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August 17, 2010

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

**Re: S185404 – *Professional Engineers in California  
Government, et al. v. Arnold Schwarzenegger, et al.*  
(Court of Appeal Case No. A129316)**

**(Alameda Superior Court Case No. RG1049800  
consolidated with Case Nos. RG10507922, RG10507081,  
RG10503805, RG10501997, RG10516259, RG10514694  
and RG10528855)**

**State Petitioners' Letter Brief in Reply to Answer to  
Petition for Review**

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

Governor Arnold Schwarzenegger, the Department of Personnel  
Administration (“DPA”), and the more than 100 state agencies and  
departments represented in these consolidated actions by the DPA  
(collectively, “State Petitioners”) submit this letter brief in reply to the joint  
Answer to Petition for Review filed by the Respondent State Employee  
Organizations (collectively, “Respondents”) on August 16, 2010.

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I.

**INTRODUCTION**

Since Governor Schwarzenegger issued Executive Order S-16-08, his first furlough Executive Order, on December 19, 2008, state employee organizations have commenced 34 separate lawsuits in four different superior courts challenging the Governor's ability to furlough state employees to address the State's ongoing fiscal and cash crisis. For example, Respondent Service Employees International Union, Local 1000 ("SEIU") alone has filed seven lawsuits challenging furloughs. Respondent California Attorneys, Administrative Law Judge, and Hearing Officers in State Employment ("CASE") has filed five.

In response to Executive Order S-12-10, the current furlough Executive Order issued on July 28, 2010, state employee organizations have filed nine separate actions challenging the Governor's ability to furlough state employees, the seven here, an eighth filed in Alameda County Superior Court on August 11, 2010 by the California Correctional Peace Officers Association that is in the process of being consolidated with these actions, and a ninth filed by CASE in San Francisco County Superior Court.

Despite this great flurry of litigation activity aimed at challenging the Governor's ability to furlough state employees by executive order, an issue of first impression in the State of California, Respondents argue that the present Petition for Review does not present important questions of law that require settling by this Court. (See California Rules of Court, Rule 8.500, subd. (b).) Moreover, despite the fact that the Superior Courts of Sacramento, San Francisco, and Alameda Counties have rendered decisions and judgments in furlough cases that are irreconcilable with one another, and despite the further fact that this Court is set to provide definitive guidance regarding the question of the Governor's authority to furlough state employees through the cases which this Court will hear on September 8, 2010, Respondents argue that this Petition for Review is not necessary to secure uniformity of decisions.

State Petitioners seek review of these cases by this Court to resolve an error committed by the trial court in granting a Temporary Restraining Order enjoining furloughs of state employees that was compounded by a second error committed by the Court of Appeal in declining to issue a Writ of Supersedeas staying that Temporary Restraining Order. The errors committed by the trial court in granting the Temporary Restraining Order were multifold: (1) the issuance of injunctive relief constituted an

impermissible judicial infringement of the executive branch's prerogatives; (2) the trial court failed to find all requisite *prima facie* elements as a precondition to issuing injunctive relief; and (3) the trial court's temporary restraining order exacerbates the State's precarious fiscal condition and prevents the State from preserving vital cash assets thereby jeopardizing the well-being of the State's citizens by placing the funding of critical state services at risk.

Rather than correct the trial court's error and preserve its own jurisdiction over the subject matter of State Petitioners' appeal of the trial court's Temporary Restraining Order through the issuance of State Petitioners' request for a Writ of Supersedeas, the Court of Appeal abused its discretion by denying the writ. The appellate court's summary denial of the Writ of Supersedeas prevents the State from achieving personnel cost savings from furloughs and thereby preserving vital cash assets now. In the event that State Petitioners are successful in reversing the trial court's decision to enjoin furloughs, the State will lack the ability to recover the personnel cost savings being lost as a result of the trial court's Temporary Restraining Order and for this reason a Writ of Supersedeas was necessary to preserve the subject matter of this appeal.

Based on the petition for review and this letter reply brief, State Petitioners respectfully request that this Court grant this Petition for Review to correct both the errors committed by the trial court and the compounding of those errors resulting from the Court of Appeal's denial of State Petitioners' Petition for Writ of Supersedeas. In addition, State Petitioners request that this Court stay the trial court's August 9, 2010 Order to Show Cause and Temporary Restraining Order pending a full review on the merits by this Court.

## II.

### LEGAL DISCUSSION

#### A. This Petition For Review Presents Important Questions Of Law That Must Be Settled By This Court.

Respondents argue that this Petition for Review does not present important questions of law because State Petitioners are only seeking review of the Court of Appeal's denial of the Writ of Supersedeas. (See Respondents' August 16, 2010 Answer to Petition for Review, p. 7.) Such an argument evidences a misunderstanding of both the nature of a Petition for Review and the issues at stake in this case.

This Court's grant of review lies from a decision of the Court of Appeal. (Cal. Const. Art. VI, § 12, subd. (b); see also *Snukal v Flightways Mfg., Inc.* (2000) 23 Cal.4th 754, 772.) "A party may file a petition in the

Supreme Court for review of any decision *of the Court of Appeal*, including any interlocutory order. ..." (Cal. Rules of Court, Rule 8.500, subd. (a)(1).) Thus, State Petitioners correctly sought review of the Court of Appeal's decision to deny the Writ of Supersedeas. That fact, however, is not synonymous with this Petition for Review suffering from a lack of important questions of law that should be settled by this Court. The consequences of the appellate court's decision to deny supersedeas relief, *i.e.*, permitting a flawed Temporary Restraining Order to remain in place so as to prevent the State from achieving critically necessary personnel cost savings from furloughs, gives rise to the important questions of law that should be settled by this Court.

**1. The Trial Court's Temporary Restraining Order Impermissibly Infringes Upon The Governor's Executive Discretion – An Important Question Of Law This Court Should Settle.**

The concept of separation of powers between the three co-equal branches of state government is embodied within our state constitution at Article III, section 3. In their Answer to the Petition for Review, Respondents acknowledge this important concept by noting that "none of the coordinate branches of our tripartite government may exercise power vested in another branch." (See Respondents' Answer to Petition for Review, p. 14, citing, *Cirone v. Cory* (1987) 189 Cal.App.3d 1280, 1286.)

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The trial court's Temporary Restraining Order violates this constitutional principle because rather than basing its decision to issue injunctive relief on its evaluation of the lawfulness of the Governor's Executive Order, the trial court instead interposed its own evaluation of the efficacy of furloughs to address the State's financial woes for the Governor's determination that furloughs were necessary and appropriate to preserve cash assets now. In other words, the trial court impermissibly replaced its own determination regarding the best approach to resolving the State's current fiscal and cash crisis for that of the Governor's and, in so doing, usurped the Governor's role as the steward of the State's finances (see Gov. Code § 13070) and his role as the state employer. (See Gov. Code § 3513, subd. (j).) This is evident both from an evaluation of what the trial court said in its ruling granting the Temporary Restraining Order as well as from what the trial court did not say in that ruling.

**a. By Directly Challenging the Efficacy of Furloughs to Address the State's Fiscal and Cash Crisis, the Trial Court Impermissibly Usurped the Prerogatives of the Executive Branch.**

In its ruling granting the Temporary Restraining Order in this case, the trial court stated the following:

The evidence of harm to [State Petitioners] and to the public interest if the restraining order is granted, on the other hand, is far less clear. The

Court accepts the reality that the State is in extremely serious cash and fiscal straits. [State Petitioners'] motivation to save cash through furloughs, among many other programs, in order to make less likely the need for the State to issue warrants in payment of bills, and in order to preserve the State's ability to borrow money externally when needed, is understandable. However, [State Petitioners] have failed to show that the \$80 million to \$110 million likely to be saved through implementation of the proposed furloughs between now and a decision on a preliminary injunction will accomplish its purpose. Put another way, it appears just as likely that the State's financial woes will continue – at least until a new budget has been adopted by the Legislature and signed by the Governor – whether the proposed furloughs are allowed to be implemented on August 13, 2010 or not.

(See State Petitioners' Exhibit 103, pp. 7-8.)

In their Answer to the Petition for Review, Respondents focus on the trial court's statement that State Petitioners "*failed to show*" how the \$80 to \$110 million "*likely to be saved*" through furloughs will resolve the State's fiscal and cash crisis and argue that this statement "*was not a policy assessment regarding the wisdom of the Governor's choices,*" but rather was an assessment of the evidence presented in support of, and in opposition to, the issuance of the Temporary Restraining Order. (See Respondents' Answer to Petition for Review, p. 13.)

A review of the entire passage, however, demonstrates this is not a mere evidentiary ruling by the trial court. The trial court does not dispute the evidence that the State “is in extremely serious cash and financial straits.” The trial court does not dispute the evidence that furloughs were ordered by the Governor to save cash “in order to make less likely the need for the State to issue warrants in payment of bills, and in order to preserve the State’s ability to borrow money externally when needed.” The trial court does not dispute the evidence that furloughs of state employees will result in a monthly reduction in state personnel costs of “\$80 million to \$110 million [that] likely [will] be saved through the implementation of the proposed furloughs.” Having accepted these important premises, what the trial court does dispute is whether saving \$80 million to \$110 million a month will mitigate the State’s “financial woes” pending the passage of a State budget.

In basing its decision to grant a Temporary Restraining Order on this conclusion, the trial court impermissibly interjected itself into the executive branch’s role “to conserve the financial interests of the state, to prevent improvidence, and to control the expenditure of state money by any of the several departments of the state.” (*Treu v. Kirkwood* (1954) 42 Cal.2d 602, 609.) The trial court’s appropriate role here was to evaluate the legality of

the Governor's actions in furloughing state employees and to weigh the relative equities of the parties, not to challenge the wisdom of the Governor's actions in terms of its effectiveness in addressing the State's fiscal and cash crisis. By intruding on the Governor's prerogative to choose among the options available to him regarding the best approach to addressing the State's immediate fiscal and cash needs, the trial court violated the separation of powers doctrine. The application of the separation of powers doctrine to the issue of the respective roles of the executive and judicial branches in evaluating the steps the Governor may take to address the State's economic ills is presented squarely by the trial court's grant of a Temporary Restraining Order here, an order which the Court of Appeal declined to stay through the issuance of a Writ of Supersedeas. These are important legal questions that should be resolved by this Court.

**b. The Trial Court's Failure to Rule on the Likelihood Respondent's Would Prevail on the Merits of their Claims Demonstrates that the Trial Court Was Not Ruling on the Lawfulness of the Governor's Executive Order in Issuing the Temporary Restraining Order.**

In their Answer to the Petition for Review, Respondents argue the trial court applied the correct standard in granting Respondents' application for a Temporary Restraining Order. (Respondents' Answer to Petition for

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Review, p. 11.) Yet, a review of the order granting the Temporary Restraining Order demonstrates that while the trial court articulates the proper standard for granting injunctive relief, it failed to apply it.

In its ruling granting the Temporary Restraining Order at issue here, the trial court commented that “[t]he cases interpreting those provisions [of Code of Civil Procedure sections 526, subdivision (a), and 527, subdivision (b)] apply the same standards to issuance of a temporary restraining order as to a preliminary injunction.” (See State Petitioners’ Exhibit 103.) Thus, the trial court was required to find and balance 1) the likelihood Respondents would prevail on the merits of their claims at trial; and 2) the interim harm their members would suffer if injunctive relief was denied, as compared to the interim harm State Petitioners may suffer if injunctive relief is granted. (*White v. Davis* (2003) 30 Cal.4th 528, 554.)

The trial court did not make a finding on the first of the above *prima facie* elements for obtaining injunctive relief, namely, the likelihood Respondents will prevail on the merits. Rather, the trial court merely found that Respondents “have raised serious questions concerning [State Petitioners’] authority to implement furloughs through the Governor’s Executive Order.” (State Petitioners’ Exhibit 103.) Respondents argue at page 12 of their Answer to the Petition for Review that a showing of “some

possibility” of success on the merits is sufficient to justify a grant of a Temporary Restraining Order, citing *O’Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1463, and that this standard was met here. There are two significant flaws in Respondents’ argument, however. First, the trial court did not find even “some possibility” that Respondents would succeed on the merit so their claims, only that they had “raised serious questions.” Thus, the trial court did not satisfy the standard Respondents advocate. Second, the court in *O’Connell v. Superior Court, supra*, the case cited by Respondents, ruled that “regardless of how much interim harm may befall the plaintiff, unless there is at least some possibility that the plaintiff will prevail on the merits of the claim.” (141 Cal.App.4th at 1463.) Thus, under Respondents’ own standard, the fact that the trial court did not make a finding of even “some possibility” of success on the merits vitiates Respondents’ claims of irreparable harm to their members and, therefore, injunctive relief should never have issued.

The trial court should have, but declined to make a finding on the likelihood Respondents will prevail on their challenges to the lawfulness of the Governor’s furlough Executive Order. Instead, the trial court improperly based its decision on its assessment of the efficacy of the Governor’s policy decision to address the State’s fiscal condition. For this

The Honorable Ronald M. George, Chief Justice  
August 17, 2010  
Page 13

reason, the Temporary Restraining Order should have been stayed by the Court of Appeal, particularly in light of the evidence of the harm to the State and its citizens if the State is thwarted in its ability to achieve the cash savings from furloughs. These are important questions of law this Court should resolve and for this reason, this Petition for Review should be granted.

**B. This Court Should Grant Review Of This Case To Secure Uniformity Of Decisions.**

As discussed above, there have been 34 lawsuits filed by state employee organizations challenging furloughs since the Governor's issuance of his initial furlough Executive Order in December 2008. These lawsuits have resulted in inconsistent and irreconcilable rulings on the subject of the Governor's authority to furlough state employees. On September 8, 2010, this Court will hear oral argument in the first three of these cases filed by state employee organizations challenging the Governor's authority to furlough state employees. In those cases to be heard by this Court on September 8, 2010, the Sacramento County Superior Court ruled that the Governor possessed the legal authority to furlough state employees – a ruling diametrically opposed to the trial court's grant of a Temporary Restraining Order in this case. (See State Petitioners' Exhibit 86.)

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The trial court's ruling granting a Temporary Restraining Order in this case has added to the confusion surrounding the question of the Governor's authority to furlough state employees. There was no need to add to that confusion, particularly in light of the fact that Respondents assert that state employees have an adequate legal remedy in the form of claims for money damages should this Court find the Governor does not possess the authority to furlough state employees. (See Prayers for Relief in State Petitioners' Exhibits 1 through 7.) In the meantime, however, the trial court should have refrained from removing one of the aggressive cash management measures from the Governor to address the State's ongoing fiscal and cash crisis. (See State Appellants' Exhibit 77 and Exhibit 74 at ¶ 5.)<sup>1</sup> Thus, to secure uniformity of decisions, this Court should grant this Petition for Review.

C. **This Court Should Grant A Stay Both To Prevent Irreparable Harm To The State And To Preserve The Subject Matter Of This Appeal Pending Review On The Merits.**

There can be no dispute – certainly the trial court did not dispute – that the State is experiencing a continuing fiscal and cash crisis. There also can be no dispute – again the trial court did not dispute – that furloughing

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<sup>1</sup> Controller Chiang also has noted that while the State has sufficient cash to meet its obligations through the month of August, the availability of cash is due solely to two factors: deferral of payments to schools and local governments and borrowing. (See State Petitioners' Exhibit 74.)

state employee three days a month as specified in Executive Order S-12-10 will result in monthly savings of between \$80 million and \$110 million. (See State Petitioners' Exhibit 74.) State Petitioners sought a Writ of Supersedeas from the Court of Appeal, and seek a stay from this Court, for two reasons: to prevent irreparable harm to the State that will result if it is unable to achieve these personnel cost savings from furloughs and to preserve the subject matter of this appeal pending consideration on the merits.

The State's current financial condition has been summarized by the Controller in several public statements contained in the record in this case. The Controller has warned that the failure to pass a timely budget would lead to a depletion of cash reserves by October 2010 and would necessitate "aggressive cash management measures, such as issuing IOUs, well in advance of any projected shortfall." (See State Petitioners' Exhibit 77 and Exhibit 74 at ¶ 5.) He has characterized the ongoing fiscal and cash crisis in this State as one in which the State has been "brought to its knees by a global recession that wreaked havoc on nearly every sector of our economy and resulted in an unemployment crisis unseen in modern California history." (*Ibid.*) The Controller has cautioned that without a budget by August 1, 2010, he would be forced to cease making payments to

community colleges, categorical school programs, local governments, non-profit organizations, and state vendors for services provided on or after July 1, 2010. (*Ibid.*)

It was for these reasons the Governor ordered thrice monthly furloughs of State employees to preserve desperately needed cash assets and it is for these reasons State Petitioners urged the Court of Appeal to issue a Writ of Supersedeas, and urge this Court to issue a stay, of the trial court's Temporary Restraining Order. Every dollar of saved cash at present is critical. If the State runs out of cash, the State will be unable to make payments for necessary services affecting the health and safety of the public. There are real consequences of the State running out of cash, namely placing the State's fiscal well-being and the health and safety of its citizens in jeopardy. A stay of the Temporary Restraining Order issued by the trial court is necessary to prevent these consequences.

A stay is also necessary and appropriate to preserve the subject matter of this appeal, *i.e.*, – the personnel cost savings to be achieved from furloughs. If the trial court's order is not stayed, the personnel cost savings from furloughs will be irretrievably lost and the State's cash position will become ever more precarious. The loss to the State of the benefit of the personnel cost saving to be achieve from furloughs if the trial court's

Temporary Restraining Order remains in place stands in contrast to the legal remedies available to state employees in the form of claims for monetary relief contained in each of the complaints filed in the trial court in these consolidated actions should it ultimately be determined the Governor lacked the legal authority to furlough those state employees.

For these reasons, State Petitioners not only urge this Court to grant the present Petition for Review, but also to issue a stay of the trial court's ruling granting a Temporary Restraining Order in these cases.

### III.

#### CONCLUSION

The State can ill afford to lose the \$80 million to \$110 million a month in personnel cost savings that would be achieved if state employees are furloughed three days a month pursuant to Executive Order S-12-10. The Court of Appeal should have issued a Writ of Supersedeas staying the trial court's August 9, 2010 Order to Show Cause and Temporary Restraining Order.

This case presents important questions of law that should be resolved by this Court. In addition, the trial court's Temporary Restraining Order further exacerbates the lack of uniformity in decisions issued to date regarding the legality of furloughs. For these reasons, State Petitioners

The Honorable Ronald M. George, Chief Justice  
August 17, 2010  
Page 18

respectfully request that this Court grant this Petition for Review and issue a stay of the trial court's August 9, 2010 Order to Show Cause and Temporary Restraining Order pending consideration of the merits of this appeal.

Sincerely,

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**PROOF OF SERVICE**

I, May Marlowe, declare:

I am a citizen of the United States and employed in Sacramento County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 400 Capitol Mall, 27th Floor, Sacramento, California 95814. On August 17, 2010, I served a copy of the within document(s):

**State Petitioners' Reply Letter Brief to Answer to Petition for Review**

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 17, 2010, at Sacramento, California.

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