IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

CALIFORNIA ATTORNEYS, etc.,

Plaintiff and Appellant,

v.

C061009

JOHN CHIANG, as State Controller, etc.,
Defendant and Appellant;

ARNOLD SCHWARZENEGGER, as Governor, etc., et al.,

Defendants and Respondents.

Sacramento County Superior Court No. 34-2009-80000134
Honorable Patrick Marlette, Judge

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

This reply brief responds to arguments raised in Respondent's Brief (hereafter "RB") and expressly incorporates all of the arguments made in the opening brief. For ease of reference, the reply arguments below are raised in the order in which the arguments appeared in the RB.

II. RESPONDENTS' ARGUMENT BEGINS WITH A MISTATEMENT OF THE GOVERNOR'S AUTHORITY

In the first paragraph of their argument, Respondents assert that "as the Chief Executive of the State, the Governor has the authority to issue orders to ensure the fiscal viability of the State and to safeguard the continual operations of all state departments." (RB 16.) Respondents cite Article V, section 1 of the California Constitution for this proposition. That section provides:

> The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed.

Nothing in that section gives the Governor the power to issue orders to ensure the fiscal viability of the state. The section is silent as to issuing any orders whatsoever. More apposite authority regarding the power of Governors to issue executive orders can be found in a published opinion of the Attorney General:

> An executive order, then, is a formal written directive of the Governor which by interpretation, or the

> specification of detail, directs and guides subordinate officers in the enforcement of a particular law.

(75 Ops.Cal.Atty.Gen 263 (1992).)[1]

In that same opinion, the Attorney General opined that "the Governor may not invade the province of the Legislature." (*Ibid*, citing California Constitution article III, section 3.) Finally, the Attorney General concluded, "the Governor is not empowered, by executive order or otherwise, to amend the effect of, or to qualify the operation of existing legislation." (*Ibid.*)

Courts have reviewed executive orders in a similar light, finding them to be in excess of jurisdiction when they contradict existing laws. (*See*, e.g., *In re Fain* (1983) 145 Cal.App.3d 540 [Governor may not use Executive Order to usurp power delegated by the Legislature to the Parole Board); *Mandel v. Hodges* (1976) 54 Cal.App.3d 596 [Governor may not declare a holiday via executive order in conflict with the establishment clauses of the State and Federal Constitutions].)

Thus, the propriety of the executive order regarding furloughs must be viewed in light of existing law, regardless of the fact that the Governor is vested with the supreme executive power. And, it is well-settled that the setting of state employee salaries is a legislative function. (*Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1325, fn. 10; *Lowe v. California Resources Agency* (1991) 1 Cal.App.4th 1140, 1151.) If the Governor abuses his power to issue executive orders in a manner that

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[1] The published Opinions of the Attorney General, although not binding on courts, are nevertheless "entitled to great weight." (*City of Irvine v. Southern California Association of Governments* (2009) 175 Cal.App.4th 506, 521.)

usurps power reserved to the Legislature, then the orders must be invalidated. Contrary to Respondents' assertion, the California Constitution does not give the Governor any special power relating to executive orders concerning fiscal matters or employee salaries.

Respondents' argument continues with another misleading description of the Governor's power. Respondents cite Article IV, section 10(f) of the California Constitution[2] for the proposition that the Governor has the authority to declare a fiscal emergency. (RB 16.) While that statement is true, it is disturbingly incomplete. Section 10 was amended as part of Proposition 58 in 2004. Governor Schwarzenegger signed the ballot

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[2] That section provides:

> (f) (1) If, following the enactment of the budget bill for the 2004-05 fiscal year or any subsequent fiscal year, the Governor determines that, for that fiscal year, General Fund revenues will decline substantially below the estimate of General Fund revenues upon which the budget bill for that fiscal year, as enacted, was based, or General Fund expenditures will increase substantially above that estimate of General Fund revenues, or both, the Governor may issue a proclamation declaring a fiscal emergency and shall thereupon cause the Legislature to assemble in special session for this purpose. The proclamation shall identify the nature of the fiscal emergency and shall be submitted by the Governor to the Legislature, accompanied by proposed legislation to address the fiscal emergency.
> (2) If the Legislature fails to pass and send to the Governor a bill or bills to address the fiscal emergency by the 45th day following the issuance of the proclamation, the Legislature may not act on any other bill, nor may the Legislature adjourn for a joint recess, until that bill or those bills have been passed and sent to the Governor.
> (3) A bill addressing the fiscal emergency declared pursuant to this section shall contain a statement to that effect.

arguments in favor of the proposition.[3] The declaration of a fiscal emergency empowers the Governor to call a special session of the Legislature. It also empowers the Governor to introduce legislation dealing with the emergency without having to ask a member of the Legislature to author the bill. Section 10(f) does not give the Governor any other authority, and certainly none to order furloughs.

To the extent Respondents base their argument at the outset on the cited constitutional provisions, it is apparent from the plain language of those sections that they do not confer the authority that Respondents apparently believe they do. More importantly, they fail to confer any authority whatsoever to unilaterally implement furloughs on state employees.

III. RESPONDENTS' RELIANCE UPON GOVERNMENT CODE SECTION 19851 IS MISPLACED

Section 19851 Does Not Permit the Use of Furloughs to Close State Offices Two Days Per Month

Respondents assert that Government Code section 19851 "provides the state with authority to establish work schedules to meet the varying needs of different state agencies and departments." (RB 18.) Government Code section 19851 provides as follows:

[3] Respondent State Controller John Chiang has submitted a brief and a request for judicial notice in case # C061011 detailing Proposition 58. That brief has been adopted by Respondent Chiang in this case.

> (a) It is the policy of the state that the workweek of the state employee shall be 40 hours, and the workday of state employees eight hours, except that workweeks and workdays of a different number of hours may be established in order to meet the varying needs of the different state agencies. It is the policy of the state to avoid the necessity for overtime work whenever possible. This policy does not restrict the extension of regular working-hour schedules on an overtime basis in those activities and agencies where it is necessary to carry on the state business properly during a manpower shortage.
>
> (b) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Section 3517.5, the memorandum of understanding shall be controlling without further legislative action, except that if the provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

As an initial matter, it must be recognized that section 19851 does not allow the Governor to close state offices two days per months for furloughs. Government Code section 11020, subdivision (a) provides:

> (a) Unless otherwise provided by law, all offices of every state agency shall be kept open for the transaction of business from 8 a.m. until 5 p.m. of each day from Monday to Friday, inclusive, other than legal holidays, but the office of Treasurer shall close one hour earlier. However, any state agency or division, branch or office thereof may be kept open for the transaction of business on other hours and on other days than those specified in this subdivision.

Whatever authority section 19851 may confer, the statutory command of section 11020 requires that offices be kept open. Accordingly, the Governor's action of shutting down state offices two days per week via furloughs is contrary to law. For that reason alone, Respondents' arguments regarding section 19851 should be rejected.

Respondents Failed to Demonstrate That Furloughs Meet the Needs of the Different State Agencies

Even assuming section 19851 had some application, Respondents have failed to satisfy the requirement of the statute. Respondents argue that section 19851 permits the Governor to implement workweeks "of a different number of hours" in the form of two-day per month furloughs. (RB 19.)

The argument fails because the statute expressly limits the power to establish "a different number of hours." The statute only permits such variation "in order to meet the varying needs of the different state agencies." Respondents made no showing whatsoever in the trial court that the furloughs were designed to meet the varying needs of different state agencies. Quite the contrary, the furloughs were applied across-the-board to virtually all state employees, without regard to the needs of the different departments.

Respondents concede their failure in their brief, when they argue the conclusory statement that "the reduction in the work hours of state employees in indisputably related to the 'varying needs of the state agencies.'" (RB 21, emphasis added.) The limitation in section 19851 is not based on whether a change is "related" to the needs of state agencies; it

requires that the change "meet" the needs of the departments. The furlough of all state employees is "related" to virtually all aspects of California government, in some way. But that fact does not trigger the ability to invoke the "different number of hours" provision of section 19851.

Moreover, the Executive Order made a number of findings about the State's fiscal crisis *in general* (see CASE JA 17-18), but made absolutely no findings about the particular and varying needs of different state agencies. Respondents' conclusory assertion that the furloughs were "justified" based on this section (RB 21) is simply unsupported by any evidence that the furloughs meet the different needs of state departments. Respondents devote merely two sentences to this issue:

> The State's cash reserve is used to pay employees and to fund essential services provided to the public by these agencies and departments. Reducing the hours of state employees increases the state's cash reserves and helps to balance the budget deficit.

(RB 21.) These assertions are unsupported by any citation to the record. California Rules of Court, Rule 8.204(a)(1)(C) requires citations to the record. As such, this Court should strike those assertions and decline to consider them. (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 990.)

There is nothing in the record to support the notion that the furloughs meet the varying needs of the different state agencies. Respondents write at some length about the fact that the fiscal crisis "resulted in an unanticipated and significant reduction in revenues." (RB 3.) Common sense would indicate that at a time when state revenues are down, it would be counterproductive to reduce the hours of employees at

agencies that actually generate revenue for the state. For example, the Franchise Tax Board administers and collects personal and corporate income taxes. (*People ex rel. Franchise Tax Bd. v. Superior Court* (1985) 164 Cal.App.3d 526, 536; Revenue and Taxation Code section 23153.) The Board of Equalization administers the collection of sales and use taxes. (Revenue and Taxation Code section 7051.) No evidence exists in the record as to how reducing the resources available to these agencies meets their needs in light of the reduction in state revenues. However, employees in these and other revenue collection departments were furloughed along with everyone else.

Respondents also rely on the "downturn in the national economy." (RB 2.) In this economy, one would expect that agencies that deal with unemployment like the Employment Development Department and the California Unemployment Insurance Appeals Board would need more resources, not fewer, to deal with the increased number of applicants. Again, however, there was no evidence presented by Respondents to show how furloughing these employees could possibly meet the needs of those departments.

Quite simply, Respondents' suggestion that section 19851 permits furloughs is contradicted by the express language of the statute. Respondents utterly failed to provide any evidence whatsoever that the furloughs meet the needs of any state departments. Accordingly, their reliance on section 19851 to implement workweeks of a different number of hours via furloughs is untenable.

Section 19851 Is Superseded by the MOU

Notwithstanding the failure of Respondents to provide an evidentiary basis to justify their reliance on Government Code section 19851, the section is completely inapplicable because it has been superseded by the Memorandum of Understanding ("MOU") between the parties. Appellant argued in the opening brief that section 19851 was superseded by various provisions of the MOU. (AOB 9-11.) Appellant cited sections 6.3.A and 6.2.C of the MOU as provisions which conflicted with Government Code section 19851. (AOB 10, 11.)

Respondents assert that Appellant failed to identify a single provision of the MOU which prohibited the Governor's furloughs. (RB 27.) However, Respondents fail to acknowledge sections 6.3.A and 6.2.C. Section 6.3.A requires employees to work an "average" of 40 hours per week, but contemplates that longer workweeks will occasionally be necessary. (CASE JA 416.) Thus, this section contemplates work weeks of 40 hours or longer, not work weeks reduced in duration by furloughs. Even if Respondents were to argue that "average" implies that some work weeks will be less than 40 hours, their position would not be advanced. The two-day per month furloughs every month for 17 months would so depress the "average" as to take it far below 40 hours per week, for nearly a year and a half, which again illustrates how the provisions of the MOU are in conflict with section 19851, as it is interpreted by Respondents.

That same section requires CASE members to "work all hours necessary to accomplish their assignments." Section 6.2.C mandates "full compensation for all the time that is required." (CASE JA 415.) These two sections, read in conjunction, expressly prohibit furloughs. Closing state

offices two days per month does not change the fact that CASE members are still obligated to "work all hours necessary to accomplish their assignments" and must be fully compensated for that work time.

Appellant presented uncontroverted evidence to the trial court that the furloughs will not result in fewer hours worked by the state's legal professionals, but will result in a reduction in salary. (CASE JA 302.) Appellant explained that CASE members will still be obligated to work as many hours as are necessary to fulfill both their contractual obligations to their employer and their ethical obligations to their clients. (CASE JA 302.) Thus, CASE members will simply have to work extra hours on non-furlough days as "necessary to accomplish their assignments." (CASE JA 302.)

Because the MOU provides that CASE members must still work all necessary hours, they are entitled to "full compensation," not the reduced compensation accomplished via the furloughs. Thus, even assuming section 19851 provides authority for furloughs, it is in conflict with provisions of the MOU, and therefore is of no effect.

Moreover, as explained in the opening brief (see AOB 12-13), the MOU contains a detailed salary schedule that CASE members are to receive. (CASE JA 485-488.) Reading section 19851 to permit furloughs and thereby reduce the salary of CASE members is in direct conflict with the salary schedule agreed upon by the parties to the MOU. Thus, for this separate reason, section 19851 is superseded. Respondents offer no argument whatsoever as to Appellant's argument on this point.

Respondents rely on section 10.3 of the MOU, which reads as follows:

> The State may propose to reduce the number of hours an employee works as an alternative to layoff. Prior to the implementation of this alternative to a layoff, the State will notify and meet and confer with the Union to seek concurrence of the usage of this alternative.

(CASE JA 445.) Disturbingly, Respondents have elected to quote only the first sentence of the section in their brief. (RB 26.) That misleading and selective quotation eliminates the second sentence which makes clear that the alternative to layoff must be agreed upon by the Union prior to its implementation. Notwithstanding their incomplete quotation, the section cited by Respondents merely allows the State to "propose" alternatives; it in no way allows the State to unilaterally implement them. Accordingly, this section does nothing to buttress the argument that section 19851 is not superseded.

Respondents have completely and repeatedly failed to address the various provisions of the MOU, raised and explicated in the opening brief, which demonstrate that section 19851, as interpreted by Respondents, is in conflict with the MOU. Instead, they have chosen to simply ignore those portions of the MOU. Their argument regarding supersession should likewise be ignored, as it is entirely unpersuasive.

IV. THE "STATE RIGHTS" CLAUSE OF THE MOU DOES NOT PROVIDE ANY AUTHORITY FOR FURLOUGHS

Respondents' next contend that section 3.1 of the MOU authorizes the Governor to furlough employees. (RB 27.) Once again, Respondents fail to quote the entirety of the section, but instead rely on

abbreviated quotations truncated with ellipses to make their argument.[4] (RB 27.) Section 3.1 reads, in full, as follows:

> 3.1 State Rights
>
> A. All State rights and functions, except those which are expressly abridged by this MOU, shall remain vested with the State.
>
> B. To the extent consistent with law and this MOU, the rights of the State include, but are not limited to, the exclusive right to determine the mission of its constituent departments, commissions, and boards; set standards of service; train, direct, schedule, assign, promote, and transfer its employees; initiate disciplinary action; relieve its employees from duty because of lack of work, lack of funds, or for other legitimate reasons; maintain the efficiency of State operations; determine the methods, means and personnel by which State operations are to be conducted; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. The State has the right to make reasonable rules and regulations pertaining to employees consistent with this MOU provided that any such rule shall be uniformly applied to all affected employees who are similarly situated.

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[4] In fact, their selective quotation is textually inaccurate, as it contains words and phrases which do not appear in the MOU. For example, the phrase "to determine . . . the procedures and standards for . . . scheduling" appears nowhere in section 3.1 or anywhere else in the CASE MOU. (See RB 27.) Similar but subtly different language is present. It is unclear whether Respondents simply cut and pasted an argument relating to the State Rights clause of a different MOU.

> C. This MOU is not intended to, nor may it be construed to, contravene the spirit or intent of the merit principle in State employment, nor to limit the entitlements of State civil service employees provided by Article VII of the State Constitution or by-laws and rules enacted thereto.

(CASE JA 397.)

Respondents argue that the provisions of section 3.1.B allow the State to "schedule" its employees, to "maintain the efficiency of State operations," and to "take all necessary actions to carry out its mission in emergencies." Respondents then argue that this language "certainly" provides authority for furloughs. (RB 27.)

The flaw in Respondents' argument on this point is that they once again ignore key language that was explicitly cited in the opening brief. (See AOB 14.) Section 3.1.A specifically limits the "State Rights" clause by clarifying that the only rights that remain vested with the state are those that are not "expressly abridged by this MOU." As explained above, sections 6.3.A and 6.2.C, along with the salary schedule, specifically abridge the State's ability to furlough employees and reduce their salaries. Respondents have no counter to this argument, and indeed there is none, because the plain language of the MOU reveals that the State Rights clause is not nearly as broad as Respondents' would like to believe.

V. SECTION 3516.5 DOES NOT AUTHORIZE FURLOUGHS

Respondents next argue that Government Code section 3516.5, which they characterize as "the emergency provision of the Dills Act," authorizes furloughs. (RB 29.) Once again, however, they fail to

respond to the two principal points raised in the opening brief which undermine their argument.

First, section 3516.5 provides an exception to the meet and confer process "in cases of emergency." Respondents go to great lengths to articulate the severity of the fiscal crisis. (RB 31-34.) But they utterly fail to address whether a fiscal crisis is the type of emergency contemplated by section 3516.5. As explained in the opening brief (see AOB 18), Government Code section 3523, which appears later in the same chapter of the Government Code, defines "emergency" as "an act of God, natural disaster, or other emergency or calamity affecting the state, and which is beyond the control of the employer or recognized employee organization . . . ." Respondents offer no argument whatsoever as to why the fiscal crisis should be included in the traditional common sense definition of emergency prescribed in section 3523. Nothing in that section refers to economic difficulties or anything similar. Whatever the magnitude of the fiscal crisis, it simply was not the kind of emergency contemplated by section 3516.5.

Second, and more significantly, Respondents ignore the fact that the urgent need for immediate action contemplated by section 3516.5 was simply not present in the instant case. The possibility of furloughs was raised as early as November 6, 2008. (CASE JA 306.) The furloughs were not implemented until 3 months later, in February 2009. In the intervening three months, as Respondents point out, the Governor convened a special session of the Legislature issued an emergency proclamation, issued the subject executive order, and ultimately agreed to and signed a budget that purported to resolve the fiscal crisis. (RB 5-8.) That three month period of reflection, debate, deliberation, and ultimate action reflects a situation that

is the polar opposite of the type of emergency contemplated in section 3516.5.

Respondents ignore these two fatal flaws in their argument, and their argument should be rejected for those reasons. But there is yet another flaw in the argument that is revealed later in their brief. Respondents assert that section 3516.5 permits the Governor "to adopt a temporary, pre-impasse rule in an emergency situation." This assertion is consistent with their argument that section 3516.5 allows the Governor to dispense with the normal meet and confer process. (See RB 29.) But their argument that they can unilaterally impose furloughs "pre-impasse" is expressly contrary to law. Government Code section 3517.8, subdivision (b), only allows unilateral implementation after impasse is reached. Respondents' argument that he is entitled to "pre-impasse" unilateral implementation of furloughs should be rejected.

VI. THE FURLOUGHS ARE A REDUCTION IN SALARY RANGE PROHIBITED BY SECTION 19826

Respondents argue that reducing salary via furloughs is not a reduction in salary ranges, and thus does not run afoul of Government Code section 19826, subdivision (b). (RB 34-35.) In making this argument, Respondents explain that the "furlough only constitutes a reduction in hours worked, not a reduction in the wage rate paid for that work." (RB 35.) They further assert that the "the rate of pay for those hours worked" will not be impacted by the furloughs. The argument goes on to give an example concerning overtime. (RB 35-36.)

The flaw in this argument is that the vast majority of CASE members are not hourly employees. Rather, they are legal professionals paid on a salary basis, and are exempt from the Fair Labor Standards Act, and thus do not collect overtime. (CASE JA 298-302.) Whatever the merits of Respondents' argument with respect to hourly employees, it has no application for salaried employees.

Approximately 3240 of CASE's 3400 members are attorneys, administrative law judges, or hearing officers. (CASE JA 299.) Under both State and Federal law, these positions are classified as "exempt" meaning they are paid on a salary basis and not on an hourly basis. Labor Code section 515 allows the establishment of exemptions for certain categories of professional employees. The wage order codified at 8 CCR §11040 establishes a "professional exemption" from overtime for any employee primarily engaged in the practice of law. The provisions mirror those in federal law. 29 CFR 541.304 (a)(1) defines "employee employed in a bona fide professional capacity" as "[a]ny employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and is actually engaged in the practice thereof." Subdivision (d) of that same regulation provides that attorneys are exempt from the overtime and minimum wage provisions of 29 CFR 541.300.

All of the foregoing rules and regulations are expressly referenced in the CASE MOU. Section 6.2.B and 6.2.C of the MOU articulate in detail the exemptions for these CASE members, and specify that these employees are paid on a "salaried" basis and that they are entitled to "full compensation" for all time required to perform their duties. (CASE JA 415.)

Reducing the pay of exempt employees is a change in their salary, which is prohibited by Government Code section 19826, subdivision (b). That section expressly "preclud[es] DPA from unilaterally adjusting represented employees' wages." (*Department of Personnel Administration v. Superior Court (Greene)* (1992) 5 Cal.App.4th 155, 178.) Because section 6.3.A of the MOU requires employees to continue to work all hours necessary to accomplish their assignments, the furloughs result in a straight reduction in pay with no reduction in time worked. As such, it is a blatant violation of statutory and decisional law.

Respondents' reliance on the idea of overtime (see RB 35-36) is completely inapposite, as the vast majority of CASE members are not entitled to overtime regardless of the number of hours they have to work. Despite the fact that Appellant made this argument in the opening brief (see AOB 12-13, 21-24), Respondents offer nothing to contradict or counter the above. They erroneously assume CASE members are hourly employees like the vast majority of other state employees, but such is not the case.

Respondents also assert that *Greene* is distinguishable because the rate of pay will remain the same, but the hours worked will be reduced. (RB 40.) While that may be true for hourly employees, sections 6.3.A, 6.2.B and 6.2.C make clear that CASE members will not have their hours reduced. Rather, they must continue to work all hours necessary to complete all their assignments and fulfill all their responsibilities. Accordingly, Respondents' effort to distinguish the ruling in *Greene* fails.

The only response offered to the arguments raised in the opening brief on this issue turns out to be a misrepresentation. Respondents assert that "Appellant also contends that its members will be unable to meet their ethical obligations to clients as a result of the

furloughs. . . ." (RB 37.) The assertion is not accompanied by a citation to the opening brief. In fact, the opening brief made the exact opposite argument. Appellant argued that it was precisely because CASE members *will* have to honor those obligations that the furloughs amount to a simple reduction in pay. (See AOB 12-13, 16.) CASE members are dedicated professionals, and despite the Governor's violation of the law, they will continue to honor their ethical and contractual obligations, and continue to fulfill all their responsibilities and assignments. It is because they are required to do so that the furloughs are simply a reduction in their salary range.

VII. SECTION 19826 IS NOT SUPERSEDED BY THE MOU

Respondents make yet another misleading argument when they assert that Government Code section 19826 is superseded by the MOU. (RB 39.) They assert that section 3517.6, subdivision (a) prescribes a list of code sections superseded by an MOU. (RB 39.) Tellingly, they fail to include the text of either section 3517.6 or 19826.[5] Section 3517.6[6] does indeed contain a list of statutes, but specifies that the MOU is controlling (and the statute is superseded) only where there is a conflict. The same caveat appears in section 19826, subdivision (d):

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[5] The AOB contained the relevant language of both sections. (See AOB 10, 21-22.)

[6] That section provides, in pertinent part:
In any case where the provisions of [section 19826] are in conflict with a memorandum of understanding, the memorandum of

> (d) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Section 3517.5, the memorandum of understanding shall be controlling. . . .

Respondents fail to mention the fact that supersession occurs only when there is a conflict. Moreover, they fail to even articulate any possible conflict that would trigger supersession, and in fact there is no such conflict. Nothing in the MOU gives the State the authority to adjust salary ranges. Respondents' argument that section 19826 is superseded should be rejected as patently groundless.

VIII. RESPONDENTS' OTHER JUSTIFICATIONS FOR FURLOUGHS ARE UNPERSUASIVE

The Governor is Not Above the Law

As part of their argument that the furlough order did not violate the separation of powers doctrine, Respondents argue that the "Executive Order was issued in order to alleviate part of the State's catastrophic and ever-worsening fiscal crisis. In the absence of immediate action, the State was projected to run out of cash by February 2009." (RB 44.) This amounts to an argument by a party to a contract, that because they were running out of money, they decided to unilaterally breach the contract. Nothing in the California law authorizes the Governor to breach contracts simply because of a cash shortage. Accordingly, Respondents' argument about the cash flow shortage is unpersuasive. While the cash

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understanding shall be controlling without further legislative action.

flow shortage may have been the reason the Governor ordered the furloughs, it cannot serve as a justification for the illegal order.

The "Temporary" Nature of the Furloughs Is Disingenuous and Irrelevant

Respondents go to great pains throughout their brief to characterize the furloughs as "temporary." In fact, on more than a dozen separate occasions, Respondents describe the furloughs as temporary. (*See* RB 1, 2, 9, 15, 17, 18, 29, 34, 41, 42, 44, 45, 46, 47.) Respondents never define "temporary" or explain why temporary furloughs are more legitimate than permanent furloughs.

Two issues arise from Respondents' dogged determination to characterize the furloughs as temporary. First, it appears that by couching their arguments in terms of "temporary" furloughs, Respondents are trying to suggest that the Governor's order was not as broad in scope as it might have been. But their efforts are largely disingenuous, because if furloughs are justified simply because they are "temporary," nothing would stop a governor from ordering temporary furloughs serially and indefinitely so as to achieve a permanent reduction in employee labor costs.

Second, in practical terms, the furloughs are anything but temporary. The executive order implemented furloughs from February 2009 through the end of June 2010, a period of 17 months. (CASE JA 18.) Asking employees to forego 10% of their salary each pay period for 17 consecutive months hardly seems "temporary." While it is true that it does not last indefinitely, the nearly year and a half of reduced pay is so long as to require all employees to make essentially permanent adjustments to their budgets. It is one thing to put off creditors 30 or even 60 days, but few can

ignore their financial obligations for a year and a half without consequence. For people without huge savings or other sources of independent wealth, a 17-month pay reduction constitutes a real, and essentially permanent financial hardship.

The Governor Has Admitted He Lacks Authority to Unilaterally Implement Furloughs

In the opening brief, Appellant explained the series of written admissions and deeds the Governor made prior to issuing the executive order which demonstrated his recognition of the fact that he lacked authority to unilaterally implement furloughs. (AOB 19-20.) Specifically, in his letter to state employees on November 6, 2008, Governor Schwarzenegger twice acknowledged that he needed legislative approval to impose his furlough plan. First, he outlined his various proposals and stated, "If approved by the Legislature, these spending reductions will impact our state workers." (CASE JA 306.) Later in the same letter, after explaining his then-one-day per month furlough plan, he stated, "All the actions we're proposing must first be approved by the Legislature." (CASE JA 307.) After memorializing in writing his admission that he needed legislative authority to impose furloughs, Governor Schwarzenegger submitted to the Legislature, during the special session, proposed legislation that would specifically authorize DPA to implement furloughs. (CASE JA 312.)

Faced with these written statements and actions which demonstrate the fact that the Governor knew he could not act unilaterally, Respondents argue that the "fact the Governor attempted to work

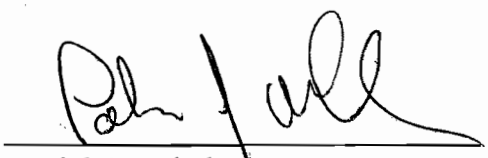
collaboratively with the Legislature in reaching a solution in no way limited his authority." (RB 46.) This attempt to "spin" his admissions is unpersuasive. Governor Schwarzenegger acknowledged in writing that furloughs "must first be approved by the Legislature." (CASE JA 307.) It is disingenuous to now claim that the Governor was merely attempting to work collaboratively; he admitted he needed legislative authority, and could not act unilaterally. It is settled that in construing whether the executive branch has overstepped its authority, some deference is given to the executive branch's construction of the law. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12-13, 16.) In this case, the Governor has acknowledged he lacks authority, and that determination should be given considerable weight, not withstanding his later determination to act unilaterally.

CONCLUSION

This Court has previously determined that the Legislature specifically withheld from DPA the power to reduce salaries for represented employees in Government Code section 19826, subdivision (b). The statute expressly "preclud[es] DPA from unilaterally adjusting represented employees' wages." (*Department of Personnel Administration v. Superior Court (Greene), supra,* 5 Cal.App.4th 155, 178.) Accordingly, "the question of represented employees' wages . . . must ultimately be resolved by the Legislature itself." (*Ibid.*) Because "the entire law-making authority of the state, except the people's right of initiative and referendum, is vested in the Legislature" (*Methodist Hospital of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691), it necessarily follows that the salary-setting authority remains in the Legislature unless and until it is delegated elsewhere. Moreover, all doubts about the scope of Legislative authority must be resolved in favor of the Legislature. (*Ibid.*)

The Governor is forbidden to exercise powers reserved to the Legislature, and any act which attempts to do so is wholly ineffective and void for any purpose. (*Lukens v. Nye* (1909) 156 Cal.498.) This Court should invalidate the Governor's furlough orders as contrary to law.

October 21, 2009
DATE



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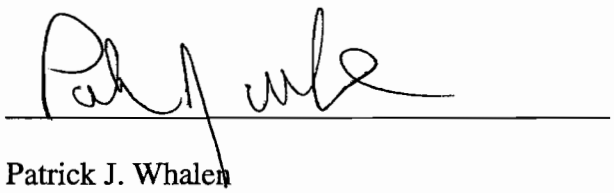
CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the foregoing brief contains 5,915 words, as determined by the "word count" feature of commercial software.



Patrick J. Whalen

10-21-09

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PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Sacramento, California. I am over the age of eighteen (18) years and not a party to the above-entitled action. My business address is 1725 Capitol Avenue, Sacramento, CA 95811.

On October 22, 2009 I served the following documents:

1. **Appellant's Reply Brief**

I served the aforementioned document(s) by enclosing them in an envelope and (check one):

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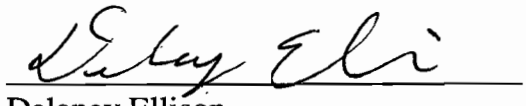
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on October 22, 2009



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