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November 8, 2010

Clerk of the Court
Court of Appeal - First Appellate District, Division 5
350 McAllister Street
San Francisco, CA 94102

Re: *Union of American Physicians and Dentists v. Arnold Schwarzenegger, et al.*, A127775

Dear Sir/Madam:

Pursuant to the Court's order dated October 20, 2010, Appellants Governor Arnold Schwarzenegger, David Gilb, Cindy Ehnes, Carrie Lopez, Tony Sauer, David Maxwell-Jolly, John A. Wagner and Kimberly Belshe ("State Appellants") submit this supplemental letter brief to address the impact of the Supreme Court's decision in *Professional Engineers in California Government v. Schwarzenegger* ("*Professional Engineers*") (2010) 50 Cal.4th 989,¹ on this case. In this Court's October 20, 2010 order, this Court asked State Appellants to address in their supplemental briefing whether their arguments remain viable following the Supreme Court's decision in *Professional Engineers* and whether the record in this case is adequate to decide the issues raised by this appeal. As the discussion to follow demonstrates, the nature of the arguments for

¹ Page number references in this letter brief are to the Slip Opinion.

reversing the trial court's judgment has changed following the Court's decision in *Professional Engineers*. However, the necessity for reversing the trial court's judgment are more compelling than ever following the Supreme Court's decision. Furthermore, the record before this Court is adequate for the purpose of finding that the trial court erred in issuing a writ of mandate compelling the State to cease implementation of the furlough program. For all of the reasons stated, and based upon the Supreme Court's decision in *Professional Engineers*, State Appellants urge this Court to reverse the trial court's judgment in this action.

I. INTRODUCTION.

In *Professional Engineers*, the California Supreme Court definitively resolved any question regarding the validity of the furloughs of state employees initiated pursuant to Governor Schwarzenegger's December 19, 2008 Executive Order S-16-08. The Court held that the California Legislature's passage of the Revised Budget Act of 2008 on February 19, 2009 validated the Governor's furlough Executive Order.

In mid-February 2009 – shortly after the furlough program went into effect – the Legislature enacted, and the Governor signed, legislation that revised the Budget Act of 2008 (2008 Budget Act) by, among other means, reducing the appropriations for employee compensation contained in the original 2008 Budget Act by an amount that reflected the savings the Governor sought to obtain through the two-day-a-month furlough program. The February 2009 legislation further provided that the specific reduction in the appropriations for employee compensation could be achieved

either through the collective bargaining process or through ‘existing administration authority.’ That phrase, in the context in which the revised budget act was adopted and in light of the provision’s legislative history, reasonably included the furlough program that was then in existence and that had been authorized by the current gubernatorial administration. In particular, the bill analyses considered by the Legislature made specific reference to furlough-related reductions of employee compensation costs. Under these circumstances, we conclude that the Legislature’s 2009 enactment of the revisions to the 2008 Budget Act operated to ratify the use of the two-day-a-month furlough program as a permissible means of achieving the reduction of state employee compensation mandated by the act. [¶] Accordingly, we conclude that the 2009 budget legislation validated the Governor’s furlough program here at issue, and reject plaintiffs’ challenge to that program.

(Slip Opn., pp. 3-4.)

In the present action, Respondent Union of American Physicians and Dentists (“UAPD”) challenges the State’s furlough program as applied to employees working in certain “special fund” agencies or departments. The trial court ruled in this case that furloughing state employees working in these special fund agencies and departments violated Government Code sections 19851 and 16310. Following the Court’s ruling in *Professional Engineers*, however, neither of these statutes can be interpreted as invalidating the furlough program at issue here. Accordingly, State Appellants respectfully submit that this Court should find in favor of State Appellants and reverse the trial court’s judgment in favor of Respondent UAPD.

II. THE RATIONALE FOR THE SUPREME COURT'S HOLDING IN *PROFESSIONAL ENGINEERS* RESOLVES ANY QUESTION REGARDING THE THIRD FURLOUGH DAY ADDED IN JULY 2009 PURSUANT TO EXECUTIVE ORDER S-13-09.

The furlough program at issue in *Professional Engineers* was the two-day-a-month program initiated pursuant to Executive Order S-16-08. The Court did not have before it the third furlough day added on July 1, 2009 pursuant to Executive Order S-13-10. This case, however, raises claims relating to this third furlough day. While the validity of the third furlough day added by Executive Order S-13-09 was not at issue in *Professional Engineers*, the Court's rationale for its holding in that case resolves any challenge to the validity of the third furlough day.

As noted above, the Court in *Professional Engineers* held that the Revised Budget Act of 2008 constituted a legislative validation of the Governor's furlough program. The Court reached this conclusion on the basis of language in the act which directed that personnel cost savings equivalent to the savings resulting from furloughs were to be achieved through either the collective bargaining process or through "existing administration authority." (*Professional Engineers, supra*, Slip Opn. p. 71.) With respect to the latter phrase, the Court held that "'existing administration authority' as employed in the February 20, 2009, budget legislation, most reasonably is understood as embodying a legislative decision to permit the mandated reductions in employee compensation to be achieved through the then-existing furlough plan." (*Id.* at p. 72.)

On July 1, 2009, Governor Schwarzenegger issued Executive Order S-13-09 adding a third furlough day per month for state employees. On July 23, 2009, the Legislature passed ABX 4 1, the Revised Budget Act of 2009, which was signed by the Governor on July 28, 2009. The 2009 Budget Act directs personnel cost reductions using the same language as contained in the Revised Budget Act of 2008. Specifically, Section 552 of the Revised Budget Act of 2009 provides:

SEC. 552. Section 3.90 of the Budget Act of 2009 is amended to read:

Sec. 3.90. (a) Notwithstanding any other provision of this act, each item of appropriation in this act, with the exception of those items for the California State University, the University of California, Hastings College of the Law, the Bureau of State Audits, the Legislature (including the Legislative Counsel Bureau), and the judicial branch, 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 \$1,477,917,000 from General Fund items and \$973,058,000 from items relating to other funds.* The Director of Finance shall allocate the necessary reductions to each item of appropriation to accomplish the employee compensation reductions required by this section.

(b) The Department of Personnel Administration shall transmit proposed memoranda of understanding to the Legislature promptly and shall include with each such transmission estimated savings pursuant to this section of each agreement.

(c) Nothing in this section shall change or supersede the provisions of the Ralph C. Dills Act (Chapter 10.3

(commencing with Section 3512) of Division 4 of Title 1 of the Government Code).

(Emphasis added.)

The Revised Budget Act of 2009 uses the same language to validate reduction of state personnel costs through the use of a third furlough day used in the 2008 Budget Act to validate the reduction of state personnel costs through use of the original two-day-a-month furlough program. Accordingly, the rationale underlying the Court's holding in *Professional Engineers* is applicable to the third furlough day. As a result, all challenges to this third furlough day must be resolved in favor of State Appellants.

III. THE LEGISLATURE AUTHORIZED FURLOUGHS OF STATE EMPLOYEES WORKING IN SPECIAL FUND AGENCIES OR DEPARTMENTS.

The Court's holding in *Professional Engineers* disposes of UAPD's argument that the furlough program was invalid as applied to state employees working in special fund agencies or departments.

First, Executive Order S-16-08 applied to all state employees, with certain express exemptions not relevant to UAPD's claim here, without distinction as to the funding source of the agency or department in which the affected employee worked. The Executive Order specifically directed the DPA to "adopt a plan to implement a furlough of represented state employees and supervisors for two days per month, *regardless of funding source.*" (Joint Appendix ["JA"], Vol. I, Tab 21, JA00170.) Thus, the furlough

plan validated by the Legislature in the Revised Budget Act of 2008 involved furloughs of all state employees regardless of the funding source of the agency or department in which they worked.

Second, the language of the budget act reflects the Legislature's intent to authorize furloughs of state employees working in special fund agencies or departments. The 2008 Budget Act authorized a reduction in state employee compensation in order to achieve \$1,024,326,000 in General Fund savings and \$688,375,000 in "other fund savings." (SBX3 2.) The use of the phrase "other funds" in the budget act can only be interpreted as a reference to "special funds" based on the contrast between "other funds" and the General Fund contained in the budget act.

The Court held in *Professional Engineers* that in enacting the Revised Budget Act of 2008, the Legislature validated the "then-existing furlough program." (Slip Opn., p. 74.) The then-existing furlough program ratified by the Legislature included furloughs of state employees working in special fund agencies and departments. Accordingly, the General Fund versus special funds dichotomy advanced by UAPD in this case as a basis for challenging the State's furlough program is no longer valid following the Court's decision in *Professional Engineers*.

IV. GOVERNMENT CODE SECTION 19851 DOES NOT PROHIBIT THE STATE'S FURLOUGH PROGRAM.

The first ground stated by the trial court in this action for finding in favor of Respondent UAPD was that “[i]ssuance of the furlough Executive Orders by the Governor, and implementation by the [named] state agencies, was an abuse of discretion because the Executive Orders violated the requirements of Government Code section 19851(a).”² (Joint Appendix, Vol. II, Tab 54, JA00341.) Following the Court’s decision in *Professional Engineers*, however, the trial court’s ruling invalidating furloughs based on section 19851, subdivision (a), cannot be sustained.

In *Professional Engineers*, the Court considered the applicability of section 19851, subdivision (a), to the analysis of the validity of the State’s furlough program. The Court “conclude[d] that the statute, properly understood, ... simply is not relevant to the type of mandatory unpaid furlough program at issue in the present proceeding.” (Slip Opn., p. 41.) Accordingly, the trial court’s reliance on Government Code section 19851,

² Government Code section 19851, subdivision (a), provides:

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.

subdivision (a), as a basis for invalidating the furlough program at issue here must be reversed following the Court's ruling in *Professional Engineers*.

IV. GOVERNMENT CODE SECTION 16310 DOES NOT PROHIBIT THE STATE'S FURLOUGH PROGRAM.

The trial court also ruled that the furloughs of state employees interfered with the operations of agencies that received any portion of their funding from "special funds" and, as such, violated Government Code section 16310, subdivision (a).³ However, in light of the Supreme Court's opinion in *Professional Engineers*, UAPD no longer has a viable claim that the furlough program violates that code section.

³ Government Code section 16310, subdivision (a), provides:

When the General Fund in the Treasury is or will be exhausted, the Controller shall notify the Governor and the Pooled Money Investment Board. The Governor may order the Controller to direct the transfer of all or any part of the moneys not needed in other funds or accounts to the General Fund from those funds or accounts, as determined by the Pooled Money Investment Board, including the Surplus Money Investment Fund or the Pooled Money Investment Account. All moneys so transferred shall be returned to the funds or accounts from which they were transferred as soon as there are sufficient moneys in the General Fund to return them. No interest shall be charged or paid on any transfer authorized by this section, exclusive of the Pooled Money Investment Account, except as provided in this section. This section does not authorize any transfer that will interfere with the object for which a special fund was created or any transfer from the Central Valley Water Project Construction Fund, the Central Valley Water Project Revenue Fund, or the California Water Resources Development Bond Fund.

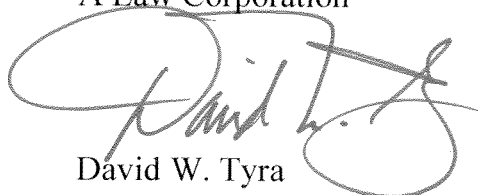
Section 16310, subdivision (a) refers *only* to acts of the Governor and as such, only constrains the acts of the Governor. The Court found in *Professional Engineers* that furloughs constituted an exercise of the legislative prerogative as a result of the ratification of furloughs contained in the Revised Budget Act of 2008. Thus, section 16310 is inapplicable to the legislatively-approved furloughs following the decision in *Professional Engineers*. Furthermore, because there is no evidence in this case that the borrowing of funds from special fund agencies and departments, as opposed to the furloughs themselves, interfered with the object for which any special fund was created, UAPD has failed to demonstrate a violation of section 16310, subdivision (a). Accordingly, the trial court's judgment must be reversed.

V. CONCLUSION.

The California Supreme Court's ruling in *Professional Engineers* fully disposes of the issues in this case. Accordingly, this Court should find in favor of State Appellants and reverse the trial court's judgment in favor of UAPD.

Sincerely,

KRONICK, MOSKOVITZ, TIEDEMANN &
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David W. Tyra

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1 **PROOF OF SERVICE**

2 I, May Marlowe, declare:

3 I am a citizen of the United States and employed in Sacramento County, California. I am
4 over the age of eighteen years and not a party to the within-entitled action. My business address
5 is 400 Capitol Mall, 27th Floor, Sacramento, California 95814. On November 8, 2010, I served a
6 copy of the within document(s):

6 **Appellants' Supplemental Brief**

- 7 by placing the document(s) listed above in a sealed Federal Express envelope and
8 affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal
9 Express agent for first overnight, earliest next business morning delivery.
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11 fully prepaid, the United States mail at Sacramento, California addressed as set
12 forth below.
- 13 by transmitting via e-mail or electronic transmission the document(s) listed above
14 to the person(s) at the e-mail address(es) set forth below.

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17 I am readily familiar with the firm's practice of collection and processing
18 correspondence for mailing. Under that practice it would be deposited with the U.S. Postal
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20 am aware that on motion of the party served, service is presumed invalid if postal cancellation
21 date or postage meter date is more than one day after date of deposit for mailing in affidavit.

21 I declare under penalty of perjury under the laws of the State of California that the
22 above is true and correct.

22 Executed on November 8, 2010, at Sacramento, California.

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May Marlowe