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JUN 30 2010

June 30, 2010

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CLERK SUPREME COURT

The Honorable Ronald M. George, Chief Justice,
and the Associate Justices of the California Supreme Court
Earl Warren Building
350 McAllister Street
San Francisco, CA 94102

Re: S183411 – *Professional Engineers in California Government v. Schwarzenegger, et al.*: Reply Letter Brief in Response to Appellants' Letter Briefs of June 23, 2010

To The Honorable Ronald M. George, Chief Justice, and the Associate Justices of the California Supreme Court:

Respondents Governor Arnold Schwarzenegger and Department of Personnel Administration ("DPA") submit this letter brief in reply to the letter briefs submitted on June 23, 2010 by the state employee organizations and the Controller.

1. The Arguments Raised by the State Employee Organizations and the Controller Fail to Demonstrate the Applicability of Government Code Section 19996.22, Subdivision (a), to the Issue of the Governor's Authority to Furlough State Employees By Executive Order.

The argument presented by the state employee organizations and the Controller that Government Code section 19996.22, subdivision (a), invalidates the Governor's furlough Executive Orders amounts to the

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following false syllogism: section 19996.22, subdivision (a), prohibits involuntary reductions of state employee work hours; furloughs are involuntary reductions of employee work hours; therefore, section 19996.22, subdivision (a), prohibits furloughs. (See e.g., Letter Brief filed by Appellant California Attorneys, Administrative Law Judges and Hearing Officers in State Employment ("CASE") at page 3 ["[I]t is clear that section 19996.22, subdivision (a) specifically prohibits forcing an employee to involuntarily reduce their worktime."]; Letter Brief filed by Appellants Professional Engineers in California Government ("PECG") and California Association of Professional Scientists ("CAPS") at page 2 ["As the state as an employer is prohibited from involuntarily reducing an employee's worktime, this demonstrates the Governor lacks the authority to reduce hours."].)

The flaw in this argument lies in the overbroad reading the state employee organizations and the Controller give to section 19996.22, subdivision (a). That code section does not prohibit *any* reduction in employee work hours. Rather, it permits employees to file a grievance when they are coerced or required to accept an involuntary reduction in work hours "*contrary to the intent*" of the Reduced Worktime Act. (Gov. Code §§ 19996.19-19996.29.)

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As discussed in the June 23, 2010 letter brief filed by the Governor and the DPA, the intent of the act is to provide caregivers with flexible work schedules in order to accommodate their home demands while still allowing the State to benefit from their talent and services. (Gov. Code § 19996.19, subd. (b).) The act does not apply to the Governor's exercise of his executive authority to furlough state employees to address a statewide fiscal and cash crisis. The interpretation of the act by the employee organizations and the Controller as imposing a broad, generally applicable restriction on the Governor's authority to reduce state employee work hours under any circumstances finds no support in the text of the act and is contrary to the legislative intent expressed in section 19996.19, subdivision (b).

The state employee organizations and the Controller offer little in an effort to establish a nexus between section 19996.22, subdivision (a), and the Governor's furlough Executive Orders. Appellant CASE argues that furloughs have the effect of "reducing all positions to part-time positions for two weeks per month" in violation of the requirement of section 19996.22, subdivision (c), that reduced work schedules adopted pursuant to the act not impair the employment or employment rights or benefits of state employees. (CASE June 23, 2010 Letter Brief, p. 3.) The contention that

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furloughs have reduced state employees to part-time status is untrue. While furloughs have reduced state employee compensation because employees are working fewer hours, those employees remain full-time employees paid at the same wage rate as before furloughs were implemented. Furthermore, furloughed state employees who were full-time employees prior to the implementation of furloughs continue to be classified as full-time employees and continue to receive the benefits that come with full-time state employment.

Appellant CASE also argues that furloughs impair the employment rights of its members, contrary to the requirements of section 19996.22, subdivision (c), because furloughs supposedly violate the terms of its Memorandum of Understanding ("MOU") with the State. (CASE June 23, 2010 Letter Brief, p. 4.) Specifically, CASE contends that furloughs violate section 6.3A of its MOU, which provides that employees in State Bargaining Unit 2 "will *normally* average forty (40) of work per workweek." (Joint Appendix in *California Attorneys, etc. v. Schwarzenegger, et al.*, Vol. II, Tab SS, pp. 386-499.) This language, however, only states that the workweek will normally be an average of

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forty (40) hours.[1] It does not establish that the MOU forbids furloughs. This provision does not prohibit a workweek of either more or less than forty (40) hours in any given week. As most state employees in Bargaining Unit 2 are attorneys and administrative law judges, this provision allows flexibility in the workweek to accommodate the nature of legal work, which is often based on caseload and litigation deadlines. Thus, this MOU provision has no effect on the Governor's authority to order furloughs during an unprecedented fiscal and cash crisis.

In fact, as explained by the Governor and the DPA in briefs on file with this Court, other provisions of the CASE MOU provide support for the Governor's authority to furlough the state employees subject to that MOU. The CASE MOU includes section 4.4, "Supersession," which expressly incorporates the provisions of Government Code section 19851; section 3.1, "State Rights," which provides the State with the right, *inter alia,* to "maintain efficiency of State operations," and "to take all necessary action to carry out its mission in emergencies;" and section 10.3, "Alternative to Layoff," which provides the State with the authority to reduce work hours as an alternative to layoffs. (Joint Appendix in *California Attorneys, etc. v.*

[1] This is the same interpretation offered by CASE at page 18 of its Respondent's Brief on the Merits in *California Attorneys, etc. v. Schwarzenegger, et al.*, Case No. S182581.

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Schwarzenegger, et al., Vol. II, Tab SS, pp. 386-499; see also, Respondents' Brief in *California Attorneys, etc. v. Schwarzenegger, et al.*, pp. 23-29; Opening Brief on the Merits in *California Attorneys, etc. v. Schwarzenegger, et al.*, pp. 40-45.) These MOU provisions confirm the Governor's authority to direct furloughs of CASE members.

Finally, while the state employee organizations and the Controller contend the Reduced Worktime Act applies broadly to bar furloughs, they simultaneously argue the grievance provision of section 19996.22, subdivision (a), is inapplicable because requiring state employees to exhaust their administrative remedies by filing grievances would be futile. Futility, as an exception to the requirement of exhaustion of administrative remedies, is applied narrowly and requires the party alleging futility to establish that the administrative agency charged with resolving the disputed matter has declared a predetermined mindset regarding the particular case. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Board* (2005) 35 Cal.4th 1072, 1081, citing, *Jonathan Neil & Associates, Inc. v. Jones* (2004) 33 Cal. 4th 917, 936.) It is not sufficient to show what a ruling would be on a particular issue or defense. Rather, the party claiming futility "must show what the agency's

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ruling would be on a particular case." (*Id.*) The state employee organizations and the Controller have not made such a showing here.

The remedy provided by the Legislature for an alleged violation of the Reduced Worktime Act is the filing of a grievance with the DPA. (Gov. Code § 19996.22, subd. (a).) While SEIU claims in its letter brief that "a grievance was a permissible but not the exclusive remedy" for a violation of the act (SEIU June 23 Letter Brief, p. 5), it offers no legal support for this position. The only remedy provided for a violation of the act is the filing of a grievance. (Gov. Code § 19996.22, subd. (a).) Pursuant to California Code of Regulations, title 2, section 599.832, the grievance procedure for represented employees is the one specified in the applicable MOU.[2] The state employee organizations and the Controller cannot have it both ways. They cannot argue the act applies to invalidate

[2] The grievance procedures under the PECG, CAPS, SEIU, and CASE MOUs are similar. The aggrieved employee starts by seeking informal resolution. If that is unsuccessful, the employee files a formal grievance with the supervisor or manager designated for first level appeals. If the employee is unsatisfied with the results at that level, successive levels of appeal may be filed culminating with an appeal to the Director of the DPA. If the grievance is not resolved to the employee's satisfaction at this final level, the employee may seek resolution through binding arbitration. (See JA in *PECG v. Schwarzenegger, et al.*, Vol. I, Tab N, pp. JA000179-JA000182; Vol. II, Tab P, pp. JA000292-JA000295; JA in *SEIU v. Schwarzenegger, et al.*, Vol. II, Tab MM, pp. JA000372-JA000376; and JA in *CASE v. Schwarzenegger, et al.*, Vol. II, Tab SS, pp. JA000417-JA000423.)

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the Governor's furlough Executive Orders while contending that the sole remedy provided in the act for redress of an alleged violation has no application.

In sum, the text of the act and statements of legislative intent in section 19996.19, subdivision (b), demonstrate the Reduced Worktime Act was not intended to restrict the Governor's authority to furlough state employees to address a fiscal and cash crisis. Rather, the act is intended to apply to situations in which caregivers require a more flexible work schedule than a full-time, 40-hour workweek.[3]

2a. Sections 3.90 of the revised Budget Act of 2008 and the Budget Act of 2009 Validate the Governor's Executive Orders Temporarily Furloughing State Employees.

In their letter briefs, the state employee organizations and the Controller disagree regarding the impact of Sections 3.90 in the revised Budget Act of 2008 and the Budget Act of 2009 on the Governor's furlough Executive Orders. CASE argues that Section 3.90 has no effect on

[3] Contrary to the Controller's assertion at page 2 of his June 23, 2010 letter brief, this is the same argument made by the Governor and DPA in their Respondents' Brief filed with the Third District Court of Appeal in *Professional Engineers in California Government v. Schwarzenegger, et al.*, Case No. C061011, in which the Governor and DPA concluded at page 25, "These code sections [*i.e.,* the Reduced Worktime Act] granting the State the ability to accommodate employees' needs and requests, cannot be read as a limitation on the Governor's executive authority to furlough state employees in the face of a fiscal crisis."

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the validity of the Governor's Executives Orders or the remedy available in this action. (CASE June 23, 2010 Letter Brief, p. 5.) SEIU argues Section 3.90 of the Budget Acts confirms its position that furloughs were invalid unless achieved through a collective bargaining process consistent with the Dills Act, Government Code section 3512, *et seq.* (SEIU June 23, 2010 Letter Brief, p. 6.) PECG and CAPS argue that the Budget Acts constituted a legislative repudiation of furloughs. (PECG/CAPS June 23 Letter Brief, p. 4.) Finally, the Controller argues that Section 3.90 confirmed the invalidity of the Governor's Executive Orders because it required him to achieve personnel cost savings in a manner consistent with existing law. (Controller June 23, 2010 Letter Brief, p. 4.)

Contrary to the variety of responses provided by the state employee organizations and the Controller, the plain language of Section 3.90 of the revised Budget Act of 2008 and the Budget Act of 2009 validate the Governor's use of furloughs to achieve reductions in state employee compensation. The amount of reduced employee compensation included in Section 3.90 of both Budget Acts was "scored" based on calculated personnel cost savings to be achieved through furloughs. Thus, the fiscal assumptions underlying Section 3.90 of the revised Budget Act of 2008 and the Budget Act of 2009 included the assumption that state employees

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would be furloughed twice monthly pursuant to the Governor's Executive Order S-16-08. (See Request for Judicial Notice submitted with June 23, 2010 Letter Brief, Exhibit 1, Declaration of Diana Ducay filed in *Schwarzenegger v. Chiang*, Sacramento County Superior Court Case No. 34-2009-80000158-CU-WM-GDS, Third District Court of Appeal Case No. C061648, at ¶ 5.) As explained in the opening letter brief from the Governor and the DPA, the Legislature would have had to find additional revenue, or make additional cuts in expenditures, to meet its constitutional obligation under California Constitution Article IV, section 12, subdivision (f), to submit a balanced budget to the Governor had it not scored the savings from furloughs.

Not only did the Legislature rely upon the personnel cost savings from furloughs in enacting Section 3.90 of the revised Budget Act of 2008 and Budget Act of 2009, it also relied upon the Governor to exercise his constitutional and statutory authority as the chief executive of the State to achieve those personnel cost savings. This reliance is evident from the Legislature's direction that the mandated reductions in employee compensation be "achieved through the collective bargaining process for represented employees *or through existing administration authority* and a proportionate reduction for nonrepresented employees (utilizing existing

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authority of the administration for nonrepresented employees)." The Legislature's intent that "existing administration authority" constitute an alternative to collective bargaining as a means for achieving the reductions in personnel cost savings is shown by the use of the disjunctive in Section 3.90 – "collective bargaining *or* existing administration authority." SEIU's argument that Section 3.90 confirms "furloughs were invalid unless achieved through collective bargaining and consistent with the Dills Act" (SEIU June 23, 2010 Letter Brief, p. 6) suggests the Legislature intended the phrase "existing administration authority" to mean the same thing as "collective bargaining." However, such an interpretation would violate the long-standing rule of statutory interpretation that "[c]ourts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage." (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22.)

"Existing administration authority," as that phrase is used in Section 3.90 of the revised Budget Act of 2008 and the Budget Act of 2009, includes the Governor's constitutional and statutory authority to furlough state employees. On January 30, 2009, three weeks prior to the Legislatures' enactment of SBX3 1 and SBX3 2, the fact that "existing administration authority" included the authority to furlough state employees

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was confirmed by the Sacramento County Superior Court. Neither the state employee organizations, nor the Controller, acknowledge this fact. Instead, they argue the Legislature's reference to "existing administration authority" cannot be interpreted as an expansion of the Governor's authority because including such an expansion of executive authority in a budget bill would violate the "single subject rule," found at California Constitution Article IV, section 9. However, the Governor has never maintained, and is not claiming now, that Section 3.90 of the Budget Acts conferred some new authority upon him he did not possess already. "Existing" authority means just that – authority existing at the time of the enactment of the Budget Acts. The authority the Governor possessed at the time the budget bills were passed included the authority to furlough state employees by Executive Order. By referencing the Governor's existing authority in the budget bills, authority which included furloughing state employees, the Legislature identified one means of achieving necessary savings through reductions in employee compensation. In so doing, the Legislature validated its and the Governor's respective roles in the budget process. (See, e.g., Cal. Const. Art. IV, § 10, subd. (a) [Governor must propose a budget "containing itemized statements for recommended state expenditures and estimated state revenues"], subd. (f) [Legislature may not

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send the Governor a budget in which appropriations from the General Fund exceed General Fund revenues].) The "single subject rule" has no applicability here and the arguments raised on this point are irrelevant to the issues before this Court.[4]

2b. The State Employee Organizations and the Controller Have Not Demonstrated the Availability of a Monetary Remedy in these Actions.

The Governor and the DPA reiterate that the state employee organizations are not entitled to any remedy in these actions because the Governor possesses the executive authority to furlough state employees by Executive Order. As detailed in the June 23, 2010 letter brief submitted by the Governor and the DPA, assuming the state employee organizations are entitled to any remedy, a monetary award would be improper because it would constitute a judicially-compelled appropriation of funds and thereby violate the separation of powers doctrine.

While the Controller chose not to respond to the Court's inquiry on this topic, the state employee organizations offer a variety of responses regarding the impact of Section 3.90 of the Budget Acts on the remedy, if

[4] The Controller's related argument that Section 3.90 could not impliedly repeal legal authorities that bar furloughs also is misplaced. (Controller's June 23, 2010 Letter Brief, pp. 6-7.) As explained in other briefing before this Court, the relevant legal authorities do not bar, but authorize, the Governor's use of furloughs to address a fiscal and cash crisis.

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any, to which they are entitled in these actions. PECG and CAPS, for instance, after acknowledging the separation of powers doctrine precludes the judiciary from ordering an appropriation of state funds, argue that no violation of the separation of powers occurs "if the court orders payment from an existing appropriation." (PECG/CAPS June 23, 2010 Letter Brief, p. 5.) Yet, PECG and CAPS fail to identify an existing appropriation from which monetary relief in these actions could be ordered. Indeed, the budget acts at issue here reflect a legislative intent *not to appropriate* the amount of employee compensation the State would have paid absent furloughs.

SEIU argues that while a judgment awarding damages would require an appropriation, an appropriation under the circumstances in these cases would be no different than any other in which the State is ordered to pay monetary damages in a civil action. (SEIU June 23, 2010 Letter Brief, p. 9.) However, an order to pay employees for days on which they were furloughed would be unlike other situations in which the State is ordered to pay monetary damages in a civil action. Pursuant to Section 3.90 of the revised Budget Act of 2008 and Budget Act of 2009, the State reduced state employee compensation by more than $2 billion over the 17-month furlough period. The benefits of the personnel cost savings achieved by Section 3.90 of the Budget Acts already have been realized by the State.

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Furthermore, Section 1.80 of the Budget Acts in question provides that funds are "appropriated for the use and support of the State of California" for the fiscal year covered by that budget. Accordingly, a monetary remedy in these cases would require a new, multi-billion dollar appropriation of funds. While SEIU's letter acknowledges there must be an appropriation to pay for monetary damages, SEIU fails to acknowledge there is no existing appropriation to pay monetary damages in these actions. The judicial branch lacks any authority to order such an appropriation without violating the separation of powers doctrine.

CASE argues the Budget Acts have no effect on the remedy to be awarded in this case because damages are expressly authorized in writ of mandate actions pursuant to Code of Civil Procedure section 1095. CASE relies on case law, however, that either does not stand for the proposition for which it is cited or is inapposite to the facts of this case. For instance, CASE cites *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943-44 for the proposition that "[c]ourts have recognized that unlawfully withheld salary is a proper basis for damages in the context of mandamus." (CASE June 23, 2010 Letter Brief, p. 9.) *Poschman* involved an action brought by a state college professor who had been denied tenure. He appealed the trial court's decision granting defendants' demurrer without leave to amend.

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(*Id.* at 936.) While the appeal was pending, the plaintiff was granted tenure and thus an issue arose as to whether the plaintiff's claims, including his claim for damages, were moot. The appellate court ruled that the damages claim was not moot, but remanded to the trial court the determination of what damages should be awarded and in what amount. (*Id.* at 944.) Accordingly, *Poschman* does not stand for the blanket rule that claims for unpaid damages are always proper in mandamus proceedings as CASE's letter brief implies.

CASE also cites a series of cases for the proposition that "numerous court have recognized that payment of unpaid or wrongfully withheld salary to public employees is a legitimate function of the writ of mandate, particularly where recovery of money is ancillary to determination of the claim that the public entity employer is acting in violation of a law amounting to the violation of a ministerial duty." (CASE June 23, 2010 Letter Brief, p. 9.) Yet, the cases cited are inapposite because they involve completely different facts and issues: the return of property to a former prisoner; a nondiscretionary payment; the denial of monetary and mandamus relief; and violations of ministerial duties in which the amounts of the claims were fixed by law.

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For instance, in *Holt v. Kelly* (1978) 20 Cal.3d 560, 565, fn. 5, a prisoner sought return of his property taken from him at arrest, or for the monetary equivalent, a situation obviously inapplicable here. *Tevis v. City and County of San Francisco* (1954) 43 Cal.2d 190, 195, involved the nondiscretionary payment of two weeks of vacation pay required by the city charter, not the exercise of executive discretion as in these cases. In *California School Employees Assn. v. Torrance Unified School Dist.* (2010) 182 Cal.App.4th 1040, 1044, the court held that classified school employees who did not work on student-free, staff development days were *not* entitled to receive pay for those days and thus were not entitled to mandamus, monetary or any other sort of relief. In *A.B.C. Federation of Teachers, et al. v. A.B.C. Unified School District* (1977) 75 Cal.App.3d 332, 340-42, plaintiff high school teachers successfully brought a mandamus action for payment of a $515 stipend for extra duties owed them pursuant to their collective bargaining agreement. The court affirmed the rule that if the *amount* of a claim is fixed by law, and the act of drawing and paying the warrant is a *ministerial duty*, mandamus will lie to compel it. (*Id.* at 341, emphasis in original.) This also was the basis for the decision in the final case cited by CASE, *Reed v. Board of Education* (1934) 139 Cal.App. 661, 663.

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None of these cases support the proposition that the state employee organizations are entitled to monetary relief in these actions. None of them involved a situation in which the courts of this State were called upon to award a multi-billion dollar remedy to state employees, the satisfaction of which would require the Legislature to appropriate funds. As stated in the Governor's and DPA's June 23, 2010 Letter Brief to the Court, such an award violates the separation of powers doctrine and, therefore, cannot be granted in this case.

CONCLUSION

The letter briefs submitted by the state employee organizations and the Controller fail to establish a nexus between Government Code section 19996.22, subdivision (a), and the Governor's furlough Executive Orders. Contrary to the arguments raised, that code section does not prohibit *any* involuntary reduction in state employee work hours, but rather only those contrary to the intent of the Reduced Worktime Act to provide caregivers with flexible work schedules.

The varied arguments contained in the Appellants' letter briefs regarding the impact of Sections 3.90 of the revised Budget Act of 2008 and the Budget Act of 2009 fail to negate the arguments presented by the Governor and the DPA that the Budget Acts validate the Governor's use of

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his executive authority to furlough state employees. The fiscal assumptions underlying the reduction in appropriations for state employee compensation by that section of the Budget Acts were based on personnel cost savings to be achieved through furloughs. Furthermore, "existing administration authority" includes the Governor's authority to furlough state employees during a fiscal and cash crisis as affirmed by the Sacramento Superior Court's January 30, 2009 ruling. Finally, the personnel cost savings to be achieved from furloughs already have been realized by the State. Thus, a monetary award in this case would require the Legislature to appropriate new funds and, therefore, would violate the separation of powers doctrine.

Sincerely,

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PROOF OF SERVICE

I, May Marlowe, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 400 Capitol Mall, 27th Floor, Sacramento, CA 95814-4416. On June 30, 2010, I served the within documents:

Reply Letter Brief in Response to Appellants' Letter Briefs of June 23, 2010

☐ by transmitting via facsimile from (916) 321-4555 the above listed document(s) without error to the fax number(s) set forth below on this date before 5:00 p.m. A copy of the transmittal/confirmation sheet is attached.

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below.

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May Marlowe

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