IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

CALIFORNIA ATTORNEYS, ADMINISTRATIVE LAW JUDGES AND HEARING OFFICERS IN STATE EMPLOYMENT, Petitioner, Plaintiff and Respondent, v. **ARNOLD SCHWARZENEGGER, in his capacity as Governor of the State of California, et al.,** Respondents, Defendants and Appellants	A127777 (Alameda County Super. Ct. No. RG-09-453982)

OPPOSITION TO PETITION FOR WRIT OF SUPERSEDEAS

On Appeal from the Alameda County Superior Court
Hon. Frank Roesch, Department 31 (9510) 268-5105

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INTRODUCTION

Petitioners Governor Arnold Schwarzenegger, the Department of Personnel Administration ("DPA"), and all state departments appearing through DPA (hereafter "appellants"[1]) have petitioned this Court for a writ of supersedeas seeking to stay "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." (Petition, p. 2.) California Attorneys, Administrative Law Judges and Hearing Officers in State Employment ("CASE")[2] hereby opposes the petition.

Appellants have failed to demonstrate the necessity of the writ. They have also failed to demonstrate the probability that the trial court erred. The various allegations of error set forth in the petition are either unpersuasive, or irrelevant to the question of whether a writ of supersedeas is required. All of the allegations of probable error can be resolved through the normal course of appellate review with no danger of harm to the parties.

Moreover, appellants have failed to demonstrate that they will suffer any irreparable harm should their request for a writ be denied. To the

[1] Appellants are petitioners in this action seeking a writ of supersedeas, but in their petition have denominated themselves as "appellants" in reference to the pending appeals. For the sake of consistency, respondent CASE will use the same designation.

[2] 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.

contrary, they have conceded that respondent CASE and its members would suffer harm; their argument that the harm that would be suffered is "limited" is not a basis upon which to grant the writ and allow such harm to continue.

STATEMENT OF THE CASE AND MATERIAL FACTS

On August 25, 2009, CASE filed a second amended complaint in the Alameda County Superior Court which sought injunctive and declaratory relief on the grounds that the furloughs of CASE members at more than 60 different agencies that were funded by sources other than the General Fund were unlawful, and should be halted. (Petition Appendix, Vol. I, Exh. E, p. 9.) A previously-filed demurrer to an earlier complaint was deemed to be a demurrer to the second amended complaint (Opposition Appendix, Exh. 1, p.1), and the demurrer was denied on October 13, 2009 (Opposition Appendix, Exh. 2, p. 22.) The trial court issued an order granting the petition for writ of mandate on December 31, 2009. (Petition Appendix, Vol. I, Exh. F, p. 57.) After additional briefing and argument regarding the form of judgment, the trial court issued an order and a judgment in favor of CASE on February 25, 2010. (Petition Appendix, Vol. I, Exh. G, p. 70; Exh. H, p. 76.)

Appellants filed notices of appeal the following day. (Petition Appendix, Vol. I, Exh. I, p. 81; Exh. J, p. 116.) In each notice of appeal, appellants argued that the judgment was automatically stayed. (Ibid.) CASE filed a motion to lift the automatic stay on March 4, 2010. (Petition Appendix, Vol. II, Exh. EE, p. 281.) On March 23, 2010, the trial court partially lifted the automatic stay, ruling that the furloughs at the named agencies should stop immediately, but declined to lift the stay on that portion of the judgment directing restoration of unlawfully withheld wages previously withhold based on furlough days that had already occurred. (Petition Appendix, Vol. I, Exh. K, pp. 153-156.)

On March 29, 2010, appellants filed a petition for writ of supersedeas in this Court. By order the following day, this Court ordered a temporary stay of the trial court's March 23, 2010 order, and directed CASE to file an opposition by 10:00 a.m. on April 7, 2010.

ARGUMENT

I. THE STANDARD FOR GRANTING THE WRIT

The sole purpose of the writ of supersedeas is to preserve appellate jurisdiction pending review of the appeal and a ruling on the merits. (*Mills v. County of Trinity* (1979) 98 Cal.App.3d 859, 861; *People ex rel. San Francisco Bay Conservation and Development Commission v. Town of Emeryville* (1968) 69 Cal.2d 533, 538.) The issuance of such a writ is entirely discretionary with the reviewing court. (*West Coast Home Improvement Co. v. Contractors' State License Board* (1945) 68 Cal.App.2d 1, 6.) As one court observed more than four decades ago,

> The issuance of a writ of supersedeas is a matter of discretion to be exercised by the court whenever it appears necessary and proper to preserve appellate jurisdiction. Being discretionary, the writ will not be granted to maintain a status quo of the litigation unless the appeal presents substantial questions for decision [citations], and unless there is a probability that error has been committed.

(*Donen v. Donen* (1964) 228 Cal.App.2d 441, 448.) The petitioner bears a heavy burden to show the necessity of the writ and the probability of error by the court below. As one court explained:

> The presumption is in favor of the trial court's decision, and we cannot presume error in determining the motion. [Citation.] Where no probable error is shown in the petition, the appellate court will refuse to issue the writ. [Citation.]

(*Saltonstall v. Saltonstall* (1957) 148 Cal.App.2d 109, 114.)

In assessing the probability of error, it is important to remember the significance of the presumption that the trial court's ruling is correct.

> We cannot presume error. This court must consider the rights of respondents as well as those of appellants. Affirmances must be contemplated as well as reversals; in fact, until the contrary is shown, the presumption is in favor of the lower court's decision. A supersedeas is issued usually to protect the appellate court's jurisdiction. If a stay can be granted only at the risk of destroying rights which would belong to the respondent if the judgment is affirmed, it cannot be said to be necessary or proper to the complete exercise of appellate jurisdiction.

(*Nuckolls v. Bank of California National Association* (1936) 7 Cal.2d 574, 578.)

II. APPELLANTS HAVE FAILED TO DEMONSTRATE THE NECESSITY OF THE WRIT

The procedural posture of this case makes it apparent that a writ of supersedeas is entirely unnecessary to preserve the jurisdiction of this Court. Indeed, granting the writ may well deprive the respondents of any possible relief.

As a result of the trial court's order, including the trial court's partial lifting of the automatic stay, the furloughs would end as soon as this Court lifts its own temporary stay. However, because the trial court did not lift the automatic stay on the portion of its order regarding the unlawfully withheld wages, the resolution of that matter will await the normal appellate process. As a result, the only immediate effect of the trial court's rulings will be to stop the unlawful furloughs from continuing until their previously designated sunset date, June 30, 2010. This could potentially be

the only relief that respondents could ever achieve, and since this appeal will not likely conclude in this Court within the next three months, failure to end the furloughs now will mean there may be no way to grant respondents any remedy whatsoever.

To see why this is so, one need only look at the possible outcomes of the appeal. If this Court ultimately determines that appellants are correct that the Governor's power to furlough employees in the named departments is plenary, then the appellants will not be harmed at all, because upon this Court's decision to that effect, they can furlough employees at that time and thereby ensure that all the employees at the named departments are furloughed for the number of days originally contemplated by the Executive Order. But if this Court ultimately determines that the furloughs are unlawful, it will be too late to grant the injunctive relief to which respondents are entitled (i.e. an end to the furloughs), and the victory will be hollow indeed.

Similarly, if appellants are correct that the trial court erred in determining that CASE members are entitled to the restoration of their unlawfully withheld salaries, there will be no remedy available for CASE members because the furloughs will have already ended by the time this Court reaches its decision, and, as appellants argue, there will be no monetary award available to CASE members.

Conversely, if respondents are correct that the furloughs are illegal, then the only way they can benefit from the ruling is if the furloughs are stopped now, because a future ruling from this Court that the furloughs are illegal will be meaningless after June 30, 2010.

Appellants argue that a failure to stay the trial court's ruling would cause irreparable harm to the State, but the argument does not withstand

scrutiny. Specifically, appellants argue that if the furloughs are ended prospectively consistent with the trial court's order, "the State will lose the necessary personnel savings that would have been gained by maintaining the furlough program." (Petition, p. 21.) Respondents argue that they will lose "their ability to obtain the necessary savings during he [sic] current budget year."

But this argument is untenable because the State of California routinely incurs unbudgeted-for obligations during a fiscal year as a result of being named as a defendant in hundreds of lawsuits every year. There already exists a mechanism for the dealing with these unplanned-for costs. Government Code section 965, subdivision (b), authorizes a report to the chairperson of the Senate or Assembly Budget Committee, "who shall cause to be introduced legislation appropriating funds for the payment of the claims, settlements, or judgments." Thus, to the extent the trial court's judgment results in unplanned-for personnel costs, the Legislature has already instructed on the procedure for appropriating additional funds to deal with that result.

The appellants' argument fails for another reason, as mentioned above. If the trial court's order is allowed to stand, and the furloughs end immediately, the appellants will have every opportunity to litigate the issue via the normal course of appellate review. If they ultimately prevail, then they will have the unchecked power to furlough anyone at any time, and can certainly furlough employees at those special fund agencies where the furloughs ended prematurely, thereby making up for the lost furlough days, and ensuring the "labor parity" with which appellants are so concerned. (See Petition at pp. 41-42.)

There is yet a third reason that appellants' arguments regarding the budget should be rejected. Appellants argue that they budgeted for the savings based on the furloughs implemented via Executive Order. Specifically, they argue that "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." (Petition at p. 43.) But this argument overlooks the fact that this Court must presume that the trial court's decision is correct. (*Saltonstall v. Saltonstall, supra*, 148 Cal.App.2d at p. 114; *Nuckolls v. Bank of California National Association, supra*, 7 Cal.2d at p. 578.) If the trial court is correct, then the appellants' argument amounts to a claim that because they budgeted for unlawfully withholding salaries from CASE members, they should be allowed to continue to do so so as not to upset their plans. This is akin to a bank robber arguing that he should not be required to return the money he stole because he has purchased a luxury home, and now has "budgeted" to pay the mortgage with the stolen loot. Such an argument should be rejected out of hand.

III. APPELLANTS HAVE FAILED TO DEMONSTRATE A PROBABILITY OF ERROR IN THE TRIAL COURT'S RULINGS

Appellants also argue that the trial court's rulings and judgment are "fraught with error." (Petition, pp. 2-3.) Specifically, appellants argue that the trial court's rulings were erroneous in several respects and that the relief granted was also improper. (See Petition at pp. 25-36.) Each of these contentions will be addressed briefly in the order raised by appellants.

A. The Focus Is Not on the Probability of Error, But On the Necessity of Supersedeas to Prevent the Destruction of Rights

Initially, it appears that appellants' are trying to demonstrate that there is a probability that the trial court's ruling was wrong. But that misapprehends the purpose of a writ of supersedeas.

> A writ of supersedeas should issue if it appears that it is necessary to protect the rights of an appellant but it should not issue if it appears that the appellant is not entitled to the relief denied by the judgment from which an appeal has been taken. [Citation.]

(*Olsen v. Board of Supervisors of San Luis Obispo County* (1939) 30 Cal.App.2d 635, 637.) Even assuming appellants are correct that the trial court erred, all of their rights can be protected through the normal appellate process. As discussed above, if appellants prevail, they will be legally entitled to furlough without any apparent limitation, and thus they can impose furlough days on all of the employees at the named departments to make up for whatever furlough days are lost as a result of the trial court's ruling.

Accordingly, there is no basis to grant the writ based on the "probability" of error. Moreover, as will appear, appellants are not correct in their assertions that the trial court erred.

B. Discretion May Not Be Exercised In Violation of the Law

Appellants first argue that the trial court erred in granting a writ of mandate because such a writ does not lie to interfere with the Governor's exercise of discretion. (Petition at pp. 27-28.) This is not a proper

argument because the appellants failed to demur on this basis below. (*County of Santa Clara v. Superior Court* (2009) 171 Cal.App.4th 119, 130, fn. 9.) Accordingly, this Court should not entertain the issue. However, even if this Court does overlook appellants' failure to preserve this issue, the simple fact is that this case does not present any issue relating to the exercise of the Governor's discretion. Rather, it concerns the legality of the implementation of furloughs at the named agencies. (See Petition Appendix Vol. I, Exhibit E, pp. 40-41, 42-46.) In any event, no governmental actor is permitted to exercise discretion in a manner that violates the law. (See, e.g., *People v. Vasquez* (2006) 39 Cal.4th 47, 72; see also Petition Appendix Vol. I, Exhibit F, pp. 6-64.)

C. Government Code Section 19851 Prohibits Furloughs Unless they Meet the Varying Needs of the Different State Agencies

Appellants next argue that the trial court erred in determining that the furloughs violated Government Code section 19851. (Petition, pp. 28-31.) The argument is based on the assertion that section 19851 sets forth a mere "policy" and that the Governor can deviate from that policy in the exercise of his discretion. (Petition, p. 29.) The argument is disingenuous because it ignores the fact that the statute plainly states that "the workweek of state employees shall be 40 hours." It is a well-settled principle of statutory construction that the word "may" in a statute is ordinarily deemed permissive, and the word "shall" is deemed mandatory. (*California Correctional Peace Officers Association v. State Personnel Board* (1995) 10 Cal.4th 1133, 1143.) Accordingly, the statute imposes mandatory

condition that cannot be violated except by the express terms allowed in the subsequent clause, which provides:

> 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 purported justification for the furloughs was the State's fiscal crisis. Appellants refer to the Governor's "Fiscal Emergency Proclamation" regarding insufficient revenues. (Petition, p. 5.) They also refer to the danger of "insufficient cash reserves." (*Ibid.*) Assuming the truth of the fiscal situation, it is reasonable to conclude that those State departments which actually generate revenue, including the Franchise Tax Board and the Board of Equalization, would need more personnel resources, not less, so that they could increase or at least maintain the State's incoming revenue streams. When the State is running out of money, it is undeniable that the "needs" of such agencies would militate against imposition of furloughs. The obvious discrepancy between the needs of these agencies and the Executive Order simply highlights the fact that the varying needs of the state agencies were not the basis for the furloughs. It is not enough to merely consider the impact of furloughs on the agencies. The statute expressly requires that any change be done "in order to meet the needs" of the agencies. Thus, a prerequisite to altering the number of hours is that there exist some need or needs of the agencies justifying the change. In this case, there was no such need ever offered or argued. Accordingly, the trial court was correct that section 19851 prohibits the furloughs.

Rather than identify any particular needs of the different state agencies, appellants argue that the furloughs were ordered "to meet the overarching needs of all state departments and agencies." (Petition at p.

30.) But this argument is unsupported and contradicted by appellants' pleadings. It is unsupported because appellants have never articulated, in this court, in the trial court, or anywhere else, how the furloughs met any needs of any of the named agencies. Indeed, it is difficult to imagine how a department's particular needs could be met by reducing the resources available to it. It is contradicted because appellants have argued in this Court that the budgets of the respective departments were reduced after the furloughs were already implemented. (Petition at pp. 14-15.) In other words, the departments "needed" to save money on personnel costs only because the Governor's furlough order was used as the basis to cut their respective budgets. The only "overarching need" that appears is the desire of the Governor to furlough employees, but that is not a need of "the different state agencies" with the meaning of section 19851. The trial court was correct when it determined that "[e]ach State agency has differing needs relating to its function and to the sources of its funding. [Appellants'] refusal to consider those varying needs" violated section 19851. (Petition Appendix, Vol. I, Exh. F, pp. 65-66.)

D. Government Code Section 16310 Prohibits Furloughs at the Named Departments Because They Interfere With the Objects of the Special Funds

Appellants next argue that the trial court erred in ruling that the furloughs violated Government Code section 16310. (Petition, pp. 31-34.) That section permits borrowing by the General Fund from various special funds managed by the Pooled Money Investment Board, with one significant limitation. Section 16310, subdivision (a) expressly states that "[t]his section does not authorize any transfer that will interfere with the

object for which a special fund was created. . . ." As appellants admit, the Governor's furloughs operated as a closure of the named agencies for three days per month (Petition at pp. 14-15), so that the General Fund could borrow the savings generated by the reduced personnel costs at those specially funded agencies. (Petition at pp. 32-33.) It is beyond dispute that the closing of special fund agencies three days per month interferes with their ability to carry out their mission.

Appellants argue that the furloughs "benefitted the State's overall fiscal health and well-being without jeopardizing the operations of the named state agencies of departments." (Petition at p. 32.) However, this argument overlooks the voluminous evidence submitted to the trial court which showed that the implementation of the furloughs resulted in increased case loads and backlogs at many agencies, more than $10 million in overtime costs, and the execution of at least 54 separate contracts for non-civil service, private sector law firms to do the State's legal work. (See Petition Appendix, Vol. I, Exh. F, p. 67.) While appellants certainly argued below that the named agencies suffered no ill effects, that argument was rejected by the trial court based on the evidence it reviewed. In an effort to demonstrate error below, appellants have simply raised those same arguments again in this Court. However, they fail to even mention the contrary evidence relied upon by the trial court, let alone attempt to explain why that evidence does not support the trial court's ruling. The trial court's resolution of conflicting evidence in favor of the prevailing party may not be disturbed on appeal. (*McGaughey v. Fox* (1979) 94 Cal.App.3d 645, 650-651.) And, it necessarily follows that mere disagreement with the trial court's resolution of evidentiary conflicts is absolutely no basis upon which to demonstrate probable error in the context of determining the propriety of

a writ of supersedeas. Appellants have utterly failed to even attempt to meet their burden of showing probable error on this point, and their argument should be rejected.

Disturbingly, appellants appear to have acknowledged the harm to the special fund agencies that a lack of resources creates, while maintaining their position that a writ of supersedeas will not cause irreparable harm. In their petition, they allege that if the writ does not issue, the State will be irreparably harmed because "departments and agencies will no longer be able to fund vital programs and services for its citizens." (Petition, p. 10.) But this allegation is an admission that when specially funded agencies are denied resources (i.e. personnel and the money associated with paying the personnel) the State is harmed. Thus admission completely contradicts appellants' argument that the special fund agencies suffered no harm from the furloughs and the resultant transfer of their money to the General Fund.

E. The Scope of the Relief Is Not A Basis to Grant the Writ

Appellants next argue that the trial court erred in granting relief to all employees of the named agencies regardless of whether they are members of the three unions who brought suit in Alameda. (Petition, pp. 34-36.) CASE does not represent the interests of those other employees, and therefore takes no position on this point. Indeed, it would be inappropriate for CASE to argue on their behalf. However, to the extent the scope of the trial court's order is offered by appellants as evidence of error and therefore a factor to consider in whether to grant the writ, CASE offers the following observations.

First, to the extent the trial court's legal reasoning was correct that the furloughs are statutorily prohibited under Government Code sections 19851 and 16310, there is no basis for concluding that the furloughs are illegal as to some employees of the named agencies but not others. The statutes in question draw no distinction based on employee classification, job duties, or union membership. Rather, they operate to prohibit the furloughs in total. Thus, there does not appear to be any legal basis for treating employees differently. Indeed, appellants' noble concern with "labor parity" (see Petition at pp. 41-42) argues in favor of ending the furloughs for all employees at the named departments.

Second, as a practical matter, CASE believes it would be counterproductive to end furloughs for some staff but not others within the same agency. The members of CASE are predominantly lawyers and judges. Having them return to work on what were previously "furlough Fridays" would be pointless if the various support staff upon which they rely to complete their duties were not also working. A lawyer without a secretary, or a court runner, or the dozens of other individuals involved in doing the state's legal business, cannot accomplish much. As such, to the extent the trial court found that the furloughs interfered with the ability of the named agencies to carry out their functions, returning only some of the staff to work but not others would result in similar interference.

Third, strictly limiting the scope of the order to only those employee groups who brought suit would only have the effect of generating yet more lawsuits challenging furloughs, as those other unions would rush to file lawsuits in Alameda County identical to the ones filed by CASE and the other petitioners below. Thus, if judicial economy has any significance, it would be unwise to limit the scope of the trial court's ruling.

F. The Propriety of the Award of Damages Can Be Resolved in the Normal Course of Appellate Review

Appellants next argue that the trial court erred in ordering that the unlawfully reduced salaries of CASE members be restored. Once again, appellants have failed to establish probable error. Initially, respondent CASE observes that the judgment issued by the trial court directed that a writ of mandate be issued to the Controller "to restore any salary wrongfully withheld as a consequence" of the furloughs. (Petition Appendix, Vol. I, Exh. H, pp. 79-80.) The Controller is separately represented in these proceedings, and has not appealed the judgment. Thus, it is doubtful whether appellants have any standing whatsoever to contest the issuance of a writ that was not issued to them. (See, e.g., *Talmo v. Civil Service Commission* (1991) 231 Cal.App.3d 210, 223 [Whether the appealing party has actually had a writ directed to them is a factor to consider in determining whether there exists standing to challenge the writ].)

Nevertheless, assuming appellants do have some basis upon which to litigate the propriety of a writ issued against a third party, the trial court ruling was correct. Code of Civil Procedure section 1095 expressly allows the recovery of damages as part of the judgment in writ proceedings. Courts have recognized that unlawfully withheld salary is a proper basis for damages in the context of mandamus. (*Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943-944.) The trial court in this case correctly determined that those damages had been pled and proved. (See Petition Appendix, Vol. I, Exh. G, pp. 74-75.)

Appellants' argument that there was no proof of damages sustained by CASE members is disturbingly disingenuous. Appellants have repeatedly and expressly acknowledged that the furloughs operated to reduce the pay of CASE members; indeed, that was the entire reason for their implementation. (See, e.g., Petition at pp. 5-6, 14-15, 30.) There is simply no dispute in this case that the furloughs had the direct result of reducing the salaries of CASE members. Accordingly, if those furloughs were illegal, the award of that unlawfully withheld salary as damages was proper. Therefore, appellants cannot demonstrate any probable error in this aspect of the trial court's ruling unless they first demonstrate that the trial court's ruling on the merits was in error, which they have failed to do.

There is, however, an even more fundamental reason why appellants' arguments regarding the unlawfully withheld wages should be rejected. Appellants offer the argument as a basis for showing the trial court erred, to the extent that is a factor in determining whether to grant the request writ of supersedeas. But the trial court's award of damages is automatically stayed pending appeal. Since the trial court declined to lift the stay as to that portion of the judgment, the propriety of the award of damages can be thoroughly and deliberately adjudicated via the normal course of appellate review. There is nothing to be gained in granting a writ of supersedeas, because it will not alter the status quo with respect to the recovery of damages. Accordingly, appellants' argument should be rejected.

IV. APPELLANTS HAVE FAILED TO DEMONSTRATE IRREPARABLE HARM

Appellants argue that they will suffer irreparable harm if this Court declines the invitation to grant a writ of supersedeas. (Petition, at pp. 40-47.) However, there is in reality no harm in letting this matter progress through the normal course of appellate review. Appellants first contend that conflicting rulings from various trial courts "will lead to confusion." (Petition, p. 40.) They also assert that the concept of "labor parity" will be harmed. (Petition, p. 41.) They argue that stopping the furloughs will cause "irreparable fiscal harm to the State." (Petition, p. 43.) Finally, they argue that the trial court's ruling is ambiguous. (Petition, p. 45.) None of these contentions has merit.

A. The Conflicting Rulings Do Not Support the Request for the Writ

Appellants argue that the conflicting rulings in the lower courts demonstrate probable error. (Petition, pp. 37-41.) However, respondent CASE submits that the resolution of conflicting judgments is in part the function of the normal appellate process, and does not in and of itself suggest that a writ of supersedeas is appropriate. Moreover, to the extent appellants seek to refer this Court to other conflicting rulings in other trial courts, the full record of the proceedings of those other trial courts are not before this Court.

There is no showing that those cases presented exactly the same evidence, legal theories, or issues as presented by this case. Indeed, the record demonstrates otherwise. As one example, appellants below filed a

demurrer to the CASE and SEIU petitions arguing that the cases should be stayed under the doctrine of exclusive concurrent jurisdiction. (Opposition Appendix, Exh. 1, pp. 1-21.) 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. (Opposition Appendix, Exh. 2, pp. 22-23.) 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. (Opposition Appendix, Exh. 3, pp. 25-31.) 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.

(*Id.* at p. 26.)

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. 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. In any event, there is no showing that the rulings in other trial courts are entitled to any greater presumption of correctness than the decision of the trial court below in this case.

Finally, and perhaps most importantly, appellants' argument regarding the conflicting rulings is somewhat hyperbolic, because no

confusion or disruption will result. As appellants acknowledge, the San Francisco County Superior Court has ruled in another case that furloughs can be applied to CalPERS employees, but the trial court in this case reached the contrary result. (Petition, p. 39.) While the rulings are different, that fact does not put appellants in any danger of having to choose which trial court order to follow. That is so because the San Francisco trial court never ordered that furloughs must be implemented, only that they may be. Accordingly, the trial court's order in this case, while reaching a different result, does not put appellants in any danger of facing contempt from the San Francisco court.

B. There Is No Danger of Harm to the Concept of "Labor Parity"

Appellants' argument that the ruling will damage the concept of "labor parity" (see Petition at pp. 41-43) is unpersuasive. Appellants' argument suggests that it is imperative that the furloughs be applied across the board to all state employees. However, the two executive orders that directed the implementation of furloughs specified that there would be "a limited exemption process" for some departments. (See Petition Appendix Vol. I, Exh. B, p. 4, and Exh. C, p. 6.) The mere fact that exemptions were contemplated suggests that the concept of labor parity is not as inviolate as appellants contend. Moreover, the evidence submitted by appellants demonstrates that in fact some employees are not being furloughed. For example, the employees in Bargaining Unit 5, which includes the officers of the California Highway Patrol, are not being furloughed. (See Petition Appendix Vol. 1, Exh. L, p. 158.) The declaration of Ms. Ducay includes a chart purporting to show the positions subject to furlough and the costs of

ending the furloughs, but that chart shows that Bargaining Unit 5 is excluded from the calculation, because they are already exempt from the furloughs.

Moreover, appellants acknowledge that the employees of the civil executive officers are not currently and never have been subject to furloughs, because the writ directing those employees to be furloughed has been stayed pending appeal. (See Petition at pp. 17-18.) Also, appellants acknowledge that all of the thousands of employees at the State Compensation Insurance Fund have not been subject to furloughs since the summer of 2009 as a result of successful litigation challenging the furloughs in that agency. (Petition, at pp. 18-19.) Despite the fact that large groups of state employees have either been exempted from furloughs by the Governor, or have avoided furloughs via litigation, there has been no showing whatsoever that this disparity has caused any harm whatsoever. To the contrary, the fact that some state agencies have avoided the unlawful furloughs has allowed the state to minimize the harm caused by the furloughs though loss of services.

Appellants argue that as a result of the trial court's order, "employees of General Fund agencies will continue to be furloughed and most employees of special fund agencies will not be." (Petition at pp. 41-42.) But there is no evidence whatsoever of any loud hue and cry from the employees of General Fund agencies that their colleagues in other agencies should continue to be furloughed. Indeed, to the extent CASE represents many of those General Fund employees, CASE would be the entity most likely to allege a violation of "labor parity" if it was a concern at all; it is not.

In any event, appellants' argument about the necessity of maintaining similar levels of compensation are belied by appellants' contrary argument on this point in other furlough litigation. Specifically, appellants in this Court argue that the importance of "maintaining relative parity among state employees" and ensuring that "positions involving comparable duties and responsibilities are similarly classified and compensated." (Petition, p. 42.) Appellants' argument is that reducing the compensation for General Fund employees through furloughs without a similar reduction in compensation for Special Fund employees will create a disparity in compensation. However, in their opposition to the petition for writ of mandate filed in Sacramento County Superior Court challenging the furloughs, appellants made exactly the opposite argument. Specifically, they argued that "[n]o employees' wage rate or salary range will be reduced as a result of the furlough." (Opposition Appendix, Exh. 4, p. 51.) They went on to argue that

> A furlough only constitutes a reduction in hours worked, not a reduction in the wage rate paid for that work. A furlough reduces an employee's total number of hours worked in a particular pay period. The corresponding rate of pay is not affected and employees will be paid at their normal rate for a reduced number of hours resulting from the two furlough days per month. There is no evidence in this case that the State has any intention of paying state employees at a lesser rate, or to impact state employee salary ranges, for the hours actually worked. The only evidence before this Court is that the hours worked will be impacted by the furloughs, not the rate of pay for those hours worked.

(*Ibid*, emphasis added.) It is fundamentally dishonest to argue in one court that the furloughs do not result in a reduction in salary, but then argue to

this Court that the elimination of furloughs in the named agencies will result in a disparity in compensation between those employees who are furloughed and those who are not. If appellants' argument to the Sacramento Superior Court is to be believed, there will be no pay disparity whatsoever, because the furloughed employees are still being compensated at the same rate, except that the number of hours worked is less. Conversely, if appellants' misrepresented the facts to the Sacramento County Superior Court, their arguments to this Court should be viewed with skepticism. For all of the foregoing reasons, the arguments about labor parity should be rejected.

C. The State Will Not Suffer Any Irreparable Harm; Rather, the Law Already Contemplates Mid-Year Budget Appropriations for Court Judgments

Appellants also contend that the loss of personnel savings will result in irreparable harm. (Petition, pp. 43-45.) But the loss of personnel savings is clearly not irreparable harm. Quite the contrary, Government Code section 965 expressly identifies a mechanism to address the "harm" caused by court judgments resulting in unplanned for expenditures. This case is no different than the hundreds of other cases in which a judgment is awarded against the State of California or one of its many departments. The State has survived such judgments before without irreparable harm, and will do so in the instant case.

Moreover, appellants speculate that if they prevail on appeal, they will "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." (Petition, p. 45.) This is manifestly untrue. As previously discussed, and as admitted in the petition, the trial court did not lift the stay on the back pay remedy. (See Petition, p. 2.) Accordingly, there will be no payments of any kind to CASE members pending the appeal, and thus nothing to recoup. Moreover, in the event this Court does reverse the trial court with respect to the legitimacy of the furloughs, appellants will at that point be able to furlough the employees of the special fund agencies as long as necessary to achieve any lost "personnel savings." There is simply no danger whatsoever of any need to litigate or engage in recoupment procedures. The argument is specious and should be rejected.

D. The Alleged Ambiguity in the Trial Court's Order Is Inherently Speculative and Is Not A Basis to Grant the Writ of Supersedeas

Finally, appellants argue that the trial court's ruling is ambiguous. (Petition, pp. 45-46.) They speculate that the Controller might interpret one provision of the March 24, 2010 order in a particular manner. (*Ibid.*) Not only is such a danger highly speculative, it is a concern that should properly be raised by the Controller, if at all. In any event, appellants have the right to request clarification from the trial court if they truly believe that the order is ambiguous, and to date they have not done so, nor have they even noticed a motion requesting clarification. Rather, it appears that the argument is merely a post hoc "make weight" contention constructed after having had time to deconstruct the verbiage of the trial court's order. Even assuming there is some ambiguity, appellants have failed to demonstrate that such ambiguity adds support for their argument that supersedeas is the

remedy. Any ambiguity can be clarified in this Court's ruling on direct appeal.

V. RESPONDENT CASE AND ITS MEMBERS WILL SUFFER IRREPARABLE HARM IF THE WRIT IS GRANTED

Appellants acknowledge that the continuation of the furloughs will result in harm to respondent CASE and its members, but argue simply that such harm is "limited" since the furloughs will end on June 30, 2010. (Petition, pp. 46-47.) However, this admission undercuts their entire argument. As one court has observed in the context of a petition for writ of supersedeas:

> Why respondent, in whose favor the presumption exists as to the correctness of the trial court's decision, should be required to stand these losses has not been made to appear. No satisfactory reason has been advanced why, in this case, the normal processes of the law should not take their ordinary course.

(*Nuckolls v. Bank of California National Association, supra*, (1936) 7 Cal.2d at p. 578.) Similarly, in the instant case, there has been no showing made as to why respondents should be required to continue to suffer the "limited" losses caused by the presumptively unlawful furloughs and corresponding reduction to their salaries. The mere fact that appellants have been successful in delaying the matter in the trial court for months does not justify their effort to do harm for a few more months. Quite the contrary, CASE members have suffered enough under the illegal furloughs, and the temporary stay should be lifted immediately.

CONCLUSION

For the foregoing reasons, respondent CASE respectfully requests that the petition for writ of supersedeas be denied, and the temporary stay granted by this Court on March 30, 2010 be immediately lifted.

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DATE

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Patrick J. Whalen
Attorney for Respondent CASE