

COPY

No. C061009

(Related to C061011 and C061020)

In the Court of Appeal of the State of California
Third Appellate District

California Attorneys, etc.,
Plaintiff and Appellant,

FILED

vs.

DEC - 8 2009

Arnold Schwarzenegger, et al.,
Defendants and Respondents.

COURT OF APPEAL - THIRD DISTRICT
DEENA C. FAWCETT

BY _____ Deputy

APPLICATION AND BRIEF OF AMICUS CURIE
TEACHERS' RETIREMENT BOARD
OF THE CALIFORNIA STATE
TEACHERS' RETIREMENT SYSTEM

FILED IN SUPPORT OF PLAINTIFF AND APPELLANT
CALIFORNIA ATTORNEYS, ETC.

On Appeal from an Order and Judgment by the Sacramento County
Superior Court, Case No. 34-2009-80000134-CU-WM-GDS,
The Honorable Patrick Marlette

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FILED

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Attorneys for Amicus Curiae Applicant
Teachers' Retirement Board of the
California State Teachers' Retirement System

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State of California
Court of Appeal
Third Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
California Rules of Court, rules 8.208, 8.490(i), 8.494(c), 8.496(c), or 8.498(d)

Court of Appeal Case Caption:

California Attorneys, etc.,
v.
Arnold Schwarzenegger, et al.

Court of Appeal Case Number: C061009

Please check here if applicable:

There are no interested entities or persons to list in this Certificate as defined in the California Rules of Court.

Name of Interested Entity or Person (Alphabetical order, please.)	Nature of Interest
1. All California state employees who have been impacted by the Governor's Executive Orders implementing the furloughs of state employees.	If the Governor's furlough orders are invalidated, the impacted public employees will receive their full pay, rather than the reduced pay they receive as a result of the furloughs.
2. N/A	N/A

Please attach additional sheets with Entity or Person Information, if necessary.

Signature of Attorney or Unrepresented Party

Date: 12/07/2009

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Party Represented: Amicus Applicant Teachers' Retirement Board of the California State Teachers' Retirement System

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**APPLICATION FOR PERMISSION TO FILE AMICUS
CURIAE BRIEF AND STATEMENT OF INTEREST
OF AMICI CURIAE**
(Cal. R. Ct. 8.520(f))

Application

Pursuant to Rule 8.520(f), the Teachers' Retirement Board of the California State Teachers' Retirement System ("CalSTRS Board" or "Amicus") respectfully applies for permission to file an amicus curiae brief in this matter.

Applicants' Interest and How Applicants' Brief Will Assist the Court

In this case, Appellants challenge the Governor's authority to order state-wide furloughs of state employees. In February 2009, the California Department of Personnel Administration ("DPA") and the California State Controller ("Controller") began implementing two furlough days per month pursuant to the Governor's first Executive Order. In July 2009, DPA and the Controller began implementing a third monthly furlough day pursuant to the Governor's second Executive Order. Furlough days are days for which employees are not paid and work is not done. Three days per month represents nearly 15% of the salaries and working hours of the affected employees.

Amicus is a defined benefit, public employees' retirement system that operates for the benefit of over 800,000 active and retired teachers in the State of California. The CalSTRS Board is charged with the "plenary authority and fiduciary responsibility for investment of moneys and administration" of the retirement system. Cal. Const., Art. XVI, §17. It stewards over \$130 billion in assets to pay its members' and their beneficiaries' retirement benefits.

CalSTRS currently employs almost 800 staff members in order to carry out its fiduciary responsibilities. The furlough orders have been applied to CalSTRS' staff against the wishes of the CalSTRS Board and the furloughs interfere with the CalSTRS Board's ability to perform its constitutional obligations. For this reason, CalSTRS has a substantial and direct interest in the Court's ruling in this case.

At core, this case is about the separation of powers. Setting public employee salaries is quintessentially a legislative act. *See Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 189. Because the Legislature may delegate legislative authority to the Governor, resolution of this case will turn on a judicial determination

as to whether the Legislature delegated state-wide furlough authority to the Governor.

When issuing his furlough orders, the Governor premised his authority on his “emergency powers” to suspend laws under the Ralph C. Dills Act and the Emergency Services Act. The trial court, however, did not uphold those laws as the source of the Governor’s authority. Instead, the trial court ruled that the Legislature had delegated the Governor authority to order state-wide furloughs under Government Code sections 19851 and 19849.

Government Code §19851(a) provides, in pertinent part: “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. [Ital. added]” Section 19849, provides, in pertinent part, that the Department of Personnel Administration (“DPA”) “shall adopt rules governing hours of work and overtime compensation and the keeping of records related thereto, including time and attendance records.” The trial court reasoned:

The Court finds that these two statutes, taken together, provide the Governor with authority to reduce the workweek of state employees to meet the needs of state agencies, and to do so by adopting a rule. The provisions of the Executive Order regarding the furlough are a rule in that they establish a standard of general application to state employees. Under the circumstances of the current fiscal crisis, the reduction in the workweek of state employees under the furlough order is indisputably related to the needs of the various state agencies, which, from the evidence respondents have submitted to the Court run the imminent risk of running out of money and thus being unable to carry out their missions, if immediate action is not taken to reduce expenditures.

Amicus can help illuminate, in practical terms, why the above rationale is fatally flawed. Simply stated: the furlough of CalSTRS' staff has *not* helped CalSTRS meet its needs. To the contrary, the furlough of CalSTRS staff is *directly contrary* to CalSTRS' needs. Further, CalSTRS, like many state agencies whose funding comes from sources other than the General Fund, had no risk of "running out of money and thus being unable to carry out [its] mission, if immediate action [was] not taken to reduce expenditures." In sum, the *theoretical* underpinnings for the trial court's reliance on sections 19851 and 19849 are simply not true *in practice*.

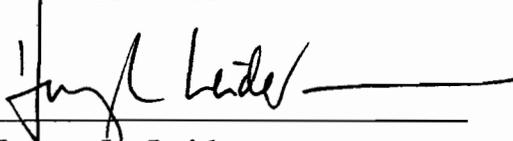
Further, CalSTRS respectfully submits that the trial court ignored, and the parties to this appeal have not sufficiently focused on, the key Constitutional directive for addressing fiscal emergencies

– Article IV, §10(f) of the California Constitution. That provision, which the People passed in 2004 as Prop. 58, mandates the appropriate separation of powers when the state government is faced with a “fiscal emergency.” Prop. 58 requires *joint action of the Governor and the Legislature*. By taking the unilateral legislative action of furloughing state employees, the Governor not only acted outside any legislative authority delegated to him, he acted contrary to the letter and spirit of Prop. 58. The trial court did not address the Constitutional mandate of Prop. 58 at all in its ruling and CalSTRS submits that this important law deserves deeper analysis than the parties have provided in their briefs.

For these reasons, the CalSTRS’ Board respectfully requests leave to file the amicus curiae brief submitted with this Application.

DATED: December 7, 2009.

REED SMITH LLP

By 

Harvey E. Leiderman
Jeffrey R. Rieger

Attorneys for the Teachers’
Retirement Board of the
California State Teachers’
Retirement System

AMICUS CURIAE BRIEF

I. INTRODUCTION

The Governor does not have unilateral authority to order state-wide furloughs of all state employees, either in the ordinary course or in the context of a “fiscal emergency.” The trial court below erred in concluding otherwise.

The trial court incorrectly ruled that Government Code section 19851 and 19849 constitute a delegation of state-wide furlough authority to the Governor in the ordinary course. That ruling is inconsistent with the plain language of those code sections, and their intended purpose. Further, there was no evidence adduced at trial to support the court’s conclusion that, as to each state agency (including CalSTRS), “the reduction in the workweek of state employees under the furlough order is indisputably related to the needs of the various state agencies, which...run the imminent risk of running out of money and thus being unable to carry out their missions.” As to CalSTRS, the furloughs certainly did not help the retirement system “meet its needs.” Thus, the Governor did not have state-wide furlough authority in the ordinary course.

Nor did the Governor have state-wide furlough authority in a “fiscal emergency.” Article IV, §10(f) of the California Constitution (“Prop. 58”) outlines the separation of powers in the government’s response to a “fiscal emergency.” That constitutional provision requires *joint action* by the Governor and the Legislature.

The Legislature did not adopt the Governor's furlough orders. Thus, the Governor lacked unilateral authority to order state-wide furloughs of all state employees in the context of a "fiscal emergency."

For these reasons, the Court should overturn the trial court's judgment and set aside the Governor's furlough orders as *ultra vires*.

II. FACTUAL AND LEGAL BACKGROUND

A. The Global Financial Crisis And Its Impact On CalSTRS

Over 800,000 active and retired teachers and their beneficiaries depend on CalSTRS to administer the retirement benefits they have earned (and will earn in the future) through their public service. CalSTRS administers over \$130 billion in segregated trust funds for these purposes, and the cost of administering the retirement system and investing those funds is paid out of those trust funds. Ed. Code §22304. By law, those trust funds are beyond the reach of the state government to use for any other purpose. Cal. Const. Art. XVI, §17(b).

CalSTRS lost a significant portion of its investment portfolio in the 2008 global financial crisis. These were assets destined to meet promises to public employees and retirees – promises backed by the taxpaying public. These losses will adversely impact future state budgets if CalSTRS cannot recoup the losses through the prudent management and investment of its resources.

B. The Impact Of The Global Financial Crisis On The State And The Governor's Response

The financial crisis also triggered a budgetary crisis for the State of California. Unable to close the growing General Fund deficit and chronically unable to reconcile budgetary policies with the state Legislature, in December, 2008, the Governor declared a "fiscal emergency" and unilaterally imposed a state-wide furlough of all state personnel. Commencing February 1, 2009, this furlough order reduced the work time and salaries of state employees by two days per month, through June 30, 2010.

By July 1, 2009 the General Fund deficit had continued to grow and the Governor and Legislature had not come to agreement over balancing the budget. The Governor declared another "fiscal emergency" and unilaterally added another unpaid day off each month for all state employees, totaling three working days per month and nearly 15% of their compensation.

C. The CalSTRS Board Is Charged With Assuring "Prompt Delivery Of Benefits And Related Services" And Prudently Investing Over \$130 Billion of Trust Funds

Under the California Constitution, the CalSTRS Board is responsible for administering the state retirement system in a manner that will "assure prompt delivery of benefits and related services to [its] participants and their beneficiaries." Cal. Const. Art. XVI, §17(a).

CalSTRS must “discharge [its] duties with respect to the system with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims.” Cal. Const. Art. XVI, §17(c).

To fulfill its constitutional obligation, CalSTRS must employ skilled and diligent staff. CalSTRS’ staff must, among other things: (a) manage CalSTRS’ relationship with approximately 1,400 participating public employers; (b) collect and account for approximately \$400 million in employee and employer contributions each month; (c) prudently diversify investments of over \$130 billion, (d) pay retirement benefits to hundreds of thousands of retirees every month, (e) promptly respond to questions and concerns of employers, participants and beneficiaries, and (f) comply with accounting, reporting, open meeting, public records and federal tax law requirements.

D. The Furloughs Run Counter To CalSTRS’ Staffing Needs

CalSTRS did not ask the Governor to furlough its staff and it opposes the application of the furlough orders to its staff. Indeed, the furloughs have been implemented at a time when CalSTRS’ staffing needs are increasing. CalSTRS believes that the furloughs interfere with its constitutional obligations.

E. There Is No Risk That CalSTRS Will Run Out Of Money During The Furlough Period

CalSTRS' administrative budget for fiscal year 2009-2010 is approximately \$163 million. The costs of administering CalSTRS (including compensation for CalSTRS' staff) are paid entirely out of the trust fund that CalSTRS administers. Ed. Code §22304. That trust fund currently has over \$130 billion in it. Thus, there was no chance whatsoever that CalSTRS would have run out of money in fiscal year 2009-2010, at the time the Governor ordered the furloughs of CalSTRS' staff.

III. ARGUMENT

A. The Legislature Has Not Delegated The Governor Authority To Order State-wide Furloughs

When the Governor issued the furlough orders, they were premised on his purported powers in a "fiscal emergency." Specifically, he cited the Ralph C. Dills Act and the Emergency Services Act. He did not premise his extraordinary action on any other claimed statutory authority. Yet, the trial court ultimately ruled in the Governor's favor based on its belief that the Governor had furlough authority under Government Code sections 19851 and 19849 – not based on his powers in a "fiscal emergency."

The trial court erred. Sections 19851 and 19849 did not delegate the Governor authority to order state-wide furloughs.

1. **On Their Face, Government Code Sections 19851 and 19849 Do Not Authorize State-Wide Reductions To The 40-Hour Work Week**

In finding that sections 19851 and 19849 authorized the Governor's actions, the trial court disregarded the plain meaning of those code sections. Government Code §19851(a) provides, in pertinent part:

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. [Ital. added]

It is evident from section 19851's plain language that it was not intended to authorize state-wide reductions to the 40 hour work week. Rather, it was intended to provide flexibility from agency to agency so that each agency could tailor its staffing levels to its own *particularized* needs. Any other interpretation of section 19851 would render the words "varying" and "different" meaningless surplusage, which is not tolerated under the principles of statutory construction. *See Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 330 ("whenever possible, significance must be given to every word in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage.")

Section 19849, provides that DPA "shall adopt rules governing hours of work and overtime compensation and the keeping of records related thereto, including time and attendance

records. Each appointing power shall administer and enforce such rules.” This section, on its face, relates to the logistics of implementing other provisions of law, such as the 40-hour work week; it does not create independent authority for the Governor or DPA to unilaterally change the state policy of a 40-hour work week.

Appellants have briefed the statutory construction of these code sections well, so Amicus will not belabor the point. Rather, below we provide the Court with practical context for what the Legislature meant when using the phrase “*varying* needs of the *different* state agencies.”

2. The Impact The Furloughs Have Had On CalSTRS Demonstrates The Error In The Trial Court’s Construction of Sections 19851 and 19849

CalSTRS does not know whether the furloughs have met the “varying” needs of some of other “different” agencies in California, but CalSTRS knows with certainty that the furloughs have not met its own needs.

a. Neither The Legislature Nor The Governor Has Reduced CalSTRS’ Budget

One of the Governor’s primary arguments in support of his interpretation of sections 19851 and 19849 is that, in passing AB 4x-1, the Legislature reduced the budgets of all state agencies, and therefore the Governor’s furlough orders enabled all of those “different state agencies” to “meet” their “varying needs” by

reducing their payroll costs.

Assuming *arguendo* this rationale has legitimacy with respect to some agencies, it certainly does not apply CalSTRS, *because the Legislature did not reduce CalSTRS budget when it passed AB 4x-1.*

b. CalSTRS' Staffing Needs Are *Increasing*

The furlough orders have been imposed on CalSTRS at the worst possible time, because CalSTRS is experiencing an *increase* in work requirements due to economic conditions and demographic shifts.

CalSTRS is required by the California Constitution to “diversify the investments of the system so as to minimize the risk of loss and to maximize the rate of return, unless under the circumstances it is clearly not prudent to do so.” Cal. Const., Art. XVI, §17(d). The unprecedented volatility in the global investment markets since Fall 2008 has presented both extraordinary opportunities and extraordinary risks to CalSTRS’ investment portfolio, which, in turn, has increased the amount of work for CalSTRS’ investment staff to ensure it is complying with its constitutional obligations.

With respect to CalSTRS’ “prompt delivery of benefits and related services” (Cal. Const., Art. XVI, §17(a)), the fact that many experienced teachers in the “Baby Boom” generation are either

recently retired, or contemplating retirement has caused a dramatic increase in retirement applications and retirement related inquiries from CalSTRS members.

For these reasons, the work load of CalSTRS staff has been increasing and CalSTRS expects that trend to continue. Thus, the Governor's claim that he is helping CalSTRS meet its needs by slashing its staff's working time by some 15% is belied by the true facts.

c. The Risk Of Loss To CalSTRS Far Outweighs Any "Savings" To Its Administrative Budget That May Result From The Furloughs

CalSTRS manages over \$130 billion of invested public trust funds for the benefit of over 800,000 members and beneficiaries. CalSTRS employs approximately 100 investment professionals to both manage assets internally and monitor external asset managers. Every moment that these professionals are working, they are furthering CalSTRS' constitutional obligation to "minimize the risk of loss and to maximize the rate of return." An arbitrary reduction of some 15% of the hours they work for almost a year and a half is manifestly going to negatively impact the results CalSTRS investment staff will achieve – particularly in these volatile economic times.

To illustrate, if the furloughs of CalSTRS' investment staff causes a reduction in CalSTRS' investment return by just ten basis points (one tenth of one percent) during the furlough period (February 2009 through June 2010), that would translate into in a loss of about \$130 million. This potential loss is far greater than any nominal "savings" that may result from the furlough of CalSTRS' staff, which CalSTRS estimates will be less than \$10 million for fiscal year 2009-2010. Further, this \$130 million figure only accounts for a small potential loss in investment performance. The furloughs have many other potentially negative financial impacts to CalSTRS, including, but not limited to: (1) increased risk of fines, penalties and litigation due to limited capacity to monitor compliance with numerous federal and state laws and regulations, (2) potentially increased overtime costs, and (3) reduced ability to invest staff time in longer term projects aimed at increasing efficiency and reducing operating costs.

In sum, accounting for all various costs, risks and rewards, it is likely that the furloughs will cost CalSTRS far more than it saves in reduced payroll costs. For this additional reason, it is clear that

Governor was not helping CalSTRS meet its needs when he ordered a 15% reduction of its staff time and slashed their salaries.

d. The Furlough Of CalSTRS' Staff Interferes With CalSTRS' Constitutional Obligations

Under the California Constitution, the CalSTRS Board (and every other retirement board in California) is responsible for administering the retirement system in a manner that will “assure prompt delivery of benefits and related services to the participants and their beneficiaries.” Cal. Const. Art. XVI, §17(a).

CalSTRS must “discharge [its] duties with respect to the system with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims.” Cal. Const. Art. XVI, §17(c).

Further, the Constitution provides that the members of the CalSTRS Board “shall discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system. A retirement board’s duty to its participants and their beneficiaries shall take precedence over any other duty.” Cal. Const. Art. XVI, §17(b).

To fulfill its constitutional obligations, CalSTRS must employ skilled and diligent staff to perform a myriad of mission-critical functions, as enumerated *supra*, at p. 4. CalSTRS must determine the proper staffing levels to make sure that all of these crucial tasks are completed efficiently and timely. In this context, CalSTRS respectfully asks the Court to consider the following questions when it considers the proper construction of Government Code sections 19851 and 19849:

(1) Would any reasonable entity that is constitutionally charged with “assur[ing] prompt delivery of benefits and related services to [its] participants and their beneficiaries,” like CalSTRS, tell the staff that delivers those benefits and related services to stay home three days per month, at a time when the work requirements of that entity are *increasing*?

(2) Would any reasonable entity responsible for investing over \$130 billion, like CalSTRS, tell its investment staff to stay home three days per month, at a time of extreme market volatility, which presents both extraordinary investment opportunities and risks?

(3) Can CalSTRS give “precedence” to its primary duty to its participants and beneficiaries if a third party (the Governor) forces its staff to stay home three days per month in order to purportedly further CalSTRS’ subordinate duty of “minimizing employer contributions”?

The answer to each of these questions is, of course, “no.” The answers further confirm the flaw in the Governor’s argument that he has authority to order state-wide furloughs, based on a statute that affords him flexibility to adjust the standard workweek to “meet the *varying* needs of the *different* state agencies.”

It is abundantly clear that the furlough orders were not designed to, nor are they helping CalSTRS “meet” its “needs.” To the contrary, the furloughs that have been imposed on CalSTRS against its will and interfere with CalSTRS’ ability to fulfill its constitutional obligations. Thus, the Governor’s interpretation on sections 19851 and 19849 is not only inconsistent with the plain meaning of those code sections, it also leads to absurd consequences and substantial public policy concerns.

For these reasons, the Court should reject the trial court’s interpretation of sections 19851 and 19849 and find that the Legislature did not delegate the Governor authority to order state-wide furloughs.

B. The Governor Does Not Have Unilateral Legislative Authority To Order Furloughs In A “Fiscal Emergency”

The Governor’s furlough orders were originally anchored to claims of “emergency powers” under the Ralph C. Dills Act and the Emergency Services Act. As we demonstrate below, neither of those statutory schemes provides the Governor with unilateral

legislative authority in a “fiscal emergency.” This is because, in 2004, the People passed Prop 58, which amended the California Constitution to expressly outline the Governor’s powers in a “fiscal emergency.” In other words, to the extent the Governor ever had unilateral legislative authority in a “fiscal emergency,” he lost that authority when the People passed Prop. 58.

1. Prop. 58 Outlines The Governor’s Authority In A Fiscal Emergency

The People of California endorsed Governor Schwarzenegger’s recommendation in 2004 and passed Prop 58 with over 70% approval. Passage of the law followed a chronic state budget crisis much like the one that occurred again in fiscal year 2009-10. Prop. 58 amended the California Constitution to expressly outline the contours of the Governor’s authority in a “fiscal emergency.” The Governor’s powers are found in Article IV, section 10(f)(1) of the California Constitution, which provides:

If, following the enactment of the budget bill for the 2004-05 fiscal year or any subsequent fiscal year, the Governor determines that, for that fiscal year, General Fund revenues will decline substantially below the estimate of General Fund revenues upon which the budget bill for that fiscal year, as enacted, was based, or General Fund expenditures will increase substantially above that estimate of General Fund revenues, or both, the Governor may issue a proclamation declaring a fiscal emergency and shall there upon cause the Legislature to assemble in special session for this purpose. The proclamation shall identify the nature of the fiscal emergency and shall be submitted by the Governor to the Legislature, accompanied by *proposed* legislation to address the fiscal emergency. (Ital. added)

In passing Prop. 58, the People established a framework that was specifically tailored to deal with a “fiscal emergency.” When determining the breadth of the Governor’s authority in a “fiscal emergency,” then, we must look to Prop. 58.

2. Prop. 58 Eliminated Any Powers That The Governor May Have Derived From The Ralph C. Dills Act Or The Emergency Services Act In A “Fiscal Emergency”

Neither the Ralph C. Dills Act nor the Emergency Services Act affords the Governor the unilateral legislative authority to furlough all state employees. Indeed, neither statute even relates to a “fiscal emergency,” which is the Governor’s purported basis for ordering the furloughs. The Ralph C. Dills Act provision relied upon by the Governor (Government Code section 3516.5) in his first furlough order (Executive Order S-16-08) permits only a temporary suspension of the “meet and confer” requirements of the California labor laws covering state employees. The Emergency Services Act provision relied upon by the Governor (Government Code section 8625) in his second furlough order (Executive Order S-13-09) relates to the temporary suspension of laws in responses to disasters like fire, flood, earthquake, epidemic, riot and severe energy shortages, when state and local resources are overwhelmed. *See* Gov’t Code §8558. Neither can be stretched to confer unilateral authority to furlough all state employees in response to a chronic budget problem.

In any event, the use of the Ralph C. Dills Act or the Emergency Services Act as a basis for exercising powers not conferred under Prop. 58 conflicts with the principle of statutory interpretation that the specific takes precedence over the general. *See, e.g., Rose v. State of California* (1942) 19 Cal.2d 713, 724 (“A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.”); *Shewry v. Wooten* (2009) 172 Cal.App.4th 741, 747 (“Under the well-established rule of statutory construction, a specific statute controls over a general statute covering the same subject.”) The Ralph C. Dills Act and the Emergency Services Act do not on their face appear directed at fiscal emergencies, and if they can be said to address them at all, they do so only in the most general of terms. Prop. 58, by contrast, addresses the subject of a “fiscal emergency” explicitly. Its failure to authorize the Governor to take unilateral legislative action must therefore take precedence.

3. The Text Of Prop. 58 Shows That The People Did Not Want The Governor Exercising Unilateral Legislative Authority In A “Fiscal Emergency”

California Constitution, Article IV, §10(f)(1) outlines the Governor’s authority in a fiscal emergency as follows: “the Governor may issue a proclamation declaring a fiscal emergency and shall there upon cause the Legislature to assemble in special session for this purpose. The proclamation shall identify the nature

of the fiscal emergency and shall be submitted by the Governor to the Legislature, accompanied by *proposed* legislation to address the fiscal emergency [Ital. Added].” The phrase “accompanied by proposed legislation” clearly indicates that the People demanded that the Legislature have the final say as to how to address the “fiscal emergency.”

Subdivision (2) of Article IV, §10(f) further supports the conclusion that the People did not grant the Governor unilateral legislative authority to address the “fiscal emergency.” That subdivision provides: “If the Legislature fails to pass and send to the Governor a bill or bills to address the fiscal emergency by the 45th day following the issuance of the proclamation, the Legislature may not act on any other bill, nor may the Legislature adjourn for a joint recess, until that bill or those bills have been passed and sent to the Governor.” Thus, even if the Legislature fails to act within the 45-day deadline, the remedy is to deny the Legislature ability to pass any other bill or recess; not to transfer its legislative power to the Governor. If the People had intended such a transfer or power to the Governor, they would have said so. *See Gikas v. Zolin* (1993) 6 Cal.4th 841, 852 (“The expression of some things in a statute necessarily means the exclusion of other things not expressed.”); *see, e.g., Digital Biometrics, Inc. v. Anthony* (1993) 13 Cal.App.4th 1145, 1160-61 (1993) (“When a statute assumes to specify the effects of a certain provision, we must presume that all the effects intended by the law-maker are stated.”)

The conclusion that the People expected the solution to a “fiscal emergency” to emerge from the ordinary legislative process – and not from executive fiat – is particularly evident, given the placement of Prop. 58 in Article IV section 10 of the Constitution, which delineates the separation of powers between the Legislature and the Governor. Clearly, the People did not take lightly the distinction between the act of the executive proposing legislation and the act of the executive taking that legislative action himself.

4. The Legislative History Of Prop. 58 Also Shows That The People Did Not Intend To Grant The Governor Unilateral Legislative Authority In A “Fiscal Emergency”

Because of the clarity of the language of Prop. 58, this Court need not turn to its legislative history. But if it should choose to do so, it will find that Prop. 58’s legislative history supports the construction that the Governor lacks unilateral authority to order state wide furloughs during a “fiscal emergency.”

The “Arguments in Favor” of Prop. 58 explained:

As California faced unprecedented budget deficits for the last 3 years, the problem was ignored, spending exceeded revenues, and there was no process in place to address the fiscal crisis. Proposition 58 will allow the Governor to call a Special Session of the Legislature to deal with future fiscal crises. If the Legislature fails to act within 45 days, then they will not be able to recess and they will not be able to pass any other legislation. This will *force the Governor and the Legislature to work together to find a solution to the problem BEFORE IT IS TOO LATE.* (italics added, all caps in

original).

See Prop. 58 excerpts from “Official Voter Information Guide – Supplemental” (recognized as cognizable legislative history in *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 31), attached hereto as Exhibit A, in compliance with Local Rule 4.

It is clear that, in passing Prop. 58, the People required the Governor and the Legislature to “work together” to solve the “fiscal emergency” through a comprehensive legislative process. Thus, the Governor’s unilateral legislative action to order furloughs of all state employees, which was premised on his purported emergency powers in a “fiscal emergency,” violates both the letter and spirit of the very Constitutional provision that controls the governmental response to a “fiscal emergency.”

5. The Legislature Did Not Delegate Furlough Authority To The Governor In This “Fiscal Emergency”

The Governor exercised his legitimate, but circumscribed, power under Prop. 58 on July 1, 2009, by Proclamation, calling the Legislature back into extraordinary session to pass an amended Budget Bill. On July 23, 2009, the Legislature and the Governor reached agreement on a revised budget and the Legislature adopted enabling amendments to the Budget Act of 2009. One of those amendments came in Assembly Bill (extraordinary session) 4-1.

Section 552 of ABx 4-1 amended section 3.90.(a) of the Budget Act of 2009 to read, in part:

Notwithstanding any other provision of this act, each 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 non-represented employees... [emphasis added]

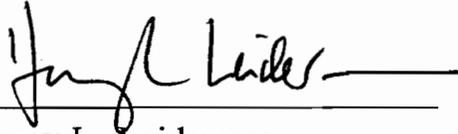
The 2009 Budget Act therefore did not authorize circumvention of State labor laws and did not constitute Legislative adoption of the furlough program. Instead, it recognizes only compensation reductions that might be achieved through further collective bargaining or through the exercise of *existing* administrative authority. As explained herein, the Governor did *not* have existing furlough authority either in the ordinary course or based on his declaration of a “fiscal emergency.”

IV. CONCLUSION

The Governor’s furlough orders are *ultra vires*. They have interfered with the CalSTRS Board’s ability to carry out its Constitutional responsibilities. CalSTRS respectfully requests that the Court overturn the trial court’s judgment and order that judgment be entered in favor of Appellants.

DATED: December 7, 2009

REED SMITH LLP

By 

Harvey L. Leiderman
Jeffrey R. Rieger

Attorneys for the Teachers'
Retirement Board of the
California State Teachers'
Retirement System

WORD COUNT CERTIFICATE

The foregoing Amicus Curiae Brief contains 4,329 words (excluding this certificate and tables). In preparing this certificate, I have relied on the word count generated by Microsoft Office Word 2003.

Executed on December 7, 2009, at San Francisco, California.

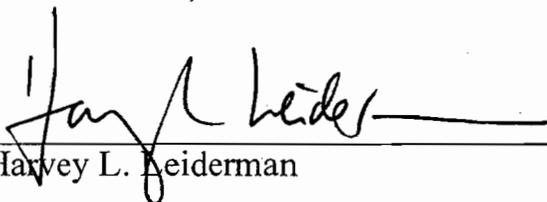

Harvey L. Heiderman

EXHIBIT A

California PRIMARY ELECTION

Tuesday, March 2, 2004

CERTIFICATE OF CORRECTNESS

I, Kevin Shelley, Secretary of State of the State of California, do hereby certify that the measures included herein will be submitted to the electors of the State of California at the Primary Election to be held throughout the State on March 2, 2004, and that this guide has been correctly prepared in accordance with the law.

Witness my hand and the Great Seal of the State in Sacramento, California, this 27th day of January, 2004.

Kevin Shelley
Secretary of State



Official Voter Information Guide

SUPPLEMENTAL



OFFICIAL TITLE AND SUMMARY

Prepared by the Attorney General

The California Balanced Budget Act.

- Requires enactment of a balanced budget where General Fund expenditures do not exceed estimated General Fund revenues.
- Allows the Governor to proclaim a fiscal emergency in specified circumstances, and submit proposed legislation to address the fiscal emergency.
- Requires the Legislature to stop other action and act on legislation proposed to address the emergency.
- Establishes a budget reserve.
- Provides that the California Economic Recovery Bond Act is for a single object or work.
- Prohibits any future deficit bonds.

Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:

- Unknown net state fiscal effects, which will vary year by year and depend in part on actions of future Legislatures.
- Reserve provisions may smooth state spending, with reductions during economic expansions and increases during downturns.
- Balanced budget and debt limitation provisions could result in more immediate actions to correct budgetary shortfalls.

Final Votes Cast by the Legislature on ACAX5 5 (Proposition 58)

Assembly:	Ayes 80	Noes 0
Senate:	Ayes 35	Noes 5

ANALYSIS BY THE LEGISLATIVE ANALYST

Background

California's Budget Situation

California has experienced major budget difficulties in recent years. After a period of high growth in revenues and expenditures in the late 1990s, state tax revenues plunged in 2001 and the budget fell badly out of balance. Although policymakers reduced program spending and increased revenues to deal with part of the shortfalls, the state has also carried over large deficits and engaged in a significant amount of borrowing. The state budget faces another major shortfall in 2004–05 and it has a variety of other obligations—such as deferrals and loans from special funds—that are outstanding at this time.

Constitutional Provisions Relating to Budgeting and Debt

There are several budget- and debt-related provisions in California's Constitution that are affected by this proposition.

- **Balanced Budget Requirement.** The Constitution requires the Governor to submit by January 10 of each year a state budget proposal for the upcoming fiscal year (beginning on July 1) which is balanced—meaning that estimated revenues must meet or exceed proposed expenditures. While this balanced budget requirement applies to the Governor's January budget submission, it does *not* apply to the budget ultimately passed by the Legislature or signed by the Governor.
- **Mid-Year Budget Adjustments.** The Legislature has met in special session during the past three years to consider mid-year proposals to address budget shortfalls. However, there is no formal process in the Constitution to require that mid-year corrective actions be taken when the budget falls out of balance.
- **Reserve Requirement.** Reserve funds are typically used to cushion against unexpected budget shortfalls. The Constitution requires that the Legislature establish a prudent state

reserve fund. It does not, however, specify the size of the reserve, or the conditions under which funds are placed into the reserve.

- **Debt-Related Provisions.** The Constitution generally requires voter approval for debt backed by the state's general taxing authority. Over the years, courts have ruled that certain types of borrowing (including short-term borrowing to cover cash shortfalls and some bonds repaid from *specific* revenue sources) can occur without voter approval. The Constitution also requires that bonds submitted to the voters for approval be for a "single object or work" as specified in the respective bond act. For example, in past years, voters have been asked to authorize bonds for such single objects as education facilities, water projects, or prison construction.

Proposal

This proposition amends the Constitution, making changes related to (1) the enactment and maintenance of a balanced state budget, (2) the establishment of specific reserve requirements, and (3) a restriction on future deficit-related borrowing. The provisions are discussed in more detail below.

Balanced Budget Provisions

This proposition requires that the state adopt a balanced budget and provides for mid-year adjustments in the event that the budget falls out of balance.

Balanced Budget. In addition to the existing requirement that the Governor *propose* a balanced budget, this measure requires that the state *enact* a budget that is balanced. Specifically, estimated revenues would have to meet or exceed estimated expenditures in each year.

Mid-Year Adjustments. Under this measure, if the Governor determines that the state is facing substantial revenue shortfalls or spending deficiencies, the Governor may declare a fiscal emergency. He or she would then be required to propose legislation to address the problem, and call the Legislature into special session for that purpose. If the Legislature fails to pass and send to the

ANALYSIS BY THE LEGISLATIVE ANALYST (CONT.)

Governor legislation to address the budget problem within 45 days, it would be prohibited from (1) acting on any other bills or (2) adjourning in joint recess until such legislation is passed.

Reserve Requirement

The proposal requires that a special reserve—called the Budget Stabilization Account (BSA)—be established in the state's General Fund.

Annual Transfers. A portion of estimated annual General Fund revenues would be transferred by the State Controller into the account no later than September 30 of each fiscal year. The specific transfers are 1 percent (about \$850 million) in 2006–07, 2 percent (about \$1.8 billion) in 2007–08, and 3 percent (about \$2.9 billion) in 2008–09 and thereafter. These transfers would continue until the balance in the account reaches \$8 billion or 5 percent of General Fund revenues, whichever is greater. The annual transfer requirement would be in effect whenever the balance falls below the \$8 billion or 5 percent target. (Given the current level of General Fund revenues—approximately \$75 billion—the required reserve level would likely be \$8 billion for at least the next decade.)

Suspension of Transfers. The annual transfers could be suspended or reduced for a fiscal year by an executive order issued by the Governor no later than June 1 of the preceding fiscal year.

Allocation of Funds. Each year, 50 percent of the annual transfers into the BSA would be allocated to a subaccount that is dedicated to repayment of the deficit-recovery bond authorized by Proposition 57. These transfers would be made until they reach a cumulative total of \$5 billion. Funds from this subaccount would be automatically spent for debt service on that bond. The remaining funds in the BSA would be available for transfer to the General Fund.

Spending From the Account. Funds in the BSA could be transferred from this account to the General Fund through a majority vote of the Legislature and approval of the Governor. Spending of these monies from the General Fund could be made for various purposes—including to cover budget shortfalls—generally with a two-thirds vote of the Legislature (same as current law).

Related Provisions in Proposition 56. Proposition 56 on this ballot also contains new, but different, requirements related to a state reserve fund.

Prohibition Against Future Deficit Borrowing

Subsequent to the issuance of the bonds authorized in Proposition 57, this proposal would prohibit most *future* borrowing to cover budget deficits. This restriction applies to general obligation bonds, revenue bonds, and certain other forms of long-term borrowing. The restriction does *not* apply

ANALYSIS BY THE LEGISLATIVE ANALYST (CONT.)

to certain other types of borrowing, such as (1) short-term borrowing to cover cash shortfalls in the General Fund (including revenue anticipation notes or revenue anticipation warrants currently used by the state), or (2) borrowing between state funds.

Other Provisions

This measure also states that:

- With regard to the bond authorized by Proposition 57, the “single object or work” for which the Legislature may create debt includes—for that measure only—the one-time funding of the accumulated state budget deficit and other obligations, as determined by the Director of Finance.
- Its provisions take effect only if Proposition 57 on this ballot is also approved by the voters.

Fiscal Effects

This measure could have a variety of fiscal effects, depending on future budget circumstances and future actions taken by Governors and Legislatures. Possible fiscal effects include:

- **Balanced Budget and Debt Provisions.** In recent years, as well as during difficult budget periods in the past, the Governor and Legislature have at times allowed accumulated

budget deficits to carry over from one year to the next. This meant that spending reductions and/or revenue increases were less than what they otherwise would have been in those years. The provisions of this measure requiring a balanced budget and restricting borrowing would limit the state’s future use of this option. As a result, the state would in some cases have to take more immediate actions to correct budgetary shortfalls.

- **Reserve Requirement.** The \$8 billion reserve target established by this proposition is much larger than the amounts included in past budget plans. This larger reserve could be used to smooth state spending over the course of an economic cycle. That is, spending could be less during economic expansions (as a portion of the annual revenues are transferred into the reserve), and more during downturns (as the funds available in the reserve are used to “cushion” spending reductions that would otherwise be necessary).
- **Other Possible Impacts.** The proposition could have a variety of other impacts on state finances. For example, to the extent that the measure resulted in more balanced budgets and less borrowing over time, the state would benefit financially from higher credit ratings and lower debt-service costs.

ARGUMENT Against Proposition 58

The same legislature that created the biggest budget deficit in California's history now wants to paper over that deficit by borrowing \$15 billion, at a total cost of over \$2,000 per California family.

Our California Constitution prohibits them from doing so. Since 1849, the "single object or work" provision of the Constitution has limited long-term borrowing to projects like schools, parks, or water projects that will serve coming generations. Prop. 58 sweeps that provision aside, and allows them to do what no generation in California's history has ever done—*steal from the future.*

At a time when our state has the lowest credit rating in the nation—challenging Singapore and Malaysia—they want to borrow \$15 billion more to pay for their own mistakes—**AND STICK YOU WITH THE BILL.** Our Constitution won't let them. But Prop. 58 shreds that provision, making it possible for them to plunge us \$15 billion deeper into debt. That is the *real* purpose of Prop. 58.

They have the *audacity* to call it a "Balanced Budget Act." How can they do that? Simple. They suspended the law that guarantees you an unbiased ballot title and summary—instead literally writing it themselves. Daniel Weintraub, perhaps the most respected newspaper columnist in California, writes that *"the balanced-budget requirement doesn't actually require that lawmakers approve a balanced budget."*

Don't be fooled. California's Constitution already prohibits long-term borrowing from being used to balance the budget. That's the part they're suspending! We've gotten into this mess because of short-term borrowing—and *short-term borrowing is exempt from Prop. 58.* As Weintraub says, Prop. 58 *"does not outlaw borrowing to paper over a deficit."*

California already has a prudent reserve requirement in current law—legislatures and governors have ignored it. Prop. 58 allows them to continue to ignore it. Weintraub: *"The governor could suspend transfers into the reserve at any time. And the Legislature could transfer money out of the reserve . . . at any time."* It is no protection at all!

The Governor **ALREADY** has the power to call the Legislature into session to address a developing budget shortfall. This initiative requires the Legislature to take action before it can move on to other business. But it is **LOOPHOLE-RIDDEN.** Weintraub writes: *"As long as they passed any bill to address the shortfall, they could continue as usual, even if the governor vetoed their approach. In practice, such a provision is unlikely to yield anything very different from the stalemates we see today."*

If they were serious about a balanced budget, they'd restore the Governor's power to make mid-year spending reductions to keep the budget in balance. If they were serious about spending restraint, they'd restore the Gann Spending Limit that produced a decade of balanced budgets and prudent reserves from 1979 until 1990.

But they're only serious about one thing—they want to borrow more money, and this amendment gives them the power to do so.

- RICHARD RIDER, Chair
San Diego Tax Fighters
- BRUCE HENDERSON, President
Association of Concerned Taxpayers
- JOE ARMENDARIZ, Executive Director
Santa Barbara County Taxpayers Association

Proposition 58

REBUTTAL to Argument Against Proposition 58

Don't be fooled by the opponents. The California Taxpayers Association supports the Gann spending limit. Proposition 58 does not require a balanced budget for the entire state government spending. Proposition 58 does not allow the Governor to suspend the law that guarantees you an unbiased ballot title and summary. Daniel Weintraub, perhaps the most respected newspaper columnist in California, writes that "the balanced-budget requirement doesn't actually require that lawmakers approve a balanced budget."

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 1999 Harrison Street, Suite 2400, Oakland, CA 94612-3572. On December 8, 2009, I served the following document(s) by the method indicated below:

APPLICATION AND BRIEF OF AMICUS CURIE TEACHERS' RETIREMENT BOARD OF THE CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM FILED IN SUPPORT OF PLAINTIFF AND APPELLANT CALIFORNIA ATTORNEYS, ETC.

by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

Patrick James Whalen Law Offices of Brooks Ellison 1725 Capitol Avenue Sacramento, CA 95811	David W. Tyra Kronick, Moskovitz, Tiedemann & Girard 400 Capitol Mall, 27th Floor Sacramento, CA 95814
Will M. Yamada Department of Personnel Administration Chief Counsel 1515 S Street, North Building, Suite 400 Sacramento, CA 95811-7246	Robin B. Johansen Remcho, Johansen & Purcell, LLP 201 Dolores Avenue San Leandro, CA 94577
Richard Chivaro State Controller's Office Chief Counsel 300 Capitol Mall, Suite 350 Sacramento, CA 95814	Supreme Court of California (4 copies) San Francisco Office 350 McAllister Street San Francisco, CA 94102-7303
Superior Court of California County of Sacramento Main Courthouse Gordon D. Schaber, Sacramento County Courthouse 720 Ninth Street, Sacramento, CA 95814-1398	

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on December 8, 2009, at Oakland, California.


Beth Gonshorowski

REED SMITH LLP
A limited liability partnership formed in the State of Delaware