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20 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
21 **COUNTY OF ALAMEDA**

22 PROFESSIONAL ENGINEERS IN
23 CALIFORNIA GOVERNMENT, *et al.*,

24 Petitioners/Plaintiffs,

25 v.

26 EDMUND G. BROWN, JR., Governor of the
27 State of California, *et al.*,

28 Respondents/Defendants.

) Case No. RG10494800, consolidated with
) Case No. RG10530845

) **PETITIONERS' OPENING BRIEF IN**
) **SUPPORT OF PETITIONS FOR WRIT**
) **OF MANDATE**

) Dept.: 17
) Judge: Steven A. Brick

) Trial Date: April 13 and 20, 2012

) Action Filed: January 21, 2010

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1 **INTRODUCTION**

2 Petitioners Professional Engineers in California Government (“PECG”) and California
3 Association of Professional Scientists (“CAPS”) (hereinafter “Petitioners”) file this opening brief in
4 support of their amended writs challenging aspects of the unpaid furlough program that was
5 instituted unilaterally by former Governor Arnold Schwarzenegger and his administration pursuant
6 to a series of Executive Orders. State employees represented by Petitioners were subject to the
7 furloughs for most of 2009 and 2010, with the furloughs continuing through the end of March 2011.

8 As the Court is aware, the furloughs engendered a great deal of litigation, most of which
9 revolved around the question of the Governor’s authority unilaterally to furlough represented state
10 employees. Since this litigation was first filed, the Supreme Court and the First District Court of
11 Appeal have issued decisions bearing on a number of the claims initially presented by Petitioners.
12 Most significantly, in *Professional Engineers v. Schwarzenegger* (2010) 50 Cal.4th 989 (hereinafter
13 “*PECG I*”), the Supreme Court agreed with the basic proposition advanced by Petitioners that the
14 Governor and the executive branch lack authority unilaterally to impose a furlough program that
15 results in salary reductions for represented state employees. *Id.* at 1043. Instead, this power is
16 reserved to the Legislature. *Id.* at 1024, 1043. Nonetheless, the Court found that the Legislature
17 had approved and authorized the furlough program through its annual budget legislation. *Id.* at
18 1044. Only the existence of this legislative authorization rendered the furlough program – which
19 the Governor otherwise had no authority to implement – valid. *Id.*

20 Petitioners advance three claims that were not resolved by *PECG I* or subsequent Court of
21 Appeals decisions, nor by the decision of the Department of Personnel Administration (“DPA”) to
22 terminate the unilaterally imposed furlough program in April 2011. First, Petitioners represent a
23 number of employees who are involved in remediation and hazardous substance management work
24 at military bases, work generally funded by federal grants and other non-state sources. The
25 positions of these employees are statutorily exempt from any personnel cutbacks or limitations such
26 as those imposed by the furloughs. *See* Health & Safety Code §25353.5 and Water Code §13177.7.
27 Respondents had no legal authority to furlough employees in positions covered by these statutory
28 exemptions.

1 Second, Petitioners represent employees at the California Earthquake Authority (“CEA”),
2 the California Housing Finance Agency (“CalHFA”), and the California Prison Industry Authority
3 (“CalPIA”), which do not receive appropriations through the annual budget legislation. As such,
4 there can be no argument that the Legislature, in enacting annual budget legislation that included
5 reductions in employee compensation, somehow authorized the furloughs of employees at these
6 agencies. There is no other legal basis for the furlough of employees at CEA, CalHFA and CalPIA.

7 Finally, Respondents’ continuation of the three-day-per-month furlough program through
8 the end of March 2011 exceeded any legislative authorization of the program. The annual budget
9 legislation authorized only reductions in represented employees’ compensation that would be
10 proportionate to the reductions made to non-represented employees’ compensation.¹ It did not
11 authorize furloughs that would result in cuts to represented employees’ wages of a *greater*
12 percentage than those made to non-represented employees. After the first furlough day in March
13 2011, the cuts exacted from PEGC- and CAPS-represented rank-and-file employees were greater
14 than those made to non-represented employees’ compensation. As such, the second and third
15 furlough days in March 2011 were beyond the scope of the Legislature’s authorization.

16 Although Petitioners’ claims now are obviously more narrow in scope than at the outset of
17 this litigation, they nonetheless stem from the heart of the Supreme Court’s ruling in *PECG I* that
18 the executive branch has no constitutional or statutory authority unilaterally to impose furloughs on
19 represented employees. 50 Cal.4th at 1041. Respondents would have this Court conclude that the
20 annual budget legislation, which authorized reductions in items of appropriation for employee
21 compensation, was a *carte blanche* to the executive branch to continue the furloughs without regard
22 to the specific positions filled by those employee or whether the employees’ departments even
23 received appropriations through the budget acts, and for as long as DPA deemed appropriate. But
24 *PECG I* teaches that the furloughs are valid only insofar as they are within the scope of some

25
26 ¹ “Non-represented employees” refers to supervisory and other excluded employees who are
27 not represented by a duly certified exclusive bargaining representative pursuant to Government
28 Code §3513(b). Thus, that these employees are deemed “non-represented” does not necessarily
mean that they are not represented by an organization. For example, PEGC and CAPS are certified
bargaining representatives of Bargaining Units 9 and 10, respectively, but also are verified
supervisory employee organizations that represent supervisory employees who are professional
engineers and scientists.

1 authorization by the Legislature. *Id.* at 1046-48. The furloughs challenged here by Petitioners were
2 outside the scope of any legislative approval, should be set aside as unlawful, and the affected
3 employees should be made whole.

4 **FACTUAL AND PROCEDURAL BACKGROUND**

5 **A. Status of Furloughs**

6 In 2008 and 2009, then-Governor Schwarzenegger issued two Executive Orders requiring
7 the furloughs of state employees, including those represented by Petitioners. *See* Decl. of Barbara J.
8 Chisholm (“Chisholm Decl.”), Exhs. A & B. Pursuant to these orders, represented employees were
9 subject to two days of unpaid furloughs each month from February 1 to June 30, 2009, and then to
10 three days of furloughs per month from July 1, 2009 to June 30, 2010. *Id.*, Exhs. A & B.

11 On July 28, 2010, the Governor issued another executive order, again directing the
12 furloughing of represented state employees for three days each month, beginning in August 2010.
13 *Id.*, Exh. C. Rank-and-file employees represented by Petitioners were subject to these furloughs
14 through the end of March 2011. Decl. of Theodore Toppin (“Toppin Decl.”) ¶7.

15 In late March 2011, Petitioners reached tentative memoranda of understanding (“MOUs”)
16 with DPA. These tentative agreements provided that DPA would cease implementing the
17 unilaterally imposed furlough program on April 1, 2011, with respect to employees represented by
18 Petitioners. Toppin Decl. ¶32.

19 **B. Remand Following *PECG I* Decision and Status of Consolidated Cases**

20 The lead case in these consolidated matters, *PECG v. Schwarzenegger, et al.*, Case No.
21 RG10494800, was filed by PECG on January 21, 2010. The Court consolidated *PECG v.*
22 *Schwarzenegger* with nine other cases filed by other unions representing state employees, which
23 also challenged the Governor’s furlough orders.²

24 On August 9, 2010, this Court entered a temporary restraining order enjoining the furlough
25 program mandated by the Governor’s July 28, 2010 executive order. Chisholm Decl., Exh. E.

27 ² The cases initially consolidated were: Case Nos. RG10507922, RG10507081,
28 RG10503805, RG10501997, RG10516259, RG10514694, RG10530845, RG10528855 and
RG10530312. With the exception of the case filed by CAPS, Case No. RG10530845, these other
matters have been or are being dismissed and/or settled.

1 After the Court of Appeal denied a writ of supersedeas filed by Respondents, the Supreme Court
2 granted review, staying further trial court proceedings, and deferred further action pending a
3 decision in *PECG I* (2010) 50 Cal.4th 989.

4 After the Supreme Court's decision in *PECG I* became final, the Supreme Court remanded
5 these consolidated cases to the Court of Appeal. Chisholm Decl., Exh. F. At Petitioners' request,
6 the Court of Appeal subsequently remanded the cases to this Court for further proceedings in light
7 of *PECG I*, the enactment of the 2010 Budget Act, and other intervening developments, without
8 passing on the merits of the claims in these actions. *Id.*, Exh. G.

9 On February 11, 2011, Petitioners filed amended petitions and complaints. *Id.*, Exhs. H & I.
10 The amended petitions/complaints challenged the legality of the furloughs in light of the Supreme
11 Court's holding that the Governor could not unilaterally impose furloughs without proper legislative
12 authorization, and on some specific bases not addressed by the Court's ruling in *PECG I*.

13 Certain claims asserted by Petitioners in their amended petitions have been addressed by the
14 Court of Appeal. For example, in *SEIU Local 1000 v. Schwarzenegger* (2011) 197 Cal.App.4th
15 252, 265-68, the court considered claims that employees at state agencies financed predominantly
16 through special and federal funds should not have been subject to the furloughs, and concluded that
17 the propriety of the furloughs should turn on whether an agency received an item of appropriation in
18 the state budget. And in *Brown v. Superior Court* (2011) 199 Cal.App.4th 971, the court found that
19 aspects of the furlough program did not violate various Labor Code protections.

20 Given the interceding court decisions and the State's termination of the furlough program,
21 Petitioners here pursue only three issues.

22 **C. The Budget Act for Fiscal Year 2010-2011**

23 On October 8, 2010, Senate Bill 870 was signed into law as the Budget Act for Fiscal Year
24 2010-2011. Section 3.91 of the act provides that "item[s] of appropriation in [the] act . . . shall be
25 reduced to reflect reductions in employee compensation achieved through the collective bargaining
26 process or through administrative actions for represented employees and a proportionate reduction
27 for nonrepresented employees" Chisholm Decl., Exh. M (S.B. 870, §3.91(a)). The section
28

1 further provides that the Director of Finance shall make the “necessary reductions to each item of
2 appropriation.” *Id.* (S.B. 870, §3.91(b)).

3 ARGUMENT

4 The Supreme Court’s decision in *PECG I* establishes that the furlough program instituted by
5 former Governor Schwarzenegger was only lawful to the extent it validly was authorized by the
6 Legislature. As explained in more detail below, the furloughs of state employees represented by
7 Petitioners exceeded any legislative authorization in three distinct ways. First, specific statutory
8 provisions prohibit the furloughing of employees represented by Petitioners who work in positions
9 related to remediation and hazardous substance management at military bases. The Legislature did
10 not, nor could it, override these statutory provisions through its annual budget legislation. Second,
11 the various budget acts cannot serve as legislative authorization of furloughs of employees at the
12 California Earthquake Authority, the California Housing Finance Agency and the California Prison
13 Industry Authority, which do not receive appropriations through the annual budget legislation. And
14 third, in the 2010 Budget Act, the Legislature only authorized the furloughs of represented
15 employees to the extent they were proportionate to the furloughs imposed on non-represented
16 employees. The continuation of furloughs pursuant to the third executive order, Executive Order S-
17 12-10, exceeded the scope of this legislative authorization once it resulted in cuts to represented
18 employees’ compensation that were greater than those imposed on non-represented employees.

19 I. Standard for Writ of Mandate

20 A writ of mandate may issue to compel the performance of an official act required by law or
21 “to correct an abuse of discretion” by a public officer. *Woods v. Strother* (1888) 76 Cal. 545, 548-
22 49; Code Civ. Proc. §1085(a); *see also Harpending v. Haight* (1870) 39 Cal. 189, 209-13 (writ
23 proper against Governor to enforce performance of act required by statute). Mandamus is thus a
24 proper remedy for actions by Respondents that are beyond their legal authority. *See Lockyer v. City*
25 *& County of San Francisco* (2004) 33 Cal.4th 1055, 1120 (writ of mandate issued to compel mayor
26 to comply with existing law where mayor acted in excess of lawful authority).³

27
28 ³ A writ must also be supported by a “verified petition of the party beneficially interested.”
Code Civ. Proc. §1086. Petitioners, as the exclusive bargaining representatives of employees who

(continued...)

1 **II. There is No Lawful Authority for the Unpaid Furloughing of Employees in Positions**
2 **Charged with Remediation and Hazardous Material Management at Military Bases,**
3 **Which Are Covered By Water Code §13177.7 and Health & Safety Code §25353.3**

4 The furloughing of certain employees represented by Petitioners working in positions
5 relating to the oversight and support of hazardous substance management and remediation work at
6 military bases is prohibited by Water Code §13177.7 and Health & Safety Code §25353.5. Both
7 prohibit the Controller and the Department of Finance from imposing “any . . . personal services
8 limitations” on those positions. Water Code §13177.77(b); Health & Safety Code §25353.3(b).
9 These Code sections are designed to protect positions that receive funding through federal grants or
10 from parties responsible for paying the costs of the Department of Toxic Substance Control
11 (“DTSC”) or the State Water Resources Control Board (“SWRCB”), the agencies charged with
12 doing the work at the military bases. Health & Safety Code §25353.3(b); Water Code
13 §13177.77(b).⁴

14 Petitioners represent numerous employees at DTSC and SWRCB who hold positions
15 covered by Water Code Section 13177.7 and Health & Safety Code Section 25353.5. As reflected
16 in the accompanying declarations, PECG and CAPS together represent 255 employees who worked

17 ³(...continued)
18 were furloughed pursuant to the challenged Executive Orders, are beneficially interested and filed
19 verified petitions.

20 ⁴ Both Code sections were enacted in 2003 in a single bill (A.B. 1700), and contain almost
21 identical language. Specifically, Water Code §13177.7(b) provides:

22 (b) Neither the Controller nor the Department of Finance may impose any hiring
23 freeze or personal services limitations, including any position reductions, upon any
24 direct or indirect position of the state board that provides oversight and related
25 support of remediation at a military base, including a closed military base, that is
26 funded through an agreement with a state agency or party responsible for paying the
27 state board’s costs, or on any direct or indirect position that is funded by a federal
28 grant that does not require a state match funded from the General Fund.

Health & Safety Code §25353.5(b) provides:

(b) Neither the Controller nor the Department of Finance may impose any hiring
freeze or personal services limitations, including any position reductions, upon any
direct or indirect position of the department that provides oversight and related
support of remediation and hazardous substance management at a military base,
including a closed military base, that is funded through an agreement with a party
responsible for paying the department’s costs, or on any direct or indirect position
that is funded by a federal grant that does not require a state match funded from the
General Fund.

1 in positions at DTSC and SWRCB that, during the time the furloughs were in effect, received non-
2 state funding to perform remediation and hazardous substance management duties at military bases.
3 Toppin Decl. ¶¶17, 20, 23, 26.⁵

4 The furloughing of PECG- and CAPS-represented employees in positions performing
5 remediation and hazardous substance management work at military bases constitutes “personal
6 services limitations” prohibited by Water Code §13177.7 and Health & Safety Code §25353.5. The
7 statutes refer to “personal service limitations” as “including,” but not as limited to, “any position
8 reductions.” *See* Health & Safety Code §25353.5(b). Thus, the Legislature’s use of the term
9 “personal services limitations” must be construed as encompassing limitations beyond the reduction
10 of the covered positions. “Personal services” is a term used to refer to employment, or to the
11 rendering of service as an employee. *See Stone v. Bancroft* (1902) 139 Cal. 78, 82, 70 P. 1017,
12 1018, *affirmed* 139 Cal. 78 (describing contract of employment as one for “personal services”);
13 *accord* Labor Code §2855 (referring to “person contracting to render . . . service” as “employee”).
14 Thus, a limitation on personal services is plainly read as a limitation on one’s employment. *See*
15 *Cal. Teachers Ass’n v. Governing Bd. of Hilmar Unified Sch. Dist.* (2002) 95 Cal.App.4th 183, 191
16 (statutory language should be given “usual and ordinary meaning”).

17 That the Water Code and Health & Safety Code provisions are intended to prohibit the
18 imposition of any limitations on the covered positions is also made clear by the other prohibitions
19 set forth in the statutes. The Controller and Department of Finance are expressly prohibited from
20 “impos[ing] any hiring freeze” with respect to the covered positions (*see* Health & Safety Code
21 §25353.5(b)), and from eliminating any covered position. *Id.* §25353.5(a). Accordingly, the term
22 “personal services limitations” must encompass a broader range of potential limitations on the
23 covered positions – beyond hiring freezes, elimination of positions and position reductions. The
24 furloughing of covered employees for up to three days each month, and the accompanying
25 reductions in salaries, certainly constitute such a personal services limitation.

26
27 ⁵ These employees are in positions that perform remediation and hazardous substance
28 management work at military bases. That the employees in these positions may also perform other
types of work is not relevant. Nothing in the statutes requires that the covered position be devoted
exclusively to work on the military bases. *See, e.g.,* Health & Safety Code §25353.5(b) (generally
protecting “position . . . that provides oversight and related support of remediation”).

1 The Water Code and Health & Safety Code sections also are designed to insulate the
2 covered positions from any budget legislation that might otherwise require reductions in wages,
3 hours or positions. Thus, the statutes require the Controller and the Department of Finance to
4 *exclude* covered positions and associated amounts from DTSC’s and SWRCB’s “base for purposes
5 of calculating *any budget or position reductions* required by any state agency or state law.” Health
6 & Safety Code §25353.5(c) (emphasis added); Water Code §13177.7(c). They also clearly prohibit
7 the elimination of the covered positions notwithstanding any other existing provision of law,
8 including certain budget act provisions that would otherwise require the Controller and Department
9 of finance to cut positions. *See* Health & Safety Code §25353.5(a)(1), (2); Water Code
10 §13177.7(a)(1), (3).

11 The legislative history further demonstrates the intent of the Legislature to prohibit any
12 reductions or limitations on the wages and working hours of state employees working on
13 remediation and hazardous substance management at military bases. Both statutory provisions were
14 enacted pursuant to Assembly Bill 1700 in 2003. *See* Chisholm Decl., Exh. O (Stats. 2003, ch. 869
15 (A.B. 1700)). At the time of the bill’s enactment, not only was there a state hiring freeze in place
16 (implemented pursuant to an executive order), but there was also a proposed 10 percent across-the-
17 board cut in personnel services. *See* Sen. Appropriations Comm., Fiscal Summary of A.B. 1700
18 (2003-04 Reg. Sess.), as amended Aug. 18, 2003 (attached as Exh. Q to Chisholm Decl.); Assem.
19 Floor Analysis of A.B. 1700 (2003-04 Reg. Sess.), as amended Sept. 2, 2003 (attached as Exh. P to
20 Chisholm Decl.). Thus, the bill was intended to “[e]xempt[] certain positions within [DTSC] and
21 [SWRCB] from any hiring freezes and staff cutbacks.” Assem. Floor Analysis of A.B. 1700 (2003-
22 04 Reg. Sess.), as amended Sept. 2, 2003.⁶ The Legislature thus clearly intended to insulate these
23 positions from precisely the type of personnel reductions the furloughs represent.

24
25 _____
26 ⁶ As explained in the floor analysis, it would make no sense to reduce these positions in any
27 way, as they are, by definition, either federally funded or funded from another non-State source, and
28 thus cost the State nothing while bringing in additional funding for needed work at the military
bases. *See* Assem. Floor Analysis of A.B. 1700 (2003-04 Reg. Sess.), as amended Sept. 2, 2003
(noting that DTSC and SWRCB at that time received “\$16.6 million in federal funding and funding
from responsible parties for remediation and management of hazardous materials at military and
closed military bases,” money which funded “187 positions at DTSC and 39 positions at SWRCB”).

1 In *California Attorneys v. Brown* (2011) 195 Cal.App.4th 119, the First District Court of
2 Appeal considered a similar statutory provision, which “exempt[s]” “positions funded by the State
3 Compensation Insurance Fund . . . from any hiring freezes and staff cutbacks otherwise required by
4 law.” Ins. Code §11873(c) (emphasis added). In that case, the State defendants argued that the
5 statutory exemption limited only the Governor’s authority to lay off employees, but did not
6 “preclude the Governor from reducing the number of hours each employee works” through a
7 furlough program. 195 Cal.App. at 125-26. The Court of Appeal agreed with the trial court’s
8 conclusion that construing the prohibition on “staff cutbacks” as barring the furloughs was
9 consistent with the language of the statute, as well as with the statutory scheme and the legislative
10 history of the State Compensation Insurance Fund. *Id.* at 126. The court explained:

11 Defendants’ suggestion that the exemption for State Fund employees from “staff
12 cutbacks” prevents layoffs but not a reduction in hours is not sensible. Staff is “cut
13 back” whether hours are reduced or employees are terminated. The reduction in
total hours worked by State Fund employees is the same whether achieved by a
furlough imposed on all employees or the layoff of only some employees.

14 *Id.*

15 Here, the statutory language at issue prohibits “freeze[s] or personal services limitations,” a
16 prohibition that is described in the legislative committee analyses as exempting the covered
17 positions “from any hiring freezes and staff cutbacks.” Assem. Floor Analysis of A.B. 1700 (2003-
18 04 Reg. Sess.), as amended Sept. 2, 2003. This is the same language used in the Insurance Code
19 section at issue in *California Attorneys*. Ins. Code §11873(c). There can be no question that, just as
20 the Insurance Code provision at issue in *California Attorneys* prevented the Governor from
21 imposing furloughs on the State Fund employees, the Governor also had no authority to furlough
22 employees at DTSC and SWRCB working in positions covered by Health & Safety Code §25353.5
23 and Water Code §13177.7.

24 Nothing in *PECG I* mandates a different result. 195 Cal.App.4th at 123. As noted above,
25 *PECG I* underscores that the Governor did not have authority unilaterally to impose mandatory
26 unpaid furloughs on state employees (50 Cal.4th at 1041), and that the furloughs were therefore
27 lawful only to the extent they were authorized by the Legislature. *Id.* at 1050-51. Respondents here
28 rely on the budget acts for their assertion that the Legislature ratified the unpaid furloughs of all

1 employees represented by PECG and CAPS, including those in positions covered by Health &
2 Safety Code §25353.5 and Water Code §13177.7. However, the Legislature could not – through its
3 annual budget legislation– overturn these statutes’ specific protections for positions related to
4 military base remediation and hazardous material management. This is because budget acts are
5 constrained by the single-subject rule. As the Court in *PECG I* explained:

6 [T]he budget bill may deal only with the one subject of appropriations to support the
7 annual budget, and thus may not constitutionally be used [1.] to grant authority to a
8 state agency that the agency does not otherwise possess or [2.] to substantively
9 amend and change existing statut[ory] law.

10 50 Cal.4th at 1049 (internal quotations, brackets, and citations omitted); *see also* Cal. Const., art.
11 IV, §9 (“A statute shall embrace but one subject, which shall be expressed in its title.”).

12 *PECG I* thus cautioned that the legislative authorization found in the budget act “should not
13 be interpreted to expand or modify the Governor’s or the DPA’s authority, under preexisting
14 statutes, in a manner that would raise constitutional questions under the single subject rule. *Id.* at
15 1051; *see also id.* at 1049-50 (holding that approval in budget act did not “substantively amend or
16 change any existing statutory provision or expand or restrict the substantive authority of any state
17 agency”).

18 Here, if the budget legislation were construed to authorize furloughs of employees in
19 positions covered by Health & Safety Code §25353.5 and Water Code §13177.7, it would violate
20 the single-subject rule in two ways. First, it would grant the Department of Finance and the
21 Controller authority to do exactly that which they are prohibited from doing under the Health &
22 Safety Code and Water Code provisions. And second, it would substantively change existing
23 statutory law by overriding the statutes’ prohibition on the imposition of any “personal services
24 limitations” on the covered positions.

25 Respondents therefore cannot rely on the budget legislation as the source of the necessary
26 legislative ratification of the Executive Orders. The furloughing of employees in positions covered
27 by Health & Safety Code §25353.5 and Water Code §13177.7 was without legal authority and the
28 Executive Orders, to the extent they were applied to employees in these positions, should be
declared unlawful and set aside.

1 **III. There is No Lawful Authority for the Unpaid Furloughing of Employees at State**
2 **Agencies Not Funded by the Annual Budget Act**

3 *PECG I* held that the Legislature’s annual budget legislation could constitute ratification of
4 the Governor’s furlough orders, insofar as it called for reductions in employees’ compensation. 50
5 Cal.4th at 1047-48. However, each of the budget acts enacted during the period the furloughs were
6 in effect specifically limited the called-for reductions to employee compensation to “item[s] of
7 appropriation” set forth in the relevant budget act. The budget acts do not purport to affect
8 employee compensation at state agencies that are not subject to items of appropriation in the acts.

9 For example, the revised 2008-2009 budget act (S.B. x3 2 §36), and the 2009-2010 budget
10 act (S.B. x3 1 §3.90), which were enacted on February 20, 2009, both provide that
11 “[n]otwithstanding any other provision of this act, *each item of appropriation in this act . . . shall be*
12 *reduced, as appropriate, to reflect a reduction in employee compensation. . . .*” Chisholm Decl.,
13 Exhs. J & K. The identical language appeared in the 2009-2010 budget act, which was signed into
14 law on July 28, 2009. *Id.*, Exh. L (A.B. x4 1 §552). Finally, the 2010-2011 budget act, enacted on
15 October 8, 2010, included essentially identical language, providing that “*each item of appropriation*
16 *in this act . . . shall be reduced, as appropriate, to reflect a reduction in employee compensation,*”
17 and further charged the Director of Finance with making “*the necessary reductions to each item of*
18 *appropriation . . .*” *Id.*, Exh. M (S.B. 870 §3.91(a), (b)) (emphases added).

19 The legislative authority for the furlough programs is thus necessarily limited to “item[s] of
20 appropriation” in the budget act. In the single published appellate decision that has addressed this
21 issue, the Court of Appeal acknowledged that for agencies that “are not tied to an ‘item of
22 appropriation’ in the Budget Acts, their inclusion in the furlough program is not ‘mandated’ by an
23 act of the Legislature, and thus, strictly speaking, are outside the holding of [*PECG I*].” *SEIU Local*
24 *1000 v. Brown* (2011) 197 Cal.App.4th 252, 271. The court identified a handful of agencies for
25 which furloughs might be invalid, including CEA, CalHFA and CalPIA, but recognized that it could
26 not conclusively determine whether these agencies were subject to appropriations through the
27 budget act. *Id.* at 270-72, n.11. The court remanded this issue to the Superior Court. *Id.* at 275.

1 Petitioners represent employees at CEA, CalHFA and CalPIA.⁷ These agencies are not
2 funded through the State’s annual budget act, nor are they subject to appropriations made therein.
3 CEA is a specially created entity that transacts earthquake insurance business (Ins. Code §10089.6),
4 and is governed “[w]ithout limitation” by a three-member board. *Id.* §10089.7(a), (c). CEA is
5 funded by the California Earthquake Authority Fund, which is not a fund in the State Treasury, and
6 which is continuously appropriated without regard to fiscal years or annual budget acts. *Id.*
7 §10089.22(b). Thus, there can be no question that CEA is not subject to an item of appropriation in
8 the annual budget act. *See also id.* §10089.22(e) (money generated by sale of insurance is “not state
9 money”). Accordingly, employees at CEA should not have been subject to the Governor’s
10 unilaterally implemented furloughs.

11 CalHFA is an entirely “fiscally self-sufficient” entity (Health & Safety Code §50956), which
12 is supported by the sale of bonds and fees from its mortgage lending operations. *See id.* §§51060,
13 51333. The operations of CalHFA (including salaries) are paid for by the revenues the agency
14 generates. *Id.* §§50154, 51333. CalHFA funds cannot be transferred to the General Fund. *Id.*
15 §51625(b). Nor is CalHFA subject to any item of appropriation in the budget acts. Chisholm Decl.,
16 Exh. R (Department of Finance admission). Because there was no legislative authorization for the
17 furloughs of represented employees at CalHFA, the furloughs of those employees were unlawful.

18 CalPIA is part of the Department of Corrections and Rehabilitation and is authorized to
19 operate industrial, agricultural and service enterprises. Penal Code §§2800, 2807(a). The expenses
20 of CalPIA are funded by a permanent Prison Industries Revolving Fund. *Id.* §2806. CalPIA is thus
21 “self-supporting and does not receive an annual appropriation from the Legislature.” *See*
22 <http://www.pia.ca.gov/About_PIA/FastFacts.html>.

23 In the absence of any legislative authorization for furloughs at CEA and CalHFA, the
24 furloughs of employees at these two agencies were unlawful, and the employees must be
25 compensated for the reductions in compensation that were caused by the illegal furloughs.

27 ⁷ CAPS represents one employee at CEA who was subject to the furloughs; PECG
28 represents eight employees at CalHFA who were subject to the furloughs; and CAPS and PECG
together represent seven employees at CalPIA who were subject to the furloughs. Toppin Decl. ¶¶9-
12.

1 **IV. To the Extent the Legislature Ratified the Governor’s Executive Order by Adopting**
2 **the 2010 State Budget Act, It Only Authorized Reductions of Represented Employees’**
3 **Compensation that Were “Proportionate” to Reductions Made for Non-Represented**
4 **Employees**

4 In enacting the 2010 Budget Act, the Legislature did not authorize the Governor to make
5 unlimited reductions to represented employee compensation. Rather, the Legislature authorized
6 reductions in represented employees’ compensation that would be proportionate to reductions in
7 non-represented employees’ compensation. Accordingly, to the extent the furloughs of employees
8 represented by Petitioners exceeded this legislative authorization, they were unlawful.

9 Although Section 3.91 of the 2010 Budget Act identifies a potential total of \$1,557 million
10 in reductions in employee compensation to be achieved through collective bargaining or
11 administrative actions, it also places limits on the manner in which any such reductions may be
12 obtained. Specifically, Section 3.91(a) of the 2010 Budget Act authorizes:

13 reductions in employee compensation achieved through the collective bargaining
14 process or through administrative actions for represented employees and a
proportionate reduction for nonrepresented employees

15 Chisholm Decl., Exh. M (S.B. 870 §3.91(a)).

16 The legislative history and context of the 2010 Budget Act underscores the importance of
17 the proportionality requirement imposed by the Legislature on any reductions to represented
18 employees’ salaries. At the time the 2010 Budget Act was being debated, the State was in the
19 process of executing new memoranda of understanding (“MOUs”) with Service Employees
20 International Union (“SEIU”) for nine bargaining units. Toppin Decl. ¶30. Prior to the passage of
21 the budget act, it was understood that these MOUs would result in a reduction of SEIU-represented
22 employees’ compensation through a one-day-per-month unpaid “personal leave” day and a 3
23 percent increase in employees’ monthly pension contributions. *Id.*

24 Thus, during floor debate in the Senate, State Senator Duchenev, the author of budget act
25 and chair of the Senate Budget Committee, made the following statement about anticipated
26 reductions in employee compensation:

27 It includes savings in employee compensation that we are pleased, as I think we are
28 waiting for the MOU that will ratify additional agreements that with nine additional
bargaining units that brings the total to about 15 of our 21 bargaining units how after
today hopefully will have signed agreements. *The savings on employee*

1 *compensation through this budget recognizes those contracts and assumes similar*
2 *savings for other units and non-represented employees*, some of which if they do not
3 have a contract would be done by the administrative actions like the furloughs the
4 Governor has already imposed. So those savings are acknowledged in this budget.

5 Chisholm Decl., Exh. N at Tab 2 (emphasis added).⁸

6 The MOUs with SEIU were introduced to and approved by the Legislature on October 7,
7 2010, and resulted in a total 8.5 percent reduction in the SEIU-represented employees’
8 compensation for the 2010-11 fiscal year. Toppin Decl. ¶30.

9 Additionally, on October 8, 2010, the same day the 2010 Budget Act was enacted, then-
10 Governor Schwarzenegger issued Executive Order S-15-10, revising the compensation directives
11 for non-represented state employees. Chisholm Decl., Exh. D. That order, which took effect on
12 November 1, 2010, implemented terms similar to those contained in the SEIU MOUs and brought
13 the non-represented employees’ compensation into alignment with the reductions made to SEIU-
14 represented employees’ compensation: it also achieved an 8.5 percent reduction in compensation for
15 the 2010-11 fiscal year. *Id.*; Toppin Decl. ¶29. That the SEIU MOUs and the executive order
16 governing non-represented employees’ salaries resulted in the *same 8.5 percent reduction* reflects
17 the understanding that a “proportionate” reduction is one that results in the same overall percentage
18 reduction to employees’ compensation.

19 Despite the executive branch’s apparent recognition that the cuts to represented and non-
20 represented employees’ compensation must be proportionate, by allowing Executive Order S-12-10
21 to stay in effect, the Governor and DPA exacted a higher percentage of reductions from employees
22 represented by Petitioners. The three-day-per-month furloughs resulted in an annualized reduction
23 of 8.5 percent in the compensation of rank-and-file employees represented by Petitioners following
24 the first unpaid furlough day in March 2011. Toppin Decl. ¶31. Each subsequent unpaid furlough
25 day resulted in reductions to these employees’ compensation that *exceeded* 8.5 percent, and thus

26 ⁸ In *PECG I*, the Court relied on legislative history to determine the scope of the legislative
27 authorization. Finding that the budget legislation’s language authorizing reductions through
28 “existing administration authority” was ambiguous, the Court turned to the Senate and Assembly
 floor analyses, as well as a statement by the chair of the Senate Budget Committee, which indicated
 that the reductions in appropriations for employee compensation “reflected the two-day-a-month
 furloughs.” 50 Cal.4th at 1046 (emphases removed). Here, the legislative history reflects the clear
 intent of the Legislature to authorize only proportionate reductions employee compensation.

1 were no longer proportionate to the cuts made to non-represented employees' compensation. *Id.*
2 With the two additional furlough days that were imposed on employees represented by Petitioner in
3 March 2011, the reduction to employee compensation rose to 9.2 percent. *Id.* ¶28. Respondents'
4 three-day-per-month furloughs thus exceeded the scope of the Legislature's authorization after the
5 first furlough day in March 2011.

6 **CONCLUSION**

7 For the foregoing reasons, Petitioners respectfully request that a writ of mandate issue
8 finding the furloughing of state employees represented by Petitioners pursuant to the Governor's
9 executive orders to be unlawful as relates to:

10 (a) the furloughing of employees in positions covered by Health & Safety Code §25353.5(b)
11 and Water Code §13177.7(b);

12 (b) the furloughing of employees working at CEA, CalHFA, and CalPIA; and

13 (c) the imposition of furloughs on employees in Bargaining Units 9 and 10 represented by
14 Petitioners that were disproportionate to those imposed on non-represented employees, and namely
15 the imposition of two unpaid furlough days in March 2011, following the first furlough day in that
16 month.

17 The executive orders should be set aside to the extent that they were unlawful and the
18 employees represented by Petitioners should be made whole for unauthorized reductions in their
19 compensation.

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Respectfully Submitted,

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