

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

Court of Appeal Case No. 127775

(Alameda County Superior Court Case No. RG-09-456684)

UNION OF AMERICAN PHYSICIANS AND DENTISTS

Plaintiffs/Respondents,

vs.

*ARNOLD SCHWARZENEGGER, in his capacity as Governor of the State
of California, et al.*

Defendants/Appellants

Appeal from the Superior Court, Alameda County
The Honorable Frank Roesch, Dept. 31, (510) 268-5105
Service on Attorney General required by Rule of Court 8.29

**RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF
SUPERSEDEAS**

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**Court of Appeal
State of California
First Appellate District**

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: A127775

Division 5

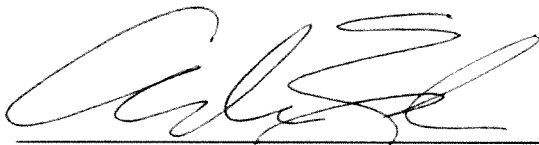
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Board of Administration of California Public Employees' Retirement System	Petitioner in related case filed in San Francisco County Superior Court.
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Edmund G. Brown, Jr., as Attorney General of the 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
Yvonne Walker	Petitioner, Appellant and Respondent in related case 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
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.
Service Employees International Union, Local 1000	Petitioner, Appellant and Respondent in related cases filed in Sacramento County Superior Court, Third District Court of Appeals, Alameda County Superior Court, San Francisco County Superior Court and First District Court of Appeals

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INTRODUCTION

Petitioners Schwarzenegger's and Department of Personnel Administration's request for a writ of supersedeas should be denied. Respondent UAPD and its members suffer irreparable harm from the continued furloughs, while the State likely benefits from promptly ending the illegal furlough program rather than perpetuating it.

Respondent UAPD challenged Petitioners' furlough orders as applied to Special Fund and federally-funded state employees. On December 31, 2009, the Superior Court of Alameda County issued a writ of mandate finding Petitioners' furlough order to be unlawful. After Petitioners filed a Notice of Appeal of the trial court's decision, Respondent UAPD filed a C.C.P. § 1110b motion to lift any purported appellate stay. The trial court granted that motion, in part, finding that UAPD and state workers would suffer irreparable harm if the stay is not lifted pending this appeal. The trial court lifted the stay as to the prospective relief of enjoining the continued furloughs but declined to lift the stay on the order of back pay.

This Court should deny Petitioners request for a writ of supersedeas because (1) it would not aid this Court's jurisdiction and would destroy Respondent UAPD's remedy, (2) Petitioners will not suffer irreparable harm if no writ of supersedeas is issued, (3) the "balance of harms" clearly tip in favor of Respondent such that the writ of supersedeas should be

denied, and (4) Respondent and state workers have a great likelihood of success on the merits.

STATEMENT OF MATERIAL FACTS

A. Citing a General Fund deficit, the Governor furloughs all state workers “regardless of funding source.”

In December of 2008, after failing to receive authorization from the Legislature, Governor Arnold Schwarzenegger unilaterally issued Executive Order S-16-08. The Executive Order declared an emergency, citing a \$15 billion General Fund deficit for 2008-2009 and a looming General Fund budget shortfall over the next 18 months. Pursuant to his alleged emergency power, Governor Schwarzenegger ordered the Department of Personnel Administration (“DPA”) to adopt a plan to implement the furloughing of all state employees for two days per month “regardless of funding source.” Although the Executive Order contemplates exemptions approved by DPA, that agency refused to grant exemptions to employees whose salary came out of Special Funds or federal funds, such as those in the California Department of Social Services (CDSS) administering the Social Security disability program. Sometime after the implementation of the Executive Order, Governor Schwarzenegger amended the order to add a third furlough day for all State employees regardless of funding source. All represented-state employees are now furloughed for three days per month. For UAPD’s members, the furloughs

mean a corresponding decrease in salary of close to 15%. *See* Ex. 2 at 22-24.

B. UAPD represents many state employed physicians and dentists at Special Fund state agencies.

Respondent UAPD is a labor organization and bargaining representative for State physicians and dentists. UAPD represents almost all State-employed physicians and dentists, totaling approximately 1600 members. Relevant to this litigation, 168 of UAPD's members work for CDSS. Although these doctors are part of a state agency, they evaluate claims for Social Security disability benefits paid for by the Federal government. *See* Ex. 3 at 38-40.¹ Their salaries are paid entirely by Federal funds coming from the Social Security Administration. *Id.* at 38 ¶ 2; *see also* Ex. 10 at 150 ¶ 2. UAPD also represents State doctors at other State agencies, such as the Department of Consumer Affairs ("DCA"), California Highway Patrol ("CHP"), Department of Rehabilitation ("DOR"), Department of Health Care Services ("DHCS"), and Department of Public Health ("DPH"). *Resp. Ex.* 3 at 38 ¶ 3-5. The vast majority, if not all, of the moneys used to fund these State agencies come from either special or federal funds. *Id.* at 38 ¶ 1-5, Ex. 10 at 150.

¹ Acronyms in this case may become difficult to follow. The represented-State doctors at CDSS actually work for a division *within* CDSS, named "DDS." "DDS" is the acronym used by the Social Security Administration when referring to these employees. "DDS" aptly stands for "Disability Determination Service."

C. UAPD files a petition for writ of mandate challenging the furloughs as applied to Special Fund and federally-funded state employees.

On June 9, 2010, UAPD filed a petition for writ of mandate on behalf of state employees employed at Special Fund agencies and employees whose salary is funded by the federal government. *See* Ex. 1. UAPD argued that in applying the furlough order to Special Fund and federally-funded state employees, (1) the Governor violated or acted in excess of any statutory authority, (2) the furlough orders require Special Fund and federally-funded employees to violate mandatory statutory duties and interferes with their ability to deliver needed services to the public, (3) the furloughing of Special Fund and federally-funded State employees is an irrational response to a General Fund shortfall, (4) the Order wastes taxpayer dollars by reducing state income tax revenues and increasing the need for state-funded welfare services with no corresponding benefit to the State, (5) the furloughs are not reasonably related to the harm cited in the Executive Order itself, and (6) the Governor’s claims of “fairness”, “equity” or “parity” are not legally-legitimate bases for the furloughing of Special Fund and federally-funded State employees, amongst other arguments. *See Id.*; *see also* Ex. 2 at 22.

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D. The evidence demonstrates that furloughing Special Fund and federally-funded state employees harms the employees, the state agencies themselves, and the public at large.

Respondent UAPD submitted extensive evidence in the trial court demonstrating how furloughing Special Fund and federally-funded employees harms the employees, the state agencies themselves and the public at large without any returning commensurate benefit to the State administration.

1. The declarations of Regional Commissioner for Social Security Peter Spencer.

The Federal government provides the State of California with all “necessary” spending for carrying out the purposes of the DDS – the State agency conducting disability determinations for federal benefits. 42 U.S.C. § 421(e); 20 C.F.R. §§ 404.1626, 416.1026. As mentioned, the doctors who conduct medical consultant reviews of disability applications are paid entirely by Federal funds coming from the Social Security Administration. 42 U.S.C. § 421(a); Program Operations Manual “POMS” DI § 39501.020. The State of California may not borrow these federal funds to increase the liquidity of the General Fund. 20 C.F.R. § 404.1626, 20 C.F.R. § 416.1026.

After the furlough order, the Social Security Administration began writing to Governor Schwarzenegger to complain about the furloughs’ impacts on its disability programs. *See* Ex. 6 ¶¶ 1-4; Ex. A-B attached thereto. Regional Commissioner Peter Spencer declared that furloughing

federally-funded state employees at CDSS's DDS for *only one day* "means the state will forgo about \$10 million – or 5 percent of the agency's \$210 million annual budget – from Washington, *without saving state government any money.*" *Id.* (emphasis added). He concluded that "[t]here really is no reason to do this, it's a no-brainer. If the governor is saying he wants all the money the federal government is offering, this is one area he's not doing it." *Id.* ¶ 3, Ex. A at 74. The Office of the Inspector General of the Social Security Administration also issued a report entitled *Impact of State Employee Furloughs on the Social Security Administration's Disability Programs.* *Id.* ¶ 4, Ex. B. This Report estimated the future rate at which disability applications will be delayed due to furloughs and demonstrated that the furloughs already caused serious delays in processing. *Id.*, Ex. B at 83.

In a second sworn declaration admitted in the trial court, Commissioner Spencer declared that California's post-furlough performance in conducting disability reviews was so poor that SSA was forced to shift cases to other SSA regions. Ex. 10 ¶ 5. He stated that the furloughs caused a 22.3% increase in processing time for reconsideration of disability claims. *Id.* ¶ 6. He found that 1,476 fewer California cases are processed for each furlough day. This corresponds to an average of \$420,800 less in the hands of vulnerable Californians *per furlough day.* *Id.* Given the backlog in disability processing caused by the furloughs, DDS is

now “pooling cases”, which results in less accurate disability determinations. *Id.* ¶ 7.

In a third and final declaration on UAPD’s C.C.P. § 1110b motion, Commissioner Spencer estimated that “three furlough days per month results in a monthly delay of over \$1.26 million in funds to California’s neediest citizens.” Ex. 14 ¶ 5. He stated that disability applicants seek state-funded welfare while they are awaiting their federal disability benefits, which increases the costs to the state with no corresponding benefit. *Id.* ¶ 7. Since making his first declaration, Spencer commented on the increasing backlog of disability cases since October of 2009. *Id.* ¶ 9. In the month of February 2010 alone, the national average for completing a DDS reconsideration was 88.5 days, while California’s average was 105.5 days. That amount signifies a near-doubling in the processing times since the furloughs were implemented. *Id.* ¶ 10. Commissioner Spencer estimated that there is an \$849,000 loss in funding to the State agency for *each furlough day*. *Id.* ¶ 8. He found that continuing three furlough days per month risks “the mandatory return of nearly \$2.55 million per month in federal funding which otherwise would contribute to the California economy.” *Id.* Commissioner Spencer concluded by stating that

California’s furlough of DDSD employees has continuing adverse impacts on the State’s ability to meet its obligations to SSA, the State economy, and the daily lives of California’s disabled population. Given the current funding and workload realities, the

damage is likely irreparable and will cause continuing adverse impacts for many years after the furloughs are concluded.

Id. ¶ 16.

2. The declarations of Dr. C. Richard Dann, MD.

Dr. Dann is a physician employed by DDS within the Department of Social Services. Although Dr. Dann works for the state of California, his salary is funded entirely by the federal government because he conducts disability reviews for federal disability benefits (Supplemental Security Income or Social Security Disability Insurance). *See Exs. 9,16.* Dr. Dann declared that “the furloughs have impacted my ability to conduct disability determinations in a timely manner Due to the three furlough days, I now process less disability applications per month than in pre-furlough months.” *Ex. 9 ¶ 4-5.* Dr. Dann also testified about techniques the State is utilizing to make their performance appear better, when in actuality the furloughs have prolonged the disability process. *See Id. ¶¶ 7-11.*

Dr. Dann submitted a second declaration in support of UAPD’s C.C.P. § 1110b motion to lift the purported appellate stay. *See Ex. 16.* Dr. Dann’s declaration, in addition to recounting other forms of irreparable harm, demonstrates the financial irreparable harm that state-employed doctors have had to endure.

Dr. Dann also declared extensively on how the furloughs have affected his and his colleagues’ ability to promptly make disability

determinations for California's most needy citizens. *See Id.* ¶¶ 9-12. The backlog in disability cases as a result of the furloughs has made “work . . . significantly more stressful than in the pre-furlough era. And there is a greater likelihood of making a mistake which would adversely impact my professional future.” *Id.* ¶ 11. Dr. Dann also discussed how the furloughs decrease his productivity levels. *Id.* ¶ 10. The stress, backlog and reduction in salary have caused Dr. Dann to consider his future in state employment. As a direct result of the furloughs he is “seriously considering . . . leaving state employment altogether . . . [and he has] submitted [his] name as a possible candidate for employment with [a] new SSA agency . . .” *Id.* ¶ 15.

E. The Alameda County Superior Court finds the furloughs as applied to Special Fund and federally-funded state employees to be unlawful.

On December 31, 2009, the trial court found the furloughs orders to be unlawful. Ex. 11. In its decision, the trial court found that Petitioners violated Government Code § 19851.² The court found that “[e]ach State agency has differing needs relating to its function and to the sources of its funding. Respondents’ refusal to consider those varying needs of the

² Section 19851 states, in relevant part, that it is “[i]t is the policy of the state that the workweek of the state employee shall be 40 hours, and the workday of the employee eight hours, *except that the workweeks and workdays of a different number may be established in order to meet the varying needs of the different state agencies.*” (emphasis added)

different state agencies before ordering and implementing the furloughs conflicts with the requirements of Section 19851 . . . [W]hen furloughs are implemented to save money, yet their implementation in some agencies saves nothing and increases costs, such a policy is arbitrary, capricious, and unlawful.” *Id.* at 162.

The trial court also found that the furloughs violated Government Code § 16310. Ex. 11 at 162. That statutory section prohibits the General Fund from borrowing from Special Fund agencies when doing so would interfere with the object of that agency. *See* Gov. Code § 16310(a). The trial court found the simple fact that state agencies are closed three days per month to be “at least a prima facie showing of interference . . .” Ex. 11 at 163. Moreover, UAPD offered extensive evidence demonstrating how the furloughs negatively impacted DDS’s ability to promptly and accurately process disability applications. *Id.*

F. The trial court lifts any purported appellate stay pursuant to C.C.P. § 1110b as to the furloughs and finds irreparable harm to UAPD and state workers.

UAPD submitted extensive evidence in the trial court regarding the irreparable harm state workers, UAPD, the state agencies, and the public would suffer if the writ of mandate was not given immediate effect. *See* Exs 14-17. After briefing and oral argument, the trial court lifted the stay as to the prospective relief of enjoining the continued furloughs but denied the request as to the issuance of backpay. The trial court found irreparable

harm to UAPD and state workers. *See* Ex. 20. That showing went un-rebutted by Petitioners.

ARGUMENT

I. There is no need for the issuance of a writ of supersedeas because a stay of the trial court decision would not aid this Court's jurisdiction. To the contrary, the issuance of a writ of supersedeas would destroy UAPD's remedy.

Petitioners request the issuance of a writ of supersedeas to “preserve this Court’s jurisdiction over the subject matter of this appeal.” Pet. at 2. Petitioners contend that denying a stay “would deprive the appellant of the benefit of a reversal of the judgment against him . . . [and] would result in a ‘denial of the appellant’s right if his appeal were successful.’” *Id.* at 21-23. As a reason to issue the writ, Petitioners argue that “[b]y the time this Court is able to decide this appeal on the merits, the State’s current furlough program will have ended . . .” *Id.* at 23. Petitioners also make several arguments regarding why back pay is not warranted in this case. *Id.* at 34. But, as this opposition brief will demonstrate, Petitioners’ arguments entirely miss the mark because it is UAPD, and the state workers it represents, who will be deprived of an effective remedy if this Court issues a writ of supersedeas.

A. The fact that the furloughs are set to expire on June 30, 2010 militates in favor of denying the request for a stay.

“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.” *Faulkner v. Faulkner*, 148 Cal.App.3d 102, 108 (1957); *see also Sun-Maid Raisin Growers of Cal. v. Paul*, 229 Cal.App.2d 368 (1964) (refusing to issue a writ of supersedeas because the order enjoined would lapse in a year and “the completion of an appeal will take all or most of that time, so that a supersedeas, entirely apart from the merits of the case, would in practical effect be a decision contrary to the injunction and in favor of the appellants for most of the period involved.”); *accord Hubert v. California Portland Cement Co.*, 161 Cal. 239 (1911).

The above-decisions demonstrate why issuing a writ of supersedeas in this case would be entirely inappropriate. As mentioned above, the furloughs are set to expire on June 30, 2010. *See* Executive Order S-16-08. There is no question then that the furloughs will have ended by the time this Court reaches a decision on the merits of this case. If this Court stays the implementation of Judge Roesch’s decision, the “practical effect [would] be a decision contrary to the injunction and in favor of the appellants” for *all* of the period involved. *See Sun-Maid Raisin Growers of Cal.* 229 Cal.App.2d at 368. Indeed, UAPD and state workers would be entirely deprived of their injunctive relief remedy. Moreover, as mentioned above, Petitioners make several arguments as to why an order of back pay is inappropriate. *See* Pet. at 34-35. If Petitioners are successful in those arguments yet this Court still finds the furloughs to be illegal, Petitioners

will be immune from any remedy whatsoever – be it injunctive or monetary. Under these circumstances, as in *Faulkner*, it is clear that a stay can “be granted only at the risk of destroying rights which would belong to the respondent if the judgment is affirmed.” *Faulkner*, 148 Cal.App.3d at 108. Accordingly, the Court should deny Petitioners’ request for a stay because issuing a stay could effectively decide the case in favor of Petitioners even though their interpretation of the law is wrong.

Courts routinely find that the threat of immunity or a defense to the award of damages or back pay constitutes irreparable harm which militates in favor of granting immediate equitable relief or denying a request for a stay. *See West Coast Constr. Co. v. Oceano Sanitary Dist.*, 17 Cal.App.3d 93, 700 (1971) (injunctive relief is warranted where “parties causing the loss are insolvent or in any manner unable to respond in damages.”); *Rum Creek Coast Sales v. Caperton*, 926 F.2d 353, 361-62 (4th Cir. 1991) (the likely immunity defense of defendant from damages liability supports the issuance of an injunction); *accord Long Term Care Pharmacy Alliance v. Ferguson*, 260 F.Supp.2d 282, 294 (D. Mass. 2003) (immunity defense on damages supported the granting of equitable relief). Accordingly, this Court should deny the request for a writ of supersedeas.

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B. Unlike UAPD and state workers, if Petitioners are successful on appeal their remedy will not be extinguished.

Petitioners cite *Deepwell Homeowners Protective Ass'n v. City Council of Palm Springs*, 239 Cal.App.2d 63 (1965) as support for the issuance of a stay. *See* Pet. at 22. Yet, *Deepwell* actually cuts against their arguments. There, the court said that the issuance of a writ of supersedeas is appropriate where its denial would be a “denial of the appellant’s rights if his appeal were successful.” *Deepwell Homeowners Protective Ass'n*, 239 Cal.App.2d at 66.

But, a denial of the writ of supersedeas in this case will not result in any denial of Petitioners’ “rights.” This case is about whether the Governor has the authority to furlough Special Fund and federally-funded state employees under applicable statutory provisions. If the judgment below is reversed and it is determined that the Governor has the authority to furlough these particular employees, nothing prevents Petitioners from recouping the money allegedly saved from the furloughs if they are enjoined during this interim period. Petitioners contend that they will be forced to “engage in costly and burdensome procedures and/or litigation to recoup overpayments”, Pet. at 10, yet offer no evidence here or below on these alleged “procedures” and utterly fail to explain why simply extending the furloughs themselves wouldn’t achieve those aims. Indeed, after a successful appeal, the Governor could simply furlough state employees for

another three months to recoup the alleged costs savings. It is the state employees who are powerless to control their own destiny and who are operating on Petitioners' timeline. Thus, there is nothing *irreparable* about the harm Petitioners would suffer if the stay is denied. *See Sun-Maid Raisin Growers of Cal.*, 229 Cal.App.2d at 376 (denying a request for a writ of supersedeas, in part, because “[n]o showing is made whatever that they . . . will suffer irreparable injury ... if the injunction is in force.

Neither have the applicants shown that a miscarriage of justice will occur in the absence of an issuance of the writ of supersedeas.”). In such circumstances a request for a writ of supersedeas should be denied. *See Yee Kee Chong v. Pacific Freight Lines*, 72 Cal.App.2d 219 (denying a request for supersedeas because of a failure to show “exceptional circumstances.”); *Kane v. Universal Film Exchanges*, 32 Cal.App.2d 365, 367 (1939) (“the applicant must show some special reason why he is entitled to the stay.”).

II. The “balance of harms” clearly tips in favor of denying the request for a writ of supersedeas.

A. State workers will be irreparably harmed if a stay is issued.

In addition to the irreparable harm recounted above, *see supra* at 10-12, UAPD submitted extensive evidence in the trial court of the irreparable harms that will occur if the writ of mandate is not given immediate effect. Exs 14-17. In a declaration to the trial court, Dr. Stuart Bussey, President of UAPD, described the effect of furloughs, stating that they “negatively

[impact] the ability of state doctors to complete their mandated work in a competent fashion . . . members struggle even more to stay on top of the disability applications. This slow-down in the disability determination process has hurt state doctors, delayed the granting of disability benefits to needy recipients, and has angered the federal government.” Ex. 15 ¶ 6. In fact, the furloughs were one reason Dr. Bussey chose to retire. *Id.* at 13. The Bussey declaration also reveals that UAPD members are losing work to subcontractors as a result of furloughs. For example, “many State agencies have not had sufficient staffing of state employed doctors. In order to comply with court orders for services, the State has instead used contractors.” *Id.* ¶ 12.

Dr. Dann, a state-employed physician whose salary is funded entirely by the Federal government and who conducts disability determinations for the Department of Social Services, corroborates much of the Bussey declaration and reveals that the Federal government is so angry with California’s furloughs that it has plans to create a federally-run DDS unit to conduct the disability assessments due to the extreme backlog caused by the furloughs. *See* Ex. 16 ¶ 14. This could permanently deprive CDSS employees of future employment as the federal unit takes over their work. In addition to recounting other forms of irreparable harm, Dr. Dann declared that

I consider myself to be in my prime wage earning years. I therefore had hoped to save a certain percentage of my current income for retirement purposes. Unfortunately, as a result of the furloughs and the commensurate 15% pay reduction, I have not been able to save the same amount as I envisioned.

Id. ¶ 5. Not only has the 15% pay cut caused irreparable harm from a retirement perspective, but it has also squeezed family budgets today. Dr. Dann declared that the “15% pay reduction has affected our family’s financial situation. We are spending less money and as a result less money is making its way into the California economy We are delaying desired home repairs and remodeling . . . I will not be able to do this part of my life over. It is time irretrievably lost without some of the comforts I would have otherwise afforded.” *Id.* ¶ 8.

Dr. Dann testified extensively on the negative impact the furloughs have had on doctors’ ability to process disability applications for California’s most needy citizens in a timely and competent fashion. *See Id.* ¶¶ 9-19. The backlog in disability cases as a result of the furloughs has made “work . . . significantly more stressful than in the pre-furlough era. And there is a greater likelihood of making a mistake which would adversely impact my professional future.” *Id.* ¶ 11. Dr. Dann also discussed how the furloughs decrease his productivity levels. *Id.* ¶ 10. The stress, backlog and reduction in salary have also caused Dr. Dann to consider his future in state employment. As a direct result of the furloughs he is “seriously considering . . . leaving state employment altogether . . .[and

he has] submitted [his] name as a possible candidate for employment with [a] new SSA agency . . .” *Id.* ¶ 15.

B. Irreparable harm to the public and the state agencies will continue if this Court issues a stay.

The Regional Commissioner for Social Security, Peter Spencer, testified about the impact of furloughs on state processing of disability claims. He explained that the furloughing of CDSS doctors will not save the State any money and will actually cost the State \$10 million in lost revenue from the Federal government. Ex. 6 ¶ 3, Ex. A at 74. Spencer also testified that the furloughs cause the CDSS a delay in processing disability claims. He further stated that the furloughs cost the State more money by making it more difficult to review, and screen out, claims of existing beneficiaries who are no longer disabled. *Id.* A report by Social Security’s Office of the Inspector General, entitled *Impact of State Employee Furloughs on the Social Security Administration’s Disability Programs* (A-01-09-29137), concluded that the furloughs will impact the number of disability determinations made and that

California DDS will encounter a shortfall of capacity by 10% due to the furlough days. As a result [it is expected that] approximately 2,375 disability cases would be delayed in processing *per month*. This would translate into about 776 allowances. Therefore [the SSA estimates] that about \$648,000 in benefits will be delayed in being paid to newly disabled claimants and from flowing into the economy on a rolling monthly basis.

Ex. 6, Ex. B attached thereto at 84. The inescapable result of these statistics is that “claimants will have to wait longer for disability decisions.”

Id. The Commissioner of Social Security lamented this state of facts in a letter to the Chair of the National Governors Association where he stated that the furloughs make no sense because “SSA funds 100 percent of DDS employees’ salaries as well as overhead . . .” Ex. 6, Ex. B at 86.

Commissioner Spencer estimated that there is an \$849,000 loss in funding to CDSS and the California taxpayer for *each furlough day*. Ex. 14 ¶ 8. He found that continuing three furlough days per month risks “the mandatory return of nearly \$2.55 million per month in federal funding which otherwise would contribute to the California economy.” *Id.* Spencer concluded that:

California’s furlough of DDS employees has continuing adverse impacts on the State’s ability to meet its obligations to SSA, the State economy, and the daily lives of California’s disabled population. Given the current funding and workload realities, the damage is likely irreparable and will cause continuing adverse impacts for many years after the furloughs are concluded.

Id. ¶ 16.

The trial court below recognized the harm to the public and state agencies in its opinion, stating that “Petitioner UAPD offers evidence to show that UAPD-represented employees are unable to complete Social Security disability reviews promptly and accurately due to the mandatory furloughs.” *See* Ex. 11 at 163-62.

Finally, Judge Roesch correctly noted that Petitioners’ continuation of furloughs is what most puts the General Fund at risk, for Petitioners’

own declarants noted they have no assurance from the federal government that a future order of back pay in this case can be billed to the federal government. Curtailing furloughs now prevents more back pay from amassing – and then the General Fund from perhaps having to take on that liability. Petitioners’ request for supersedeas is simply more get-tough posturing with their labor opponents, rather than reflecting a sound fiscal approach.

C. UAPD will also continue to suffer irreparable harm if this Court issues a writ of supersedeas.

The furloughs also cause irreparable harm to UAPD as a union. *See* Ex. 15 ¶¶ 6-7. The 15% pay reduction for its members corresponds to a reduction in dues payable to the union for its own operations. *Id.* ¶ 6. The reduction in dues “forced [UAPD] to curtail its operations in line with the 15% pay reduction of our members.” *Id.* The union is irreparably harmed by the reduction in dues and curtailment in its own operations. Often unions are forced to spend money on communications or outreach to its membership. In many instances events require time sensitive action. But, when the union does not have adequate dues to carry out these activities it irreparably loses the opportunity to respond and can never get that opportunity back.

In addition, courts and the National Labor Relations Board (NLRB) have recognized the harm caused to unions through unilateral action by an

employer. See, e.g., *N.L.R.B. v. C & C Plywood Corp.*, 385 U.S. 421, 430 n. 15 (1967)(“For the real injury in this case is to the union's status as bargaining representative, and it would be difficult to translate such damage into dollars and cents.”); *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Mack Trucks Inc.*, 820 F.2d 91, 95-96 (3d Cir.1987) (management's unilateral change in health plan deprived union of a valuable “bargaining chip” which was “sort of harm ... compensable only by a permanent injunction”); *International Ass'n of Machinists & Aerospace Workers (IAM) v. Northwest Airlines Inc.*, 674 F.Supp. 1387, 1391-92 (D.Minn.1987) (potential harm of allowing company to unilaterally change collective bargaining agreement was “grave:” it undermined IAM's statute as sole representative and proponent of the employees' interests).

Unilateral action by an employer circumvents the collective bargaining process and makes the union appear weak vis-a-vi the employer. Here, the President on the UAPD has declared that the

Governor's furlough order has also irreparably harmed UAPD's reputation. By engaging in the unilateral act of ordering furloughs without first negotiating with UAPD, the Governor has harmed UAPD's reputation amongst its members. The Governor's unilateral actions make UAPD appear weak as the representative of state-employed doctors.

Ex. 15 ¶ 7.

D. The abstract and unsupported concept of “labor parity” cannot be sufficiently weighty to overcome the irreparable harm suffered by state workers, UAPD, the state agencies and the public at large from the unlawful furlough order.

Petitioners contend that this Court should issue a writ of supersedeas because irreparable harm will result “to the concept of labor parity among the state workforce . . .”. Pet. at 3. Putting aside for the moment whether irreparable harm to a *concept* is a cognizable injury, it is clear that any such interest in concepts cannot be considered sufficiently weighty to overcome the harm suffered to state workers, the public, state agencies and UAPD itself.

After recognizing that no General Fund savings are generated by furloughing Special Fund and federally-funded State employees, Petitioners attempted to satisfy Government Code §19851 in the trial court below by arguing that the furloughs meet the “varying needs of the different state agencies” because of the “labor parity” they impose. But, the trial court correctly rejected that argument. *See* Ex. 11 at 161. The trial court stated that “[w]hen the only justification underpinning the furlough of these employees that remains is ‘labor parity,’ the Court cannot do otherwise than conclude that Respondents have abused their discretion.” *Id.* The concept of labor parity “requires the quantum of pay cuts be *increased* so that all State employees suffer equally, without regard to savings to the General Fund and without lessening the pay cuts suffered by the General Fund

agencies' employees. This is not rationally related to any governmental purpose." *Id.* at 161 FN 3.

Second, Petitioners wholly failed to present *any* evidence below that "labor parity" serves a "need" of any of the state agencies. *See* Gov Code § 19851. Petitioners simply asserted this justification without providing declarations or any other evidence as to why imposing labor parity serves a "need" of a state agency. Simply put, there is no competent evidence before the trial court or this Court on that issue.

Third, it would be one thing if the State's General Fund employees were loudly insisting that their Special Fund brethren suffer equally. To the contrary, through their unions they are actively blessing different treatment – they well understand that just because some workers have to suffer, it does not logically mean that all other workers should suffer too. "It was Emerson who wrote, 'a foolish consistency is the hobgoblin of little minds.' Ralph Waldo Emerson, 'Self-Reliance,' *Essays: First Series* (1841)." *Silva v. Vowell* (CA5 1980) 621 F.2d 640, 647. Moreover, nothing could be worse for morale than the fact Petitioners are not furloughing the hundreds of non-union private contractors who work alongside the civil service employees. Ex. 3 ¶ 14. The Governor's assertion of a "fairness" rationale really just appears to be pretext here: the need for "parity" apparently stops in this Administration when one is no longer a disfavored union member. The real reason for the furloughs in these Special Fund agencies is simply

raw politics: to create maximum pain for public employee unions in order to pressure the Governor's political opponents in the Legislature. When acting to reduce state employees' workweeks, however, section 19851 does not allow for raw politics to prevail. Rather, it is the "varying needs of the different state agencies" that must prevail.

Thus, it is clear that in light of the irreparable harm suffered to state employees, UAPD, the state agencies and the public, that the abstract "concept of labor parity" cannot be sufficiently weighty for this Court to issue a writ of supersedeas.

E. Petitioners cannot immunize their unlawful conduct by arguing that it would be difficult to implement the judgment because of subsequent actions taken in reliance on the unlawful furlough order.

In addition to the "labor parity" argument, Petitioners argue that this Court should issue a writ of supersedeas because (1) the appropriations to Special Fund agencies were reduced as a result of the unlawful furlough orders so the agencies cannot increase salaries without exceeding that appropriation, *see* Pet. at 41,³ and (2) harm will result to the state agencies themselves and the public from lifting the stay. Pet. at 44-45.

First, Petitioners should not be allowed to avoid immediate implementation of the writ of mandate based on their argument that they

³ Petitioners claim that "savings from the 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." Pet. at 41.

“locked-in” their illegal furlough order. At its core, Petitioners’ argument is that a stay should be imposed because at their behest lower levels of appropriations were authorized for Special Fund agencies in reliance on the unlawful furlough order. Pet. at 41. But, this situation is no different from any judgment against the State. State agencies always draft budgets and are authorized appropriations according to their officials’ assumptions. Yet, sometimes these assumptions turn out to be incorrect. State officials cannot avoid the effect of court judgments by arguing that they failed to predict their litigation positions would be rejected by the courts. *See* Gov. Code § 965 (holding that where there is an insufficient appropriation to pay a judgment, the matter should be reported to the chairperson of either the Senate Committee on Appropriations or the Assembly Committee on Budget).

In effect, any order allowing Petitioners to avoid their obligations based on the argument that appropriations were lowered to conform to the unlawful furlough order rewards them for their unlawful conduct. It would provide incentives for parties to take subsequent actions to “lock-in” their unlawful or illegal conduct. The Court should reject Petitioners’ circular argument and not reward their conduct.

Courts have rejected similar arguments in the remedial phases of cases, finding that administrative incapacity cannot justify the deprivation of important rights. *See Jefferson v. Southworth*, 447 F.Supp. 179 (D. R.I.

1978). A court will not refuse enforcement of its orders merely because the respondents are presently incapable of remedying the illegal conditions they created. Victorious plaintiffs cannot be expected to go on suffering unlawful conditions because of management's inability to deal with the problem. In *Jefferson*, the court found an across-the-board lockup to violate the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* In response to the ruling, defendants attempted to agree on a remedial plan for ending the lockup but ultimately failed to present anything to the court. The court implemented its own plan and held the

Court cannot permit the defendants to continue to inflict unconstitutional hardships . . . because they, as defendants, are incapable of remedying the conditions they rely upon to justify their actions The defendants' responsibility to eliminate the unconstitutional burdens suffered by inmates cannot be measured *nor be depending on their management capabilities* Administrative incapacity cannot justify the deprivation of civil rights.

Id. at 190, FN 8 (emphasis added).

Here too, Petitioners seek a stay by relying, in part, on the unlawful conditions on appropriations that they themselves imposed. Under *Jefferson* and other authorities, Respondents should not be permitted to impose a stay by pointing to their own furtherance of their illegal program. The Government Code contemplates a scheme whereby judgments against

the State are paid in an orderly fashion through subsequent appropriations.

See Gov. Code §§ 965 *et seq.*⁴

F. The balance should tip in favor of UAPD and state workers because of the trial court’s well-reasoned decision on both the merits and UAPD’s C.C.P. § 1110b motion.

On a writ of supersedeas, the “presumption is in favor of the lower court’s decision.” *Kane v. Universal Film Exchanges*, 32 Cal.App.2d 365, 367 (1939); *Deepwell Homeowners’ Protective Ass’n v. City Council of Palm Spring*, 239 Cal.App.2d 63, 67 (1965) (denying the issuance of a writ of supersedeas and noting “the presumption in favor of the trial court’s action” and “the requirement that ‘*we must presume the truth of the findings of the trial court . . .*’”) (emphasis added); *Building Code Action v. Energy Resources Conservation & Dev. Com.*, 88 Cal.App.3d 913, 923 (1979) (refusing to issue a writ of supersedeas and declining “to agonize ourselves by speculating as to the final outcome of the appeal. *We note that the trial court in issuing the writ gave a lengthy, careful and thoughtful consideration to the issues as reflected by his extensive notice of intended decision.* While we are not bound to agree with the trial court, in the

⁴ In opposition to UAPD’s C.C.P. § 1110b motion to lift the stay in the trial court, Petitioners submitted declarations detailing the harm that *may* befall the State and public if the appellate stay was lifted by the trial court. Most of those dire predictions were not admitted into evidence and were struck by the trial court as pure speculation after proper evidentiary objections. CITE.

exercise of our discretion at this stage, we are unable to detect anything that compels us to disagree.”) (emphasis added).

Here too, the trial court below issued “lengthy, careful and thoughtful” decisions on both the merits and the C.C.P. § 1110b motion to lift the stay. *See* Exs. 11, 12, 20. With respect to lifting the stay pursuant to C.C.P. § 1110b, the trial court took a very balanced and reasoned approach – denying the request as to the back pay and granting it as to the prospective relief of ceasing the furloughs. This balanced approach takes into account the rights of both litigants and preserves remedies for both sides in the event that this Court alters the decision. The presumption in favor of the trial court’s decision, as enunciated in the above authorities, should tip the balance in favor of UAPD and state workers. Accordingly, the request for a writ of supersedeas should be denied.

III. UAPD and state workers have a greater likelihood of success on the merits.

Petitioners contend that a writ of supersedeas should issue where they can demonstrate “a likelihood of success on appeal by raising substantial questions of probable error by the trial court . . .” Pet. at 22. Yet, the cases Petitioners cite do not call for that legal standard. Rather, the cases Petitioners cite state that in order for a writ of supersedeas to issue *at all*, the petitioner must *at least* demonstrate that “substantial questions will be raised upon the appeal.” *Deepwell Homeowners’ Protective Ass’n*, 239

Cal.App.2d at 67. None of the other cases Petitioners cite state the legal proposition in the manner they advocate (i.e. “probable error”). In fact, in *Deepwell Homeowners Protective Ass’n*, the court of appeals specifically stated that it will not engage in an analysis of the underlying merits of the appeal. *See Id.* at 67 (“It is not the province of this court on a petition for writ of supersedeas to pass upon the merits of the appeal.”); *accord Shakin v. Board of Medical Examiners*, 254 Cal.App.2d 102, 117 (1967) (“The correctness of the decision of the trial court . . . is not involved in a supersedeas proceeding; it ‘is not the function of such a writ to reverse, supersede or impair the force of, or pass on the merits of the judgment or order from which the appeal is taken . . .’”). Thus, it is obvious that in passing on a writ of supersedeas, the Court should not consider the underlying merits. Nevertheless, if this Court were inclined to engage in such an analysis, it is clear that UAPD and state workers have a greater likelihood of success on the merits.

- A. Petitioners’ across-the-board furlough order “regardless of funding source” violates Government Code § 19851. The Governor used a sledgehammer to achieve furlough costs-savings when the statute requires the use of a scalpel.**

The Governor’s power is valid only to the extent that is it exercised in conformance with the California Constitution or pursuant to a delegation of power by the Legislature. Cal. Const. § 1, Art. V. Article II, section 3 of the California Constitution states that “[t]he 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.” Article VI, section 1 of the California Constitution states that “[t]he supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed.”

The Governor may not invade the province of the Legislature and is not empowered, by executive order or otherwise, to amend or qualify the operation of existing legislation. *Lukens v. Nye*, 156 Cal. 498, 503-504 (1909). Because the Legislature is empowered to create laws, the Governor is only authorized to issue executive orders as permitted by law. As a result, the Governor’s power to issue any executive order must be rooted in statute.

The Governor’s power to alter the 40-hour workweek is limited by Government Code § 19851. Section 19851 provides that:

(A) 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 . . .*

(b) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Section 3517.5, the memorandum of understanding shall be controlling without further legislative action . . .

(emphasis added).

UAPD and state workers have argued that the furlough orders violate § 19851 because, in issuing them to *all* state employees “regardless of funding source”, the Governor failed to take into account the “varying needs of the different state agencies.” Simply put, the Governor used a sledgehammer in seeking General Fund budget savings through an across the board furlough order when § 19851 requires that he use a scalpel.

Because the Governor’s furlough orders apply to *all* state employees almost without exception, they necessarily apply to Special Fund and federally-funded State employees. Yet, furloughing these employees, as found by the trial court, achieves no costs savings to the General Fund. *See Deepwell Homeowners’ Protective Ass’n*, 239 Cal.App.2d at 67 (“we must presume the truth of the findings of the trial court . . .”). For example, consider UAPD member-physicians who work for the California Department of Social Services. These doctors conduct disability reviews and determinations for the granting of federal disability benefits. And, although they are state employees, their salaries are funded entirely with federal moneys. As such, furloughing them three days per month with a commensurate 15% pay reduction achieves no costs savings to the General Fund and actually costs the state a substantial amount of money. Moreover, given the fact that these employees are working three less days per month, the disability determination process is slowed - prolonging the waiting period for disabled, vulnerable Californians to receive their rightful federal

benefits.⁵ Regional Commissioner for the Social Security Administration, Peter Spencer, explained that the furloughing of CDSS doctors will not save the State any money and will actually cost the State \$10 million in lost revenue from the Federal government. *Id.* ¶ 3, Ex. A at 1.

The trial court correctly found that the across the board furlough order (i.e. the sledgehammer) violated § 19851 because

[e]ach State agency has different needs relating to its functions and to the sources of its funding. Respondents' refusal to consider those varying needs of the different state agencies before ordering and implementing furloughs conflicts with the requirements of Section 19851 . . . Moreover, when furloughs are implemented to save money, yet their implementation in some agencies saves nothing and increases costs, such a policy is arbitrary, capricious, and unlawful.

Ex. 11 at 162. Thus, the writ of supersedeas should be denied because UAPD and state workers can show a greater likelihood of success on the merits.

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⁵ Even worse, persons who receive SSI or SSDI are often very low-income with disabilities that preclude them from working. Ex. 5 ¶ 8-9 (“Patino Decl.”). When SSI or SSDI applicants have to wait for a determination on their disability benefits, they are forced to seek other sources of state-funded public welfare assistance. *Id.* ¶¶ 10-13. This means disabled persons will seek CalWORKs benefits if they have dependent children or General Assistance benefits if they are single with no children. *Id.* As the waiting time for Federal disability benefits increases due to the furloughing of State doctors, more and more disabled persons will seek interim state-funded benefits through either CalWORKs or General Assistance benefits. *Id.* ¶ 10-13, Ex. A-B attached thereto.

B. Petitioners' arguments effectively concede that the furlough orders violate § 19851.

Petitioners argue that “the furlough program was ordered by Governor Schwarzenegger specifically *to meet the overarching needs of all state departments and agencies.*” Pet. at 29 (emphasis added). That statement effectively concedes Petitioners' noncompliance with § 19851. When altering the 40-hour workweek, Section 19851 requires the Governor to consider “the *varying* needs of *the different* state agencies” not the “overarching needs of all state departments and agencies.” Petitioners' construction would effectively rewrite the statute. It is therefore obvious from Petitioners' own arguments that they failed to comply with § 19851. Further, Petitioners utterly fail to explain how furloughing Special Fund or federally-funded State employees serves *any* “need” of their agencies unless one rewrites the statute to replace “varying needs” with “parity.”

C. Section 19851 does impose mandatory duties.

In their attempt to avoid the effects of § 19851, Petitioners claim that the statute does not create a mandatory duty, but rather is merely “advisory.” See Pet. at 28-29. But, this constrained construction of the statutory language ignores obvious mandatory language and the context in which the statute is written. First, Petitioners focus on the word “policy” in their attempt to argue that § 19851 is merely advisory. Yet, Petitioners wholly ignore the statutory language that says the “workweek of state

employees *shall* be 40 hours . . .” Gov. Code § 19851 (emphasis added). The word “shall” connotes mandatory statutory language. *See Woodbury v. Brown-Dempsey*, 108 Cal.App.4th 421, 433 (2003) (“Ordinarily, the word ‘may’ connotes a discretionary or permissive act; the word ‘shall’ connotes a mandatory or directory duty.”).

Moreover, “various parts of the statutory enactment must be harmonized by considering the particular clause in the context of the whole statute.” *Nunn v. State of California*, 35 Cal.3d 616, 625 (1984). Part (b) of § 19851 would be wholly superfluous if part (a) of the statute were not mandatory. Thus, it is obvious that by reading § 19851 in its context that it confers mandatory duties.

Finally, if this statute is merely an advisory one, then it does not provide the necessary statutory authority for the Governor to effectively cut the pay received by state workers that was previously fixed on a monthly basis by their MOUs, which agreements the Legislature has commanded be continued in effect. *See* Gov. Code § 3517.8. In other words, if § 19851 is meaningless verbiage, then the Governor has no legislative authorization at all of this conduct here.

D. Petitioners cannot show a likelihood of success on the merits of the Government Code § 16310 claim.

Government Code § 16310 permits the General Fund to borrow from Special Fund agencies in the event that the General Fund is depleted. Gov.

Code § 16310. But, the statute “does not authorize *any* transfer that will interfere with the object for which a special fund was created . . .” *Id.* (emphasis added). Petitioners contend that the furloughs have not interfered with “the operations of the named state agencies or departments.” Pet. at 31. Yet, this contention has absolutely no support in the trial court record or in any of the declarations submitted with the writ of supersedeas.

The trial court found “the operations of each agency have been reduced by three days per month. This basic fact alone is at least a prima facie showing of interference with the object of the special fund agencies . . .” Ex. 11 at 163. The trial court also found that:

UAPD offers evidence to show that UAPD-represented employees are unable to complete Social Security disability reviews promptly and accurately due to the mandatory furloughs. Fewer applications are processed per month than in pre-furlough months, processing times have increased by about 14% . . . and pending cases have increased by about 39% compared to the prior year. *While the national average processing time for reconsiderations of disability determinations has increased by about 3%, the California average processing time has increased 22.3% since the implementation of the furloughs.*

Id. (emphasis added). UAPD offered two declarations from Dr. Dann and three declarations from Regional Commissioner for Social Security, Peter Spencer, during the course of this litigation demonstrating the harm caused to the state agencies. On the other hand, Petitioners simply assert that the furloughs have not jeopardized “the operations of the named state agencies or departments”, Pet. at 31, yet fail to rebut any of the evidence on the

matter or explain why the trial court's reasoning above does not show interference with the purposes of the state agency.

E. In applying the furlough order to Special Fund and federally-funded state employees, Petitioners abused their discretion.

In addition to violating the mandatory statutory duties discussed above, Petitioners abused their discretion in applying the furlough order to Special Fund and federally-funded State employees.

Mandamus will lie to limit the Governor's abuse of discretion. *See O'Brien v. Olson*, 42 Cal.App.2d 449, 455 (1941) (mandamus against the governor is appropriate under certain circumstances, reasoning that "if a governor were immune from judicial control under all circumstances merely because he is the chief executive of the state . . . he might arbitrarily remove public officers for political or personal reasons without just cause, and thereby defeat the very purpose of our democratic form of government."); *Middleton v. Low*, 30 Cal. 596 (1866) (mandamus is available against the Executive Officer of the state).

In determining whether the Governor abused his discretion, courts have stated that "a challenger must show the official acted arbitrarily, beyond the bounds of reason or in derogation of the applicable legal standards. Where only one choice can be a reasonable exercise of discretion, a court may compel an official to make that choice." *California Correctional Supervisors Organization, Inc. v. Dept. of Corrections*, 96

Cal.App.4th 824, 827 (2002)(“CCSO”); *Ng v. State Personnel Board*, 68 Cal.App.3d 600, 605 (1977) (“Discretion is abused when the action exceeds the bounds of reason.”).

Here, the Governor’s actions are completely illogical as applied to Special Fund and federally-funded employees. Although the stated reason for the emergency is a General Fund shortfall, the Governor furloughed all state employees “regardless of funding source.” Furloughing Special Fund and federally-funded employees does not improve the General Fund deficit one iota – this is a fact over which “reasonable minds could not differ . . .” CCSO, 96 Cal.App.4th at 832. In fact, as the evidence in the trial court demonstrates, furloughing these employees actually *costs* the state substantial money.

IV. The other issues raised by Petitioners lack merit and do not warrant the issuance of a writ of supersedeas.

A. The back pay order has already been stayed.

Petitioners contend that the trial court’s back pay order raises “issues of probable error” and thus a writ of supersedeas is required. Pet. at 34-35. But, the trial court did not lift the stay as to the back pay order. Ex. 20. Consequently, that order has already been stayed pending the appeal. Thus, regardless of the underlying merits of the back pay order, it is clear a writ of supersedeas is not needed to preserve that issue nor should it be a rationale for issuing a stay as to the rest of the relief granted in this case.

Indeed, even if this Court were inclined to agree with Petitioners as to the back pay issue, this is actually a reason to deny their request for supersedeas relief altogether. *See* Section IA *supra* at 10-13.

B. The “scope” of the trial court’s order does not warrant the issuance of a writ of supersedeas.

As yet another reason for a writ of supersedeas, Petitioners contend that the trial court impermissibly expanded the scope of its order to cover *all* employees at the state agencies named in UAPD’s original petition. Notwithstanding the fact that these cases raised mainly legal questions, Petitioners appear to argue that any writ relief must be limited to UAPD’s members and not the other state workers employed at the Special Fund agencies.

It is obvious that this argument entirely lacks merit and is even less of a reason to issue a writ of supersedeas. This case raises the question of whether Petitioners had the legal authority to furlough Special Fund and federally-funded state employees. The trial court correctly included employees at the Special Fund who are not necessarily represented by UAPD. In light of considerations of judicial economy and the heavy workload of state trial courts, the decision to have the order cover all employees at the affected state agencies makes perfect sense (rather than invite further lawsuits to accomplish the same end). As the trial court stated,

the lawsuit's theory for relief is that the Governor issued Executive Orders implementing a furlough/wage reduction program and that those Orders are invalid and illegal because he failed to comply with mandatory requirements found in the Government Code. Its object was a determination of the legality of the Orders; UAP&D members were not the only employees in Respondent Departments and Agencies affected by them. It follows that the Order of this Court must apply to all employees of the Respondent Departments and Agencies affected by the illegal Executive Orders.

Ex. 12 at 168-69.

After the Executive Orders have been found unlawful, are Petitioners seriously contending that *every* single public sector union (and *every* Special Fund employee in the event they are not represented by a union) must bring a lawsuit challenging the validity of the furlough order as applied to them in order to obtain relief? Are they saying that several “copy-cat” lawsuits *must* be filed? While such an arrangement may be advantageous for outside defense counsel, it hardly serves judicial economy or our overworked trial courts well. Moreover, it is obvious that this argument cannot be a reason for the issuance of a writ of supersedeas as to UAPD's own members.

C. Petitioners incorrectly contend that the holding in this case is in “direct conflict” with decisions from the Sacramento Superior Court.

Petitioners argue that “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 in PECG/CAPS, CASE, and SEIU actions

litigated in Sacramento County Superior Court.” Pet. at 36 (emphasis added). Yet, a review of the decision in that case completely refutes Petitioners’ claims. The Sacramento cases raised a “facial challenge” to the authority of the Governor to furlough *any* state employee. The trial court expressly withheld judgment on the very issue presented by this appeal: whether the furlough orders are unlawful *as applied* to Special Fund and federally-funded state employees?⁶ Accordingly, this argument is utterly without merit.

CONCLUSION

For the foregoing reasons, this Court should deny the request for writ of supersedeas. UAPD and state workers will be irreparably harmed if the illegal furlough orders are allowed to continue during the pendency of this appeal.

Dated: April 6, 2010

DAVIS, COWELL & BOWE, LLP.

By: 

Andrew J. Kahn

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Attorneys for Petitioner-Plaintiff

⁶ The Sacramento trial court stated: “[C]ounsel for CASE and PECG argued that many of their members work in so-called “special funds” agencies, and that the Governor’s order, which was designed to deal with a looming General Fund deficit, was not reasonably related to the fiscal emergency insofar as it orders furloughs for those employees . . . This contention was not raised in any of the petitions or complaints for declaratory relief The Court therefore makes no findings on it.” *See* Ex. 3 at 58 FN 19.

CERTIFICATE OF WORD COUNT

I, Adam J. Zapala, attorney for UAPD hereby declare under penalty of perjury that the number of words in this Opposition to Petitioners' Request for a Writ of Supersedeas equals 9,844 words, as per the word count feature in Microsoft Word.

Dated: April 6, 2010

DAVIS, COWELL & BOWE, LLP.

By: 

Adam J. Zapala

Attorneys for Petitioner-Plaintiff

**CERTIFICATE OF SERVICE
(CCP § 1013)
STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO**

Re: Union of American Physicians and Dentists, v. Arnold
Schwarzenegger, et al., Court of Appeal Case No. 127775
Alameda County Superior Court Case No.: RG09456684

The undersigned, Verna Owens, certifies and declares that I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 595 Market Street, Suite 1400, San Francisco, California 94105, which is located in the county where the service described below took place.

On April 6, 2010, I served the foregoing document(s) described as:

**RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF
SUPERSEDEAS**

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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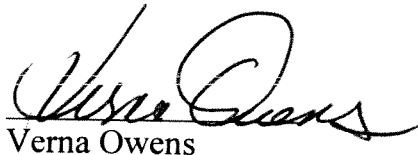
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UNITED PARCEL SERVICE: On April 6, 2010, I deposited in a box or other facility regularly maintained by UNITED PARCEL SERVICE, an express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive the above referenced documents for priority overnight delivery.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 6, 2010, at San Francisco, California.


Verna Owens

