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California Department of Personnel Administration and the  
10 Department of Personnel Administration

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 COUNTY OF SACRAMENTO

13 DAVID A. GILB; CALIFORNIA  
14 DEPARTMENT OF PERSONNEL  
ADMINISTRATION

15 Petitioners/Plaintiffs,

16 v.

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

19 Respondents/Defendants.

) Case No.

) PETITION FOR WRIT OF MANDATE (CCP §  
1085); COMPLAINT FOR INJUNCTIVE AND  
DECLARATORY RELIEF

) Date:

) Time:

) Dept:

) Trial Date:

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

21 Petitioners/Plaintiffs, DAVID A. GILB and the CALIFORNIA DEPARTMENT OF  
22 PERSONNEL ADMINISTRATION, hereby allege as follows:

23 **GENERAL ALLEGATIONS**

24 **PARTIES**

25 1. Petitioners/Plaintiff's DAVID A. GILB is the Director of the Department of  
26 Personnel Administration, and sues herein in his official capacity only. DAVID A. GILB (Gilb) is  
27 charged with administering and enforcing the laws pertaining to personnel, and to perform such  
28 other duties that may be prescribed by law. (Gov. Code §§ 19815.3, 19815.4.)



1           12.     The budget for the previous fiscal year expired on June 30, 2008, leaving the State of  
2 California currently without a state budget.

3           13.     When there is no budget for a fiscal year, the State government has no authority to  
4 make a wide variety of payments. These include public-purpose payments for, among other things,  
5 payments to vendors and contractors for goods and services chargeable to Fiscal Year 2008-2009;  
6 apportionments of highway user taxes to the state, cities and counties for highway and road  
7 improvement projects; grants to higher education students; funds for the operation of the trial courts,  
8 the University of California, California State University system, and the California Community  
9 College system; payments for non-federally mandated social services programs such as Community  
10 Care Licensing, Adult Protective Services, State Only Foster Care, State Only Adoptions Assistance,  
11 and Cash Assistance Program for Immigrants; and tax relief payments to low income senior and  
12 disabled persons. (Declaration of Michael C. Genest, (Genest Decl.) ¶ 6.)

13           14.     When there is no budget for a fiscal year, some payments required by law must  
14 continue without consideration of the state's fiscal condition. This has resulted in the commitment  
15 of approximately \$487 million above the expenditure adjustments proposed by the Governor in his  
16 May Revision of the proposed Fiscal Year 2008-2009 budget. (Genest Decl. ¶ 7.)

17           15.     The Department of Finance (DOF) currently projects it is likely the State will have  
18 insufficient cash attributable to the General Fund to meet the State's obligations, including its  
19 obligations to bondholders, in either September or October, 2008. (Genest Decl. ¶ 8.)¶

20           16.     The salaries of state employees are paid out of the State General Fund. (Gov. Code  
21 § 19824.)

22           17.     Except where payments are self-executing under the California Constitution, the State  
23 has no authority to pay state employee their full salaries where it does not have an appropriation  
24 such as in this case where there is no budget for Fiscal Year 2008-2009.

25           18.     In the absence of a current budget, or other available appropriation, the Office of  
26 State Controller is prohibited by state law from paying state employees their salaries, except as  
27 minimally provided in the California Constitution and the requirements of *White v. Davis* to pay  
28 wages as minimally required by federal law. (*White v. Davis, supra*, at 533.)

1           19.    The California Supreme Court held in *White v. Davis* that in the absence of a state  
2 budget state employees do not have a contractual right actually to receive the payment of salary prior  
3 to enactment of an available appropriation. (*White v. Davis, supra*, at 535.)

4           20.    Consistent with the requirements of federal law, the Controller is required,  
5 notwithstanding a budget impasse and the limitations imposed by state law, to timely pay those state  
6 employees who are subject to the minimum wage and overtime compensation provisions of the Fair  
7 Labor Standards Act (“FLSA” or “Act”) (non-exempt employees), the wages required by that act.  
8 (*White v. Davis, supra*, at 535.)

9           21.    The Court determined that, except as minimally required by the FLSA, or in  
10 situations where there is a continuing appropriation, or payment is authorized by a self-executing  
11 provision of the State Constitution, the Controller is not authorized to pay state employee salaries in  
12 the absence of a budget or other available appropriation. (*White v. Davis, supra*, at 535.)

13           22.    By paying state employees their full salaries in the absence of an available  
14 appropriation, the Controller violates Article XVI, section 7 of the California Constitution, which  
15 provides that “money may be drawn from the treasury only through an appropriation made by law  
16 and upon a Controller’s duly drawn warrant.” (*White v. Davis, supra*, at 566.)

17           23.    By paying state employees their full salaries in the absence of an available  
18 appropriation, the Controller also violates Government Code section 12440, which provides “the  
19 Controller shall draw warrants on the Treasurer for the payment of money directed by law to be paid  
20 out of the State treasury; but a warrant shall not be drawn unless authorized by law, and unless,  
21 except for refunds authorized by Section 13144, unexhausted specific appropriations provided by  
22 law are available to meet it.” (*White v. Davis, supra*, at 567.)

23           24.    Government Code section 9610 provides that “the fixing or authorizing the fixing of  
24 the salary of a State officer or employee is not intended to and does not constitute an appropriation  
25 of money for the payment of the salary. The salary shall be paid only in the event that monies are  
26 made available by another provision of law.” (*White v. Davis, supra*, at 567.)

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1           25.     Government Code section 1231.1 provides that funds from appropriations in the  
2 budget act “may be expended to pay to...employees whatever salary that would have otherwise been  
3 received had the budget act been adopted on or prior to July 1, of that fiscal year.” (*White v. Davis*,  
4 *supra*, at 568.)

5           26.     The Controller’s act of paying state employees their full salaries in the absence of an  
6 available appropriation violates Government Code sections 9610 and section 1231.1.

7           27.     The salary to be paid a state employee which is payable in whole or in part out of  
8 state funds, is subject only to the approval of DPA before it becomes effective and payable, unless  
9 the Legislature expressly provides that DPA approval is not necessary. (Gov. Code § 19825.)

10          28.     In accordance with the Governor’s July 31, 2008 Executive Order, DPA has approved  
11 salaries to be paid to certain state employees who are specified in DPA’s August 5, 2008 Pay Letter  
12 to the Controller. (Declaration of David A. Gilb, (Gilb Decl.) ¶¶ 9-11.)

13          29.     On July 31, 2008, Governor Schwarzenegger issued an Executive Order (Executive  
14 Order S-09-08) directing the State of California to take various emergency measures in light of the  
15 late State Budget for Fiscal Year 2008-2009. (Gilb Decl. ¶ 2, Exhibit A.)

16          30.     In the Executive Order, the Governor directed state agencies and departments “to  
17 cease and desist authorization of all overtime for employees effective July 31, 2008,” except for  
18 “services and functions of state government deemed critical and exempt by the Order and emergent  
19 situations to preserve and protect human life and safety.” (Gilb Decl. ¶ 2, Exhibit A.)

20          31.     In the Executive Order, the Governor ordered DOF and DPA to work with the State  
21 Controller “to develop and implement the necessary mechanisms, including but not limited to pay  
22 letters and computer programs, to comply with the California Supreme Court’s *White v. Davis*  
23 opinion to pay federal minimum wage to those nonexempt FLSA employees who did not work any  
24 overtime.” (Gilb Decl. ¶ 4, Exhibit A.)

25          32.     The Executive Order further ordered “that the necessary mechanisms to ensure  
26 compliance with the *White v. Davis* opinion must be in place to be effective for the August 2008  
27 payroll.” (Gilb Decl. ¶ 5, Exhibit A.)

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1           33.     The Executive Order also ordered “that this Order shall remain in effect until such  
2 time as both a Fiscal Year 2008-2009 Budget is adopted and the Director of the DOF confirms an  
3 adequate cash balance exists to meet the State’s fiscal operations.” (Gilb Decl. ¶ 6, Exhibit A.)

4           34.     In a July 31, 2008 letter to the Governor, the Controller stated unequivocally, “I will  
5 not comply with the Order.” (Gilb Decl. ¶ 7, Exhibit B.) In his letter to the Governor, the  
6 Controller further stated he will continue to provide full pay to all state employees irrespective of an  
7 available appropriation. (Gilb Decl. ¶ 7, Exhibit B.)

8           35.     DPA is the state agency charged with administering and enforcing certain laws.  
9 (Gov. Code § 19815.2, 19815.4(b) and (h), 19816, 19824.)

10          36.     A “pay letter” is the historical administrative document issued by DPA (and its  
11 predecessor, the California State Personnel Board) to the Controller that “triggers” the Controller’s  
12 duty to perform his ministerial role regarding the payment of employee salaries. (Declaration of  
13 Jerri Judd (Judd Decl.) ¶¶ 4-5.)

14          37.     On August 5, 2008, DPA issued Pay Letter 08-23. It provided the Controller with the  
15 necessary instructions to comply with state law and the requirements of *White v. Davis* to pay wages  
16 as minimally required by federal law. (Gilb Decl. ¶ 9, Exhibit C.)

17          38.     The DPA Pay Letter provided the Controller with special salary payment instructions  
18 concerning state employees to be effective July 31, 2008. In particular, DPA instructed the  
19 Controller to comply with federal labor law and the California Supreme Court’s decision in *White v.*  
20 *Davis*. With regard to non-exempt state employees (Workweek Group 2), DPA instructed the  
21 Controller to pay them the federal minimum wage of \$6.55 per hour. (Gilb Decl. ¶¶ 9-10, Exhibit C.)

22          39.     The Pay Letter also included a list of departments and programs that are not subject to  
23 the overtime prohibition in the Executive Order due to the critical nature of the work performed by  
24 these departments and programs. The Pay Letters excluded these departments and programs because  
25 there is a reasonable expectation that these non-exempt FLSA state employees will work overtime.  
26 (Gilb Decl. ¶ 11, Exhibit C.)

27          40.     The DPA Pay Letter also provides the Controller with special salary payment  
28 instructions for all Executive, Administrative, and Professional (EAP) (Workweek Group E)

1 employees covered by the FLSA. DPA instructed the Controller to pay these employees \$455.00 per  
2 week, which represents the minimum salary required by the FLSA in order to preserve the EAP  
3 exemption. (Gilb Decl. ¶ 10, Exhibit C.)

4 41. The DPA Pay Letter also provides the Controller with special salary payment  
5 instructions to employees covered by the Code of Federal Regulation sections 541.303 and 541.304  
6 (Workweek Group SE). DPA instructed the Controller to delay payment of all wages to these  
7 employees because these employees are exempt from the FLSA salary basis test and are not subject  
8 to any minimum salary requirements under the FLSA. DPA instructed the Controller that these  
9 employees should not receive any compensation until after the adoption of a state budget. (Gilb  
10 Decl. ¶ 10, Exhibit C.)

11 42. On August 7, 2008, DPA met with the Office of the Controller to discuss  
12 implementation of salary payments consistent with the California Supreme Court's holding in *White*  
13 *v. Davis*, the Governor's Executive Order, and DPA's August 5, 2008 Pay Letter. DPA presented  
14 three options it believed would enable the Controller to comply with state law and DPA's August 5,  
15 2008 Pay Letter. (Declaration of Julie Chapman, (Chapman Decl.) ¶ 15; Judd Decl. ¶ 12.)

16 43. The Controller's representatives did not present any options for complying with  
17 *White v. Davis* or DPA's August 5, 2008 Pay Letter. They did not make any recommendations or  
18 suggestions that could assist them in complying with the California Constitution, the Supreme  
19 Court's decision in *White v. Davis*, or the August 5, 2008 Pay Letter. (Chapman Decl. ¶ 30; Judd  
20 Decl. ¶ 12.)

21 44. During the August 7, 2008 meeting, the State Controller's Office did not allege it was  
22 impossible to comply with the California Constitution, the Supreme Court's decision in *White v.*  
23 *Davis* or DPA's August 5, 2008 Pay Letter. (Chapman Decl. ¶ 14.)

24 45. DPA sent the State Controller's Office a memorandum on August 8, 2008, asking if it  
25 believed any of the three options presented during the August 7 meeting would enable it to  
26 implement salary payments consistent with the law and DPA's August 5, 2008 Pay Letter. DPA also  
27 asked for alternative solutions to implementing the law and the August 5 Pay Letter. DPA requested  
28 a response by noon on Monday, August 11, 2008. (Chapman Decl. ¶ 31.)







1 Supreme Court decision of *White v. Davis*. As set forth more fully elsewhere in the complaint,  
2 Petitioners/Plaintiffs contend that the Controller violates state law by paying state employees'  
3 salaries in the absence of a budget or other available appropriation, except as minimally required by  
4 federal law. Petitioners/Plaintiffs are informed and believe that Respondents/Defendants dispute  
5 these contentions.

6 73. Petitioners/Plaintiffs seek to enforce their rights and to declare  
7 Respondents/Defendants obligations under the law. In particular, Petitioners/Plaintiffs ask this court  
8 to declare the Controller is legally required under state law to refrain from paying state employee  
9 salaries in the absence of a budget or other available appropriation, except as minimally required by  
10 the FLSA.

11 74. Petitioners/Plaintiffs will continue to seek this relief even if a state budget is passed  
12 prior to the final adjudication of this dispute on the merits.

13 **PRAYER**

14 WHEREFORE, PETITIONERS/PLAINTIFFS pray that judgment be entered against  
15 Respondents/Defendants, and each of them, as follows:

16 1. For a writ of mandate pursuant to Code of Civil Procedure section 1085 compelling  
17 the Controller to refrain from violating state law by paying state employees in a manner inconsistent  
18 with the California Supreme Court decision of *White v. Davis*, and the DPA Pay Letter cited herein;

19 2. For a preliminary and permanent injunction, against Defendant predicated on the  
20 claims presented herein, enjoining him, and his agents, servants, and employees, and all persons  
21 acting under, in concert with, or for him, from paying state employees in a manner inconsistent with  
22 the California Supreme Court decision of *White v. Davis*, and the DPA Pay Letter;

23 3. For declaratory relief that the Controller is legally required under state law to refrain  
24 from paying state employee salaries in the absence of a budget or other available appropriation,  
25 except as minimally required by the FLSA;

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- 4. For costs of suit incurred herein;
- 5. For such costs and further relief as the Court deems just and proper.

Dated: August 11, 2008

Respectfully submitted,

K. WILLIAM CURTIS  
Chief Counsel

By:   
K. WILLIAM CURTIS  
Chief Counsel  
Attorneys for Petitioners/Plaintiffs