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10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF SACRAMENTO
12

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14 **ARNOLD SCHWARZENEGGER, Governor;**
15 **DAVID A. GILB, Director of Department of**
PERSONNEL ADMINISTRATION; DEPARTMENT OF
16 **PERSONNEL ADMINISTRATION,**

17 Plaintiffs and Petitioners,

18 v.

19 **STATE CONTROLLER JOHN CHIANG; and**
DOES 1 through 20, inclusive,

20 Defendant and Respondent,

21 **LIEUTENANT GOVERNOR JOHN**
22 **GARAMENDI, SECRETARY OF STATE DEBRA**
23 **BOWEN, ATTORNEY GENERAL EDMUND G.**
24 **BROWN JR., STATE TREASURER BILL**
25 **LOCKYER, STATE SUPERINTENDENT OF**
PUBLIC INSTRUCTION JACK O'CONNELL,
26 **AND CALIFORNIA BOARD OF**
EQUALIZATION,

Intervenors.

Case No. 34-2009-80000158

RESPONDENT'S AND
INTERVENORS'
MEMORANDUM OF POINTS
AND AUTHORITIES IN
OPPOSITION TO PETITION
FOR WRIT OF MANDATE

Date: March 13, 2009

Time: 10:00 p.m.

Dept: 19

Judge: Hon. Patrick
Marlette

Trial Date: March 13, 2009

Action Filed: February 9, 2009

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	2
II. STATEMENT OF FACTS	3
III. STATEMENT OF THE CASE	5
IV. A PETITION FOR WRIT OF MANDATE MUST BE DENIED IN THE ABSENCE OF A MINISTERIAL DUTY ON THE PART OF RESPONDENT	6
V. ARGUMENT	8
1. THE GOVERNOR LACKS POWER TO FURLOUGH THE EMPLOYEES OF THE OTHER INDEPENDENTLY ELECTED CONSTITUTIONAL OFFICERS.	8
A. Applying the Governor’s Order to the Constitutional Officers Would Violate the System of Divided Executive Power Embodied in the California Constitution.	8
B. The Governor’s Assertion of Unlimited Furlough Power is Inconsistent With the Independent Powers and Duties Assigned to the Constitutional Officers.	12
2. THE EXECUTIVE ORDER DOES NOT AFFORD A BASIS ON WHICH TO FURLOUGH EMPLOYEES OF THE OFFICERS	16
A. The New State Budget and the Governor’s Vetoes of Executive Officer Appropriations Moot All Justifications for the Executive Order.	17
B. The Petitioners Should Be Equitably Estopped From Asserting that the Executive Order Applies to the Constitutional Officers.	22
C. The Executive Order Does Not By Its Express Terms Direct the Constitutional Officers to Furlough Employees.	24
3. THE ORDERS AND JUDGMENTS IN THE UNION CASES DO NOT DECIDE THE FACTUAL AND LEGAL QUESTIONS PRESENTED IN THIS ACTION.	26
4. PETITIONERS HAVE NOT ESTABLISHED GROUNDS FOR THE ISSUANCE OF A PRELIMINARY OR PERMANENT INJUNCTION	27
VI. CONCLUSION	29

1 **TABLE OF AUTHORITIES**

2 **Page**

3 **Cases**

4 *Butt v. State of California* 28
(1992) 4 Cal.4th 668

5 *California Correctional Peace Officers Ass'n v. Schwarzenegger*
6 (2008) 163 Cal.App.4th 802 18

7 *Carmel Valley Fire Protection Dist. v. State of California*
(2001) 25 Cal.4th 287 10

8 *Driscoll v. City of Los Angeles*
9 (1967) 67 Cal.2d 297 22

10 *Golden Day Schools, Inc. v. Department of Education*
(1999) 69 Cal.App.4th 681 22

11 *In re Rosenkrantz*
12 (2002) 29 Cal.4th 616 10

13 *Love v. Baehr*
(1874) 47 Cal. 364 9

14 *Moran v. Department of Motor Vehicles*
15 (2006) 139 Cal.App.4th 688 7

16 *Marine Forests Soc. v. California Coastal Com'n.*
(1985) 36 Cal.4th 1) 8, 11

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18 (1993) 4 Cal.4th 1095 26

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(1860) 16 Cal. 11 9, 12

20 *People ex rel. Younger v. County of El Dorado*
21 (1971) 5 Cal.3d 480 7

22 *State Bd. of Education v. Honig*
(1993) 13 Cal.App.4th 720 14

23 *Simi Corp v. Garamendi*
24 (2003) 109 Cal.App.4th 1496 18

25 *Taking Politics Seriously*

26 *Tirapelle v. Davis*
(1993) 20 Cal.App.4th 1317 12

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28 (1952) 112 Cal.App.2d 450 18

TABLE OF AUTHORITIES (continued)

		Page
1		
2	Constitutional Provisions	
3	Cal. Const., art. III, § 3	10
4	Cal. Const., art. V, § 1	11
4	Cal. Const., art. V, § 6	12
5	Cal. Const., art. V, § 9	13
5	Cal. Const., art. V, § 10	13
6	Cal. Const., art. V, § 13	13
6	Cal. Const., art. V, § 11.	9
7	Cal. Const., art. IX, § 2	9
7	Cal. Const., art. XIII, § 17	9
8	Statutes	
9	Code of Civil Procedure section:	
10	§ 1085, subdivision (a)	6
11	Education Code	
11	§ 33110	14
12	§ 33111	14, 15
12	§ 3516.5	14, 15, 17
13	Gov. Code sections:	
14	§ 12101	13, 15
14	§ 12152, subd. (a)	13, 15
15	§ 12159	13
15	§ 12172.5	13
16	§ 12302	14
16	§ 12320	14
17	§ 12324	14
17	§ 12328	14
18	§ 12329	14
18	§ 12330	14
19	§ 12402	15
19	§ 12410-12439	14
20	§ 12502	13
20	§ 12510	13
21	§ 12511	13
21	§ 15604	15
22	§ 15606	15
23	Other Authorities	
24	63 Ops.Cal.Atty.Gen. 583, 584 (1980)	25
25	6 Witkin, California Procedure (5th ed. 2008) Provisional Remedies, § 288, p. 228.)	28
26	8 Witkin, California Procedure (5th ed. 2008) Extraordinary Writs, § 74, p. 954.)	7
27	Mattheson <i>Constitutional Status and Role of the State Attorney General</i> , 6 U. Fla. J.L. & Pub. Pol’y 1, 5-6 (1993) (<i>Constitutional Status</i>)	9-10
28		

TABLE OF AUTHORITIES (continued)

1
2
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51 UCLA L. Rev. 1079, 1113 (2004)

Page

8, 11

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I.

INTRODUCTION

1
2
3 The writ sought by the petitioners in this action is quite literally without precedent. No prior
4 authority has held that the Governor may intrude on the operations of the other independently
5 elected constitutional officers by ordering them to furlough their employees. And no statute or
6 constitutional provision grants the Governor this power.

7 Under the system of divided executive power embodied in the California Constitution, the
8 Governor lacks the authority to command the constitutional officers to furlough their employees.
9 The Governor may not intrude on the core functions of these officers any more than they may
10 intrude on the core functions of his office. Under the authority delegated by law to the
11 constitutional officers, they—not the Governor—determine when and how to employ the staff
12 necessary to exercise the powers of their respective offices. Lacking this authority, the Governor
13 and the other petitioners may not obtain the relief sought in this action.

14 The constitutional flaw in the petitioners' case is not the only reason that the petition must
15 be denied. On its own merits, the Executive Order that is the subject of this action does not
16 support the petitioners' claims. As discussed below, the recent budget package signed by the
17 Governor, combined with the Governor's line item vetoes of the constitutional officers' budgets,
18 renders the Executive Order moot. The Governor's sole justification for asserting emergency
19 furlough authority—the lack of legislative action on the budget—no longer exists. Indeed, the
20 Governor's own veto message emphasized that his cuts in the constitutional officers' budgets
21 were in lieu of the furlough program.

22 Moreover, before bringing this action, the Governor's Office informed the constitutional
23 officers that they were not subject to the furlough order. In reliance on these representations, the
24 constitutional officers implemented their own significant budget reductions. Given this pattern
25 of representation and reliance, the petitioners should be estopped from obtaining a writ to enforce
26 the Executive Order.

27 But perhaps more significantly, the Order does not even purport to apply to the
28 constitutional officers. In directing the Department of Personnel Administration to implement

1 the furloughs, the Governor expressly excluded state entities not under his “direct executive
2 authority.” As the Governor himself has recognized in other executive orders, the constitutional
3 officers are beyond his direct command.

4 These factors make this case very different from the recent union challenges to the
5 Governor’s furlough authority previously heard by this Court. Unlike the union cases, this
6 proceeding raises fundamental constitutional questions concerning the status of the
7 independently elected officers. And, again unlike the union cases, this proceeding presents
8 unique factual questions of mootness, estoppel, and inapplicability.

9 In short, the petitioners have not met their burden to show that the Controller has failed to
10 perform a ministerial duty specially enjoined by law with respect to issuing pay warrants for the
11 constitutional officers’ employees. As a legal matter, the Governor lacks the authority to direct
12 the Controller and the other constitutional officers to comply with his order. As a factual matter,
13 the Executive Order is no longer effective to compel such action, if, indeed, it ever was. As such,
14 the petitioners have not met their burden to establish that they are entitled to the issuance of a
15 writ or to injunctive relief. Therefore, the Controller and the Intervenors respectfully request that
16 this Court deny the petition and enter judgment in their favor.

17 **II.**

18 **STATEMENT OF FACTS**

19 Faced with an ongoing budget crisis, the Governor issued Executive Order S-16-08 on
20 December 19, 2008. (Request for Judicial Notice (“RJN”), Exh. 2.) Citing a projected \$42
21 billion General Fund budget shortfall over the next 18 months and other fiscal concerns, the
22 Governor declared that an emergency existed and directed the Department of Personnel
23 Administration (“DPA”) and other agencies and departments under his direct executive authority
24 to implement a series of budget measures. (*Ibid.*) As material to this proceeding, the Executive
25 Order directed the DPA to implement “a furlough of represented state employees and supervisors
26 for two days per month” and “an equivalent furlough or salary reduction for all state managers,
27 including exempt state employees.” (*Id.*, p. 2.) The furloughs were to be effective from February
28 1, 2009 through June 30, 2010. (*Ibid.*)

1 In addition to the state's immediate fiscal problems, the Executive Order cited a perceived
2 lack of response by the Legislature as justifying the need for an emergency edict. (RJN, Exh. 2,
3 p. 1.) Noting that he had twice convened the Legislature in extraordinary session to address the
4 fiscal crises in November and December 2008, the Governor declared that the Legislature had
5 "failed . . . to enact any bills to address the State's significant economic problems" and had
6 "failed to effectively address the unprecedented statewide fiscal crisis." (*Ibid.*) The Governor
7 asserted that "failure to substantially reduce the deficit carried forward from the current fiscal
8 year into the next fiscal year will likely prevent the State from being able to finance the cashflow
9 shortages of billions of dollars, thus making it likely that the State will miss payroll and other
10 essential services payments at the beginning of 2009." (*Ibid.*)

11 The Governor, however, recognized that his authority to issue the Executive Order was not
12 unlimited. Without purporting to order that they do so, he requested "other entities of State
13 government not under my direct executive authority . . . implement similar or other mitigation
14 measures to achieve budget and cash savings for the current and next fiscal year." (RJN, Exh. 2,
15 p. 2.)

16 The Executive Order was quickly challenged in Sacramento County Superior Court by labor
17 unions representing California state employees. In six separate petitions or complaints, the
18 unions contested the Governor's authority to order *any* furloughs under state law. (See Petition,
19 pp. 3-4, ¶¶ 12-17.) On January 30, 2009, this Court issued a minute order denying writ relief in a
20 ruling directed to three of the actions.¹ (RJN, Exhs. 8-10 [Judgments and 1.30.09 Minute
21 Order].) In its minute order, this Court held that the Governor "has the statutory authority to
22 reduce the hours of state employees pursuant to Government Code sections 19851 and 19849."
23 (*Id.* [1.30.09 Minute Order, p. 6].) "[T]hese two statutes, taken together, provide the Governor
24 with authority to reduce the workweek of state employees to meet the needs of state agencies,
25 and to do so by adopting a rule." (*Id.* [1.30.09 Minute Order, p. 7].) Further, the Court found
26

27 1. *Professional Engineers in California Government, et. al. v. Arnold Schwarzenegger*, case
28 no. 34-2008-80000126; *California Attorneys, Administrative Law Judges and Hearing Officers in
State Government v. Arnold Schwarzenegger, et. al.*, case no. 34-2008-8000134; *Service Employees
International Union, Local 1000 v. Arnold Schwarzenegger, et. al.*, case no. 34-2009-80000135.)

1 that the Governor “has authority to reduce the work hours of the state employees . . . pursuant to
2 the terms of the MOUs the State entered into with the petitioner employee organizations.” (*Ibid.*)

3 By letter, the Controller asked the Court to clarify whether this ruling was intended to apply
4 to the independently elected constitutional officers. (RJN, Exh. 11.) Even though the
5 Governor’s Office had informed the constitutional officers that they were not affected by the
6 Executive Order, the Controller noted that after the Court’s ruling the Governor’s Office had
7 “notified the independent constitutional officers and state-wide officials that their employees are
8 impacted by the ruling.” (*Ibid.*) Submitted with the Controller’s inquiry were letters from six
9 constitutional officers² challenging the Governor’s authority to order furloughs of their
10 employees. (*Ibid.*) In a responding minute order dated February 4, 2009, this Court noted that
11 the unions’ petitions and complaints “did not raise any issues regarding the Governor’s authority
12 to order furloughs for the employees of those officers and officials.” (*Id.*, Exh. 12.) The Court
13 further responded that its earlier order “did not address, or make any ruling regarding, the
14 Governor’s authority to order furloughs for the employees of those officers and officials.” (*Ibid.*)
15 Therefore, the Court “expresse[d] no views regarding that issue.” (*Ibid.*)

16 On February 20, 2009, the Governor signed a new budget package passed by two-thirds of
17 each house of the Legislature. (RJN, Exhs. 5-7.) In signing the budget package, however, the
18 Governor exercised his line item veto authority to reduce the budgets approved by the Legislature
19 for the other constitutional officers. (*Ibid.*) These cutbacks ranged from approximately 10
20 percent for most constitutional officers to 62 percent for the Lieutenant Governor. (*Ibid.*; see
21 discussion, *infra.*)

22 III.

23 STATEMENT OF THE CASE

24 On February 9, 2009, petitioners filed their Petition and Complaint against the Controller
25 and unnamed Does. Other than naming the Controller, petitioners did not name any of the
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28 2. The letters were submitted by or on behalf of the Lieutenant Governor, the Secretary of
State, the Treasurer, the Superintendent of Public Instruction, the Insurance Commissioner, and the
Attorney General. (RJN, Exh. 11.)

1 constitutional officers as respondents.

2 In their first cause of action, petitioners seek a writ of mandate pursuant to Code of Civil
3 Procedure section 1085. (Petition, pp. 9-10, ¶¶ 38-46.) They ask the Court to issue a writ
4 directing the Controller to “to comply with the Governor’s Executive Order with respect to
5 furloughing of employees of the constitutional officers and State Board of Equalization and to
6 comply with Judge Marlette’s January 29, 2009 and February 5, 2009 orders.” (*Id.*, p. 10, ¶ 46.)

7 In their second and third causes of action, petitioners seek injunctive and declaratory relief.
8 (Petition, pp. 10-12, ¶¶ 47-58.) Although not expressly made clear, the petition appears to seek a
9 mandatory injunction enjoining the Controller from failing to implement furloughs of the
10 employees of the state constitutional officers. (*Id.*, pp. 10-11, ¶¶ 48-54.) Separately, petitioners
11 ask the Court to declare that “the Controller is legally required under the Executive Order as well
12 as Judge Marlette’s January 29, 2009 and February 5, 2009 rulings to comply with the
13 implementation of furloughs of state employees by the constitutional officers and the State Board
14 of Equalization.” (*Id.*, p. 12, ¶ 58.)

15 On February 26, 2009, the Court granted the state constitutional officers and the Board of
16 Equalization leave to file a complaint in intervention. Five of the state constitutional officers
17 (the Lieutenant Governor, the Secretary of State, the Attorney General, the State Treasurer, and
18 the Superintendent of Public Instruction) and the State Board of Equalization have now filed a
19 complaint in intervention. They ask the Court to deny the petition for writ of mandate and issue
20 a declaration that the petitioners are unable to compel the other constitutional officers and the
21 Board of Equalization to comply with a furlough program implemented by executive order. (See
22 Complaint in Intervention, p. 7 [prayer for relief].)

23 **IV.**

24 **A PETITION FOR WRIT OF MANDATE MUST BE DENIED IN THE**
25 **ABSENCE OF A MINISTERIAL DUTY ON THE PART OF RESPONDENT**

26 Pursuant to Code of Civil Procedure section 1085, subdivision (a), a traditional writ of
27 mandamus compels the performance of a duty specially enjoined by law:
28

1 A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or
2 person, to compel the performance of an act which the law specially enjoins, as a duty
3 resulting from an office, trust, or station, or to compel the admission of a party to the use
and enjoyment of a right or office to which the party is entitled, and from which the party is
unlawfully precluded by such inferior tribunal, corporation, board, or person.

4 “The primary purpose of the writ of mandate is to enforce a plain, nondiscretionary legal
5 duty to act” (CEB, Civil Writ Practice (3d ed. 2007) § 3.21, pp. 75-76.) “[T]he writ will
6 not lie to control discretion conferred upon a public officer or agency.” (*People ex rel. Younger*
7 *v. County of El Dorado* (1971) 5 Cal.3d 480, 491.) “Two basic requirements are essential to the
8 issuance of the writ: (1) A clear, present and usually ministerial duty upon the part of the
9 respondent . . . and (2) a clear, present and beneficial right in the petitioner to the performance of
10 that duty.” (*Ibid.*) “In the absence of a showing of this correlative duty and right, the writ will be
11 denied.” (8 Witkin, Cal. Procedure (5th ed. 2008) Extraordinary Writs, § 74, p. 954.)

12 Moreover, “[w]here the alleged ministerial duty would be contrary to law, mandate is
13 unavailable.” (*Moran v. Department of Motor Vehicles* (2006) 139 Cal.App.4th 688, 691.)
14 Where the public officer “does not have a duty to perform the act requested, and doing so would
15 be *contrary* to law, relief cannot be granted by a writ of mandate.” (*Id.* at p. 693.)

16 As the moving party, petitioners bear the burden of proof to establish that they are entitled
17 the requested relief. (CEB, Civil Writ Practice in California, *supra*, § 9:70, p. 387 [“The party
18 seeking extraordinary relief has the burden of proving his or her case and cannot simply depend
19 on the failure of the adverse party to prove a defense.”].)

20 As will be demonstrated below, neither the Controller nor the other constitutional officers
21 nor the Board of Equalization are subject to the Governor’s Executive Order. It follows that the
22 writ of mandate sought by petitioners may not issue.

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V.

ARGUMENT

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3 **1. THE GOVERNOR LACKS POWER TO FURLOUGH THE EMPLOYEES OF**
4 **THE OTHER INDEPENDENTLY ELECTED CONSTITUTIONAL OFFICERS.**

5 **A. Applying the Governor's Order to the Constitutional Officers Would Violate**
6 **the System of Divided Executive Power Embodied in the California**
7 **Constitution.**

8 Regardless of how far his authority extends to furlough employees under his direct
9 command, the Governor lacks any power to order the other independently elected constitutional
10 officers^{3/} to furlough their employees. Under California's system of divided executive authority,
11 the Governor may not intrude on the core functions of the other officers. And given his lack of
12 authority to direct furloughs of this type, the Governor has no basis to seek a writ in this
13 proceeding directing the Controller to comply with his Executive Order.

14 "Unlike the federal Constitution, the California Constitution—like many state
15 constitutions—embodies a structure of divided executive power, providing for the statewide
16 election of not only the Governor (and the Lieutenant Governor), but also of the Attorney
17 General, the State Treasurer, the Secretary of State, the Controller, and the Superintendent of
18 Public Instruction." (*Marine Forests Soc. v. California Coastal Com'n.* (1985) 36 Cal.4th 1, 31.)
19 As one commentator has observed, "the California Constitution explicitly and repeatedly creates
20 a multiple executive. The Lieutenant Governor, Attorney General, Secretary of State, Treasurer,
21 and Controller all are directly elected and do not answer to the Governor." (Zaslow, *Taking*
22 *Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. Rev. 1079, 1113
23 (2004) (*Taking Politics Seriously*)).

24 This divided executive structure distinguishes California and most other states from the
25 federal system of a unitary executive: "Most states have adopted a constitutional structure for the
26 executive branch that differs significantly from the federal constitution. The distinguishing
27

28 3. For convenience, references to the constitutional officers in the remainder of this brief shall include the Board of Equalization.

1 feature of the federal model is the unitary executive. . . . By contrast, the states in varying
2 degrees typically follow a fragmented executive branch model, with several officials serving as a
3 result of statewide election, each independently accountable to the voters.” (Mattheson,
4 *Constitutional Status and Role of the State Attorney General*, 6 U. Fla. J.L. & Pub. Pol’y 1, 5-6
5 (1993) (*Constitutional Status*)).

6 For all but one of the constitutional officers, this independent status is inherently derived
7 from the California Constitution.⁴ “The Lieutenant Governor, Attorney General, Controller,
8 Secretary of State, and Treasurer shall be elected at the same time and places and for the same
9 term as the Governor.” (Cal. Const., art. V, § 11.) Similarly, the State Superintendent of Public
10 Instruction “shall be elected by the qualified electors of the State at each gubernatorial election.”
11 (Cal. Const., art. IX, § 2.) And the Board of Equalization consists of the Controller and four
12 members elected for four-year terms at gubernatorial elections. (Cal. Const., art. XIII, § 17.)

13 Historically, when the respective roles of the Governor and the other constitutional
14 officers have been considered by the California Supreme Court, the independent status of each
15 office has been recognized. For example, the Court long ago recognized that the State Controller
16 “does not hold his appointment of the Governor, is not responsible to him, and acts entirely
17 independent of him.” (*People ex rel. McCauley v. Brooks* (1860) 16 Cal. 11, 55.) Similarly,
18 “[t]he Secretary of State, though appointed in the first instance by the Governor, is not
19 responsible to that officer, but is independent of him.” (*Id.* at p. 58.) Further, “[t]he Treasurer is
20 not responsible to the Governor, the Secretary of State or the Controller. He is independent of all
21 those officers.” (*Id.* at p. 59.)

22 Likewise, the independent nature of the separate constitutional offices limits the ability of
23 the legislative branch to exert “an unlimited discretion in respect to the nature of the duties which
24 it may require to be performed by these officers.” (*Love v. Baehr* (1874) 47 Cal. 364, 367
25 [Legislature could not require Attorney General to serve on Board of Examiners].) “From the
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28 4. Provision for the statewide election of the Insurance Commissioner is statutory, rather
than constitutional. (*Marine Forests Soc. v. California Coastal Com’n, supra*, 1 Cal.4th at p. 31 n.
11, citing Ins. Code, § 12900.)

1 earliest period of our history as a nation, almost every State in the Union had a Secretary of State,
2 Controller, Treasurer, and Attorney-General; and the general nature of the duties pertaining to
3 each were perfectly well known to the framers of our Constitution. It is clear beyond
4 controversy, that in establishing similar offices here, the framers of that instrument had reference
5 to the same general class of duties, which it was well known pertained to such offices
6 elsewhere.” (*Id.* at pp. 367-368.) Thus, for example, “[t]he Legislature has no more power to
7 compel the Attorney-General to [serve on the Board of Examiners] as a part of the duties of his
8 office, than it has to compel the Superintendent of Public Instruction to take charge of the State
9 prison, or to perform the duties of State Gauger. The Attorney-General is, therefore, under no
10 obligation to perform such services, and he may decline to perform them, without any breach of
11 his official duty as Attorney-General.” (*Id.* at p. 370.)

12 Commentators have noted that sound reasons exist for maintaining the separate and
13 independent status of the constitutional officers. For example, the existence of separate
14 constitutional officers, such as the Attorney General, “constitutes a check and balance feature of
15 the executive branch of state government.” (*Constitutional Status, supra*, 6 U. Fla. J.L. & Pub.
16 Pol’y at pp. 10-11.)

17 The system of checks and balances among the constitutional officers is closely related to
18 the analogous concept of separation of powers among the three branches of government. Under
19 California’s system of government, “[t]he powers of state government are legislative, executive,
20 and judicial[,]” and “[p]ersons charged with the exercise of one power may not exercise either of
21 the others except as permitted by this Constitution.” (Cal. Const., art. III, § 3.) The separation of
22 powers doctrine “limits the authority of one of the three branches of government to arrogate to
23 itself the core functions of another branch.” (*Carmel Valley Fire Protection Dist. v. State of*
24 *California* (2001) 25 Cal.4th 287, 297.) Although “the other branches do not necessarily violate
25 the separation of powers doctrine simply because they undertake actions that affect those core
26 functions[,]” they may not “defeat or materially impair the inherent functions of another branch.”
27 (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 662.)

28

1 Here, the Governor cannot, consistent with California’s system of divided executive
2 authority, order the other constitutional officers to furlough their employees. Allowing the
3 Governor to exert this power would not only intrude on the “core functions” of the other
4 executive offices but would “defeat or materially impair” these functions. Plainly, the ability to
5 remain open and operating during normal business hours is fundamental to the power of each
6 officer to carry out his or her constitutional duties. With limited exceptions, these officers—as
7 well as the Governor—carry out the duties of their offices through deputies or employees to
8 whom assignments have been delegated. If the Governor could order independently elected
9 officials to furlough their employees—to close up shop on his command—the Governor, not
10 those officials, would in a very real sense control the functions of the other independent
11 executive departments. Nothing in the California Constitution suggests that the Governor is
12 imbued with such overarching executive authority.

13 True, the Constitution provides that the Governor is vested with “the supreme executive
14 authority of this State” and directs that he or she “shall see that the law is faithfully executed.”
15 (Cal. Const., art. V, § 1.) But this provision has never been construed as granting the Governor
16 the broad power that he is attempting to assert over the other constitutional officers in this
17 proceeding. Indeed, the California Supreme Court has declined in the past to read this provision
18 as expansively as has been urged by the Governor. (See *Marine Forests Soc. v. California*
19 *Coastal Com’n*, *supra*, 36 Cal.4th at p. 47 [Provisions of art. V, § 1, “never have been viewed as
20 granting the Governor the constitutional authority to appoint all executive officers or as
21 conflicting with and invalidating any statutory provision that grants the Legislature the power to
22 appoint an executive officer.”]; see also *Taking Politics Seriously*, *supra*, 51 UCLA L. Rev. at p.
23 1109 [“To be sure, the document declares that the Governor is vested with ‘the supreme
24 executive power’ of the state, but if we examine what the Governor actually can do, and what he
25 is forbidden from doing, we can see that the rhetoric dissolves.”]) Certainly, the Governor has
26 cited no authority construing his executive authority to encompass the power to furlough
27 employees of independent officers and officials.

28

1 If anything, the California Constitution deprives the Governor of the authority to manage
2 the day-to-day affairs of the other elected officers in this manner. Under the Constitution,
3 “Authority may be provided by statute for the Governor to assign and reorganize functions
4 among executive officers and agencies and their employees, *other than elective officers and*
5 *agencies administered by elective officers.*” (Cal. Const., art. V, § 6, emphasis added.) By
6 prohibiting the Legislature from granting the Governor power to reorganize the offices of the
7 elective officers, the Constitution protects the divided executive structure of California
8 government. It would be fundamentally inconsistent with this provision to permit the Governor,
9 who may not assign or reorganize the functions of employees in the elective offices, to
10 nonetheless furlough those same employees.

11 This is not to say that the constitutional officers are free from the normal checks and
12 balances of our constitutional system. For example, each independently elected officer operates
13 within the budget provided for his or her office by the Legislature. Further, they are subject to
14 judicial writs directing compliance with ministerial duties. (See *People ex rel McCauley v.*
15 *Brooks, supra*, 16 Cal. at pp. 62-63.) And ultimately they are answerable to the people who
16 elected them to office. But nothing in our constitutional scheme subjects their offices to the
17 micromanagement represented by how the Governor is now seeking to apply the Executive
18 Order.

19 **B. The Governor’s Assertion of Unlimited Furlough Power is Inconsistent With**
20 **the Independent Powers and Duties Assigned to the Constitutional Officers.**

21 The Constitution has been described as following “a minimalist approach” with respect to
22 delineating the duties and functions of the constitutional officers. (*Tirapelle v. Davis* (1993) 20
23 Cal.App.4th 1317, 1327.) For example, with respect to the Controller, “it provides for the office
24 but primarily leaves it to the Legislature to define the duties and functions of the Controller.”
25 (*Ibid.*) But the duties and functions that are prescribed in the Constitution and the statutes leave
26 little room for the furlough order issued by the Governor. Applying that order to the
27 constitutional officers would fundamentally conflict with the functions delegated to those officers
28 by the Legislature.

1 The independent powers and duties of the executive officers and the Board are recognized
2 in a broad array of constitutional provisions and in statutes:

3 The Lieutenant Governor: The Lieutenant Governor shall have the same qualifications as
4 the Governor, serves as President of the Senate, and has a casting vote in that body. (Cal. Const.,
5 art. V, § 9.) Further, not only does the Lieutenant Governor succeed to the Governorship when
6 there is a vacancy, but he or she “shall act as Governor during the impeachment, absence from
7 the State, or other temporary disability of the Governor or of a Governor-elect who fails to take
8 office.” (*Id.*, art. V., § 10.) Moreover, the Lieutenant Governor may appoint a secretary and such
9 clerical assistants as “the Lieutenant Governor deems necessary for his office.” (Gov. Code, §
10 12101.)

11 The Secretary of State: The Secretary of State is charged with various duties, including
12 maintaining a record of the official acts of government and the certification and declaration of
13 election results. (Gov. Code, § 12159, et. seq.) Among other significant duties, the Secretary of
14 State is the chief elections officer of the state and administers the provisions of the Elections
15 Code. (*Id.*, § 12172.5.) To carry out these duties, the Secretary of State “may appoint one
16 Assistant Secretary of State, whose powers, duties and liabilities shall be those of a deputy, and
17 any deputies and clerical, expert, technical and other assistants necessary for the proper conduct
18 of his or her office.” (*Id.*, § 12152, subd. (a).)

19 The Attorney General: “Subject to the powers and duties of the Governor, the Attorney
20 General shall be the chief law officer of the State.” (Cal. Const., art. V, § 13.) The California
21 Constitution confers on the Attorney General “the duty . . . to see that the laws of the State are
22 uniformly and adequately enforced.” (*Ibid.*) By statute, the Attorney General is head of the
23 Department of Justice, and, with limited exceptions, has charge, as attorney, of all legal matters
24 in which the state is interested. (Gov. Code, §§ 12510, 12511.) And he or she is granted power
25 to appoint persons necessary to carry out the duties of the office: “The Attorney General may
26 appoint and fix the salaries of such Assistant Attorneys General, Deputy Attorneys General,
27 service agents, experts, and technical and clerical employees as he deems necessary for the
28 proper performance of the duties of his office.” (*Id.*, § 12502.)

1 The State Treasurer: Like other constitutional officers, the State Treasurer performs
2 duties defined in the Government Code. (Gov. Code, § 12320, et. seq.) Among other duties, the
3 Treasurer receives and keeps state money, bonds and other securities (*id.* § 12320), pays warrants
4 drawn by the Controller (*id.*, § 12324), and prepares reports and information concerning state
5 balances for the Controller, the Governor, and the Legislature (*id.*, §§ 12328, 12329, 12330).
6 The Treasurer “may appoint one deputy treasurer at the annual salary as the Treasurer shall
7 establish.” (*Id.*, § 12302.) And, subject to the Civil Service Act, he or she “may also appoint and
8 fix the salaries . . . of such officers and employees as may be necessary to carry out the duties of
9 the office.” (*Ibid.*)

10 The State Controller: The Controller “shall superintend the fiscal concerns of the state.”
11 (Gov. Code, § 12410.) Further, he or she “shall audit all claims against the state, and may audit
12 the disbursement of any state money.” (*Ibid.*) Other specific duties are set forth in the
13 Government Code. (*Id.*, §§ 12410-12439.) The Controller “may organize his or her office into
14 divisions and may, in conformity with the State Civil Service Act . . . and the State Constitution,
15 appoint deputy controllers, chiefs of divisions, and other subordinate officers and employees as
16 may be necessary for the proper conduct of the office.” (*Id.*, § 12402.)

17 Superintendent of Public Instruction: The Superintendent “shall execute, under direction
18 of the State Board of Education, the policies which have been decided upon by the board and
19 shall direct, under general rules and regulations adopted by the State Board of Education, the
20 work of all appointees and employees of the board.” (Educ. Code, § 33111.) The
21 Superintendent “may employ one Deputy Superintendent of Public Instruction and necessary
22 clerical and expert assistants, and may fix the compensation of all statutory and other employees
23 as provided by law, except as otherwise provided.” (*Id.*, § 33110; see *State Bd. of Education v.*
24 *Honig* (1993) 13 Cal.App.4th 720, 757 [“[T]he Superintendent is authorized by constitutional
25 and statutory law to nominate or appoint at least 12 key personnel for the Department.”])

26 Board of Equalization: The Government Code prescribes mandatory duties for the Board
27 of Equalization. (Gov. Code, § 15606.) The Board may appoint its secretary and prescribe his or
28 her duties and “may employ such expert and clerical assistants as it deems necessary in the

1 performance of its powers and duties.” (*Id.*, § 15604.)

2 As the foregoing summary shows, the constitutional officers, not the Governor, decide
3 which officers and employees are “necessary for the proper conduct of the office.” (Gov. Code,
4 § 12402 [Controller]; accord: *id.*, § 12101 [Lt. Governor]; *id.*, § 12152, subd. (a) [Secretary of
5 State]; *id.*, § 12302 [Treasurer]; *id.*, § 12502 [Attorney General]; *id.*, § 15604 [Board of
6 Equalization]; Educ. Code, § 33111 [Supt. of Public Inst.] .) The Governor cites no authority
7 that would allow him to supercede the authority of constitutional officers to staff their offices and
8 arrogate this function to himself through furloughs or any other means.

9 It is no answer for the Governor to cite to the emergency authority allowing
10 implementation of work rule changes in limited circumstances without meeting with employee
11 bargaining units. (Gov. Code, § 3516.5.) Nothing in this statutory authority purports to override
12 the independent authority of the constitutional officers. Moreover, these officers are equally
13 capable in exercising their constitutional authority to respond to emergency budget crises through
14 the management of their respective offices.

15 It is also no answer to suggest that the Governor may exercise this power merely because
16 the DPA may negotiate work rule changes with the employee bargaining units. Negotiated
17 changes would present a radically different scenario for the independent constitutional officers
18 than would an emergency decree issued by the Governor. For one thing, negotiated memoranda
19 of understanding must be ratified by the bargaining unit members and then approved by the
20 Legislature. If negotiated furloughs would seriously interfere with the operation of their offices,
21 the elected officers could bring such concerns to the Legislature’s attention. This situation would
22 preserve the checks and balances among the respective executive branch officers as well as the
23 separation of powers among the independent branches of government. By contrast, except for
24 legal challenges, there would be no apparent appeal from an emergency executive order.

25 Moreover, the core duties of the constitutional officers—essential to the functioning of
26 state government—do not allow for the broad furlough power claimed by the Governor. For
27 example, the Attorney General’s Office interacts on a regular basis with the court system, law
28 enforcement, and the general public. As part of this interaction, the deputies employed by the

1 Attorney General must be prepared to appear in court during normal working hours. Since the
2 judicial branch is expressly excluded from the Governor's Executive Order, unrestricted
3 furloughs would not only interfere with essential functions of the Attorney General's Office but
4 could lead to disruption of the judicial system. Moreover, the deputies owe professional duties to
5 their clients—duties that may prove inconsistent with furloughs ordered by the Governor.

6 No less, the State Treasurer operates in a global financial market that leaves little room
7 for furlough days of the kind contemplated by the Governor. In carrying out his duties to
8 safeguard and maximize public funds, the Treasurer must be prepared to respond in real time to
9 events occurring in financial markets, particularly in the highly uncertain economic environment
10 of the present day. Similarly, the Secretary of State must be prepared to comply with the
11 exacting requirements of the Elections Code, including the mandatory deadlines established for
12 everything from ballot pamphlets to vote certification. And the Superintendent of Public
13 Instruction oversees the State Special Schools, which operate on a 24-hour residential basis
14 serving students with special needs. No doubt, each of the constitutional officers face similar
15 concerns.

16 These constitutional and statutory functions, which go to the essence of state
17 constitutional government, have long been recognized as falling within the purview of their
18 respective executive officers. These officers—not the Governor—are charged by the state
19 Constitution with determining how best to carry out these functions within the existing budgetary
20 and statutory framework. Because his Executive Order conflicts with this fundamental ordering
21 of state government, the Governor may not obtain the writ prayed for in this action.

22 **2. THE EXECUTIVE ORDER DOES NOT AFFORD A BASIS ON WHICH TO**
23 **FURLOUGH EMPLOYEES OF THE CONSTITUTIONAL OFFICERS**

24 In addition to the Governor's inherent lack of legal authority to direct the constitutional
25 officers to furlough employees, the Executive Order itself is ineffective to support writ relief in
26 this action. To begin with, the rapidly changing state budget situation has now mooted the
27 Governor's emergency justification for the Order. Further, representations by the Governor's
28 Office that the Order would not apply to the constitutional officers should estop the petitioners

1 from obtaining the requested writ of mandate. And, perhaps most fundamentally, the Order does
2 not apply to the constitutional officers in the first instance. Each of these factors represents an
3 independent basis on which to deny the writ.

4 **A. The New State Budget and the Governor’s Vetoes of Executive Officer**
5 **Appropriations Moot All Justifications for the Executive Order.**

6 In his Executive Order, the Governor rested his legal authority to issue an emergency
7 order on Government Code section 3516.5. (RJN, Exh. 2, p. 2.) Under section 3516.5, “[e]xcept
8 in cases of emergency as provided in this section,” recognized employee organizations must be
9 given written notice and an opportunity to meet and confer in response to proposed changes
10 within the scope of the organization’s representation. (Gov. Code, § 3516.5.) An emergency is
11 present “when the employer determines that a law, rule, resolution, or regulation must be adopted
12 immediately without prior notice or meeting with a recognized employee organization.” (*Ibid.*)

13 The Executive Order left no doubt as to why the Governor believed he had to take
14 emergency steps under the authority of section 3516.5 to address California’s budget crisis. As
15 described by the Governor, the Legislature, twice called into special session to address the
16 budget, “failed . . . to enact any bills to address the State’s significant economic problems” and
17 “failed to effectively address the unprecedented statewide crisis.” (RJN, Exh. 2, p. 1.) The
18 Governor issued his Executive Order only after the second session convened December 1, 2008
19 did not result in a new budget package. (*Ibid.*; see Petition, p. 3, ¶ 10 [Executive Order issued
20 when “a solution acceptable to both the Governor and the Legislature was proving elusive.”].)

21 It is, of course, well known that the budget landscape, while dire, has shifted radically
22 since the issuance of the Executive Order. On February 20, 2009, the Governor signed what his
23 office described as “an historic budget package to solve California’s \$42 billion deficit.” (RJN,
24 Exh. 4 [2.20.09 Press Release].) According to the Governor’s Office, this budget package “takes
25 the necessary steps to reduce spending, bring in new revenue, improve our business climate and
26 create jobs, and make government more efficient.” (*Ibid.*) The budget package includes \$14.9
27 billion in budget deductions and well as “temporary revenue increases” of \$12.5 billion through
28 increases in the state sales tax, vehicle license fee, and personal income tax. (*Ibid.*)

1 Moreover, in approving the new budget, the Governor exercised “his line item veto power
2 to save the state an additional \$957 million from the 2009-10 budget [general fund].” (RJN, Exh.
3 4 [2.20.09 Press Release].) These line item vetoes included “at least a 10 percent reduction to
4 most of the Constitutional Offices.” (*Ibid.*)

5 The passage of the new budget moots the entirety of the Governor’s Executive Order.
6 The justification for the Order—the lack of legislative action that had been sought by the
7 Governor—has been addressed by the new budget package. That is not to say that budget solved
8 all of state’s fiscal problems or that California’s economic problems have disappeared. But the
9 Governor’s justification for the Executive Order was not that a budget solution was less than
10 ideal but that there had been *no* legislative action whatsoever. By contrast, the state now has a
11 budget deal approved by two-thirds of each house of the Legislature and signed by the Governor
12 subject to substantial line item vetoes. Having received the budget package he requested, the
13 Governor should not be heard to demand enforcement of an emergency decree that has been
14 superceded by that very budget.

15 Nothing in Government Code section 3516.5 suggests that the emergency authority
16 conferred therein grants the Governor unlimited and ongoing authority even after the emergency
17 conditions cited in an executive order have ceased to exist. Under the Emergency Services Act⁵⁴
18 (Gov. Code, § 8550, et. seq.), issuance of an emergency proclamation implies the Governor has
19 made the necessary findings to support the proclamation. (*California Correctional Peace*
20 *Officers Ass’n v. Schwarzenegger* (2008) 163 Cal.App.4th 802, 820.) “[I]t is sufficient if the
21 proclamation sets forth circumstances that support the implied finding.” (*Ibid.*) But here, the
22 very circumstances set forth in the Executive Order are no longer present. In effect, the
23 petitioners are asking this Court to issue a writ to enforce an order describing an emergency (i.e.,
24 lack of a budget) that no longer exists. They cite no authority that would allow such open ended
25 executive power.

26
27
28 5. The Executive Order did not purport to order furloughs pursuant to the Governor’s
authority under the Emergency Services Act. Nothing in this brief should be construed as addressing
the scope of that authority in circumstances falling within the scope of the Act.

1 This all leads to one conclusion: the Governor's Order is moot. "[A]lthough a case may
2 originally present an existing controversy, if before decision it has, through act of the parties or
3 other cause, occurring after the commencement of the action, lost that essential character, it
4 becomes a moot case or question which will not be considered by the court." (*Wilson v. Superior*
5 *Court* (1952) 112 Cal.App.2d 450, 453.) "A case becomes moot when a court ruling can have no
6 practical impact or cannot provide the parties with effective relief." (*Simi Corp v. Garamendi*
7 (2003) 109 Cal.App.4th 1496, 1503.)

8 It is not just the Executive Order that is now out of date. The petition itself is premised
9 on the lack of a state budget as triggering the emergency supporting the writ request. (Petition, p.
10 3, ¶ 10; p. 11, ¶ 54 [asserting that petitioners and entire state of California will suffer irreparable
11 injury in light of "the real and immediate statewide fiscal crisis."]; see also Opening Brief, pp. 2-
12 3.) Petitioners no longer have a pleading that even purports to justify writ relief under existing
13 circumstances.

14 Moreover, petitioners' supporting declarations are also out of date. For example, the
15 declaration of Director of Finance Michael Genest addresses the state's financial situation before
16 the February budget package. (See Michael Genest Declaration, ¶¶ 4-9.) Similarly, the
17 Declaration of Alene Shimazu does not account for the Governor's line item vetoes of the
18 Constitutional Officers' budgets. (See Alene Shimazu Declaration, ¶¶ 6-12.)

19 In this context, the Governor's line item vetoes of the constitutional officers' budgets are
20 particularly significant. The Governor's Office acknowledges that the budget cuts instituted by
21 these vetoes typically amount to 10 percent of their budgets. (RJN, Exh. 4 [2.20.09 Press
22 Release].) Even if an emergency still justified furloughs to reduce constitutional officers'
23 budgets following the budget package, the Governor has substituted line item veto cuts in lieu of
24 the allegedly necessary action. Petitioners offer no evidence that there is an emergency requiring
25 *both* the veto cuts *and* the emergency furloughs.

26 The change in circumstances caused by the vetoes is perhaps best illustrated by the
27 Governor's cutbacks in the budget of the Lieutenant Governor. The Governor reduced the
28 Lieutenant Governor's budget from the \$2.778 million approved by the Legislature to \$1.044

1 million, a \$1.734 million cut equivalent to a 62.4 percent reduction. (RJN, Exh. 5, [2.20.09 veto
2 message, p. 1].) In her declaration, Alene Shimazu asserts that furloughs under the Governor's
3 Executive Order would lead to total savings of \$334,632 in the Lieutenant Governor's Office
4 through 2009-2010. (Alene Shimazu Declaration, ¶ 9.) And this declaration was given *before*
5 the Governor approved the budget subject to the vetoes. Left unexplained by the petitioners'
6 papers is what justification would exist for allowing the Governor to impose furloughs in
7 addition to the substantial veto cutbacks, which in the case of the Lieutenant Governor amount to
8 more than five times the purported furlough savings.

9 As shown by data publicly released by the Department of Finance, the same holds true for
10 other constitutional officers. (RJN, Exh. 7 [2009 Budget Act Package — Vetoes].) For example,
11 although Alene Shimazu projects that the furloughs will save \$36.707 million from the Attorney
12 General's budget (Alene Shimazu Declaration, ¶ 8.), the Governor's line item veto removed
13 \$47.896 million from the Attorney General's 2009 budget. (RJN, Exh. 7 [2009 Budget Act
14 Package — Vetoes, item 2].) For the State Controller, Shimazu projects \$10.704 million in
15 furlough savings. (Alene Shimazu Declaration, ¶ 6.) This compares to \$11.108 million in line
16 item veto reductions. (RJN, Exh. 7 [Vetoes, item 3].) For the Superintendent of Public
17 Instruction the comparable numbers are a projected \$10.830 million from furloughs and an actual
18 \$17.369 million from vetoes. (Alene Shimazu Declaration, ¶ 7; RJN, Exh. 7 [Vetoes, item 10].)
19 For the Secretary of State, it is \$1.610 million from the furloughs but \$3.436 million from the
20 vetoes. (Alene Shimazu Declaration, ¶ 10; RJN, Exh. 7 [Vetoes, item 6].)⁶

21 Indeed, the Governor's Office itself has recognized that the budget reductions for the
22 constitutional officers has drastically changed the prevailing circumstances. As represented by
23 the Governor's Office in a statement released on the day the budget was signed:

24 The reduction from most Constitutional Officers' budgets will achieve \$47 million in
25 savings.⁷ This reflects equity among all executive branch agencies for the state employee

26 6. The Treasurer and the Board of Equalization were not spared from these cutbacks. The
27 vetoes slashed the Treasurer's 2009 budget by \$825,000 and the Board's budget by \$13.456 million.

28 7. Presumably, the \$47 million figure in the statement was not meant to refer to the total
reductions imposed on the constitutional officers. The veto reductions in the Department of

1 compensation reductions within the budget through furloughs, elimination of positions,
2 overtime reform and reducing paid state holidays. The Constitutional Officers will have
the flexibility to implement the savings within their own offices.

3 (RJN, Exh. 4, [2.20.09 Press Release].)

4 The Governor's veto message asserted the same thing: the appropriation reduction for
5 most executive officers "reflects the state employee compensation reductions for furloughs,
6 overtime reform and elimination of two state holidays." (RJN, Exh. 5, p. 2 [Attorney General],
7 p. 5 [Controller], p. 9 [Secretary of State], pp. 9-10 [Treasurer], p. 11 [Dept. of Education].) The
8 Governor added, "I am reducing these funds to ensure equity among all executive branch
9 agencies relative to employee compensation levels." (*Ibid.*) With respect to the Board of
10 Equalization, the Governor's message made this point with added detail:

11 I am reducing this appropriation to reflect savings in the Board of Equalization's
12 budget which would normally be expected to occur as a result of the state
13 employee furloughs I ordered, net of the tentative bargaining agreements reached
14 with Units 1, 3, 4, 11, 14, 15, 17, 20 and 21. Because the Board of Equalization
has declined to participate in the furloughs, I am reducing these funds to ensure
equity among all executive branch agencies relative to employee compensation
levels.

15 (*Id.*, p. 7.)

16 Indeed, other actions by the Governor in the wake of the budget package indicate that he
17 no longer views the two-day per month furloughs essential to the state's response to the budget
18 crisis. As has been widely reported, the Governor, through the DPA, has negotiated a 1-day per
19 month furlough with the Service Employees International Union. If the Governor no longer
20 believes that the Executive Order should control employees of this bargaining unit, there is no
21 justification for issuing a writ to compel compliance by the Controller or the other constitutional
22 officers.

23 Thus, the Governor's own public statements and messages have made clear that the line
24 item vetoes were intended as a substitute in lieu of the furloughs that were the subject of the
25 Executive Order.⁸ The Governor has already cut the budgets of the constitutional officers to

26
27 Justice's 2009 budget alone approximately equal this amount. (See RJN, Exh. 7 [Vetoes, item 2].)

28 8. The same sentiment was expressed by the Governor's Finance Director, Michael Genest,
who was quoted as stating, "If we should lose the lawsuit, they're still going to have to give us the

1 achieve parity with the furlough cuts imposed on state agencies under his direct command.
2 Under these circumstances, the petitioners should not be heard to assert that there is a continuing
3 justification for a writ directing the Controller to implement the furloughs with respect to the
4 constitutional officers.

5 **B. The Petitioners Should Be Equitably Estopped From Asserting that**
6 **the Executive Order Applies to the Constitutional Officers.**

7 “The elements of an estoppel claim are: ‘(1) the party to be estopped must be apprised of
8 the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party
9 asserting the estoppel had a right to believe it was so intended; (3) the other party must be
10 ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.’ (*Golden*
11 *Day Schools, Inc. v. Department of Education* (1999) 69 Cal.App.4th 681, 693, quoting *Driscoll*
12 *v. City of Los Angeles* (1967) 67 Cal.2d 297, 305.) “Where the defendant is a government entity,
13 a fifth element requires that the injury to the plaintiff’s personal interest if the government is not
14 estopped outweighs the injury to the public interest if the government is estopped.” (*Ibid.*)

15 Here, Respondent and Intervenors have submitted declarations demonstrating that the
16 Governor’s Office initially represented that the furlough order would not apply to the
17 constitutional officers. During a conference call held January 9, 2009, representatives of the
18 Governor’s Office led senior officials from the other independent executive offices to believe
19 that they were not subject to the furlough order. (See Susan Lange Declaration, ¶¶ 5-6 [Dept. of
20 Educ.]; Collin Wong-Martinusen Declaration, ¶ 4 [SCO]; Caroline Cabias Declaration, ¶¶ 2-3
21 [Bd. of Equal.]; Simeona Pasquil, ¶ 3-4 [Lt. Gov.]; Dora Mejia, ¶ 3 [Sec. of State]; Steve Cooney
22 Declaration, ¶ 4 [Treasurer]; James Humes Declaration, ¶¶ 14 [Attorney General].)

23 Indeed, following the January 9 conference call, State Treasurer Bill Lockyer wrote to
24 David Gilb, DPA Director and a petitioner in this action, to confirm this understanding:

25 As acknowledged by representatives of the Governor’s Office during a phone call
26 today with representatives of the constitutional officers, the Governor’s Executive
27 Order S-16-08 may not be imposed on the constitutional officers. After careful
28 consideration of the Governor’s Executive Order and a thorough review of the
issues by our legal office, the State Treasurer’s Office will not comply with the

cut.” (RJN, Mark Beckington Declaration, ¶ 16; Exh. 15 [2.21.09 Sacramento Bee article].)

1 furlough program provided for in the Executive Order, including the most recent
2 announcement regarding closing the first and third Friday of each month.

3 (Steve Cooney Declaration, Exh. B [1.09.09 letter].)

4 Moreover, the constitutional officers have responded to the budget crisis by implementing
5 significant budget and revenue measures that would likely exceed the savings that the Governor
6 projects would result from the furlough program. (See Susan Lange Declaration, ¶¶ 3-4, 7 [Dept.
7 of Educ.]; Collin Wong-Martinusen Declaration, ¶ 5 [SCO]; Caroline Cabias Declaration, ¶¶ 4-5
8 [Bd. of Equal.]; Liz Houser Declaration, ¶¶ 3-5 [Bd. of Equal.]; Simeona Pasquil, ¶¶ 4-5 [Lt.
9 Gov.]; Dora Mejia, ¶¶ 4-5 [Sec. of State]; Steve Cooney Declaration, ¶¶ 5-8 [Treasurer]; James
10 Humes Declaration, ¶¶ 3-13, 16-19 [Attorney General].) These measures were implemented both
11 before the Executive Order was issued and in response to the representation that furloughs would
12 not apply to the constitutional officers. (*Ibid.*) Further, imposing the furloughs on top of the
13 budget and revenue measures already adopted would adversely impact the ability of the
14 constitutional officers to perform important functions and duties. (See e.g. Susan Lange
15 Declaration, ¶ 7[impact on Dept. of Educ. on employees and State Special Schools]; Caroline
16 Cabias Declaration, ¶¶ 4-5 [impact on Bd. of Educ. revenue-collection resources]; Steve Cooney
17 Declaration, ¶ 8 [impact on operations of State Treasurer]; James Humes Declaration, ¶ 18
18 [impact on Dept. of Justice].)

19 Tellingly, petitioners do not assert that the other constitutional officers are not effectively
20 managing their budgets in response to the state's fiscal emergency. Indeed, they offer no
21 evidence *at all* to suggest that furloughs are needed on grounds that the constitutional officers are
22 failing to respond to the situation or that failure to implement the furloughs will result material
23 budget concerns given the actions already taken by the these officers. (See e.g., Declaration of
24 Michael Genest [no discussion of furloughs or constitutional officer's budget and revenue
25 actions]; Declaration of Alene Shimazu [no comparison of furlough cost savings with actions
26 already taken by constitutional officers].) All of the constitutional officers have outlined or
27 implemented plans to address these serious concerns. (See Susan Lange Declaration, ¶¶ 3-4, 7
28 [Dept. of Educ.]; Collin Wong-Martinusen Declaration, ¶ 5 [SCO]; Caroline Cabias Declaration,

1 ¶¶ 4-5 [Bd. of Equal.]; Liz Houser Declaration, ¶¶ 3-5 [Bd. of Equal.]; Simeona Pasquil, ¶¶ 4-5
2 [Lt. Gov.]; Dora Mejia, ¶¶ 4-5 [Sec. of State]; Steve Cooney Declaration, ¶¶ 5-8 [Treasurer];
3 James Humes Declaration, ¶¶ 3-13, 16-19 [Attorney General].)

4 Therefore, each of the four basic elements of an estoppel claim are present to bar the
5 petitioners from seeking to enforce the Executive Order against the constitutional officers in this
6 proceeding. The Governor's Office was aware of the representations made by its senior staff
7 members and must have known and intended that the other constitutional officers would act in
8 reliance on these representations. Further, the other officers could not have known that the
9 Governor would subsequently reverse course and assert the Executive Order did apply to their
10 operations. And the other officers relied by implementing budget measures on the understanding
11 that the Governor would not assert the authority to impose added furloughs on their employees.

12 In addition, the fifth element for estoppel against a government entity is also present.
13 Plainly, the public interest would not be served by imposing furloughs in contradiction of the
14 representations of the Governor's staff when other budget measures were implemented and the
15 Governor separately imposed cutbacks in the officers' budgets in lieu of the furlough program.
16 (See discussion, *supra*.)

17 In light of this history of representations and reliance, the petitioners cannot justify the
18 imposition of furloughs on the constitutional officers. The petitioners should be estopped from
19 seeking writ or injunctive relief to enforce the Executive Order against the constitutional officers.

20 **C. The Executive Order Does Not By Its Express Terms Direct the**
21 **Constitutional Officers to Furlough Employees.**

22 Beyond its legal infirmity, mootness, and equitable unenforceability, the Executive Order
23 suffers from an additional fatal flaw when applied to the constitutional officers: it is not directed
24 to those officers and it expressly exempts agencies not under the Governor's "direct executive
25 authority."

26 After directing the DPA to implement furloughs and other programs, the Governor
27 recognized that certain state entities were not subject to his order:

28 IT IS REQUESTED that other entities of State government not under my direct
executive authority, including the California Public Utilities Commission, the

1 University of California, the California State University, California Community
2 Colleges, the legislative branch (including Legislative Counsel Bureau), and
3 judicial branch, implement similar or other mitigation measures to achieve budget
and cash savings for the current and next fiscal year.

4 (RJN, Exh. 2, p. 2.)

5 As structured, the Executive Order lists five directives. (RJN, Exh. 2, p. 2.) The first
6 four directives are addressed to the DPA, an entity within the Governor's direct control, but give
7 no hint that they might apply to entities not controlled by the Governor. (*Ibid.*) Tellingly, the
8 fifth directive, imposing restrictions on personal services and consulting contracts, is directed to
9 "all State agencies and departments under my direct executive authority." (*Ibid.*) The paragraph
10 requesting compliance by other agencies merely confirms that the order's scope was not intended
11 to apply to the independent agencies.

12 Thus, by its own terms, the Executive Order may not be reasonably interpreted as
13 applying to the constitutional officers or the Board since none of them are subject to the
14 Governor's direct executive authority. Given what the Executive Order actually says—as
15 opposed to the petitioners' more recent interpretation—it is understandable that both the
16 Governor's staff and the constitutional officers viewed it as being inapplicable.

17 An executive order has been defined as "a formal written directive of the Governor which
18 by interpretation, or specification of detail, directs and guides *subordinate officers* in the
19 enforcement of a particular law." (63 Ops. Cal. Atty. Gen. 583, 584 (1980) emphasis added.)
20 And, in other executive orders, the Governor has repeatedly acknowledged that the constitutional
21 officers are not under his direct authority. For example, the Governor's July 31, 2008 Executive
22 Order addressing the budget crisis expressly acknowledged that the constitutional officers are not
23 under the Governor's direct executive authority. (RJN, Exh. 1, p. 3.) And after the furlough
24 order, the Governor's February 11, 2009 Executive Order establishing the Commission on the
25 21st Century also includes the constitutional officers in this category along with the legislative
26 branch, judicial branch, and local agencies. (RJN, Exh. 3, p. 2.)

27 The Governor cannot have it both ways. If the constitutional officers were not under his
28 direct executive authority last July or last month, then they were not under his direct executive

1 authority in December. The question of whether these officers are under the Governor's
2 authority is one of constitutional magnitude; the answer cannot be changed at the whim of the
3 Governor.

4 Plainly, it would be height of inconsistency for the Governor to repeatedly recognize that
5 the constitutional officers are not subject to his direct authority and then claim that they are
6 subject to the furlough order merely because they were not included among the exempt agencies
7 expressly identified in that order. As it must, the order exempts *all* state entities not under the
8 Governor's direct executive authority *including* those expressly named. This language does not
9 admit of limiting the order to those expressly identified. (See *Ornelas v. Randolph* (1993) 4
10 Cal.4th 1095, 1101 [the word "includes" is ordinarily a term of enlargement rather than
11 limitation.]) Because the constitutional officers are not subject to the Governor's control, and
12 the order excludes all such entities from its scope, the Governor should not be heard to assert that
13 mandates furloughs for their offices.

14 The absence of an order directed to the constitutional officers controls the relief sought by
15 the petitioners. Although the order may give the Governor the authority to furlough employees
16 under his direct control, he may not demand relief against constitutional officers not even
17 purportedly subject to the order. And if there is no order directed to the constitutional officers,
18 he may not direct the Controller to issue paychecks deducting for furlough days for those officers
19 pursuant to that order. It follows that no writ may issue against the Controller or the other
20 constitutional officers.

21 **3. THE ORDERS AND JUDGMENTS IN THE UNION CASES DO NOT DECIDE**
22 **THE FACTUAL AND LEGAL QUESTIONS PRESENTED IN THIS ACTION.**

23 In their Opening Brief, petitioners suggest that this Court's rulings in the cases filed by
24 the employee unions control the petitioners' claims against the Controller. But no such inference
25 may be drawn from the prior rulings and orders issued by this Court.

26 First, as noted above, the Court has already held that its rulings never addressed the
27 application of the Executive Order to the other constitutional officers. The Court's unequivocal
28 language refutes the petitioners' apparent belief that the orders in the union cases may be

1 mechanically applied in this proceeding:

2 The independently elected Constitutional Officers and other elected state-wide
3 officials referenced were not parties to these matters. The petitioners and
4 complaints upon which the Court ruled did not raise any issues regarding the
5 Governor's authority to order furloughs for the employees of those officers and
6 officials. The Court's ruling therefore did not address, or make any ruling
7 regarding, the Governor's authority to order furloughs for the employees of those
8 officers and officials. Accordingly, the Court expresses no views regarding that
9 issue.

7 (RJN, Exh. 12 [2.4.09 minute order].)

8 Second, as reflected by the Court's detailed rulings, the issues presented in the union
9 actions did not concern any of the issues that lie at the heart of the constitutional officers' defense
10 of this action. In their actions, the unions challenged the Governor's authority to impose
11 emergency furloughs under the Dills Act and the MOUs. (RJN, Exh. 8-10.) They also raised
12 issues concerning the Fair Labor Standards Act. (*Id.*, Exh. 8-10.) None of these issues address
13 the constitutional question of the Governor's authority to impose furloughs on the constitutional
14 officers. Nor does do they address the factual questions of mootness, estoppel, or inapplicability
15 to the independent officers.^{9/}

16 In short, the petitioners must independently meet their burden to establish in this action
17 that they are entitled to writ relief. But having failed to establish that the Controller or the other
18 elected officers and officials have failed to carry out any ministerial duties, they are not entitled
19 to the relief requested.

20 **4. PETITIONERS HAVE NOT ESTABLISHED GROUNDS FOR THE ISSUANCE**
21 **OF A PRELIMINARY OR PERMANENT INJUNCTION**

22 In addition to seeking a writ of mandate, petitioners also ask the court to grant injunctive
23 relief prohibiting the Controller from refusing to comply with the Governor's Executive Order.
24 The record shows no basis on which to grant injunctive relief.

25 Petitioners cite boilerplate law governing the issuance of *preliminary* injunctions.
26 (Opening Brief, pp. 27-28.) "In deciding whether to issue a preliminary injunction, a court must
27

28 9. The same is true for the other union cases with judgments or rulings. (See RJN Exh. 13
[Judgment, case no. 34-2009-80000137]; Exh. 14 [Ruling, case no. 34-2009-00322732].)

1 weigh two ‘interrelated’ factors: (1) the likelihood that the moving party will ultimately prevail
2 on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the
3 injunction.” (*Butt v. State of California* (1992) 4 Cal.4th 668, 677-678.) Petitioners only
4 justification for likely success on the merits is the Court’s earlier orders in the union cases.
5 (Opening Brief, p. 28:23-25.) This argument lacks any merit given the Court’s determination
6 that its order did not consider claims against the constitutional officers. As for the equities, the
7 petitioners point to expenditures that would be incurred if the furloughs are not implemented.
8 (*Id.*, p. 28:25-27.) But this ignores the budget reductions that have been implemented by the
9 constitutional officers as well as the Governor’s vetoes in lieu of the furloughs. They also claim
10 that the Controller is interfering with the Governor’s authority as state employer to determine the
11 working hours of state employees. (*Id.*, pp. 28:28-29:1.) Not only does this overstate the
12 Governor’s claim (the Governor is purporting to act under emergency authority not general
13 authority), it begs the question of the Governor’s power when asserted over the employees of
14 other elected officials. Petitioners have not met their burden as to either prong.

15 Moreover, all of the factors discussed above in response to the writ petition also apply to
16 the complaint for injunctive relief. Petitioners cannot establish any likelihood of success in
17 obtaining an injunction directing the Controller to comply with an order that the Governor may
18 not, as a matter of law, impose on the constitutional officers. And the factual flaws in their
19 claim—mootness, estoppel, and inapplicability—defeat this claim as well. These factors also
20 demonstrate that the balance of harms do not weigh in the Governor’s favor.

21 Petitioners’ moving papers leave unclear whether they are seeking a preliminary or
22 permanent injunction. “A permanent injunction is very different from a preliminary injunction.
23 While a preliminary injunction is issued to maintain the status quo, a permanent injunction is a
24 final judgment on the merits.” (6 Witkin, California Procedure (5th ed. 2008) Provisional
25 Remedies, § 288, p. 228.) But the uncertainty inherent in the petitioners’ moving papers matters
26 little. For the same reasons that they have failed to show entitlement to a preliminary injunction,
27 petitioners have failed to establish any basis for the issuance of a permanent injunction.

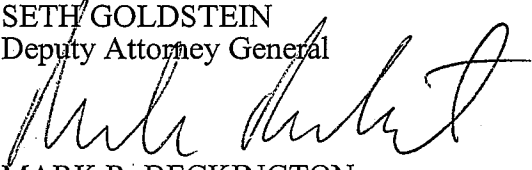
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VI.
CONCLUSION

For the foregoing reasons, Respondent and Intervenors respectfully submit that the petition for writ of mandate and complaint for injunctive and declaratory relief should be denied.

Dated: March 3, 2009

Respectfully submitted,
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