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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF SACRAMENTO

13 DAVID GILB, CALIFORNIA DEPARTMENT )  
14 OF PERSONNEL ADMINISTRATION, )

15 Petitioners/Plaintiffs )

16 v. )

17 JOHN CHIANG, sued herein in his official )  
18 capacity only, OFFICE OF THE STATE )  
CONTROLLER, )

19 Respondents/Defendants. )

Case No.

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PETITION FOR WRIT OF  
MANDATE(CCP § 1085); COMPLAINT  
FOR INJUNCTIVE AND DECLARATORY  
RELIEF**

Date:  
Time:  
Dept:  
Trial Date:

**Exempt from Fees  
(Gov. Code § 6103)**

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1 **INTRODUCTION**

2 In a matter of significant public importance, Petitioners bring this action under Code of Civil  
3 Procedure section 1085 to compel the Controller of the State of California and the Office of State  
4 Controller to refrain from violating the California Constitution and state law. Petitioners seek a writ  
5 of mandate that will prevent the Controller from paying state employee salaries in the absence of a  
6 state budget or other available appropriation, except as minimally required by federal law. The  
7 California Supreme Court has already held the Controller violates the California Constitution and  
8 state law by drawing monies from the state’s treasury to pay state employee salaries in the absence  
9 of a state budget beyond what federal law minimally mandates. (See *White v. Davis* (2003) 30  
10 Cal.4<sup>th</sup> 528.) The Controller has unequivocally announced his intention to refuse to comply with the  
11 requirements of the *White v. Davis* decision to pay wages as minimally required by federal law, and  
12 to refuse the efforts of Petitioners to secure compliance with that decision. If not enjoined from  
13 doing so, the Controller will illegally spend monies from the state treasury for the August 2008 pay  
14 period and beyond by continuing to pay full salaries to state employees in the absence of a state  
15 budget in contravention of the law. In the process, the Controller will have refused to comply with  
16 the lawful directives given him by Petitioners to issue employee pay in compliance with *White v.*  
17 *Davis* and federal law. Accordingly, for the reasons set forth herein, Petitioners respectfully request  
18 that this court grant its petition for writ of mandate against the Controller.

19 **STATEMENT OF FACTS**

20 Petitioner/Plaintiff CALIFORNIA DEPARTMENT OF PERSONNEL ADMINISTRATION  
21 (DPA) is a California state agency statutorily created by the Legislature in 1981 for the purposes of  
22 managing the nonmerit aspects of the state’s personnel system. (Gov. Code § 19815.2.) DPA has  
23 jurisdiction over the state’s financial relationship with its employees, including matters of salary,  
24 layoffs, and nondisciplinary demotions. (*Tirapelle v. Davis* (1993) 20 Cal.App.4<sup>th</sup> 1317, 1322; Gov.  
25 Code §§ 19816, 19825, 19826.) Petitioner/Plaintiff DAVID A. GILB (Gilb) is the Director of DPA,  
26 and sues herein in his official capacity only. Gilb is charged with administering and enforcing the  
27 laws pertaining to personnel, and to perform such other duties that may be prescribed by law. (Gov.  
28 Code §§ 19815.3, 19815.4.)

1 In addition to DPA’s authority over the nonmerit aspects of the state’s personnel system,  
2 Petitioners have authority over state employee compensation and salaries. Under state law, DPA  
3 “succeeds to and is vested with the duties, purposes, responsibilities, and jurisdiction exercised by  
4 the State Personnel Board with respect to the administration of salaries...” (Gov. Code § 19816.)  
5 Moreover, regarding any employee salary paid from state funds, “the salary is subject only to the  
6 approval of [DPA] before it becomes effective and payable...”<sup>1</sup> (Gov. Code § 19825.) Government  
7 Code section 19824 requires the State of California to generally pay its employees out of the General  
8 Fund. DPA therefore has widespread administrative and approval authority over state employee  
9 salaries.

10 Petitioners bring this suit against Respondents/Defendants JOHN CHIANG and the OFFICE  
11 OF STATE CONTROLLER to compel Respondents to refrain from violating the California  
12 Constitution and state law by paying state employees their full salaries in the absence of a budget or  
13 other available appropriation, and to order Respondents to honor Petitioners’ lawfully propagated  
14 pay letter. Respondent/Defendant JOHN CHIANG is the Controller for the State of California. The  
15 Controller is the head of the Office of the Controller. (Gov. Code § 12405.) Respondent/Defendant  
16 OFFICE OF STATE CONTROLLER is a state department charged with auditing the disbursement  
17 of any state money, including the processing of payroll transactions for state employees. (Gov. Code  
18 §§ 12410, 12412.) The authority of the Controller is ministerial in nature, as in this case, when the  
19 amount of an expenditure is set by law or entrusted to the discretion of another agency or branch of  
20 government. (See *Tirapelle v. Davis, supra*, 20 Cal.App.4<sup>th</sup> at 1329.)

21 All state employees, except certain appointees and high level executives, received payment  
22 of their full salaries for the “July pay period” (July 1 through July 30.) Only employees falling  
23 within the parameters of *White v. Davis* will receive a partial payment of their salaries for the  
24 “August pay period” (July 31 through August 31.) This partial payment of wages is only a

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26 <sup>1</sup> There is an exception to this rule, not applicable here, whenever any state court or other  
27 judicial agency is authorized by statute to fix the salary of an employee or officer who is exempt  
28 from civil service under subdivision (b) of Section 4 of Article VII of the California Constitution.  
(Gov. Code § 19825, subd. (b).)

1 temporary condition. Once a budget is adopted, they will receive their full salaries including any  
2 unpaid wages due. (Judd Decl. ¶¶ 21-23.)

3 Article IV, section 12 of the California Constitution provides in part that “[t]he Legislature  
4 shall pass the budget bill by midnight of June 15 of each year.” However, in recent years the timely  
5 adoption of the budget bill in California has proven to be the exception rather than the rule. (See  
6 *White v. Davis, supra*, 30 Cal.4<sup>th</sup> 528, 533.) This year, the Legislature has failed to meet the  
7 constitutional deadline to pass a budget bill by June 15. The budget for Fiscal Year 2007-2008  
8 expired on June 30, 2008, leaving the State of California currently without a state budget. (Genest  
9 Decl. ¶ 5.) When there is no budget for a fiscal year, the State government has no authority to make  
10 a wide variety of payments. These include public-purpose payments such as payments to vendors  
11 and contractors for goods and services chargeable to Fiscal Year 2008-2009; apportionments of  
12 highway user taxes to the state, cities and counties for highway and road improvement projects;  
13 grants to higher education students; funds for the operation of the trial courts, the University of  
14 California, California State University system, and the California Community College system;  
15 payments for non-federally mandated social services programs such as Community Care Licensing,  
16 Adult Protective Services, State Only Foster Care, State Only Adoptions Assistance, and Cash  
17 Assistance Program for Immigrants; and tax relief payments to low income senior and disabled  
18 persons. (Genest Decl. ¶ 6.) Similarly, when there is no budget for a fiscal year, some payments  
19 required by law must continue without consideration of the state’s fiscal condition. This has resulted  
20 in the commitment of approximately \$487 million above the expenditure adjustments proposed by  
21 the Governor in his May Revision of the proposed Fiscal Year 2008-2009 budget. (Genest Decl. ¶  
22 7.) The Department of Finance (DOF) currently projects it is likely the State will have insufficient  
23 cash attributable to the General Fund to meet the State’s obligations, including its obligations to  
24 bondholders, in either September or October, 2008. (Genest Decl. ¶ 8.) Thus, unless a payment is  
25 self-executing under the California Constitution or there is a continuous appropriation, the State has  
26 no authority to pay state employee salaries where it does not have an appropriation (in this case, a  
27 state budget). (*White v. Davis, supra* at 533.)

28 ///

1 California law prohibits the Controller from paying state employees their salaries in the  
2 absence of a budget or other available appropriation. Article XVI, section 7 of the California  
3 Constitution provides, “money may be drawn from the treasury only through an appropriation made  
4 by law and upon a Controller’s duly drawn warrant.” Government Code section 12440 provides,  
5 “the Controller shall draw warrants on the Treasurer for the payment of money directed by law to be  
6 paid out of the State treasury; but a warrant shall not be drawn unless authorized by law, and unless,  
7 except for refunds authorized by Section 13144, unexhausted specific appropriations provided by  
8 law are available to meet it.” In 2003, the California Supreme Court cited these and other authorities  
9 in support of its seminal decision addressing the State’s payment of employee salaries without a  
10 budget. (See *White v. Davis*, *supra*, 30 Cal.4<sup>th</sup> 528.)

11 On July 31, 2008, Governor Schwarzenegger issued an Executive Order (Executive Order S-  
12 09-08) directing the State of California to take various emergency measures in light of the late  
13 budget for Fiscal Year 2008-2009. (Gilb Decl. ¶ 2, Exh. A.) In that Executive Order, the Governor  
14 directed state agencies and departments “to cease and desist authorization of all overtime for  
15 employees effective July 31, 2008,” except for “services and functions of state government deemed  
16 critical and exempt by the Order and emergent situations to preserve and protect human life and  
17 safety.” (Gilb Decl. ¶ 3, Exh. A.) The Governor ordered the DOF and the DPA to work with the  
18 Controller “to develop and implement the necessary mechanisms, including but not limited to pay  
19 letters and computer programs, to comply with the California Supreme Court’s *White v. Davis*  
20 opinion to pay federal minimum wage to those nonexempt Fair Labor Standards Act (FLSA)  
21 employees who did not work any overtime.” (Gilb Decl. ¶ 4, Exh. A.) The Executive Order further  
22 directed “that the necessary mechanisms to ensure compliance with the *White v. Davis* opinion must  
23 be in place to be effective for the August 2008 payroll.” (Gilb Decl. ¶ 5, Exh. A.) Finally, the  
24 Executive Order also directed “that this Order shall remain in effect until such time as both a Fiscal  
25 Year 2008-2009 Budget is adopted and the Director of the DOF confirms an adequate cash balance  
26 exists to meet the State’s fiscal operations.” (Gilb Decl. ¶ 6, Exh. A.)

27 ///

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1           The Controller declared his intention to refuse to comply the Executive Order in a July 31,  
2 2008 letter to the Governor. Specifically, the Controller stated without equivocation, “I will not  
3 comply with the Order.” (Gilb Decl. ¶ 7, Exh. B.) The Controller further stated he intended to  
4 continue to provide full pay to all state employees irrespective of an available appropriation, and  
5 notwithstanding the *White v. Davis* decision. (Gilb Decl. ¶ 7, Exh. B.)

6           DPA issued a pay letter (including a cover letter) on August 5, 2008 providing the Controller  
7 with the necessary instructions to comply with the requirements of *White v. Davis* to pay wages as  
8 minimally required by federal law, the California Constitution, and state law. (Gilb Decl. ¶ 9, Exh.  
9 C.) A pay letter is the historical administrative document issued by DPA (and its predecessor, the  
10 California State Personnel Board) to the Controller that “triggers” the Controller’s time to perform  
11 his ministerial duties regarding the payment of employee salaries. (Judd Decl. ¶¶ 4-5.) The Pay  
12 Letter instructed the Controller to pay nonexempt state employees (Workweek Group 2) the federal  
13 minimum wage of \$6.55 per hour, effective July 31, 2008. (Gilb Decl. ¶ 10, Exh. C.) The pay letter  
14 also included a list of departments and programs that are not subject to the overtime prohibition in  
15 the Executive Order due to the critical nature of the work performed by these departments and  
16 programs. (Gilb Decl. ¶ 11, Exh. C.) The pay letters excluded these departments and programs  
17 because there is a reasonable expectation that these nonexempt FLSA state employees will work  
18 overtime. (Gilb Decl. ¶ 11, Exh. C.)

19           The DPA Pay Letter also provided the Controller with special salary payment instructions for  
20 all Executive, Administrative, and Professional (EAP) (Workweek Group E) employees covered by  
21 the FLSA. (Gilb Decl. ¶ 10, Exh. C.) DPA instructed the Controller to pay these employees  
22 \$455.00 per week, which represents the minimum salary required by the FLSA in order to preserve  
23 the EAP exemption. (Gilb Decl. ¶10, Exh. C.) The DPA Pay Letter also provided the Controller  
24 with special salary payment instructions for employees covered by the Code of Federal Regulation  
25 sections 541.303 and 541.304 (Workweek Group SE). (Gilb Decl. ¶ 10, Exh. C.) DPA instructed  
26 the Controller to delay payment of all wages to these employees because these employees are  
27 exempt from the FLSA salary basis test and are not subject to any minimum salary requirements  
28 under the FLSA. (Gilb Decl. ¶ 10, Exh. C.)

1 On or about August 7, 2008, DPA met with the Controller's office to discuss implementation  
2 of Pay Letter 08-23. Also present at the meeting were representatives from the DOF, and the Office  
3 of the State Chief of Information Officer (OCIO). (Chapman Decl. ¶ 5; Judd Decl. ¶ 12.) During  
4 the meeting Julie Chapman, Deputy Director of Labor Relations for DPA and Jerri Judd, Personnel  
5 Program Manager in the Labor Relations Division of DPA presented three viable options for  
6 implementing Pay Letter 08-23. (Judd Decl. ¶¶ 12-19.) The representatives from the Controller's  
7 Office did not make any suggestions or present any additional options that would assist them in  
8 complying with the California Supreme Court's decision in *White v. Davis*. (Chapman Decl. ¶ 28;  
9 Judd Decl. ¶ 20.)

10 On or about August 8, 2008 DPA sent a memorandum to the Office of the State Controller  
11 documenting the prior day's meeting and requesting a response on whether or not any of the three  
12 options presented by DPA were viable from the Controller's perspective. (Chapman Decl. ¶ 31.)  
13 Specifically DPA asked that the Controller provide a response by 12:00 PM on Monday August 11,  
14 2008. (Chapman Decl. ¶ 31.)

15 On or about August 11, 2008, DPA received a response from Don Scheppmann. The  
16 Controller's August 11, 2008 letter is consistent with his prior statements indicating he will not  
17 comply with his legal duties under *White v. Davis* (2003) 30 Cal.4th 528. Instead he purports to  
18 identify a number of scenarios that he considers obstacles to his ability to comply with *White v.*  
19 *Davis*. The August 11, 2008 letter suggests the Controller has taken virtually no action since 2003 to  
20 address the alleged obstacles in implementing salary payment consistent with *White v. Davis*.  
21 Assuming the obstacles raised in the August 11, 2008 letter have some validity (a fact DPA disputes)  
22 action is needed by the court to compel the Controller to fulfill his responsibility to comply with the  
23 law state law, the California Constitution and *White v. Davis*.

24 Thereafter, on August 11, 2008, Petitioners filed the instant action in this court to compel  
25 Respondents to refrain from violating the California Constitution and state law by paying state  
26 employees their full salaries in the absence of a budget or other available appropriation, and to  
27 compel Respondents to honor Petitioners' lawfully propagated pay letter implementing the payment  
28 of state employee salaries consistent with the requirements of *White v. Davis* to pay wages as

1 minimally required by federal law. For the reasons set forth herein, Petitioners respectfully request  
2 that this court grant to Petitioners all of the relief requested in this action.

3 **ARGUMENT**

4 **I. A PETITION FOR WRIT OF MANDATE MUST ISSUE TO COMPEL THE**  
5 **CONTROLLER TO REFRAIN FROM VIOLATING STATE LAW.**

6 Petitioners request this court issue a writ of mandate directing the State Controller to  
7 refrain from violating state law, as set forth by the California Supreme Court in *White v. Davis*,  
8 *supra*, 30 Cal.4<sup>th</sup> 528, by continuing to pay state employees full salaries in the absence of a  
9 budget or other available appropriation, except as minimally required by federal law. In  
10 particular, Petitioners seek a writ of mandate under Code of Civil Procedure section 1085(a),  
11 which provides as follows:

12 “A writ of mandate may be issued by any court to any inferior tribunal,  
13 corporation, board, or person, to compel the performance of an act  
14 which the law specially enjoins, as a duty resulting from an office,  
15 trust, or station, or to compel the admission of a party to the use and  
16 enjoyment of a right or office to which the party is entitled, and from  
17 which the party is unlawfully precluded by such inferior tribunal,  
18 corporation, board, or person.” (Civ. Proc. § 1085, subd. (a).)

17 A writ of mandate lies to compel a public official to perform an official act required by law.  
18 (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442; *Environmental Protection*  
19 *Information Center, Inc. v. Maxxam Corp.* (1992) 4 Cal.App.4<sup>th</sup> 1373, 1380.) An official's  
20 affirmative obligation to perform also encompasses the corollary obligation not to perform the duty  
21 in violation of the law. (*Horwath v. City of E. Palo Alto* (1989), 212 Cal. App.3d 766, 773 fn. 8.)  
22 Courts have labeled the writ restraining such unlawful performance ‘prohibitory mandate,’ which is  
23 what Petitioners seek in this case. (*Ibid.*)

24 In general, a writ of mandate must issue when there is no plain, speedy, and adequate  
25 alternative remedy; the respondent has a duty to perform; and the petitioner has a clear and  
26 beneficial right to performance. (*Payne v. Superior Court* (1976) 17 Cal.3d 908, 925.) In this case,  
27 Petitioners satisfy all of the elements for issuance for a writ of mandate. As set forth herein,  
28 Petitioners respectfully request that the court issue a writ of mandate in this case to prevent the

1 Controller from paying state employee their full and regular salaries during a budget impasse in  
2 violation of state law.

3 **A. The Controller Has A Legal Duty To Refrain From Violating State Law,**  
4 **As Set Forth By The California Supreme Court in *White v. Davis*.**

5 The issue of whether the State of California has the authority to pay state employees their full  
6 salary in the absence of a budget has already been squarely litigated and decided by the California  
7 Supreme Court. In *White v. Davis, supra*, 30 Cal.4<sup>th</sup> 528, a taxpayers' organization, in reaction to  
8 state budget impasses that delayed passage of two yearly state budget bills, brought two successive  
9 actions seeking injunctive and declaratory relief to prevent the Controller from making payment  
10 from the treasury until such budget bills were passed. (*Id.*, at 533.) In the action filed in 1998, the  
11 trial court issued a preliminary injunction broadly barring the Controller from making payments  
12 from the state treasury in the absence of passage of the budget bill or an emergency appropriation.  
13 (*Ibid.*) After briefing and argument, the Court of Appeal ultimately concluded the Controller may  
14 authorize the payment of state funds during a budget impasse in a variety of circumstances,  
15 including (1) when payment is authorized by a continuing appropriation enacted by the Legislature,  
16 (2) when payment is authorized by a self-executing provision of the California Constitution, or (3)  
17 when payment is mandated by federal law. (*Ibid.*) The Court of Appeal reversed the trial court's  
18 judgment granting a preliminary injunction insofar as the injunction applied to these categories of  
19 payments, but otherwise affirmed the order. (*Ibid.*)

20 The Controller and a number of state employee unions that had intervened in the lower court  
21 actions filed petitions for review in the California Supreme Court. In particular, the state employee  
22 interveners specifically challenged the Court of Appeal's conclusions regarding the payment of state  
23 employee salaries during a budget impasse, contending that the Court of Appeal erred in determining  
24 that state law did not authorize the Controller to pay all state employees their full and regular salaries  
25 in the absence of a duly enacted budget bill. (*Id.*, at 534.) The state employee interveners also  
26 contended that the Court of Appeal erred in concluding that the FLSA required the Controller,  
27 during a budget impasse, to pay state employees covered by that law only at the minimum wage rate  
28 for hours worked during the impasse. (*Ibid.*) The California Supreme Court granted review, in part,

1 specifically to address this substantive question of whether the Controller is authorized to pay state  
2 employees their full and regular salaries during a budget impasse. (*Ibid.*)

3 In *White v. Davis, supra*, the California Supreme Court held that under applicable California  
4 statutes, state employees who work during a budget impasse are protected by the contract clauses of  
5 the federal and state Constitutions and are entitled *ultimate* payment of their full salary for work  
6 performed during the budget impasse. (*Id.*, at 535.) However, the California Supreme Court also  
7 determined that the Court of Appeal was correct in determining: (1) that state employees do not have  
8 a contractual right actually to receive the payment of salary prior to the enactment of an applicable  
9 appropriation; (2) the State Controller is not authorized under state law to pay those salaries prior to  
10 such an appropriation; and (3) the Controller is required, notwithstanding a budget impasse and the  
11 limitations imposed by state law, to timely pay those state employees who are subject to the  
12 minimum wage and overtime compensation provisions of the FLSA, the wages required by that act.  
13 (*Ibid.*) Thus, pursuant to *White v. Davis*, the Office of State Controller is prohibited by state law  
14 from paying state employee salaries in the absence of a state budget or other available appropriation,  
15 except as minimally required by the FLSA<sup>2</sup>.

16 In *White v. Davis, supra*, the California Supreme Court carefully explained its rationale that  
17 state law does not authorize the Controller to disburse state funds to state employees until an  
18 applicable appropriation has been enacted. The Court explained as an initial matter that Article XVI,  
19 section 7 of the California Constitution provides, “money may be drawn from the treasury only  
20 through an appropriation made by law and upon a Controller’s duly drawn warrant.” (*Id.*, at 566.)  
21 The Court also noted that, consistent with Article XVI, section 7 of the California Constitution,  
22 Government Code section 12440 provides “the Controller shall draw warrants on the Treasurer for  
23 the payment of money directed by law to be paid out of the State treasury; but a warrant shall not be  
24 drawn unless authorized by law, and unless, except for refunds authorized by Section 13144,  
25 unexhausted specific appropriations provided by law are available to meet it.” (*Id.*, at 567.) Further,  
26

---

27 <sup>2</sup> The California Supreme Court in *White v. Davis* only addressed what to pay nonexempt  
28 FLSA employees during a budget impasse. However, the holding equally applies to all state  
employees and requires the State to pay wages as minimally required by the FLSA.

1 the Court referenced Government Code section 9610, which provides, “the fixing or authorizing the  
2 fixing of the salary of a State officer or employee is not intended to and does not constitute an  
3 appropriation of money for the payment of the salary. The salary shall be paid only in the event that  
4 monies are made available by another provision of law.” (*Ibid.*) The Court concluded that “the  
5 constitutional and statutory provisions set forth above clearly require that some applicable  
6 appropriation be available before a state employee’s salary actually may be paid from public funds.”  
7 (*Ibid.*)

8 The California Supreme Court also discussed the application of Government Code sections  
9 1231 and 1231.1 in the absence of a state budget. The Court noted that, while section 1231 provides  
10 an employee’s salary shall remain in effect during the budget impasse, section 1231 does not  
11 indicate a legislative intent to authorize the actual payment of salary to employees prior to the  
12 passage of a budget act that includes a requisite appropriation of funds for such salaries. (*Id.*, at  
13 568.) The Court determined that if Section 1231 afforded employees the right actually to receive  
14 their full pay during a budget impasse. (*Ibid.*) Accordingly, the Court concluded “the employment  
15 rights of state employees must be viewed as including a condition that the actual payment of an  
16 employee’s salary is dependent upon the existence of an available appropriation.” (*Id.*, at 569.)

17 The Court also explained “so as not to leave the Controller without guidance on the issue,”  
18 the rationale behind its conclusion the FLSA does not require payment of full employee salaries  
19 above and beyond the federal minimum wage to nonexempt employees, except in the situation in  
20 which the employer authorizes overtime. (*Id.*, at 575.) The Court reviewed federal law interpreting  
21 the FLSA, including *Biggs v. Wilson* (9<sup>th</sup> Cir. 1993) 1 F.3d 1537, and determined an employer  
22 complies with the FLSA so long as it pays those employees who are subject to the FLSA at the  
23 minimum wage rate on payday. (*Id.*, at 576.) The Court determined that federal law does not  
24 require an employer to pay employees their regular wage on payday, unless the employees work  
25 authorized overtime. (*Ibid.*) The Court held that under federal law “the state is required to comply  
26 with the FLSA during a budget impasse, but that the state satisfies the requirements of the FLSA by  
27 paying nonexempt state employees (who do not work overtime) at the minimum wage rate for the  
28 straight-time hours (that is, non-overtime hours) worked by those employees during the full pay

1 period. *For nonexempt employees who do not work overtime, the FLSA does not require the prompt*  
2 *payment of full salary.” (Id., at 577.) (Italics added.)*

3 Finally, the Court also addressed the Controller’s claim that its “negative payroll” system  
4 rendered it infeasible or impossible for the Controller to pay only the minimum wage compensation  
5 to state employees, or to segregate those employees who worked overtime from those who did not  
6 work overtime, and to make such determinations quickly enough to comply with the FLSA. (*Id.*, at  
7 578.) The Court did not evaluate the Controller’s factual claim of impossibility but remarked that,  
8 even if it is administratively infeasible, “we are somewhat skeptical of the contention that the state  
9 would be found to have violated the FLSA if, during a budget impasse, the state (1) pays full regular  
10 wages and overtime compensation to those nonexempt employees who it reasonably anticipates will  
11 work overtime during a given pay period, (2) pays minimum wage rate for all straight time hours an  
12 employee is scheduled to work during the pay period to those nonexempt employees who it  
13 reasonably anticipates will not work overtime during a given pay period, and (3) in the following  
14 pay period, pays employees all additional sums that are due under the FLSA for the prior pay period  
15 based on information the state obtains through reporting forms it collects on or immediately  
16 following the preceding payday.” (*Id.*, at 578-579.) Thus, the Court has already provided the  
17 Controller with a blueprint demonstrating how the Controller may overcome any administrative  
18 difficulties in carrying out the Court’s directives.

19 The California Supreme Court in *White v Davis* directly addressed the dispute at the core of  
20 this litigation. Under the Court’s ruling, the Controller has no authority to pay state employees their  
21 full salaries in the absence of a budget or other available appropriation, except as minimally required  
22 by the FLSA. Thus, the Controller is prohibited from paying “nonexempt” state employees more  
23 than the federal minimum wage, unless those employees worked authorized overtime. The  
24 Controller is prohibited from paying employees in workweek group E more than \$455 per week.  
25 Finally, the Controller is prohibited from paying state employees in Workweek Group SE and all  
26 other employees not covered by the FLSA any wages at all in the absence of a budget or other  
27 available appropriation.

28 ///

1           **B.       A Writ Of Mandate Must Issue To Prevent The Controller From Violating State**  
2           **Law Because Petitioners Have No Plain, Speedy, And Adequate Alternative**  
3           **Remedy To Such Relief.**

4           A writ of mandate must issue in this case because the Controller has stated he will disregard  
5 the California Supreme Court decision in *White v. Davis*, and not implement the DPA Pay Letter,  
6 which administers employee salaries in accordance with the law.

7           The Governor issued an executive order on July 31, 2008 directing DOF and DPA “to  
8 develop and implement the necessary mechanisms, including but not limited to pay letters and  
9 computer programs, to comply with the California Supreme Court’s decision in *White v. Davis* to  
10 pay federal minimum wage to those nonexempt FLSA employees who did not work any overtime.”  
11 (Gilb. Decl. ¶ 4, Exh. A.) However, the Controller has stated unequivocally, “I will not comply with  
12 the Order.” (Gilb. Decl. ¶ 7, Exh. B.)

13           The Controller also announced his intent to disregard DPA’s implementing Pay Letter.  
14 Petitioner’s August 5, 2008 Pay Letter provided the Controller with the necessary instructions to  
15 comply with the requirements of *White v. Davis* to pay wages as minimally required by federal law,  
16 the California Constitution and applicable state law. (Gilb Decl. ¶ 9, Exh. C.) The Pay Letter  
17 requires the Controller to refrain from paying state employees in the absence of a budget, except as  
18 minimally required by federal law. (Gilb Decl. ¶ 9, Exh. C.) However, the Controller refuses to  
19 comply with this instruction as well.

20           If the court does not issue a writ of mandate, Petitioners will be left without a plain, speedy,  
21 and adequate alternative remedy. (Gilb Decl. ¶¶ 17-18.) The Controller fully intends to disregard  
22 *White v. Davis*, and DPA’s Pay Letter. If this court does not prevent the Controller from violating  
23 the law, the Controller will unlawfully issue full salary to all state employees in the August 2008 pay  
24 period and beyond, irrespective of a state budget or other available appropriation. (Gilb Decl. ¶ 17.)  
25 Once the Controller violates the law, that violation will have occurred and cannot be reversed. (Gilb  
26 Decl. ¶ 17.) Therefore, Petitioners seek a writ of mandate to prevent the Controller from violating  
27 the California Constitution and state law.

28       ///

1           **C.       Petitioners Have A Beneficial Right To Performance In This Case.**

2           The Controller does not have the right to refuse to comply with Petitioners’ lawful  
3 instruction. The California Legislature vested DPA with authority over state employee  
4 compensation and salaries. Under state law, DPA “succeeds to and is *vested with the duties,*  
5 *purposes, responsibilities, and jurisdiction* exercised by the State Personnel Board *with respect to*  
6 *the administration of salaries...*” (Gov. Code § 19816.) Moreover, regarding any employee salary  
7 paid from state funds, “*the salary is subject only to the approval of [DPA] before it becomes*  
8 *effective and payable...*” (Gov. Code § 19825.) In addition, the law charges that DPA’s director  
9 “shall *administer and enforce* the laws pertaining to personnel,” and “perform such other duties as  
10 may be prescribed by law, and such other administrative duties as have by other provisions of law  
11 been previously imposed. (Gov. Code § 19815.4.) (Emphasis added.)

12           The California Court of Appeal in *Tirapelle v. Davis, supra*, 20 Cal.App.4<sup>th</sup> 1317 rejected a  
13 similar act of noncompliance by the Controller to the authority of DPA. In *Tirapelle*, in the midst of  
14 the budget crisis in July 1991, DPA announced an immediate general salary decrease for various  
15 state managers and other employees excluded from collective bargaining. (*Id.*, at 1326.) However,  
16 in September 1991, after initially complying with the DPA directive, the Controller announced he  
17 would cease implementing the managerial compensation reductions, and would repay managerial  
18 employees for sums which had previously been withheld. (*Id.*, at 1327.) DPA petitioned for a writ  
19 of mandate compelling the Controller to implement its salary reduction decisions, and the trial court  
20 granted the relief sought by DPA. (*Ibid.*)

21           The Court of Appeal affirmed the trial court’s decision to grant the writ of mandate against  
22 the Controller. In the decision, the appellate court cited long-standing authority, explaining that  
23 “although in some circumstances the Controller may have discretionary duties, ‘...the greater part of  
24 the duties devolved upon him by law are of a ministerial character...(h)is duties are enumerated and  
25 defined by law, and they are, as we have said, generally of a purely ministerial character.’ (*Id.*, at  
26 1331 citing *McCauley v. Brooks* (1860) 16 Cal.11, 55.) Thus, according to the appellate court,  
27 “since the Controller has not been given powers of supervision over the DPA nor the power to  
28 review its decisions, the extent of his authority to disregard orders of the DPA in the performance of

1 his audit function is limited by fundamental principles of jurisdiction.” (*Id.*, at 1333.) The appellate  
2 court therefore concluded “that the Controller’s duty to audit claims against the Treasury...does not  
3 include the power to review and approve or reject decisions of a department vested by the  
4 Legislature with authority over expenditures. Where a department or agency acts within the  
5 authority delegated to it by the Legislature, the Controller *must defer* to the agency or department  
6 and leave review of the decision to the courts and/or the Legislature.” (*Id.*, at 1335.) (Emphasis  
7 added.)

8 The Legislature delegated to DPA “jurisdiction over the state’s financial relationship with its  
9 employees, including matters of salary....” (*Tirapelle v. Davis*, 20 Cal.App.4<sup>th</sup> *supra* at 1322, citing  
10 Gov. Code § 19816.) The Controller must defer to the jurisdiction of DPA in these circumstances,  
11 and cannot lawfully refuse to comply with the DPA’s pay letter concerning a matter squarely within  
12 DPA’s scope of authority. If the Controller is allowed to decide whether to comply or not comply  
13 with the lawful instructions that properly fall within the jurisdiction of another agency, then the  
14 governmental process becomes dysfunctional and the rule of law becomes meaningless. (See  
15 *Tirapelle v. Davis*, *supra*, 20 Cal.App.4<sup>th</sup> 1317, 1331.) As the California Supreme Court described  
16 in one of the state’s earliest decisions, if every state officer always maintains independent authority  
17 to second-guess the decision of another state officer, “the administration of the government would  
18 for all useful purposes be dissolved...if this doctrine can be maintained, the government must cease  
19 to be one of law, and must sink into merited contempt for its weakness and inefficiency.”  
20 (*McCauley v. Brooks* (1860) 16 Cal. 11, 61, cited in *Tirapelle v. Davis*, 20 Cal.App.4<sup>th</sup> *supra* at  
21 1331.) Accordingly, Petitioners have a beneficial right to performance in this case, which the  
22 Controller may not lawfully refuse.

23 **II. AN INJUNCTION MUST ISSUE TO COMPEL THE CONTROLLER TO REFRAIN**  
24 **FROM VIOLATING STATE LAW BEGINNING IN AUGUST 2008**

25 Code of Civil Procedure section 526(a) provides:

26 (a) An injunction may be granted in the following cases:

27 (1) When it appears by the complaint that the plaintiff is entitled to  
28 the relief demanded, and the relief, or any part thereof, consists in  
restraining the commission or continuance of the act complained of,  
either for a limited period or perpetually.

1 (2) When it appears by the complaint or affidavits that the  
2 commission or continuance of some act during the litigation would  
3 produce waste, or great or irreparable injury, to a party to the action.

4 (3) When it appears, during the litigation, that a party to the action is  
5 doing, or threatens, or is about to do, or is procuring or suffering to be  
6 done, some act in violation of the rights of another party to the action  
7 respecting the subject of the action, and tending to render the judgment  
8 ineffectual.

9 (4) When pecuniary compensation would not afford adequate relief.

10 (5) Where it would be extremely difficult to ascertain the amount of  
11 compensation which would afford adequate relief.

12 (6) Where the restraint is necessary to prevent a multiplicity of  
13 judicial proceedings.

14 (7) Where the obligation arises from a trust.

15 . . . .

16 Injunction is an appropriate remedy in this case. Petitioners seek to enjoin the Controller, a  
17 public official, from paying state workers full salaries without authority and contrary to the  
18 California Constitution and state law, beginning with the August 2008 pay period and continuing  
19 thereafter until the state has adopted a budget. A public entity can be enjoined from taking official  
20 action in violation of the law. (See *Environmental Protection Information Center, Inc. v. Maxxam*  
21 *Corp.* (1992) 4 Cal.App.4th 1373, 1381.)

22 **A. A Preliminary Injunction Must Issue To Prevent The Controller From Issuing**  
23 **Unlawful Payments Pending A Hearing On The Merits Of The Writ Petition.**

24 In deciding whether to issue a preliminary injunction, a court must weigh two  
25 “interrelated” factors: (1) the likelihood that the moving party will ultimately prevail on the  
26 merits and (2) the relative interim harm to the parties from issuance or non issuance of the  
27 injunction. (*Butt v. State of California* (1992) 4 Cal.4<sup>th</sup> 668, 677-678; *Common Cause v. Board*  
28 *of Supervisors* (1989) 49 Cal.3d 432, 441-442.) The trial court’s determination must be guided  
by a “mix” of the potential-merit and interim-harm factors; the greater plaintiff’s showing on  
one, the less must be shown on the other to support an injunction.” (*Butt v. State*, 4 Cal.4th *supra*  
at 678.) If the party seeking the injunction can make a sufficiently strong showing of likelihood  
of success on the merits, the trial court has discretion to issue the injunction notwithstanding that  
party’s inability to show that the balance of harm tips in its favor. (*Common Cause v. Board of*

1 *Supervisors*, 49 Cal.3d 432, *supra* at 447; *King v. Meese* (1987) 43 Cal.3d 1217, 1227-1228;  
2 *Pleasant Hill Bayshore Disposal v. Chip-It* (2001) 91 Cal.App.4th 696.)

3 **1. There is a high probability DPA will ultimately prevail on the**  
4 **merits of this case.**

5 **a. The Supreme Court has previously decided the issue in**  
6 **this Case.**

7 Under the doctrine of stare decisis, the lower court is bound by the precedent set by the  
8 California Supreme Court’s decision in *White v. Davis*. (*Auto Equity Sales, Inc. v. Superior Court of*  
9 *Santa Clara County* (1962), 57 Cal.2d 450, 456.)

10 In *White v. Davis*, the California Supreme Court held the State Controller has no authority to  
11 pay state employees full salaries in the absence of a budget unless: (1) payment is authorized by a  
12 continuing legislative appropriation; (2) payment is authorized by a self-executing provision of the  
13 California Constitution; or (3) payment is made pursuant to federal law. (*White v. Davis, supra*, 30  
14 Cal. 4<sup>th</sup> 528.)

15 The Supreme Court concluded, “thus, state law contractually guarantees that state employees  
16 will receive their full salary for work performed during a budget impasse, but state law does not  
17 authorize the Controller to disburse state funds to employees until an applicable appropriation has  
18 been enacted. (*Id.*, at 535.)

19 **b. The Controller has a legal duty to adhere to the rule**  
20 **of law and the California Constitution.**

21 An official’s affirmative obligation to perform encompasses a corollary obligation not to  
22 perform the duty in violation of the law. (*Horwath v. City of East Palo Alto, supra*, 212 Cal.App.3d  
23 766, 773 (fn. 8).)

24 The California Constitution, Article XVI, section 7, provides, “Money may be drawn from  
25 the Treasury only through an appropriation made by law and upon a Controller’s duly drawn  
26 warrant.”

27 ///

28 ///

1 Harmonizing the California Constitution and other state and federal laws, the California  
2 Supreme Court in *White v. Davis* held the Controller was not authorized to disburse full salaries for  
3 work performed during a budget impasse to state employees until an applicable appropriation is  
4 made. (*White v. Davis, supra*, 30 Cal. 4<sup>th</sup> 528, 535.) The Court also held the Controller is required to  
5 pay state employees who are subject to the minimum wage and overtime provisions of the FLSA, the  
6 wages required by that act. (*Ibid.*)

7 The Controller does not have discretion as to the issuance of warrants for appropriations for  
8 the public service. (*Tirapelle v. Davis, supra*, 20 Cal.App.4<sup>th</sup> 1317, 1330.) The Controller's  
9 authority is ministerial when the amount of the expenditure is set by law or entrusted to the  
10 discretion of another agency or branch of government. (*Id.*, at 1329).

11 The DPA is the governmental entity the Legislature vested with jurisdiction over the state's  
12 financial relationship with its employees in relation to matters of salary, layoffs, and non-  
13 disciplinary demotions. (*Id.*, at 1322, citing Gov. Code §§ 19816, 19816.2, 19825, and 19826).

14 It is highly likely Petitioners will succeed on the merits because there is no law that  
15 authorizes the Controller to disregard his ministerial duty to comply with the California Constitution  
16 and state law.

17 The instant litigation seeks to implement the Court's decision in *White v. Davis* by  
18 preventing the Controller from unlawfully continuing to pay state employees their full salaries  
19 during a budget impasse, when there is no appropriation for such salaries, or when such salaries are  
20 not payable consistent with the decision in *White v. Davis*.

21 Therefore, there is a high likelihood Petitioners will ultimately prevail on the merits of this  
22 case seeking to compel the Controller to comply with existing judicial precedent. (*Ibid.*)

23 **c. Petitioners have demonstrated they are to succeed**  
24 **on the merits of the Petition for Writ of Mandate**

25 Injunctive relief may be granted in a declaratory relief action. (*Los Angeles County v. State*  
26 *Dept. of Public Health* (1958) 158 Cal.App.2d 425, 445.) Injunctive relief provides an equitable  
27 remedy similar to that provided through a writ proceeding. Both actions may be brought  
28 concurrently. (Code Civ. Proc. §1060.)

1           Petitioners are seeking declaratory relief and remedy through a writ of mandate pursuant to  
2 Code of Civil Procedure section 1085. Petitioners have demonstrated above that the requirements  
3 for a writ of mandate are met in this case.

4           There is no speedy alternative remedy at law to prevent the Controller from unlawfully  
5 issuing full salaries to state employees beginning with the August 2008 pay period, and continuing  
6 thereafter until the state has enacted a budget. The Controller has a ministerial duty to pay state  
7 employees according to DPA's Pay Letter of August 5, 2008, which requires the payment of state  
8 employee salaries consistent with state law, the California Constitution, and the requirements of  
9 *White v. Davis* to pay wages as minimally required by federal law. Petitioners have a beneficial  
10 interest in the matter as the general administrator of state salaries in accordance with the California  
11 Constitution and state law.

12           There is a high likelihood Petitioners will succeed on the merits because: (1) the California  
13 Supreme Court has already held in *White v. Davis* the Controller cannot pay full salaries to state  
14 employees absent an appropriation or a Constitutional authorization, and this court must apply the  
15 law; (2) the Controller has a duty to comply with the California Constitution, state law, and DPA's  
16 Pay Letter implementing payment of employee salaries consistent with the law; and (3) Petitioners  
17 will ultimately prevail on its writ of mandate compelling the Controller to comply with the  
18 California Constitution and state law.

19           **B.       The Balancing Of Hardships In This Case Supports The Granting Of The**  
20           **Preliminary Injunction.**

21           All state employees, except certain appointees and high level executives, received payment  
22 of their full salaries for the "July pay period" (July 1 through July 30.) Only employees falling  
23 within the parameters of *White v. Davis* will receive a partial payment of their salaries for the  
24 "August pay period" (July 31 through August 31.) This partial payment of wages is only a  
25 temporary condition. Once a budget is adopted, they will receive their full salaries including any  
26 unpaid wages due. The Controller traditionally establishes a "cutoff" date after which no further  
27 payroll adjustments may be submitted for the current pay period. The "cutoff" date for the current  
28 pay period is on or about August 21, 2008 with payday on August 29, 2008. (Judd Decl. ¶¶ 21-25.)

1           The courts have variously defined the degree of harm or hardship required to justify issuing a  
2 preliminary injunction. The California Supreme Court has stated that “[t]he term ‘irreparable injury’  
3 . . . means that species of damages, whether great or small, which ought not to be submitted to on the  
4 one hand or inflicted on the other.” (*Anderson v. Souza* (1952) 38 Cal.2d 825, 834.) Additionally,  
5 courts have since held that “the word ‘irreparable’ is . . . used in expressing the rule that an  
6 injunction may issue to prevent wrongs of a repeated and continuing character.” (*Christopher v.*  
7 *Jones* (1964) 231 Cal.App.2d 408, 416.)

8           The harm threatened by the Controller’s actions in this case is sufficient to meet the  
9 standards set out above because it would result in injuries that defy precise calculation and is of a  
10 continuing or repeated nature. The harm caused by the Controller’s actions also is of a type that  
11 cannot be left unchallenged because it undermines DPA’s statutory authority to administer state  
12 employee salaries and compensation.

13                           **1.       The Burden On The Petitioners Is Low.**

14           Petitioners are likely to prevail on the merits. The Supreme Court’s clear holding in  
15 *White v. Davis* requires the Controller not to pay full state employee salaries without an  
16 appropriation and instead to pay wages as minimally required by federal law until there is a state  
17 budget. The Controller refuses to act consistent with that holding. As the court noted in *Right*  
18 *Site Coalition v. Los Angeles Unified School Dist* (2008) 160 Cal.App.4th 336, if the party  
19 seeking the injunction shows a strong likelihood of success on the merits, the trial court has  
20 discretion to issue the injunction notwithstanding a deficiency of harm. Therefore, Petitioners’  
21 legal burden, with respect to the harm suffered, is diminished.

22           Even so, the balance of hardships still favors the Petitioners in this case because of the  
23 difficulty in ascertaining the precise damages to the State and the repeated and continuing nature  
24 of the harm.

25    ///

26    ///

27    ///

28    ///

1                                   **2.     Harm To The Petitioners Is Irreparable Because Of The Uncertain**  
2                                   **Fiscal Impacts.**

3                   In *Wind v. Herbert* (1960) 186 Cal.App.2d 276, the court upheld a preliminary injunction  
4 because the plaintiffs would be subject to a type of damage that was uncertain and subject to  
5 speculation. (*Id.*, at 285.) In that case, plaintiffs, limited partners in a partnership, sought an  
6 injunction against the general partners, to halt the dissipation of partnership assets. (*Id.*, at 279.)  
7 The court found the damages were irreparable given the fact the defendant’s actions would subject  
8 the petitioner to a type of damages that was “only estimable by conjecture.” (*Id.*, at 285.)

9                   In *Wind*, the defendants argued that a preliminary injunction was not necessary to prevent  
10 “irreparable injury” because any conceivable future loss of partnership assets could be compensated  
11 with money damages. (*Id.*, at 284.) The court disagreed, holding that irreparable injury is not  
12 merely limited to injuries that cannot be compensated by damages. (*Id.*, at 285) Rather, an  
13 injunction is appropriate in any case where “it would be extremely difficult to ascertain the amount  
14 of compensation that would afford relief.” (*Id.*)

15                   Due to the complexity of the state budget, because of the budget’s large scope and  
16 breadth, and because an expenditure in one area often affects expenditures in other areas, the  
17 specific economic injury in this case is difficult to ascertain. The Controller’s non-compliance  
18 with the executive order will exacerbate California’s financial crisis by potentially forcing the  
19 state to borrow funds at higher interest rates. As in *Wind*, the financial impact of the  
20 Controller’s actions defies exact calculation and subjects the State to consequences that can only  
21 be accurately measured after the lawless action occurs.

22                   It is difficult to estimate the harm the State will suffer if the Controller is allowed to  
23 violate state law by paying state employees their full salaries without an appropriation. The lack  
24 of a state budget already places the State in a precarious fiscal situation. When no fiscal year  
25 budget is in place, the State lacks authority to make a wide range of public expenditures.  
26 (Genest Decl. ¶ 6.) For example, the State has no authority to issue payments to vendors and  
27 contractors for goods and services chargeable to Fiscal Year 2008-2009; apportionments of  
28 highway user taxes to the state, cities and counties for highway and road improvement projects;

1 grants to higher education students; funds for the operation of the trial courts, the University of  
2 California, California State University system, and the California Community Colleges system;  
3 payments for non-federally mandated social services programs such as Community Care  
4 Licensing, Adult Protective Services, State Only Foster Care, State Only Adoptions Assistance,  
5 and Cash Assistance Program for Immigrants; and tax relief payments to low income seniors and  
6 disabled persons. (Genest Decl. ¶ 6.)

7 In addition to the operational effects of a budget impasse described above, when no fiscal  
8 year budget is in place, other payments required by law continue without consideration of, or  
9 adjustments to address the state's fiscal condition. (Genest Decl. ¶ 7.) As a result, the State has  
10 now committed to spending approximately \$487 million above the expenditure adjustments  
11 previously proposed by the Governor in his May Revision of the proposed Fiscal Year 2008-09  
12 budget. (Genest Decl. ¶ 7.) Consequently, the State is suffering financially from the absence of  
13 a budget, even without the Controller issuing illegal salary disbursements to state employees.

14 The State's fiscal situation may be adversely affected if the Controller is allowed to pay  
15 state employees their full salaries in contravention of *White v. Davis*, and the implementing DPA  
16 pay letter. DOF works with the State Controller's Office and the State Treasurer's Office every  
17 year to determine whether, on a monthly basis, the state will have sufficient cash attributable to  
18 the General Fund to meet the state's obligations, including its obligations to its bondholders.  
19 (Genest Decl. ¶ 8.) DOF currently projects it is likely the State will have insufficient cash in the  
20 General Fund to meet those needs by either September or October 2008. (Genest Decl. ¶ 8.)

21 The consequences of insufficient cash in the General Fund will be extremely detrimental,  
22 and could ultimately cost the State literally hundreds of millions of dollars. It is routinely  
23 necessary to borrow cash on a short-term basis in order to meet the state's obligations between  
24 periods that tax revenues are scheduled to be received. (Genest Decl. ¶ 9.) That borrowing  
25 process is the issuance of Revenue Anticipation Notes (RANs). (Genest Decl. ¶ 9.) However,  
26 when a budget is not in place, this cash flow borrowing cannot take place. (Genest Decl. ¶ 9.)  
27 Instead, in order to meet cash flow needs, borrowing must be done through the issuance of  
28 Revenue Anticipation Warrants (RAWs). (Genest Decl. ¶ 9.) RAWs are more expensive to

1 issue than RANs. (Genest Decl. ¶ 9.) It is anticipated that RAWs will bear interest at a rate at  
2 least one percent higher than RANs, and that the security for this type of borrowing, which is not  
3 required for RANs, will cost approximately \$215 million. (Genest Decl. ¶ 9.) If a budget  
4 appropriation for state employee salaries is not passed in time to assure that RANs can be issued  
5 to meet this cash flow need, it may be necessary to issue the much more expensive RAWs.  
6 (Genest Decl. ¶ 10.) It is therefore prudent fiscal policy to reduce spending in order to reduce  
7 the size of any issuance of RAWs. (Genest Decl. ¶ 10.)

8 **3. The Harm To Petitioners Is Of A Continuing Nature.**

9 In *Wind v. Herbert, surpa*, 186 Cal.App.2d 276, the court noted that wrongs of a repeated and  
10 continuing character may also be sufficient grounds for issuing a preliminary injunction. (*Id.*, at  
11 285.) In that case, plaintiffs contended unless the defendants were restrained by an injunction, they  
12 would continue to dissipate partnership assets in unauthorized disbursements to themselves. (*Id.*)  
13 The defendants had access to the partnership funds and were in fact making repeated use of  
14 partnership funds in violation of the partnership agreement. The court found that wrongs were of a  
15 repeated nature and generally constituted irreparable harm.

16 Similarly here, the Controller has usurped control of the disbursement of funds without  
17 regard to the State's uncertain fiscal condition. His intention to pay employees their regular salaries  
18 will be of a continuing nature as he will repeatedly ignore the California Constitution, the mandates  
19 of state law, and DPA's August 5, 2008 Pay Letter implementing the holding in *White v. Davis*,  
20 limiting state employee salary payments to what is minimally required by the FLSA. This unlawful  
21 payment will occur with each pay check issued and with each successive pay period.

22 **4. The Controller's Actions Will Undermine DPA's Statutory Authority.**

23 The financial harm the State may suffer is not the only hardship justifying a preliminary  
24 injunction in this case. By refusing to comply with Petitioners' lawfully issued Pay Letter that  
25 implements *White v. Davis*, the Controller undermines the authority vested in DPA to administer  
26 employee salary and compensation in accordance with state law.

27 ///

28 ///

1 “Where public officers act in breach of trust or without authority, or threaten to do so, and  
2 such acts will result in irreparable injury, or will make necessary a multiplicity of suits at law to  
3 obtain adequate redress, they may be enjoined.” (*Save the Welwood Murray Mem'l Library Com v.*  
4 *City Council* (1989) 215 Cal.App.3d 1003, 1017.)

5 In *Save the Welwood Murray Mem'l Library Com v. City Council* (1989) 215 Cal.App.3d  
6 1003, a non-profit citizens' group sought an injunction against a City Council to prevent the City  
7 from using property that had been dedicated for library purposes. (*Id.*, at 1007.) The City held title  
8 to the library property subject to a public trust and could not use the property for purposes other than  
9 those specified in the title. (*Id.*, at 1006-1007.) The court noted under the Code of Civil Procedure  
10 section 526, an injunction could be granted where the obligation arises from a trust, and that “[a]  
11 public trust is created when property is held by a public entity for the benefit of the general public.”  
12 (*Id.*, at 1017.) Consequently, the court held that an injunction was legally justified to restrain the  
13 City from acting. (*Id.*, at 1017-1018.)

14 In the present case, funds in the state treasury are property held by a public entity for the  
15 benefit of the general public. The Controller threatens to breach that trust by disbursing the property  
16 without valid authorization. Just as the City Council was not authorized to use property held in  
17 public trust for non-library purposes, the Controller draw warrants against treasury funds without an  
18 available appropriation. (See *White v. Davis, supra*, 30 Cal.4th 528.) In an orderly government, a  
19 state official cannot arbitrarily maintain independent authority to second-guess the decision of  
20 another state officer. (*McCauley v. Brooks, supra*, 16 Cal. at 61.) The Controller cannot simply  
21 ignore DPA's directions any more than the City Council in *Murray Mem'l Library* could ignore  
22 clear restrictions on its authority. Thus, the Controller's acts must be enjoined to prevent a violation  
23 of State Constitution, state law, and permanent erosion of the Petitioner's authority to lawfully  
24 administer state employee salaries consistent with *White v. Davis*. If the Controller is permitted to  
25 refuse to follow Petitioners' instructions, then Petitioners' authority will be effectively undermined.

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**CONCLUSION**

For the aforementioned reasons, Petitioners have satisfied all standards for the issuance of writ of mandate in this case. As such, Petitioners respectfully request that this court issue a writ of mandate compelling the Controller to refrain from violating state law. Petitioners have also satisfied all the standards for the issuance of a Preliminary Injunction. Petitioners respectfully request that the court enjoin the Controller from issuing full salaries to state employees except as permitted by *White v. Davis*, in the absence of a lawful appropriation.

Dated: August 11, 2008

Respectfully submitted,

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