

ATTORNEY GENERAL--OFFICE COPY

In the Supreme Court of the State of California

PROFESSIONAL ENGINEERS IN  
CALIFORNIA GOVERNMENT, et. al.,

Plaintiffs and Appellants,

v.

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

Defendants and Respondents;

JOHN CHIANG, as State Controller, etc.,

Defendant and Appellant.

AND CONSOLIDATED APPEALS.

Case No.  
S183411

Third Appellate  
District Case  
Nos. 061011,  
C061009,  
C061020

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APPLICATION OF CALIFORNIA CONSTITUTIONAL OFFICERS  
FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE; AMICUS BRIEF  
OF CALIFORNIA CONSTITUTIONAL OFFICERS

EDMUND G. BROWN JR.  
Attorney General of California  
JAMES M. HUMES  
Chief Deputy Attorney General  
GORDON B. BURNS  
Deputy State Solicitor General  
JONATHAN K. RENNER  
Senior Assistant Attorney General  
STEPHEN P. ACQUISTO  
Supervising Deputy Attorney General

MARK R. BECKINGTON  
Deputy Attorney General  
State Bar No. 126009  
300 South Spring Street, Suite 1702  
Los Angeles, CA 90013  
Telephone: (213) 897-1096  
Fax: (213) 897-1071  
Email: Mark.Beckington@doj.ca.gov  
*Attorneys for Amicus Curiae Attorney  
General Edmund G. Brown Jr., Secretary  
of State Debra Bowen, State Treasurer  
Bill Lockyer, Superintendent of Public  
Instruction Jack O'Connell, and the State  
Board of Equalization*

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**APPLICATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE**

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE  
OF CALIFORNIA, AND THE HONORABLE ASSOCIATE JUSTICES  
OF THE CALIFORNIA SUPREME COURT:

Pursuant to California Rules of Court, rule 8.520(f), California Attorney General Edmund G. Brown Jr., Secretary of State Debra Bowen, State Treasurer Bill Lockyer, Superintendent of Public Instruction Jack O'Connell, and the State Board of Equalization (collectively "the constitutional officers") respectfully request leave to file the accompanying amicus curiae brief in this matter.

The constitutional officers have a significant interest in the outcome and final decision in the consolidated appeals that have been transferred to this Court. As the parties' briefs recognize, the officers are appellants in a separate appeal, now pending in the Third District Court of Appeal, from a judgment holding that the Governor's first executive order implementing furloughs of state employees also applied to the officers' employees. (*Arnold Schwarzenegger, et. al., v. John Chiang, etc.*, No. C061648.) That appeal raises unique constitutional and statutory questions concerning the power of the Governor to impose furloughs on the constitutional officers and unique factual questions concerning the application of the order to the officers. Moreover, some of the officers are parties to other appellate and trial proceedings that address other issues raised by the Governor's furlough orders.

In the proposed amicus brief, the officers will apprise the Court of the unique legal and factual issues that the furlough orders present to their offices and which are pending before the Third District. Because these issues have not been briefed in these proceedings by any party, the officers will ask the Court to recognize in any final decision that these unique issues must first await argument and decision in the intermediate appellate court,

or in future proceedings in this Court, and that resolution of these issues be expressly excluded from that decision.

Further, in the proposed amicus brief, the constitutional officers have briefed the two supplemental questions posed by the Court in its order of June 9, 2010, as they relate to the validity of Governor's furlough orders. As discussed in the amicus brief, neither Government Code section 19996.22, which is part of the Reduced Worktime Act (Gov. Code, § 19996.19, et. seq.), nor the revised 2008 Budget Act (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 2 § 36 [SBX3\_2, § 36]), which reduced the appropriation for employee compensation in the 2008-2009 budget year, authorizes the Governor to impose furloughs on state employees. No language in either the Reduced Worktime Act or in the revised Budget Act can reasonably be construed as conferring this authority on the Governor.

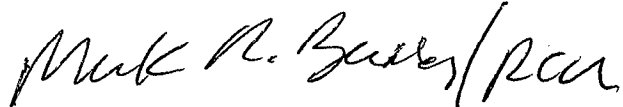
As constitutional officers of the state, charged with management and administration of their respective offices, the amici have a direct interest in the answers to these supplemental questions. Moreover, as officers who have direct experience with the implementation of state personnel laws and budget measures, the amici believe that their brief may be of assistance to this Court in resolving these supplemental questions.

For the foregoing reasons, the constitutional officers respectfully request that the Court accept the accompanying brief for filing in this matter.

Dated: June 23, 2010

Respectfully submitted,

EDMUND G. BROWN JR.  
Attorney General of California  
STEPHEN P. ACQUISTO  
Supervising Deputy Attorney General

A handwritten signature in black ink, appearing to read "Mark R. Beckington / PCA". The signature is written in a cursive style.

MARK R. BECKINGTON  
Deputy Attorney General  
*Attorneys for Amicus Curiae Attorney  
General Edmund G. Brown Jr., Secretary  
of State Debra Bowen, State Treasurer  
Bill Lockyer, Superintendent of Public  
Instruction Jack O'Connell, and the State  
Board of Equalization*

## AMICUS BRIEF

### INTRODUCTION

As has been acknowledged in the briefs filed in these consolidated proceedings, one of the furlough matters now pending in the Courts of Appeal arises out of an action brought by the Governor against the Controller.<sup>1</sup> (*Schwarzenegger v. Chiang*, No. C061648; see Controller's AOB, pp. 5-6 [PECG Appeal, No. C061011].) In that proceeding, the Governor obtained a judgment directing the Controller to implement the furloughs with respect to employees of the state constitutional officers. (*Ibid.*)

The Controller and the other constitutional officers who had intervened in the case appealed the judgment to the Third District in April 2009.<sup>2</sup> All briefing in that appeal was completed in December 2009 and the parties are waiting for the scheduling of oral argument. For the constitutional officers, the appeal effectively stays the trial court's order. (See Controller's AOB, pp. 5-6 [PECG Appeal, No. C061011].)

In their opening brief filed in the Third District, the constitutional officers defined three factual and three legal issues in urging the appellate court to overturn the trial court's decision upholding the Governor's power

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<sup>1</sup> In addition to the Governor, the plaintiffs included the Department of Personnel Administration and its director. For convenience, references to the Governor in relation to this and other proceedings shall include these parties unless the context indicates otherwise.

<sup>2</sup> In addition to the Controller, the constitutional officers joining in the appeal were the Lieutenant Governor, the Secretary of State, the Attorney General, the State Treasurer, the Superintendent of Public Instruction, and the State Board of Equalization.

to impose furloughs on the officers.<sup>3</sup> The three factual issues focus on the applicability of the Governor's executive order to the constitutional officer employees:

(1) Did the Governor's executive order, which excluded state entities not under the Governor's "direct executive authority," apply by its own terms to the constitutional officers?

(2) Was the question of the executive order's application to the constitutional officers rendered moot when the Legislature approved a new state budget and the Governor used line-item vetoes to cut the officers' budgets by an amount equivalent to the projected savings that would have been achieved through furloughs?

(3) Did statements by the Governor's representatives that the constitutional officers were not subject to the executive order equitably estop the Governor from subsequently asserting that the order applied to the officers?

(See Appellants' Opening Brief, No. C061648, filed October 19, 2009, p. 1.)

In addition, the three legal issues raised in the appeal also present unique questions for the Court of Appeal:

(1) Would the Governor's assertion of furlough power over the constitutional officers contravene the system of divided executive authority embodied in the California Constitution?

(2) Would the Governor's assertion of the power to furlough the constitutional officers' employees usurp the power of the Legislature, which has never granted the Governor any

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<sup>3</sup> Pursuant to the California Rules of Court, copies of the opening brief were lodged with this Court at the time of filing. (Cal. Rules of Court, rule 8.212(c).)

authority to manage their department's day-to-day operations, thereby violating the doctrine of separation of powers between the executive and legislative branches?

(3) Would the constitutional officers, as the statutory appointing powers for their offices, and not the Governor, control furloughs in their offices, to the extent that any such power exists, just as they control such fundamental staffing and management decisions as hiring, firing and layoffs?

(*Id.* at p. 2.)

These issues have not been raised or briefed by the appellants or respondents in the consolidated appeals now before this Court. Nor have they been raised in the supplemental questions posed by the Third District or by this Court. (See Letter, Office of the Clerk, Jan. 29, 2010, Nos. C061009, C061011, C061020 [requesting additional briefing in response to five questions]; Order, June 9, 2010, No. S183411 [requesting briefing in response to two questions].)

## ARGUMENT

### **I. ISSUES UNIQUE TO THE CONSTITUTIONAL OFFICERS AND PENDING BEFORE THE THIRD APPELLATE DISTRICT ARE NOT BEFORE THE COURT IN THESE PROCEEDINGS.**

As the summary of factual and legal issues in the constitutional officers' case shows, this proceeding does not present the unique questions posed by the Governor's attempt to compel the officers to furlough their employees. Those unique questions, now fully briefed in the Court of Appeal, are appropriate for resolution in that forum. The officers therefore respectfully urge this Court to clarify that its decision in the instant matter is not intended to resolve the unique issues still pending in the proceedings before the Third Appellate District.

This approach recognizes the benefits of awaiting intermediate appellate review before addressing the issues presented by the constitutional officers. For example, the constitutional officers have urged the Court of Appeal to resolve the case on the factual and procedural grounds without reaching the deeper and possibly more difficult constitutional issues. As this Court is well aware, “courts will not reach constitutional questions ‘unless absolutely necessary to a disposition’ of the case before them.” (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1979) 22 Cal.3d 208, 233, quoting *Bayside Timber Co. v. Board of Supervisors* (1971) 20 Cal.App.3d 1, 5-6.) Moreover, it should not be discounted that the evolving budget situation could lead to a determination that the underlying issues in the existing appeal have been mooted by events and no longer are in need of resolution.

## **II. THE REDUCED WORKTIME ACT DOES NOT GRANT THE GOVERNOR ANY POWER TO IMPLEMENT A GENERAL FURLOUGH OF STATE EMPLOYEES.**

In the first of its two supplemental questions, this Court has asked the parties to brief the effect, if any, that Government Code section 19996.22 has on the validity of the Governor’s executive order instituting a mandatory furlough on state employees. This statutory provision, which is part of the Reduced Worktime Act (RWA), does not support the Governor’s assertion of furlough authority.

Under the RWA, “[i]t is the policy of the state that to the extent feasible, reduced worktime be made available to employees who are unable, or who do not desire, to work standard working hours on a full-time basis.” (Gov. Code, § 19996.21, subd. (a).) As used in the RWA, “reduced worktime” means “employment of less than 40 hours of work per week,” and includes job sharing, workdays of less than eight hours, and “such other arrangements which the department finds consistent with maximum

employment opportunity to employees desiring other than a standard worktime.” (Gov. Code, § 19996.20.)

Section 19996.22 protects state employees from coercive or involuntary reductions contrary to the intent of the RWA. Under its terms, “[a]ny employee who is being coerced, or who has been required, by the appointing power, a supervisor, or another employee, to involuntarily reduce his or her worktime contrary to the intent of this article, or who has been unreasonably denied the right to participate in this program, may file a grievance with the department.” (Gov. Code, § 19996.22, subd. (a).) Moreover, nothing in the Act “shall impair the employment or employment rights or benefits of any employee.” (Gov. Code, § 19996.22, subd. (c).)

The plain language of these provisions, including section 19996.22, does not comport with a grant of authority to impose furloughs. The RWA does not mention furloughs but instead focuses on providing reduced worktime to employees who are unable to work on a full-time basis or who prefer alternatives to standard full-time arrangements. As such, it was designed to authorize reduced worktime for this category of employees as an exception to the general state policy of the 40-hour work week. (See Gov. Code, § 19851, subd. (a).) Nothing within its terms suggests that it was designed to authorize statewide involuntary reductions in worktimes, including through the use of furloughs.

This understanding is underscored by the fact that the RWA contains remedies for the involuntary reduction of work hours of state workers in section 19996.22. By protecting state employees from coercion or involuntary reductions contrary to the intent of the RWA, the Legislature sought to protect state workers.

The RWA is designed to enhance the ability of state employees to voluntarily take advantage of reduced work schedules when feasible. After enacting the measure, the Legislature added a statement of intent

concerning its purpose in adopting the measure. (Gov. Code, § 19996.19, subd. (b).) Among other things, the Legislature sought “to increase the numbers and kinds of public and private sector *voluntary* reduced worktime options” (*id.*, subd. (b)(3) emphasis added); “to support the creation of a healthy balance between work and family needs . . .” (*id.*, subd. (b)(4)); “to encourage *voluntary* reduced worktime opportunities within the private as well as public sector” (*id.*, subd. (b)(5) emphasis added); “to develop policies and procedures which support the growth of *voluntary* reduced worktime positions” (*id.*, subd. (b)(6) emphasis added); “to promote job stability” (*id.*, subd. (b)(7)); and “to benefit the family and society by promoting a balance between work and home” (*id.*, subd. (b)(8)).

This conclusion is consistent with the Department of Personnel Administration’s interpretation and implementation of the RWA. Under that act, the DPA is directed “to adopt appropriate rules and guidelines relating to reduced worktime implementation.” (Gov. Code, § 19996.27.) Pursuant to this authority, the DPA has adopted a set of regulations implementing the RWA’s terms. (Cal. Code Regs, tit. 2, § 599.830, et. seq.) None of these regulations address furloughs, provide any means for implementing furloughs, or provide a grievance procedure for statewide furloughs. (*Ibid.*)

The Governor relies on these provisions as impliedly supporting his assertion of furlough power, but his reliance is misplaced. In his briefs in the Third District, he asserted that the RWA “serve[s] to further demonstrate the Governor’s inherent authority as the state employer to establish varying schedules for state employees.” (Resp. Br., p. 26 [PECG Appeal].) But the RWA’s emphasis on *voluntary* worktime reductions counters the Governor’s reliance on its terms for the power to impose *involuntary* work week reductions.

**III. NEITHER THE 2008 BUDGET ACT REVISION NOR LATER BUDGET MEASURES CONFER FURLOUGH POWER ON THE GOVERNOR.**

In the second of the two questions posed by this Court, the parties have been asked to brief the question of what effect the reduction in employee compensation in the revised 2008 Budget Act has on the validity of the Governor's executive order. Regardless of any other meaning that may be ascribed to this provision, it does not confer any independent authority on the Governor to furlough state workers and it neither implements nor ratifies the furloughs.<sup>4</sup>

In the revised 2008 Budget Act, the Legislature included a provision that reduces the appropriation for employee compensation:

“[E]ach item of appropriation in this act, . . . shall be reduced, as appropriate, to reflect a reduction in employee compensation achieved through the collective bargaining process for represented employees or through existing administration authority and a proportionate reduction for nonrepresented employees (utilizing existing authority of the administration to adjust compensation for nonrepresented employees) in the total amounts of \$385,762,000 from General Fund items and \$285,196,000 from items relating to other funds.”

(Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 2, § 36 (SBX3 2 § 36 [§ 3.90, subd. (a)]).)

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<sup>4</sup> This Court additionally has asked the parties to brief the effect, if any, that this measure might have on “the remedy, if any, to which the petitioning labor organizations may be entitled in these actions. (Order, June 9, 2010, case no. S183411.) Because the employees of the constitutional officers have not been furloughed, amici will not here address this part of the Court's question.

To carry out this directive, “[t]he Director of Finance shall allocate the necessary reduction to each item of appropriation to accomplish the employee compensation reductions required by this section.” (*Ibid.*)

Nearly identical provisions were included in the 2009 Budget Act approved in February 2009 and in the revised 2009 Budget Act passed in July 2009. (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 1, § 3.90, subd. (a) (SBX 3 1 § 3.90); setting 2009-2010 employee compensation reductions at \$1,024,326,000 for the General Fund and \$688,375,000 for other funds]; Stats. 2009, 4th Ex. Sess. 2009-2010, ch. 1, § 552 (ABX 4 1, § 552 [§3.90, subd. (a)]) [increasing employee compensation reductions to \$1,477,917,000 in the General Fund and \$973,058,000 in other funds].)

Under the “plain meaning rule,” a court will give “[w]ords used in a statute or constitutional provision . . . the meaning they bear in ordinary use.” (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) “If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or to the voters (in the case of a provision adopted by the voters).” (*Ibid.*) But “[t]he meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and the provisions relating to the same subject matter must be harmonized to the extent possible.” (*Ibid.*)

The text of the budget measure makes no reference to furloughs. Nor does it make any reference to the Governor’s executive order directing state agencies to implement furloughs or to any court decision ruling on the validity of that order. Nothing on the face of the measure demonstrates that the Legislature contemplated furloughs as a means to implement the employee compensation reductions.

This understanding is consistent with the wording actually used by the Legislature. The measure refers to only two methods of implementing its

terms: the collective bargaining process for represented employees and “existing administration authority.” Plainly, reductions achieved through the collective bargaining process do not equate to unilateral furloughs imposed by an executive order. And the use of the term “existing” presupposes authority that derives from a source independent of the Budget Act. In the absence of some independent source of gubernatorial authority to impose furloughs, the Budget Act plainly does not authorize their use in implementing any of the employee compensation reductions.

In his briefs filed in the Third District, the Governor cited two alleged sources of authority for concluding that the phrase “existing administration authority” encompassed furloughs: his executive order and the trial court judgment upholding that order. (Resp. Br., pp. 8-9 [CASE Appeal].) Neither is, of course, an existing authority for the executive order, such as a statute or constitutional provision. The Governor’s arguments simply beg the question: what precisely is his authority for the executive order?

As this Court has noted in its question, the dollar amount of the employee compensation reduction approved by the Legislature approximates the amount of the reduction foreseen by the administration from the furloughs through the end of the subject fiscal year. But this does not show that the Legislature intended to ratify the Governor’s executive order or to independently authorize furloughs. Instead, the Legislature, faced with a serious budget deficit, approved an overall budget package that included a variety of expenditure reductions, revenue increases, and other measures. The fact that the Legislature chose to use a similar dollar amount as the one included in this package for employee compensation reductions does not mean that it also approved a particular method of achieving those reductions, such as furloughs.

In using the phrase “existing administration authority,” the Legislature may have had a number of available administrative actions in mind. For

example, such authority could encompass attrition, elimination of vacant positions, and other actions, including, in the absence of other options, layoffs. (See Gov. Code, § 19997, et. seq. [layoffs and demotions].) Given the availability of other administration authority, there is no basis to see this phrase as necessarily synonymous with furloughs.

“A statute should be interpreted so as to effectuate its apparent purpose.” (*Industrial Risk Insurers v. Rust Engineering Co.* (1991) 232 Cal.App.3d 1038, 1042.) The apparent purpose of the Legislature in passing the revised 2008 Budget Act was to address a serious budget deficit. Nothing suggests that Legislature intended to recognize or confer a blanket furlough power on the Governor. Indeed, given that the Legislature’s limited goal was to breach the existing budget gap, it seems unlikely that the Legislature contemplated endorsing a policy that, whatever its other attributes, would reduce work hours for all state employees, including those employees who enhance revenues or reduce costs.

It follows that the Governor may not find authority to implement furloughs from a Budget Act provision directing the implementation of employee compensation reductions. That authority, if it exists at all, must be found elsewhere.

## CONCLUSION

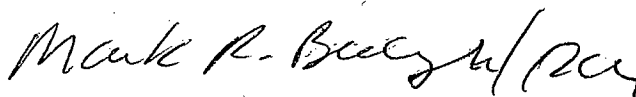
For the forgoing reasons, the constitutional officers respectfully submit that any decision by this Court should recognize that unique factual and legal issues posed by the officers' own appeal on the furlough question remain to be addressed in the Third District.

Further, the officers submit that neither the Reduced Worktime Act nor the revised 2008 Budget Act can reasonably be construed as conferring any authority on the Governor to furlough state employees.

Dated: June 23, 2010

Respectfully submitted,

EDMUND G. BROWN JR.  
Attorney General of California  
STEPHEN P. ACQUISTO  
Supervising Deputy Attorney General



MARK R. BECKINGTON  
Deputy Attorney General  
*Attorneys for Amicus Curiae Attorney  
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Instruction Jack O'Connell, and the State  
Board of Equalization*

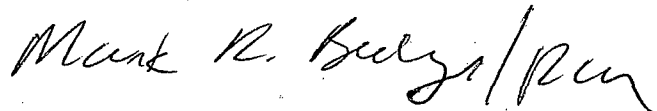
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## CERTIFICATE OF COMPLIANCE

I certify that the attached Amicus Brief uses a 13 point Times New Roman font and contains 2,640 words, exclusive of the application and tables.

Dated: June 23, 2010

EDMUND G. BROWN JR.  
Attorney General of California

A handwritten signature in black ink that reads "Mark R. Beckington". The signature is written in a cursive style with a vertical line through the end of the name.

MARK R. BECKINGTON  
Deputy Attorney General  
*Attorneys for Amicus Curiae Attorney  
General Edmund G. Brown Jr., Secretary  
of State Debra Bowen, State Treasurer Bill  
Lockyer, Superintendent of Public  
Instruction Jack O'Connell, and the State  
Board of Equalization*

**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: **Professional Engineers in California Government, et al.v. Schwarzenegger, etc., et al.**

Case No.: **S183411**

I declare:

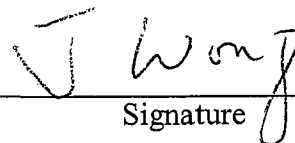
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 23, 2010, I served the attached **APPLICATION OF CALIFORNIA CONSTITUTIONAL OFFICERS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*; AMICUS BRIEF OF CALIFORNIA CONSTITUTIONAL OFFICERS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

**[SEE ATTACHED SERVICE LIST]**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 23, 2010, at San Francisco, California.

\_\_\_\_\_  
Janet Wong  
Declarant

\_\_\_\_\_  
  
Signature

[SERVICE LIST]

David W. Tyra, Esq.  
Kronick Moskowitz Tiedemann & Girard  
Kristinannet T. Seargeant  
Meredith Packer  
Kronick, Moskowitz  
Tiedemann & Girard  
A Professional Corporation  
400 Capitol Mall, 27th Floor  
Sacramento, CA 95814

Will Yamada, Esq.  
Labor Relations Counsel  
Department of Personnel Administration  
1515 S. Street, N. Building, Suite 400  
Sacramento, CA 95814 D-222

Ann M. Giese  
Service Employees International Union,  
Local 1000  
Legal Department  
1808 14th Street  
Sacramento, CA 95811

Jeffrey Ryan Rieger  
Reed Smith LLP  
P.O. Box 7936  
San Francisco, CA 94120-7936

Court of Appeal of the State of California  
Third Appellate District  
621 Capitol Mall, 10th Floor  
Sacramento, CA 95814

Superior Court of California  
County of Sacramento  
720 9th Street  
Sacramento, CA 95814-1398

Patrick J. Whalen  
Law Office of Brooks Ellison  
1725 Capitol Mall  
Sacramento, CA 95811

Richard Chivaro  
Office of the Chief Counsel  
State Controller's Office  
300 Capitol Mall, Suite 1850  
Sacramento, CA 95814 B-8

Gerald A. James  
Professional Engineers in California  
Government  
455 Capitol Mall, Suite 501  
Sacramento, CA 95814

Robin Johansen  
Remcho, Johansen & Purcell  
201 Dolores Avenue  
San Leandro, CA 94577