - 3. Other Petitions Filed in the San Francisco County Superior Court. 19
  - 4. The Alameda County Superior Court Cases 20

II. ARGUMENT 21

- A. The Court Should Issue a Temporary Stay Pending Determination of the Present Writ Because Enforcement of the Judgment Will Occur Immediately and Cause Immediate Irreparable Harm. 21
- B. Standard for Writ of Supersedeas 22
- C. A Writ of Supersedeas is Proper In This Matter Because A Timely Appeal Has Been Perfected 23
- D. A Writ of Supersedeas Should Be Granted In This Matter Because It is Necessary To Protect This Court's Jurisdiction Over this Appeal. 24
- E. There is a Likelihood that this Appeal Will Succeed Because it Raises Substantial Questions of Probable Error By the Trial Court. 25

TABLE OF CONTENTS
(continued)

Page

1. The Trial Court Erred By Issuing a Writ of Mandate to Invalidate a Discretionary Act by the Governor Falling Within His Constitutional and Statutory Authority. 27
    a. Mandamus relief will issue only to compel the performance of a ministerial duty and may not issue to interfere with the exercise of discretion on matters within the executive branch's core functions 27
    b. The Trial Court Erred in Ruling that the Government Code section 19851 Imposes a Mandatory Ministerial Duty Violated by The State's Furlough Program 28
    c. The Trial Court Erred in Ruling that the Government Code section 16310 Imposes a Mandatory Ministerial Duty Violated by the State's Furlough Program 31
2. The Trial Court Also Erred in Impermissibly Expanding the Relief Granted Beyond the Issues and Evidence Presented to it. 34
3. The Trial Court's Award of Back Pay Also Was Erroneous 35
4. A Comparison Of The Trial Court's Rulings and Judgments With Those Of Other Superior Courts That Have Ruled on Furlough-Related Cases Further Support a Finding of Probable Error by this Trial Court 37

F. A Writ of Supersedeas Should Be Granted to Prevent Irreparable Harm to Appellants and the State of California. 40

TABLE OF CONTENTS
(continued)

Page

1. This Court Should Issue a Writ of Supersedeas In Order to Preserve the Status Quo and Prevent The Harm, Disruption, and Confusion That Will Result From The Conflicting and Inconsistent Rulings. 40

2. This Court Should Grant a Writ of Supersedeas Because The Inconsistent Application of the Furlough Program Among Similarly Situated State Employees Creates Irreparable Harm to Labor Parity in the State Workforce 41

3. The Loss of Personnel Savings Resulting from the Cessation of Furloughs Will Cause Irreparable Fiscal Harm to the State. 43

4. A Writ of Supersedeas Should Issue to Stay the Rulings and Judgment of the Trial Court Due to Inherent Ambiguities in those Rulings and Judgment that Could Cause Irreparable Harm to the State and Appellants 45

G. Any Harm That Results To Respondents' Employees Will Be Minimal As Compared To The Harm That Will Result to Appellants and The State if A Writ of Supersedeas Is Not Granted 46

III. CONCLUSION 47

TABLE OF AUTHORITIES

Page(s)

STATE CASES

Betancourt v. Workers Compensation Appeals Board (Holland America Ins. Co.)
(1971) 16 Cal.App.3d 408 27

Branciforte Heights, LLC v. Santa Cruz
(2006) 138 Cal.App.4th 914 .... 27, 29

California State Police Association v. State of California
(1981) 120 Cal.App.3d 674 42

Colthurst v. Fitzgerald
(1922) 56 Cal.App. 740 35

Deepwell Homeowner's Protective Association v. City Council of the City of Palm Springs
(1965) 239 Cal.App.2d 63 .... 22-25, 44

Gould v. Moss
(1910) 158 Cal. 548 36

In re Christy L.
(1986) 187 Cal.App.3d 753 .... 22, 23

In re Lugo
(2008) 164 Cal.App.4th 1522 28

In re Rosenkrantz
(2002) 29 Cal.4th 616 28

Mills v. County of Trinity
(1979) 98 Cal.App.3d 859 .... 23, 24, 25

Nuckolls v. Bank of California, National Association
(1936) 7 Cal.2d 574 .... 22, 23, 25

People ex. rel. San Francisco Bay Conservation and Development Commission v. Town of Emeryville
(1968) 69 Cal.2d 533 22

Spector v. Superior Ct.
(1961) 55 Cal. 2d 839 37

State Trial Attorneys' Association v. State of California
(1976) 63 Cal.App.3d 298 41

Syngenta v. Helliker
(2006) 138 Cal.App.4th 1135 27

West Coast Home Improvement Company v. Contractor's State License Board of Department Professional and Vocational Standards
(1945) 68 Cal.App.2d 1 .... 23, 25

STATUTES

Cal. Const. Article I, section 10(f) 5

Cal. Const. Article III, section 3 28

Cal. Const. Article IV, section 10(f). 14

Cal. Const. Article IV, section 17 37

Code of Civil Procedure section 916 45

Code of Civil Procedure section 923 22

Code of Civil Procedure section 1085 27

Code of Civil Procedure section 1095 .... 35, 36

Code of Civil Procedure section 1110b 2, 8

Government Code section 16310 .... 9, 31, 34, 35

Government Code section 18500, subdivision (c)(1) 42

Government Code section 19816.10 26

Government Code section 19826(b) 16, 17

Government Code section 19849 26

Government Code section 19851 .... 9, 26, 28-30, 35

Insurance Code section 11873(c) 18, 19, 25

Government Code section 19826(b) 16, 17

Government Code section 19849 26

Government Code section 19851 .... 9, 26, 28-30, 35

Insurance Code section 11873(c) 18, 19, 25

INTRODUCTION

This action involves challenges to state employee furloughs implemented pursuant to Governor Arnold Schwarzenegger's Executive Orders S-16-08 and S-13-09. Respondent Service Employees International Union, Local 1000 ("SEIU") sought a writ of mandate in the trial court compelling the Governor and the state departments and agencies named in the action to cease furloughing state employees. SEIU alleged that the furlough program instituted by the Executive Orders was unlawful as applied to its members employed in departments or agencies funded by special or federal funds. Specifically, SEIU asked the trial court to issue a writ of mandate based on its assertion that the decision to implement statewide furloughs for all state employees irrespective of the funding source of the agency in which they were employed was inconsistent with the rationale for the furloughs as stated in the Governor's Executive Orders, namely, the achievement of cost savings to the State's General Fund.

An evidentiary hearing on the merits was held on November 16, 2009, following which the trial court issued a ruling on December 31, 2009 granting the requested writ of mandate. On February 25, 2010, the trial court issued its final judgment in favor of SEIU. The trial court granted the requested relief to *all* state workers employed in the named departments and agencies, not just those represented by SEIU. The trial court also

ordered back pay for all state workers at the named departments and agencies for the reduction in wages resulting from the furloughs, without regard to whether the employee worked on the furlough days.

On February 26, 2010, Governor Arnold Schwarzenegger, former Director of the Department of Personnel Administration ("DPA") David Gilb and all California state departments and agencies appearing in this action through the DPA (hereinafter collectively referred to as "Appellants") filed their notices of appeal, the result of which was an automatic stay of the trial court's judgment. On March 24, 2010, a hearing was held on SEIU's motion for relief from stay pursuant to Code of Civil Procedure section 1110b. This motion was granted as to the prospective furloughing of state employees at the named departments and agencies. However, the trial court did not lift the stay as to the back pay remedy.

Appellants now seek a temporary stay and writ of supersedeas staying the final judgment issued by the Alameda County Superior Court on February 25, 2010 and the enforcement of that judgment as provided by the trial court's order of March 24, 2010. A writ of supersedeas is necessary to stay the entirety of the trial court's rulings and judgment in this action in order to preserve this Court's jurisdiction over the subject matter of this appeal. The trial court's rulings and judgment in this action conflict with rulings and judgments of other California superior courts that have adjudicated furlough cases. The trial court's rulings and judgment

also are fraught with error and create a strong likelihood that Appellants will prevail on the merits of this appeal. The trial court's rulings and judgment are fraught with error and for this reason should be stayed by this Court.

The conflict between the trial court's rulings and judgment in this action versus those issued by other superior courts adjudicating furlough-related actions has resulted in inconsistent determinations regarding Appellants' rights and authority with respect to the furloughing of state employees. This has created confusion and disparity with respect to the ongoing administration of the statewide furlough program. As a consequence, the State's ability to administer the furlough program, the state budget, and the state workforce in an efficient and consistent manner has been prejudiced. For example, if the trial court's rulings and judgment are not stayed, the State will be faced with a situation in which state employees performing like work will or will not be furloughed depending upon the funding source of the department or agency in which they are employed. This will result in irreparable harm to the concept of labor parity among the state workforce, a concept well established in state civil service employment. Furthermore, this disparity arises at a time when the State's current furlough program has only three months remaining on it before it expires on June 30, 2010.

In addition, if a writ of supersedeas is not granted, the State of California will lose millions of dollars in personnel savings in the current budget year resulting from the furlough program. This loss of necessary savings cannot be easily absorbed. Moreover, if the trial court's rulings and judgment are not stayed, the State's ongoing fiscal crisis in California, a crisis which currently is projected to result in a $20+ billion budget deficit, will be exacerbated as a result of the loss of personnel savings resulting from furloughs.

Not only do these factors warrant the issuance of the requested writ of supersedeas, but also a temporary stay to preserve the status quo. If the temporary stay and writ of supersedeas do not issue, furloughs at the affected state departments and agencies will cease for all employees of those departments and agencies as of April 2, 2010, the next regularly scheduled furlough day. Thus, if the trial court's rulings and judgment are not stayed, the State immediately will begin to incur the irreparable harm detailed in this petition resulting from the cessation of the furlough program at the affected departments and agencies.

This Court should grant the requested writ of supersedeas and stay the judgment in this action in order to preserve the status quo pending appeal. A writ of supersedeas should issue because there is a strong likelihood that the present appeal will be successful. Furthermore, this petition and the supporting evidence demonstrate that the State and

Appellants will suffer irreparable harm if a writ of supersedeas does not issue. For all of the foregoing reasons, as more fully discussed below, Appellants respectfully request that this Court issue both a temporary stay of the trial court's judgment as well as the requested writ of supersedeas.

PETITION

1. On December 1, 2008, Governor Arnold Schwarzenegger issued a Fiscal Emergency Proclamation pursuant to his authority under California Constitution Article I, section 10(f). In his Fiscal Emergency Proclamation, the Governor declared the nature of the fiscal emergency "to be the projected budget imbalance and insufficient cash reserves for Fiscal Year 2008-2009 and the projected insufficient cash reserves and potential budgetary and cash deficit in Fiscal Year 2009-2010 which are anticipated to result from the dramatically lower than estimated General Fund revenues in Fiscal Year 2008-2009." (A copy of the December 1, 2008 Fiscal Emergency Proclamation is attached to this petition and is incorporated herein as Exhibit A.)

2. On December 19, 2008, Governor Arnold Schwarzenegger issued Executive Order S-16-08 which directed the implementation of a two-day a month furlough for all state employees commencing in February 2009 and ending in June 2010. (A copy of the December 19, 2008 Executive Order S-16-08 is attached to this petition and is incorporated herein as Exhibit B.)

3. On July 1, 2009, as a result of continued budgetary and cash shortfalls, the Governor issued Executive order S-13-09, directing a third furlough day for state employees, "regardless of funding source." (A copy of the July 1, 2009 Executive Order S-13-09 is attached to this petition and is incorporated herein as Exhibit C.)

4. Also on July 1, 2009, the Governor issued a Fiscal Emergency Proclamation. (A copy of the July 1, 2009 Fiscal Emergency Proclamation is attached to this petition and incorporated herein as Exhibit D.) In the July 1, 2009 Fiscal Emergency Proclamation, the Governor noted that "the Legislative Analyst predicted that the Governor's May Revision revenue projections may prove overly optimistic and instead, projected that the drop in revenues will be at least $3 billion worse than projected putting the size of the state's shortfall at more than $24 billion for fiscal years 2008-09 and 2009-10." (*Id.*)

5. On June 9, 2009, SEIU commenced the present action and filed a verified petition for writ of mandate/prohibition and complaint for declaratory and injunctive relief. Ultimately, SEIU filed a First Amended Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive relief, which was the controlling pleading at the time of the November 14, 2009 evidentiary hearing in this matter. (A copy of the First Amended Petition is attached to this petition and incorporated herein as Exhibit E.) SEIU alleged in its petition that the State's furlough program

was unlawful as applied to SEIU members employed by state agencies or departments funded by special or federal funds. SEIU further alleged in its petition that the decision by the Governor to implement statewide furloughs for all state employees irrespective of funding source was inconsistent with the rationale for furloughs as stated in the Executive Orders.

6. A Final Order Granting Writ of Mandate and directing the preparation and entry of final judgment in this action was issued by the Honorable Frank Roesch of the Alameda County Superior Court on December 31, 2009. (A copy of this Order is attached to this petition and incorporated herein as Exhibit F.)

7. On its own motion, the Alameda County Superior Court held a hearing on the form and scope of the judgment on February 22, 2010.

8. On February 25, 2010, the Honorable Frank Roesch of the Alameda County Superior Court issued an Order after Hearing and Judgment for Petitioner granting relief to every employee of all Respondent departments and agencies, whether represented by SEIU or not, and awarding both prospective and retroactive monetary relief. (A copy of the Order is attached to this petition and incorporated herein as Exhibit G. A copy of the Judgment for Petitioner is attached to this petition and incorporated herein as Exhibit H.)

9. On or about February 26, 2010, Governor Arnold Schwarzenegger, former Director of the DPA David Gilb, and those State departments and

agencies appearing through the DPA filed Notices of Appeal from the trial court's orders of December 31, 2009 and February 25, 2010 and the trial Court's judgment of February 25, 2010. (A copy of the Notice of Appeal filed by Governor Schwarzenegger and former Director Gilb is attached to this petition and incorporated herein as Exhibit I. A copy of the Notice of Appeal filed by the State Departments and agencies appearing through the Department of Personnel Administration is attached to this petition and incorporated herein as Exhibit J.)

10. Given that the Orders from the Alameda County Superior Court were orders granting writ of mandate, all writs of mandate issuing from the Alameda County Superior Court in this action were automatically stayed pending appeal.

11. On March 4, 2010, SEIU moved for relief from stay under California Code of Civil Procedure section 1110b.

12. On March 24, 2010, the Alameda County Superior Court held a hearing on the motion for relief from stay and issued an order granting relief from stay in part. (A copy of the Order Granting Relief From Stay In Part is attached to this petition and incorporated hereto as Exhibit K.) The trial court lifted the stay as to the furlough program but maintained the stay as to the back pay remedy.

13. The appeal in this action is based on the following grounds:

a. The writ of mandate issued by the trial court interferes with the exercise of discretion on matters within the executive branch's core function and, as such, should not have issued.

b. The trial court erred in finding that Government Code sections 19851 and 16310 created mandatory ministerial duties that were violated by the State's furlough program.

c The furlough of state employees, regardless of the funding source for the agency in which they are employed, benefits the general fund and contributes to the overall fiscal well-being of the state.

d The trial court erred in expanding its original order to include a back pay remedy.

e The trial court erred in expanding its original order to include all employees of named agencies and departments regardless of whether they were represented by SEIU.

14. The judgment and orders issued by this Court conflict with judgments by other state superior courts on the legality and application of the furlough program. If a writ of supersedeas is not granted to stay this judgment in its entirety, the State will be prejudiced by being required to enforce concurrent and conflicting judgments. The inconsistent administration of furloughs that will result if a writ of supersedeas does not issue will cause irreparable harm to the State's ability to manage the state workforce and the state budget in an equitable or efficient manner.

15. If the judgment of the trial court is not stayed in its entirety, the furlough program will be administered inequitably across the state workforce. If the judgment is not stayed, the furlough program will continue to be implemented for some state employees, but not others. This will do irreparable harm to the labor parity within the state workforce.

16. All state departments and agencies affected by the trial court's judgment will be irreparably harmed if a writ of supersedeas does not issue because those departments and agencies do not have sufficient appropriations in their budgets to cover the increased personnel costs of ceasing the furlough program. The affected state departments and agencies will be unable to pay salaries without anticipated furlough savings because they are prohibited from engaging in deficit spending.

17. The State of California and its citizens will be irreparably harmed if a writ of supersedeas does not issue because the State and its departments and agencies will no longer be able to fund vital programs and services for its citizens.

18. Appellants will suffer irreparable harm if a writ of supersedeas does not issue because if the writ of mandate is reversed on appeal Appellants will be required to engage in costly and burdensome procedures and/or litigation to recoup overpayments.

19. The irreparable harm to the State, its departments and agencies, its employees, and citizens if the writ of supersedeas is not granted exceeds

any harm that SEIU's members will suffer if the writ of supersedeas is granted.

REQUEST FOR WRIT OF SUPERSEDEAS TO ENFORCE AUTOMATIC STAY

WHEREFORE, ARNOLD SCHWARZENEGGER, as Governor of the State of California; DAVID GILB, as the former Director of the DPA, and those state departments and agencies appearing through the DPA pray that this Court issue a writ of supersedeas or other appropriate stay of the trial court's final judgment, barring enforcement of the writ of mandate issued pursuant to that final judgment, pending the resolution of this appeal.

REQUEST FOR TEMPORARY STAY

ARNOLD SCHWARZENEGGER, as Governor of the State of California, DAVID GILB, as former director of the DPA, and all state departments and agencies appearing through the DPA further pray that this Court grant a temporary stay of the Writ of Mandate pending determination of this petition.

Dated: March 29, 2010

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation

By ______________________
David W. Tyra,
Attorneys for Defendants/Appellants
ARNOLD SCHWARZENEGGER, as
Governor of the State of California; DAVID
GILB, as former Director of the Department of
Personnel Administration

Dated: March 29, 2010

DEPARTMENT OF PERSONNEL
ADMINISTRATION

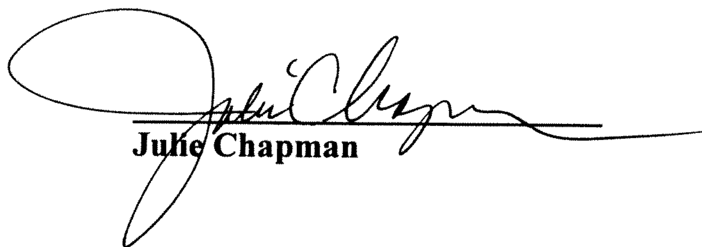
By ______________________ for
Will Yamada
Labor Counsel
For Defendants/Appellants

VERIFICATION

I, Julie Chapman, declare as follows:

I am the Chief Deputy Director of the Department of Personnel Administration, one of the Appellants in this appeal. I have read the foregoing Petition for Writ of Supersedeas and Request for Temporary Stay and know its contents. The facts alleged in the Petition are within my own knowledge and I know those facts to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Verification was executed on March 23, 2010 at Sacramento, California.



Julie Chapman

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF SUPERSEDEAS AND REQUEST FOR TEMPORARY STAY

I.

STATEMENT OF MATERIAL FACTS

A. The Executive Orders Directing Furloughs of State Employees.

On December 19, 2008, Governor Schwarzenegger issued Executive Order S-16-08 directing the implementation of a two-day a month furlough plan for all state employees commencing in February 2009 and ending in June 2010. (Exhibit B.) The issuance of this Executive Order was preceded by a Fiscal Emergency Proclamation issued by the Governor on December 1, 2008 pursuant to his authority under California Constitution Article IV, section 10(f). (Exhibit A.) In his Fiscal Emergency Proclamation, the Governor declared the nature of the fiscal emergency "to be the projected budget imbalance and insufficient cash reserves and potential budgetary and cash deficit in Fiscal Year 2009-2010 which are anticipated to result from the dramatically lower than estimated General Fund revenues in Fiscal Year 2008-2009." (Exhibit A.) In Executive Order S-16-08, the Governor reiterated the fact that, absent immediate action, the State would run out of cash in February of 2009 and would not be able to meet its mandatory obligations. (Exhibit B.)

In February 2009, following the commencement of furloughs for state employees, the Legislature passed, and the Governor signed into law,

a Budget Act. Section 3.90 of the February 2009 Budget Act required the Department of Finance ("DOF") to reduce appropriations to State departments and agencies to reflect reductions in employee compensation in the 2008-2009 and 2009-2010 fiscal years obtained through the collective bargaining process or existing administrative authority. These employee compensation reductions were achieved through existing administrative authority[1] and were associated with the two furlough days implemented pursuant to Executive Order S-16-08. (See ¶ 3 of Diana Ducay Declaration [Ducay Decl.], Exhibit L.)

On July 1, 2009, as a result of continued budgetary and cash shortfalls, the Governor issued Executive Order S-13-09, directing a third furlough day for state employees, "regardless of funding source." (Exhibit C.) On that same date, the Governor also issued a Fiscal Emergency Proclamation. (Exhibit D.) In the July 1, 2009 Fiscal Emergency Proclamation, the Governor noted that "the Legislative Analyst predicted that the Governor's May Revision revenue projections may prove overly optimistic, and instead, projected that the drop in revenues will be at least $3 billion worse than projected putting the size of the state's shortfall at more than $24 billion for fiscal years 2008-09 and 2009-10." (*Id.*) The

---

[1] Prior to the passage of the February 2009 Budget Act, the Sacramento County Superior Court had ruled on January 30, 2009 that the Governor had the authority to direct the furloughing of state employees pursuant to the issuance of an Executive Order. Thus, the Governor's "existing administrative authority" at the time of the passage of the Budget Act included furloughs.

Governor further noted that "the State Controller has determined that the State's $2.8 billion cash shortage in July 2009 will grow to $6.5 billion in September, and a double-digit freefall after September." (*Id.*)

A second Budget Act was passed by the Legislature and signed into law by the Governor in July 2009. Section 3.90 of the July 2009 Budget Act further required DOF to reduce appropriations to State departments and agencies to reflect reductions in employee compensation in the 2009-10 fiscal year obtained through the collective bargaining process or existing administrative authority. These employee compensation reductions were achieved through existing administrative authority and were associated with the three furlough days implemented pursuant to Executive Order S-13-09. (¶ 5, Ducay Decl., Ex. L.)

B. Summary of Litigation Challenging the Governor's Executive Orders.

1. Initial Litigation in the Sacramento County Superior Court.

The first petition for writ of mandate challenging the Executive Order and resultant furloughs was filed by state employee organizations Professional Engineers in California Government ("PECG") and California Association of Professional Scientists ("CAPS") in December 2008. That action challenged Executive Order S-16-08 on the basis that the furloughs directed by it constituted an unlawful reduction in wages in violation of Government Code section 19826, subdivision (b). A second petition was

filed by the California Attorneys, Administrative Law Judges and Hearing Officers in State Employment ("CASE") in January 2009 alleging that the Executive Order and resulting furloughs violated Government Code section 19826(b), the relevant Memorandum of Understanding, and the Fair Labor Standards Act ("FLSA"). A third petition was filed by SEIU alleging the same claims as the first two. All three cases were consolidated for hearing and decision. On January 30, 2009, the Sacramento County Superior Court issued a final ruling denying the petitions and holding that the Governor had the legal and contractual authority to furlough state employees by way of Executive Order. The Sacramento County Superior Court found that the furloughs ordered by the Governor did not constitute a *de facto* salary reduction in violation of Government Code section 19826(b). (See January 30, 2009 Decision by Sacramento Superior Court, Exhibit M.) All four of the state employee organizations filed timely appeals in the Third District Court of Appeals where those actions are still pending.

A fourth petition subsequently was filed in the Sacramento County Superior Court by the California Correctional Peace Officers Organization ("CCPOA"). The Sacramento County Superior Court denied the petition, and CCPOA did not appeal. (See February 5, 2009 Decision by Sacramento Superior Court, Exhibit N.)

Immediately following the ruling of the Sacramento County Superior Court, the State Controller took the position that the ruling did not

apply to state employees in his office or those employees working for the State's other civil executive officers (the Secretary of State, Attorney General, State Treasurer, State Superintendent of Public Instruction and the Board of Equalization). As a result, Governor Schwarzenegger and the Department of Personnel Administration filed an action in the Sacramento County Superior Court seeking a writ of mandate compelling the Controller to comply with the January 30, 2009 order as to the State's civil executive officers. On March 12, 2009, the court issued an order that the Executive Order S-16-08 applied to the employees of civil executive officers. (See March 12, 2009 Decision of Sacramento County Superior Court, Exhibit O.) The civil executive officers timely appealed and that appeal is still pending.

2. <u>Petitions Challenging the Furloughs As Applied to the State Compensation Insurance Fund.</u>

The next set of furlough challenges were filed by CASE (on February 10, 2009) and SEIU (on June 12, 2009) in the San Francisco County Superior Court. These actions challenged the furloughs as applied to employees working for the State Compensation Insurance Fund ("SCIF"). CASE and SEIU argued that the exemption for SCIF employees from "staff cutbacks" imposed on other state employees contained at Insurance Code section 11873(c) applied to the furloughs implemented pursuant to the Governor's Executive Orders. In both the CASE and SEIU

SCIF matters, the San Francisco County Superior Court ruled that the furloughs were unlawful as applied to SCIF because the furloughs constituted "staff cutbacks" in violation of Insurance Code section 11873(c). (See San Francisco Superior Orders After Hearing, Exhibits P and Q.) The Governor and the Department of Personnel Administration timely appealed both rulings. On March 19, 2010, this Court upheld the trial court ruling in the CASE action on the ground that the exemption from "staff cutbacks," uniquely applicable to SCIF employees per Insurance Code section 11873(c), included furloughs. (See this Court's March 19, 2010 Decision in CASE action, Exhibit R.) The SEIU action is still pending in this Court.

3. Other Petitions Filed in the San Francisco County Superior Court.

Several furlough cases were filed in the San Francisco County Superior Court challenging the implementation of furloughs on the same basis as asserted by SEIU in this action, *i.e.,* furloughs cannot be implemented with respect to employees who work in state departments or agencies that are largely or solely funded by special or federal funds. For instance, on August 19, 2009, CalPERS filed a petition for writ of mandate in the San Francisco County Superior Court challenging the Governor's authority to furlough CalPERS employees on the ground that it is not a special fund agency that receives no funding from the General Fund.

December 18, 2009, the San Francisco trial court denied the petition finding the Governor had broad discretion to direct the working hours of state employees, including ordering furloughs of those employees through Executive Order. (See Order After Hearing in CalPERS action, Exhibit S.)

On July 24, 2009, CAPS filed a petition challenging the Governor's authority to furlough employees of agencies and departments funded in whole or in part by special funds. The San Francisco Superior Court denied the petition on January 21, 2010. (See Order After Hearing in CAPS action, Exhibit T.)

On October 14, 2009, the California Medical Association ("CMA") brought a petition alleging that the Governor had exceeded his authority in instituting the furlough via the Executive Orders and the furloughs prevented the Medical Board from discharging its statutory duties. On March 4, 2010, the San Francisco trial court denied that petition as well. (See Order After Hearing in CMA action, Exhibit U.)

4. **<u>The Alameda County Superior Court Cases</u>**

This action was consolidated for hearing with two other actions filed in the same court by CASE and Union of American Physicians and Dentists ("UAPD"). Both CASE and UAPD raised the same challenges to the furloughs as raised by SEIU here. The trial court issued the same rulings in the CASE and UAPD actions as was issued in this action.[2]

[2] In total, 27 cases have been filed in state and federal court raising

II.

ARGUMENT

A. The Court Should Issue a Temporary Stay Pending Determination of the Present Writ Because Enforcement of the Judgment Will Occur Immediately and Cause Immediate Irreparable Harm.

Appellants request that this Court grant a temporary stay of the trial court's *entire* judgment during the determination of the writ of supersedeas. If a temporary stay is not granted, all furloughs at the state departments and agencies named in this action will cease immediately. As such, the State will lose the personnel savings that would have been gained by maintaining the furlough program at those departments and agencies until the scheduled completion of the furlough program on June 30, 2010. The named state agencies and departments have budgets and appropriations based on the furlough savings through June 30, 2010. (See discussion, *infra.*)

The next scheduled furlough day is April 2, 2010. If a temporary stay is not granted, that furlough day, and all others subsequent to it, will not occur and the State will lose the necessary personnel savings that would have been gained by maintaining the furlough program. If this occurs, the State will be required to make unbudgeted wage payments and will lose vital savings. Moreover, this Court will be divested of its jurisdiction over

---

challenges to the State's furlough program. Other than the ones described above, only one other has been decided, an action filed by CCPOA alleging that the furloughs violated certain provisions of the California Labor Code. That case was decided by the same trial judge that decided this case and currently is on appeal to this Court. All other furlough challenges are still pending in four different trial courts throughout the State.

a significant portion of the subject matter of this appeal, including the irrevocable loss of savings achieved by the State's furlough program. To preserve jurisdiction and Appellants' right to an effective judgment if the appeal is successful, this Court should issue a temporary stay pending determination of the writ of supersedeas.

B. Standard for Writ of Supersedeas

The appellate court has the authority to stay a judgment during the pendency of an appeal by issuing a writ of supersedeas. (Code of Civ. Proc. Section 923; *In re Christy L.* (1986) 187 Cal.App.3d 753, 759.) A writ of supersedeas is an extraordinary writ used to "protect the appellate court's jurisdiction," during the pendency of the appeal. (*Nuckolls v. Bank of California, National Association* (1936) 7 Cal.2d 574, 578.) A petition for writ of supersedeas should be granted when "to deny a stay would deprive the appellant of the benefit of a reversal of the judgment against him." (*Deepwell Homeowner's Protective Association v. City Council of the City of Palm Springs* (1965) 239 Cal.App.2d 63, 66.)

The Court of Appeal has broad and inherent power and discretion to grant a writ of supersedeas. (*People ex. rel. San Francisco Bay Conservation and Development Commission v. Town of Emeryville* (1968) 69 Cal.2d 533, 538-539.) The writ should issue when the petitioner (1) demonstrates a likelihood of success on appeal by raising substantial

questions of probable error by the trial court, and (2) shows that the balance of the equities weighs in favor of granting the requested writ. (*Deepwell Homeowner's Protective Association, supra,* 239 Cal.App.2d at 65 – 67; *West Coast Home Improvement Company v. Contractor's State License Board of Department Professional and Vocational Standards* (1945) 68 Cal.App.2d 1, 6; *Mills v. County of Trinity* (1979) 98 Cal.App.3d 859, 861; *Nuckolls v. Bank of California, National Association, supra,* 7 Cal.2d 574, 578.) A writ of supersedeas may issue if the petitioner demonstrates it will suffer irreparable injury if the writ of supersedeas is not granted. (*Mills v. County of Trinity, supra,* 98 Cal.App.3d 859, 861; *Deepwell Homeowner's Protective Association v. City Council of the City of Palm Springs, supra,* 239 Cal.App.2d 63, 66.) Specifically, a writ of supersedeas should issue to avoid situations where the result of a judgment taking effect during the pendency of the appeal would result in a "denial of the appellant's right if his appeal were successful." (*Deepwell Homeowner's Protective Association, supra,* 239 Cal.App.2d at 66.)

C. A Writ of Supersedeas is Proper In This Matter Because A Timely Appeal Has Been Perfected.

This Court is authorized to grant a writ of supersedeas because a timely appeal has been perfected in this matter. (*In re Christy L.* (1986) 187 Cal.App.3d 753, 758-759.) On February 26, 2010, all Appellants filed notices of appeal, one day following the trial courts issuance of the final

judgment in this action. (Exhibits I and J.) As such, this Court is within its authority to grant a writ of supersedeas.

D. A Writ of Supersedeas Should Be Granted In This Matter Because It is Necessary To Protect This Court's Jurisdiction Over this Appeal.

This Court should grant a writ of supersedeas because it is the only viable method of preserving this Court's jurisdiction over the appeal in this matter. If this writ does not issue, the furlough program will cease for all employees at the affected state departments and agencies and the personnel savings from the remaining furlough days will irretrievably be lost for the current budget year. By the time this Court is able to decide this appeal on the merits, the State's current furlough program will have ended and the State will have lost three months (which equals 25% of the budget year) of personnel savings from that program.

A writ of supersedeas serves the "sole function of preserving our appellate jurisdiction pending review of the appeal and a ruling on its merits." (*Mills v. County of Trinity* (1979) 98 Cal.App.3d 859, 861.) If a writ of supersedeas does not issue, the State will immediately lose the right to implement the remainder of the furlough program at the affected state departments and agencies. The State will immediately lose the right to recoup the necessary savings during the current budget year resulting from furloughing employees at those departments and agencies. As the court in *Deepwell Homeowner's Protective Association, supra,* 239 Cal.App.2d at

66, held, a writ of supersedeas should issue when the result of a judgment taking effect in its entirety during the pendency of an appeal would result in a "denial of the appellant's right if his appeal were successful." Accordingly, a writ of supersedeas should issue because if it does not, Appellants will lose their ability to obtain the necessary savings during he current budget year that could be achieved by the continuation of the furlough program.

E. There is a Likelihood that this Appeal Will Succeed Because it Raises Substantial Questions of Probable Error By the Trial Court.

This Court should grant a writ of supersedeas because this appeal raises substantial questions of probable error by the trial court on which Appellants are likely to prevail. (*Deepwell Homeowner's Protective Association, supra,* 239 Cal.App.2d at 65 – 67; *West Coast Home Improvement Company v. Contractor's State License Board of Department Professional and Vocational Standards* (1945) 68 Cal.App.2d 1, 6; *Mills v. County of Trinity* (1979) 98 Cal.App.3d 859, 861; *Nuckolls v. Bank of California, National Association, supra,* 7 Cal.2d 574, 578.)

To date, the Alameda County Superior Court is the only court to rule that the Governor lacks broad authority to direct and implement furloughs of state employees.[3] The trial court's finding that the Governor lacks such

[3] While this Court ruled that the Governor does not have authority to direct furloughs of SCIF employees, that holding was based on the application of Insurance Code section 11873(c), a narrow and specific statute applicable *only* to SCIF employees. Neither this Court, nor any of

authority presents a substantial question of probable error. As a result of this error, the trial court issued a writ of mandate that interferes with the Governor's exercise of his broad discretion over the working hours of state employees. (See Gov. Code §§ 19851, 19849, and 19816.10.) As the Executive Orders at issue in this action was an exercise of executive judgment and discretion and not a mandatory ministerial duty, the issuance of mandamus relief was improper.

Additionally, the trial court improperly expanded its ruling beyond the scope of the allegations in SEIU's petition and beyond the issues and evidence presented to it by applying that ruling in its final judgment to all employees in the state agencies and departments named in the action regardless of whether they are represented by SEIU. Furthermore, the award of back pay constituted error because it was not based on any evidence contained within the trial court record. All of these issues raise substantial questions of trial court error.

---

the other trial courts to rule thus far, have found the Governor lacks the authority to direct and implement furloughs of other state employees.

1. The Trial Court Erred By Issuing a Writ of Mandate to Invalidate a Discretionary Act by the Governor Falling Within His Constitutional and Statutory Authority.

a. Mandamus relief will issue only to compel the performance of a ministerial duty and may not issue to interfere with the exercise of discretion on matters within the executive branch's core functions.

The trial court erred in granting a writ of mandate because mandamus relief can only issue to compel the exercise of a ministerial duty, and *cannot* issue to interfere with the Executive Branch's exercise of discretion within its core functions. Writ relief under Code of Civil Procedure section 1085 is only appropriate when the Petitioner establishes a "clear, present and usually ministerial duty on the part of the Respondent." (*Branciforte Heights, LLC v. Santa Cruz* (2006) 138 Cal.App.4th 914, 934.) "A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists." (*Id.*) While a writ of mandate can compel an agency to exercise its discretion, "a writ of mandate ordinarily cannot compel the exercise of discretion in a particular manner." (*Syngenta v. Helliker* (2006) 138 Cal.App.4th 1135, 1181. See also, *Betancourt v. Workers Compensation Appeals Board (Holland America Ins. Co.)* (1971) 16 Cal.App.3d 408, 412-413.)

This general prohibition against interference by the courts with the Governor's exercise of his judgment and discretion through the issuance of

mandamus relief emanates from the concept of the separation of powers embodied in the California Constitution at Article III, section 3, which provides:

> The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.

The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 662.) Thus, the intrusion by the judiciary into matters vested in the policy and decision-making authority of the executive branch violates the constitutional principle of separation of powers. (*In re Lugo* (2008) 164 Cal.App.4th 1522, 1538.)

b. **The Trial Court Erred in Ruling that the Government Code section 19851 Imposes a Mandatory Ministerial Duty Violated by The State's Furlough Program.**

The trial court erred in determining that the State's furlough program violated a mandatory duty created by Government Code section 19851 to "take into account the Agencies' 'varying needs' before reducing working hours." (Exhibit F, at p. 8.) The trial court held that the furlough program violated a mandatory ministerial duty in that section 19851(a) only permits a workweek reduction if the Governor engages in a department-by-department, agency-by-agency analysis to ensure that the implementation

of furloughs meets the varying needs of *each and every* state department of agency. In effect, the trial court ruled that section 19851(a) imposes a singular, mandatory methodology.

The trial court's interpretation of section 19851 is incorrect for several reasons. First, section 19851(a) merely establishes a "policy" of the State that state employees work 40-hour workweeks and 8-hour workdays. The code section does not create a mandatory duty to maintain workweek and workday schedules of that number of hours. Section 19851(a) provides,

> It is the *policy* of the state that the workweek of the state employee shall be 40 hours, and the workday of state employees 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.

The trial court erred in interpreting section 19851 to create a mandatory duty. There is nothing in the statute that creates a mandatory duty. The term "policy" is not synonymous with "mandate" or "obligation" and does not create a mandatory ministerial duty. A ministerial duty is an act a public officer is *required* to perform without regard to his own judgment or opinion. (See *Branciforte Heights, LLC v. Santa Cruz, supra,* 138 Cal.App.4th at 934.) Nothing in section 19851 creates an act that a public officer is *required* to perform.

Second, there was no violation of a mandatory ministerial duty with respect to the manner in which furloughs were implemented. The unprecedented fiscal crisis required unprecedented action to address the fiscal and operational needs of the State and its departments and agencies. The furlough program was implemented in response to an unexpected and escalating State fiscal and cash crisis. As such, furloughs were directed by the Governor's Executive Orders to ensure the continuing fiscal and budgetary stability of the State and its economy. Ensuring the continuing fiscal stability of the State meets the varying needs of *each and every* state department and agency. Without the exercise by the Governor of his constitutionally and statutorily conferred discretion, the State's fiscal crisis would have had a negative effect on the stability and continuing operations of state departments and agencies. As such, the furlough program was ordered by Governor Schwarzenegger specifically to meet the overarching needs of all state departments and agencies. The ruling by the trial court that the Governor was constrained by section 19851(a) with respect to the manner in which he exercised his discretion constitutes an erroneous interpretation of that code section.

Accordingly, the trial court erred in determining that the state furlough program violated a mandatory ministerial duty imposed by Government Code section 19851. The substantial questions raised by this

appeal regarding this erroneous statutory interpretation warrant the issuance of the requested writ of supersedeas.

c. The Trial Court Erred in Ruling that the Government Code section 16310 Imposes a Mandatory Ministerial Duty Violated by the State's Furlough Program.

The trial court erred in finding that the State's furlough program violated a mandatory ministerial duty contained in Government Code section 16310. The trial court held the Executive Orders constituted an abuse of discretion because internal borrowing from special funds was ordered and implemented without regard to whether "such borrowing interfered with the objects for which the special funds were created." (Exhibit F, at p. 10.) Without regard to the evidence presented by Appellants, the trial court held that reducing the operations of special fund agencies by three days per month was an interference with the operations of the special fund agencies.

The trial court's interpretation and application of Government Code section 16310(a) was in error. Government Code section 16310(a) provides as follows:

> When the General Fund in the Treasury is or will be exhausted, the Controller shall notify the Governor and the Pooled Money Investment Board. The Governor may order the Controller to direct the transfer of all or any part of the moneys not needed in other funds or accounts to the General Fund from those funds or accounts, as determined by the Pooled Money Investment Board, including the Surplus Money Investment

> Fund or the Pooled Money Investment Account. All moneys so transferred shall be returned to the funds or accounts from which they were transferred as soon as there are sufficient moneys in the General Fund to return them. No interest shall be charged or paid on any transfer authorized by this section, exclusive of the Pooled Money Investment Account, except as provided in this section. This section does not authorize any transfer that will interfere with the object for which a special fund was created or any transfer from the Central Valley Water Project Construction Fund, the Central Valley Water Project Revenue Fund, or the California Water Resources Development Bond Fund.

The evidence adduced in the trial court established that furloughing State employees benefited the State's overall fiscal health and well-being without jeopardizing the operations of the named state agencies or departments.

First, of the 69 departments named in this lawsuit, 30 departments receive a portion of their budgets from the General Fund. (See Declaration of Veronica Chung-Ng, filed in the trial court in conjunction with Respondents' Opposition on the Merits, ¶ 14. A copy of the Declaration of Veronica Chung-Ng is attached to this petition and incorporated herein as Exhibit V.) Accordingly, the furloughing of these employees resulted in a direct savings to the General Fund.

Second, 62 of the 69 department named as Respondents have borrowable state funds. Furloughing special fund employees provided relief to the General Fund cash shortage because it increased the cash

balances in internal borrowable resources. (Exhibit V, ¶ 12.) Furloughing employees in special fund agencies also reduced spending from borrowable funds because the reduction in hours worked created a payroll savings and thus increased borrowable cash balances available for the General Fund. (*Id.*)

Third, specially funded departments have made direct loans to the General Fund. (See Declaration of William Davidson ¶¶ 5, filed in the trial court in this action. A copy of the Declaration of William Davidson is attached to this petition and incorporated herein as Exhibit W; Declaration of Steven Keck ,¶¶ 7-9, filed in the trial court in this action. A copy of the Declaration of Steven Keck is attached to this petition and incorporated herein as Exhibit X.) For example, the Department of Transportation has loaned the General Fund $2.766 billion in budget years 2008-2009 and 2009-2010. (Exhibit X., ¶¶ 7-9.) Other state departments or agencies named in this action have made their funds available for use by the General Fund because their funds are located in the PMIA. (*Id.*; see also, Declaration of Brian Dougherty ¶ 3, filed in the trial court in this action. A copy of the Declaration of Brian Dougherty is attached to this petition and incorporated herein as Exhibit Y.)

The trial court ignored evidence demonstrating that the internal borrowing of special fund resources has not interfered with operations of departments named in this action. (See Declaration of Robert Stavis, ¶9. A

copy of the Declaration of Robert Stavis is attached to this petition and incorporated herein as Exhibit Z. Declaration of Laura Anderson, ¶ 5, filed with the trial court in this action. A copy of the Declaration of Laura Anderson is attached to this petition and incorporated herein as Exhibit AA. Accordingly, the trial court erred in finding that the furloughs violated a mandatory ministerial duty found at section 16310(a). This appeal raises substantial questions regarding this error by the trial court and, therefore, the requested writ of supersedeas should issue.

2. The Trial Court Also Erred in Impermissibly Expanding the Relief Granted Beyond the Issues and Evidence Presented to it.

In its February 25, 2010 Order, the trial court impermissibly expanded the relief granted beyond the allegations in the pleadings and beyond any evidence presented to it. The February 25, 2010 Order "applies to and affects each Respondent and all employees of each Respondent. It is not limited by bargaining unit or union membership." (Exhibit G)

The February 25, 2010 Order expands the relief beyond that which was included in the December 31, 2009 Order on the merits. The December 31, 2009 Order was properly limited in scope based on the representational role of SEIU, allegations, evidence, legal arguments and relief requested. This Order specifically stated, "A writ of mandate shall issue commanding Respondents to set aside those portions of Executive orders S-16-08 and S-13-09 *affecting SEIU-represented* employees which

were issued in violation of mandatory duties in Government Code 16310(a) and 19851(a), and to cease and desist the furlough of *SEIU-represented employees*." (Exhibit F, at p. 14 [emphasis added].) The December 31, 2009 Order is unambiguous – it grants relief *only* to employees of named departments and agencies.

The award of relief to parties not before the court should be reversed on appeal because such relief violates Appellants' due process rights. During the briefing and hearing on the merits, SEIU did not present any evidence regarding the furlough program as applied to state employees not represented by SEIU. Throughout the pendency of the litigation, there was no notice that the judgment would include employees not represented by SEIU. After the December 31, 2009 Order, a dispute arose regarding the form of judgment. In resolving that dispute, the trial court issued its February 25, 2010 Order improperly expanding the December 31, 2009 Order beyond the original scope of this action.

3. <u>**The Trial Court's Award of Back Pay Also Was Erroneous.**</u>

The trial court's award of back pay was in error because the trial court record did not contain evidence sufficient to support an award of back pay. In order to recover damages pursuant to California Code of Civil Procedure section 1095, Petitioner must allege and prove its damages. Recovery for unalleged and unproven damages is prohibited. (*Colthurst v.*

Fitzgerald (1922) 56 Cal.App. 740, 741 ["Petitioner ... claimed the right to damages sustained. He neither alleged nor proved any damage and consequently can recover none."]; see also *Gould v. Moss* (1910) 158 Cal. 548, 549 [Section 1095 provides "that if a judgment be given in a proceeding in mandamus, he may recover such damages as he may be found to have sustained[.]" (Emphasis added.)

SEIU did not present any evidence in support of the specific money damages allegedly suffered by any of the affected employees. SEIU did not provide the trial court with any facts regarding the amount of unpaid compensable time, or how many hours of retroactive pay each employee is allegedly due, if any. Absent an evidentiary showing, such a remedy was inappropriate.

In addition to failing to satisfy the requirements in section 1095, an award of damages without an evidentiary hearing is improper. The California Supreme Court has confirmed this basic principle:

> It is a cardinal principle of our jurisprudence that a party should not be bound or concluded by a judgment unless he has had his day in court. This means that a party must be ... afforded an opportunity to be heard and to offer evidence at such hearing in support of his contentions. [¶] His right to a hearing does not depend upon the will, caprice or discretion of the trial judge who is to make a decision upon the issues. [¶] An order or judgment without such an opportunity is lacking in all the attributes of a judicial determination.

(*Spector v. Superior Ct.* (1961) 55 Cal. 2d 839, 843-44, citations omitted.) As no specific hearing on the amount of damages was held, the remedy is improper. In fact, awarding blanket retroactive back pay without any evidence supporting the specific amount due to each employee is improper because it may constitute a gift of public funds. (See Cal. Const. Art 4, § 17.)

4. A Comparison Of The Trial Court's Rulings and Judgments With Those Of Other Superior Courts That Have Ruled on Furlough-Related Cases Further Support a Finding of Probable Error by this Trial Court.

The existence of substantial questions of probable error is further supported by the conflict between the trial court's rulings and judgment in this case and those of the Sacramento County Superior Court and the San Francisco County Superior Court in other furlough-related cases. At this point, both the Sacramento County and San Francisco County Superior Courts consistently have ruled that the Governor possesses the discretion and authority to direct and implement furloughs of state employees.

The trial court in this case ruled that furloughing state employees working in agencies funded in whole or in part by special funds was improper and unlawful. However, this ruling is in direct conflict with the ruling of the in the PECG/CAPS, CASE and SEIU actions litigated in the Sacramento County Superior Court. In those cases, the Sacramento County Superior Court ruled that furloughs were properly applied to *all* state civil service employees subject to the Ralph C. Dills Act, Government Code

section 3512, *et seq.* (Exhibit M.) However, despite this decision, the trial court in this action held that furloughs were invalid not only as applied to the employees represented by the state employee organizations who were parties to the actions, *i.e.,* CASE, SEIU, and UAPD, but also as applied to *all* state employees working in over 60 special fund departments and agencies regardless of whether they are represented by the state employee organizations that were before the trial court.

Furthermore, the trial court's rulings and judgment in this action also conflict with two earlier decisions made by the San Francisco County Superior Court. In *Board of Administration of the California Public Employees Retirement System v. DPA, et al.,* San Francisco County Superior Court Case No. CPF-09-509754, the San Francisco Superior Court ruled on December 18, 2009 that the furloughs were applied properly to state employees working at CalPERS, regardless of the fact that CalPERS is a special fund agency. (Exhibit R.) CalPERS was a named party in this action. Therefore, the two rulings are in direct conflict with one another. As a result of these rulings, the San Francisco County Superior Court has ruled that the furlough program *can* be applied to CalPERS employees and the trial court in this action has ruled CalPERS employees are not subject to furloughs.

Additionally, the final judgment by the trial court in this action conflicts with a decision made the San Francisco County Superior Court in

CAPS v. Schwarzenegger, et al., No. CPF-09-509695. In that case, the San Francisco Superior Court ruled on January 21, 2010 that state employees represented by CAPS were subject to furloughs regardless of the funding source of the departments and agencies in which those employees worked. (Exhibit S.) At the time the San Francisco County Superior Court issued that ruling, the trial court's December 31, 2010 ruling in this action was limited to the state employees represented by the state employee organizations before it. (Exhibit F.) Later, on February 25, 2010, the trial court improperly expanded its judgment to *all* state employees at the named departments and agencies irrespective of the San Francisco County Superior Court's earlier ruling in the *CAPS* action. (Exhibits G and H.)

The trial court's rulings and judgment in this case are inconsistent with the findings made by other courts that have addressed the same issues raised here. The fact that the trial court's rulings and judgment in this case is out of step with those other decisions demonstrates the probable error committed by this trial court. Accordingly, because this appeal raises substantial questions of probable error, the requested writ of supersedeas should issue.

F. A Writ of Supersedeas Should Be Granted to Prevent Irreparable Harm to Appellants and the State of California.

1. This Court Should Issue a Writ of Supersedeas In Order to Preserve the Status Quo and Prevent The Harm, Disruption, and Confusion That Will Result From The Conflicting and Inconsistent Rulings.

The State of California and Appellants will suffer irreparable harm if this rulings and judgment in this action are not stayed in their entirety. The conflict in the rulings and judgment in this case versus those issued by other superior courts in furlough-related actions, as detailed above, will lead to confusion regarding the administration of the furlough program. It is impossible for the State or Appellants to reconcile these decisions. Does the State follow the decision of the San Francisco County Superior Court in the *CalPERS* or *CAPS* actions because they were first in time and continue to furlough CalPERS employees and those represented by CAPS? Does it follow the decision of the Alameda County Superior Court because it is the most recent and cease furloughing CalPERS employees and those represented by CAPS? The State is faced with an untenable dilemma. This dilemma can only be resolved by this Court staying the judgment in this matter pending appeal.

The rulings in the Sacramento County, Alameda County, and San Francisco County Superior Courts are impossible to implement concurrently, efficiently, or in an equitable manner. These inconsistent rulings have placed the State and the individual state departments and

agencies in an untenable position in which it is impossible to comply simultaneously with different court rulings affecting the same state employees. This irreconcilable conflict has prejudiced Appellants and creates irreparable harm to the State's ability to administer the state workforce in a manner that is efficient or equitable.

2. This Court Should Grant a Writ of Supersedeas Because The Inconsistent Application of the Furlough Program Among Similarly Situated State Employees Creates Irreparable Harm to Labor Parity in the State Workforce.

A writ of supersedeas should be granted to stay the trial court's rulings and judgment because the present enforcement of those rulings and judgment will lead to the inconsistent application of furloughs to the state workforce and thus violate basic principles of labor parity. The trial court's rulings and judgment disrupt labor parity in the state workforce by creating a discrepancy between the working hours and compensation of similarly situated state employees. This discrepancy will be created because employees of General Fund agencies will continue to be furloughed and most employees of special fund agencies will not be.

The principle of maintaining relative parity among state employees regarding the terms and conditions of employment is a well-established concept in state employment. (See e.g., *State Trial Attorneys' Association v. State of California* (1976) 63 Cal.App.3d 298, 303, holding that paying attorneys in the Department of Transportation a salary lower than attorneys

in other state agencies and departments violated the concept of "horizontal parity among comparable positions throughout the civil service structure.") This concept of internal parity is at the heart of the state civil service system. Government Code section 18500, subdivision (c)(1) provides that the purpose of statutes within the Government Code addressing wages, hours, and other terms and conditions of employment for state employees is, in part, "[t]o provide a comprehensive personnel system for the state civil service, *in which positions involving comparable duties and responsibilities are similarly classified and compensated.*" (Emphasis added. See also, *California State Police Association v. State of California* (1981) 120 Cal.App.3d 674, 677.)

Unless this judgment is stayed by writ of supersedeas pending appeal, the State will not be able to administer the furloughs in an equitable and consistent manner pending the resolution of this appeal. For example, state employees in the various state bargaining units represented by SEIU are subject to furloughs if they work in General Fund departments and agencies, but are not subject to furloughs if they work in special fund agencies or departments. In other words, state employees performing comparable work are subject or exempt from furloughs simply as a matter of the funding source of the department or agency in which they work. This situation not only violates concepts of labor parity, it also provides a significant incentive to state employees to seek transfer from General Fund

agencies or departments to special fund agencies or departments. This hinders the State's ability to retain key personnel in General Fund agencies and departments.

3. <u>The Loss of Personnel Savings Resulting from the Cessation of Furloughs Will Cause Irreparable Fiscal Harm to the State.</u>

A writ of supersedeas should issue because Appellants and the State of California will suffer irreparable fiscal harm if the current furlough program is discontinued before the appeal in this case is resolved.

The savings from furloughs already have been factored into department and agency budgets for the 2009-2010 year and have been taken out of their budgets for the current budget year. (¶¶ 3, 5, and 6 of Ducay Decl., Exhibit L.) Section 3.90 of the February 2009 Budget Act required the State Department of Finance ("DOF") to reduce appropriations to State departments and agencies (including named departments and agencies) to reflect reductions in employee compensation in the 2008-2009 fiscal year. (¶ 3 of Ducay Decl., Exhibit L.) At the time of the February 2009 Budget Act, the furlough program had been held to be lawful and within the Governor's authority pursuant to a January 30, 2009 judgment of the Sacramento County Superior Court. As such, these reductions in employee compensation were achieved through existing administrative authority and were associated with the two furlough days that had been implemented by Governor Schwarzenegger pursuant to Executive Order S-16-08. Similarly,

the July 2009 Budget Act contained section 3.90 which required the DOF to reduce appropriations to State departments and agencies (including named departments and agencies) to reflect reductions in employee compensation in the 2009-2010 fiscal year obtained either through the collective bargaining process or existing administrative authority. Reductions in employee compensation were achieved through existing administrative authority in that they were associated with the third furlough day implemented by Executive Order S-13-09. (See ¶ 5 of Ducay Decl., Ex. L.)

A writ of supersedeas should issue where the result of a judgment taking effect during the pendency of the appeal would result in a "denial of the appellant's rights if his appeal were successful." (*Deepwell Homeowner's Protective Association, supra,* 239 Cal.App.2d at 66.) Appellants will irreparably be harmed if the judgment in this matter is not stayed pending appeal because millions of dollars will have been paid out of State funds for increased personnel costs as a result of the cessation of the furlough program. If this Court determines that the trial court erred in issuing its ruling in this case, and thus reverses that ruling, the State will have lost current budget year savings that would have been preserved if the requested writ of supersedeas is granted. The State will also be required to engage in costly and burdensome procedures and/or litigation to recoup any

overpayments made to employees during the pendency of the appeal, to the extent the State is able to recoup those overpayments.

4. A Writ of Supersedeas Should Issue to Stay the Rulings and Judgment of the Trial Court Due to Inherent Ambiguities in those Rulings and Judgment that Could Cause Irreparable Harm to the State and Appellants.

There are inherent ambiguities in the rulings and judgment of the trial court that warrant issuance of the requested writ of supersedeas because of the potential for irreparable harm created by those ambiguities.

The last sentence of the trial court's March 24, 2010 Order reads, "This order does not apply to any Respondent not affected by the automatic stay provisions of Code of Civil Procedure section 916." (Exhibit K.) This sentence of the ruling is ambiguous because it does not elucidate to which Respondent the trial court is referring. If the trial court intended that the relief from stay not apply to any Respondents who were subject to the judgment but did not appeal, *e.g.,* the Controller, the California Earthquake Authority, and CalPERS, this sentence is inconsistent with the preceding paragraph of the Order governing the stay of the backpay portion of the Order.. That paragraph states, "As to relief from the automatic stay of enforcement on the retrospective, backpay portion of this Court's order, the irreparable harm has already occurred. While there is no doubt that there is continuing harm as a consequence of lost pay for prior furlough days, the Court declines to exercise its discretion to remove the effect of the automatic stay of enforcement as to back pay relief." (Exhibit K.) If the

last sentence of the March 24, 2010 Order is interpreted to exempt the Controller, and the preceding paragraph does not apply to the Controller, then it is possible the Controller could begin issuing back pay checks and not be in violation of the Order. As such, the Order is inherently ambiguous to such a degree that it creates the potential for irreparable injury to the State because it could lead to the payment of hundreds of millions of dollars in back pay remedies. Accordingly, the writ of supersedeas must issue to avoid the potential catastrophic result of the trial court's inherently ambiguous rulings and judgment in this action.

G. Any Harm That Results To Respondents' Employees Will Be Minimal As Compared To The Harm That Will Result to Appellants and The State if A Writ of Supersedeas Is Not Granted.

Respondents have made claims in the trial court, and will most likely make similar claims in this Court, regarding the irreparable harm that will result to the employees represented by their organization if the furloughs are allowed to continue pending appellate review. Any harm that Respondents will suffer will be limited, given that the current furlough program will end on June 30, 2010. Thus, if the trial court's order is stayed in its entirety, only nine furlough days are scheduled to occur before the end of the furlough program. Any alleged additional harm from nine furlough days is outweighed by the harm to the State and Appellants from not staying enforcement of the rulings and judgment of the trial court.

III.

CONCLUSION

The requested supersedeas relief should be granted in this action because the State, the named departments and agencies, state employees, and the citizens of the State of California will suffer irreparable harm if the judgment and writ in this action are not stayed pending final determination of the appeal. Furthermore, as has been demonstrated above, there is a likelihood that the present appeal will be successful because the appeal raises substantial questions of probable error by the trial court.

For all of the foregoing reasons, Governor Arnold Schwarzenegger, former Director David Gilb, and all state departments and agencies appearing through the DPA respectfully request that a temporary stay and writ of supersedeas be granted in this matter.

Dated: March 29, 2010

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation

By ______________________
David W. Tyra,
Attorneys for Defendants/Appellants
ARNOLD SCHWARZENEGGER, as Governor of the State of California; DAVID GILB, as Director of the Department of Personnel Administration

Dated: March 29, 2010

DEPARTMENT OF PERSONNEL ADMINISTRATION

By ______________________ for
Will Yamada
Labor Counsel
For Defendants/Appellants

CERTIFICATE OF WORD COUNT

I, David W. Tyra, Attorney for Defendants/Appellants GOVERNOR ARNOLD SCHWARZENEGGER and DAVID A. GILB, hereby declare under penalty of perjury that the number of words in Appellants Governor Arnold Schwarzenegger and David A. Gilb's Petition for Writ of Supersedeas and Request for Temporary Stay equals 10,564 words, as per the word count feature in Microsoft Word.

Dated: March 29, 2010

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Law Corporation

By: ______________________
David W. Tyra
Attorneys for Defendants/Appellants
GOVERNOR ARNOLD SCHWARZENEGGER and DAVID A. GILB

936834.1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

I, May Marlowe, declare:

I am a citizen of the United States and employed in Sacramento County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 400 Capitol Mall, 27th Floor, Sacramento, California 95814. On March 29, 2010, I served a copy of the within document(s):

- **Appendix to Petition for Writ of Supersedeas and Request For Temporary Stay**

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☐ by placing the document(s) listed above in a sealed ______ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a _______ agent for delivery.

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Sacramento, California addressed as set forth below.

☒ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

Attorneys for Plaintiffs/Petitioners
Paul E. Harris, III, Esq.
J. Felix De La Torre, Esq.
Monica Ahuja, Esq.
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000
1808 14th Street
Sacramento, CA 95811
Fax: (916) 554-1292
E-mail: fdelatorre@seiu1000.org

Attorneys for Defendant/Respondent John Chiang
Ross C. Moody, Esq.
Deputy Attorney General
STATE OF CALIFORNIA ATTORNEY GENERAL'S OFFICE
455 Golden Gate Avenue, Suite 1100
San Francisco, CA 94102-7004
Fax: (415) 703-1234
E-mail: Ross.Moody@doj.ca.gov

Attorneys for Respondents/Defendants CalPERS and CalSTRS
Harvey L. Leiderman, Esq.
REED SMITH LLP
101 Second Street, Suite 1800
San Francisco, CA 94105
Fax: (415) 391-8269
E-mail: hleiderman@reedsmith.com

Attorneys for Defendant/Respondent Glenn Pomeroy
Jonathan D. Krop, Esq.
Michael J. Strumwasser, Esq.
STRUMWASSER & WOOCHER LLP
10940 Wilshire Blvd., Suite 200
Los Angeles, CA 90024
Fax: (310) 319-0156
E-mail: : jkrop@strumwooch.com
mstrummwasser@strumwooch.com

Attorneys for Defendants/Respondents Mike Chrisman and California Energy Commission
Jenny Esquivel, Esq.
DEPARTMENT OF PERSONNEL ADMINISTRATION
1515 S Street, North Building, #400
Sacramento, CA 95814
E-mail: jenny.esquivel@dpa.ca.gov

Attorneys for Defendants/Respondents Steve Poizner, California Insurance Commissioner
Jerry Whitfield, Esq.
CALIFORNIA DEPT. OF INSURANCE
Legal Division
45 Fremont Street
San Francisco, CA 94105
E-mail:
WhitfieldJ@insurance.ca.gov

Attorneys for Defendant/Respondent Joan Borucki
Ronald B. Turovsky, Esq.
MANATT, PHELPS & PHILLIPS, LLP
11355 W. Olympic Blvd.
Los Angeles, CA 90064-1614
Fax: (310) 312-4224
E-mail: rturovsky@manatt.com

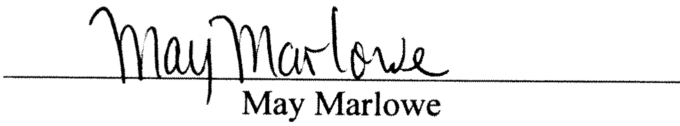
Honorable Frank Roesch
Alameda County Superior Court
Department 31
U.S. Post Office Building
201 Thirteenth Street
Oakland, CA 94612

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102
(4 copies)

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S.

Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 29, 2010, at Sacramento, California.



May Marlowe