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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT, CALIFORNIA ASSOCIATION OF PROFESSIONAL SCIENTISTS, Plaintiffs/Appellants,

vs.

JOHN CHIANG, as State Controller, etc., Defendant/Appellant,

ARNOLD SCHWARZENEGGER, as Governor, et al. Defendants/Respondents.

Court of Appeal Case No. C061011

(Superior Court Case No. 34-2008-80000126XUWMP)

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On Appeal from the Superior Court, Sacramento County Honorable Patrick Marlette

RESPONSE OF RESPONDENTS GOVERNOR ARNOLD SCHWARZENEGGER AND DEPARTMENT OF PERSONNEL ADMINISTRATION TO APPLICATION AND BRIEF OF AMICUS CURIAE TEACHERS' RETIREMENT BOARD OF THE CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM

DAVID W. TYRA, State Bar No. 116218 KRISTIANNE T. SEARGEANT State Bar No. 245489 MEREDITH H. PACKER State Bar No. 253701 KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD A Law Corporation 400 Capitol Mall, 27th Floor Sacramento, California 95814 Telephone: (916) 321-4500 Facsimile: (916) 321-4555 E-mail: dtyra@kmtg.com

K. WILLIAM CURTIS Chief Counsel, State Bar No. 095753 WARREN C. STRACENER Deputy Chief Counsel, State Bar No. 127921 LINDA A. MAYHEW Assistant Chief Counsel, State Bar No. 155049 WILL M. YAMADA Labor Relations Counsel, State Bar No. 226669 DEPARTMENT OF PERSONNEL ADMINISTRATION 1515 S Street, North Building, Suite 400 Sacramento, CA 95811-7258 Telephone: (916) 324-0512 Facsimile: (916) 323-4723 E-mail: WillYamada@dpa.ca.gov Attorneys for Defendants/Respondents GOVERNOR ARNOLD SCHWARZENEGGER, STATE OF CALIFORNIA and DEPARTMENT OF PERSONNEL ADMINISTRATION

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DAVID W. TYRA,  
State Bar No. 116218  
KRISTIANNE T. SEARGEANT  
State Bar No. 245489  
MEREDITH H. PACKER  
State Bar No. 253701  
KRONICK, MOSKOVITZ,  
TIEDEMANN & GIRARD  
A Law Corporation  
400 Capitol Mall, 27th Floor  
Sacramento, California 95814  
Telephone: (916) 321-4500  
Facsimile: (916) 321-4555  
E-mail: [dtyra@kmtg.com](mailto:dtyra@kmtg.com)

K. WILLIAM CURTIS  
Chief Counsel, State Bar No. 095753  
WARREN C. STRACENER  
Deputy Chief Counsel, State Bar No. 127921  
LINDA A. MAYHEW  
Assistant Chief Counsel, State Bar No. 155049  
WILL M. YAMADA  
Labor Relations Counsel, State Bar No. 226669  
DEPARTMENT OF PERSONNEL  
ADMINISTRATION  
1515 S Street, North Building, Suite 400  
Sacramento, CA 95811-7258  
Telephone: (916) 324-0512  
Facsimile: (916) 323-4723  
E-mail: [WillYamada@dpa.ca.gov](mailto:WillYamada@dpa.ca.gov)  
Attorneys for Defendants/Respondents  
GOVERNOR ARNOLD  
SCHWARZENEGGER,  
STATE OF CALIFORNIA and  
DEPARTMENT  
OF PERSONNEL ADMINISTRATION

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## I.

### INTRODUCTION

Respondents Governor Arnold Schwarzenegger and the Department of Personnel Administration (“Respondents”) respectfully submit that this Court should deny the application of the Teachers’ Retirement Board of the California State Teachers’ Retirement System (“CalSTRS”) to file an amicus curiae brief in this action. CalSTRS’ proposed amicus brief raises new factual and legal issues neither addressed by the parties in the trial court, nor addressed by the parties in their briefs to this Court. CalSTRS brief is, therefore, improper and its application should be denied. (See *California Association for Safety Education v. Brown* (1995) 30 Cal.App.4th 1264, 1275; *Younger v. State of California* (1982) 137 Cal.App.3d 806, 813.)

Even if this Court grants CalSTRS’ application to file its amicus curiae brief, however, that brief fails to establish a basis for reversing the judgment of the trial court finding that Governor Schwarzenegger has the inherent authority to direct temporary furloughs of state employees in the face of an unprecedented fiscal crisis. CalSTRS argues the trial court erred in finding that Government Code sections 19851 and 19849 provide the Governor with inherent discretion to establish the schedules and working hours of state employees by, among other means, directing the temporary furloughs of state employees. CalSTRS’ argument, however, is premised

on an overly narrow, and ultimately erroneous, reading of those code sections.

Furthermore, CalSTRS' argument regarding the impact of furloughs on CalSTRS operations is based on factual and evidentiary material never presented to the trial court and which Respondents have never been given the opportunity to rebut with evidence of their own. Thus, the arguments regarding the impact of furloughs on CalSTRS operations are improper and should be disregarded by this Court even if it grants CalSTRS' application to file its proposed amicus brief.

Finally, CalSTRS' arguments regarding the applicability of Proposition 58 are inapposite to the issues before this Court. The Governor's authority to direct furloughs of state employees derives from constitutionally and statutorily conferred authority granted him as the state employer. The Governor's use of "emergency" powers with respect to the furloughing of state employees was related to the manner in which furloughs were directed, *i.e.*, through the issuance of an Executive Order as permitted by Government Code section 3516.5, a code section found within the Ralph C. Dills Act ("Dills Act"), which allows the State to adopt a law, rule, resolution, or regulation affecting state employment during times of emergency without prior notice or meeting and conferring with state employee organizations. It is undisputed that California was facing a fiscal

emergency and thus the Governor was justified in directing furloughs of state employees through the mechanism of an Executive Order.

For these reasons, Respondents respectfully request that CalSTRS' application to file an amicus curiae brief be denied. However, if this Court grants CalSTRS' application, Respondents urge the Court to affirm the judgment of the trial court in that CalSTRS has failed to provide any grounds for reversing that judgment.

## II.

### **STATEMENT OF THE CASE**

[The facts and procedural history of this case have been fully briefed by Respondents in their brief to this Court filed in response to Appellants' Opening Brief. Those facts and procedural history are set forth verbatim here to aid the Court in evaluating CalSTRS' amicus brief.]

#### **A. Statement of Facts.**

##### **1. Efforts to Resolve the State Budget Crisis Prior to the Issuance of Executive Order S-16-08.**

On July 31, 2008, Governor Schwarzenegger issued Executive Order S-09-08 directing the State of California to take various budget mitigation measures in light of the State's budget impasse. (Joint Appendix ["JA"]<sup>1</sup>,

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<sup>1</sup> This case is one of three cases filed in this Court appealing the final judgment of the Sacramento County Superior Court affirming the Governor's authority to furlough state employees. The other two cases are *California Attorneys, Administrative Law Judges and Hearing Officers in State Employment v. Schwarzenegger, et al.*, Third District Court of Appeal Case No. C061009 and *Service Employees International Union, Local 1000 v. Schwarzenegger, et al.*, Third District Court of Appeal No. C061020. The citations to the record in this brief are primarily cites to the Joint Appendix filed in this case. However, because the Controller has filed its brief not only in this case, but has filed a Notice of Adoption of his

Vol. III, Tab X, JA000482 – JA000484) This Executive Order directed all state agencies and departments “to cease and desist authorization of all overtime for employees effective July 31, 2008.” (*Id.*, at JA000483.)

On September 23, 2008, Governor Schwarzenegger signed into law a new budget for the 2008-2009 fiscal year. (JA, Vol. III, Tab Y, JA000486; JA, Vol. III, Tab Z, JA000490.) However, the downturn in the national economy shortly thereafter resulted in an unanticipated and significant reduction in revenues from those forecasted in the 2008-2009 budget. (JA, Vol. III, Tab LL, JA000557.) The State’s Department of Finance determined the shortfalls in the budget compromise would cause a budget deficit of approximately \$11.2 billion. (JA, Vol. III, Tab Z, JA000490.) The Department of Finance also initially determined that revenue for the 2009-2010 fiscal year would be \$13 billion lower than projected. (*Id.*) The Department of Finance concluded the “State will run out of cash in February and be unable to meet all of its obligations for the rest of the year.” (*Id.*) The Department of Finance issued an October 2008 Finance Bulletin that stated, “Preliminary General Fund agency cash for October was \$923 million below the 2008-09 Budget Act forecast of \$10.667 billion.” (JA, Vol. III, Tab AA, JA000516.) The Department of

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Opening Brief in the other two cases, it will be necessary to cite to the record in those other two cases in order to address fully the arguments raised by the Controller. When cites to other appendices in related cases are made, it will be noted clearly.

Finance also concluded, “year-to-date revenues are \$1.06 billion below the \$22.58 billion that was expected.” (*Id.*)

In response to the unanticipated budget deficit, the Governor issued a special session proclamation on November 6, 2008 calling for an emergency session of the Legislature to address this budget crisis. (JA, Vol. III, Tab BB, JA000518.) On the same day, the Governor issued a letter to all state workers informing them of the potential impact of some of the cost-savings plans he was considering. (JA, Vol. III, Tab CC, JA000520 – JA000521.) He also informed state employees of the emergency session of the Legislature. (*Id.*, at JA000520.)

The Legislature failed to reach a resolution of the pending budget crisis in the November 2008 special session. (JA, Vol. III, Tab GG, JA000530.) As a result, on December 1, 2008, the Governor issued a Fiscal Emergency Proclamation pursuant to his authority under Article IV, section 10(f) of the California Constitution. (*Id.*, at JA000530 – JA000531.) In his Fiscal Emergency Proclamation, the Governor specifically identified the nature of the fiscal emergency “to be the projected budget imbalance and insufficient cash reserves for Fiscal Year 2008-2009 and the projected insufficient cash reserves and potential budgetary and cash deficit in Fiscal Year 2009-2010 which are anticipated to result from the dramatically lower than estimated General Fund revenues in Fiscal Year 2008-2009.” (*Id.*, at JA000530.) In his Fiscal Emergency

Proclamation, the Governor reconvened the Legislature for another special session to address the fiscal emergency. (*Id.*, at JA000531.)

The Governor's proclamation of a fiscal emergency was supported by the Department of Finance's further view and updating of its revenue estimates, which found that actual revenues for the 2008-2009 fiscal year were expected to be \$14.8 billion below the estimated revenues at the time the 2008-2009 budget was passed. (JA, Vol. III, Tab LL, JA000557.) The Department of Finance determined that the deficit would increase to \$41.6 billion by the end of the 2009-2010 fiscal year. (*Id.*) The deficit had increased by more than \$3 billion in the span of approximately two months. (*Id.*) As a result of the devastating budget deficit, the conclusion reached was that the State would run out of cash by February 2009. (*Id.*)

During this same period of time, and in an effort to work with state bargaining unit representatives, the Department of Personnel Administration ("DPA") put forth proposals to the state employee organizations in early November 2008 including, but not limited to, a proposed one-day furlough and elimination of two holidays per year. (JA, Vol. II, Tab U, JA000435.) Prior to the issuance of Executive Order S-16-08, none of the state bargaining units agreed to either of these proposals. (*Id.*) The state employee organizations, however, including PECCG and CAPS, all recognized and acknowledged the State of California was facing

a serious and immediate fiscal crisis. (JA, Vol. III, Tab DD, JA000523; JA, Vol. III, Tab EE, JA000525; JA, Vol. III, Tab FF, JA000528.)

**2. Executive Order S-16-08.**

Faced with the unresolved and mounting fiscal crisis, the Governor issued Executive Order S-16-08 on December 19, 2008. (JA, Vol. III, Tab HH, JA000533 – JA000534.)

With respect to employees represented by recognized bargaining units, the Executive Order directed “that effective February 1, 2009 through June 30, 2010, the Department of Personnel Administration shall adopt a plan to implement a furlough of represented state employees and supervisors for two days per month, regardless of funding source.” (*Id.*, at JA000534.)

With respect to unrepresented employees, the Executive Order provided “that effective February 1, 2009 through June 30, 2010, the Department of Personnel Administration shall adopt a plan to implement an equivalent furlough or salary reduction for all state managers, including exempt state employees, regardless of funding source.” (*Id.*)

Executive Order S-16-08 articulated clearly, and in detail, the justification for the actions ordered by the Governor. It noted that “the cash reserve in the State Treasury is below the amount established by the State Controller to ensure that the cash balance does not reach zero on any day in the month.” (*Id.*, at JA000533.) The Executive Order confirmed that in

two separate special sessions in November and December 2008, “the Legislature failed ... to enact any bills to address the State’s significant economic problems.” (*Id.*) The Executive Order concluded by noting “immediate and comprehensive action is needed to address the fiscal and cash crisis facing the State of California.” (*Id.*)

In order to address the fiscal and cash crisis as described, the Governor issued the Executive Order pursuant to his authority under Government Code section 3516.5 before meeting and conferring with public employee unions. (*Id.*, at JA000534.)

3. **Confirmation of State Fiscal Crisis Following Issuance of Executive Order S-16-08.**

On December 19, 2008, the California State Controller, John Chiang, released a statement urging the Governor and Legislature to reach a resolution in order to prevent the State from running out of cash in late February 2009. (JA, Vol. III, Tab II, JA000536.) On December 22, 2008, Controller Chiang sent a letter to the Governor and the Legislature, reiterating the severity of the fiscal crisis the State was facing. (JA, Vol. III, Tab JJ, JA000538 – JA000540.) In this letter, the Controller stated,

[I]f current projections hold true, the State is less than seventy days from running out of cash. Worse, my office’s analyses indicate there will be no shelter from the storm as the State’s cash position will remain negative throughout the remainder of the fiscal year. As I indicated during the recent Legislative Budget Session, the failure of the Governor and the Legislature to quickly arrive at an agreement to responsibly

address the State's \$41 billion budget crisis would begin a cascading series of regrettable actions necessary to conserve the State's dwindling cash reserves.

(*Id.*, at JA000538.)

On January 13, 2009, the Director of the Department of Finance, Michael Genest, issued a special report titled "California at the Brink of Financial Disaster" detailing the State's financial crisis and the immediate harm that will be caused when the State runs out of cash. (JA, Vol. III, Tab KK, JA000542 – JA000552.) He confirmed the State was expected to run out of cash in February 2009. (JA, Vol. III, Tab LL, JA000557.)

On February 19, 2009, the Legislature agreed on a new State budget which, in relevant part, included a spending reduction of \$1.4 billion in state employee payroll over the 17-month period from enactment of the new budget. Section 38 of the February 2009 budget compromise legislation, added Section 3.90 to the Budget Act of 2008 to provide that each item of appropriation in the Budget Act of 2008 would be reduced to reflect a reduction in employee compensation. Reductions in employee compensation were to be achieved through the collective bargaining process for represented employees *or existing administration authority*, with a proportionate reduction for nonrepresented employees. At the time of the budget compromise, "existing administration authority" included the authority to furlough state employees pursuant to Executive Order S-16-08 and DPA's furlough plan as the trial court so ruled on January 30, 2009.

4. **Evidence Presented to the Trial Court Regarding Cost Savings Resulting to the State from Furloughs.**

The trial court was presented with uncontradicted evidence showing that for the 2008-2009 fiscal year, the two-day furlough was estimated to result in savings to the General Fund in the amount of \$298,541,141. (JA, Vol. II, Tab V, JA000471.) The savings to the General Fund for excluded unrepresented employees was estimated at \$76,837,793 for fiscal year 2008-2009. (*Id.*) For the 2009-2010 fiscal year, the two-day furlough was estimated to result in savings to the General Fund in the amount of \$716,498,739. (*Id.*) The savings to the General Fund for fiscal year 2009-2010 for excluded unrepresented employees was estimated at \$184,410,703. (*Id.*) The savings to the General Fund was estimated at \$75,075,787 per month by implementing a temporary two-day a month furlough for represented and excluded unrepresented employees covering a seventeen-month period. (*Id.*, at JA000472.)

5. **Efforts to Meet and Confer with State Public Employee Unions Regarding Furloughs Following Issuance of Executive Order S-16-08.**

Appellants PECG and CAPS are covered by Memoranda of Understandings (MOU) that remain in full force and effect.<sup>2</sup> (JA, Vol. III, Tab MM, JA000564 – JA000565.)

On December 19, 2008, DPA telephoned and sent out letters to all of the state public employee unions advising them of the furloughs and

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<sup>2</sup> Although the MOUs between Appellants PECG and CAPS and the State have expired, both remain in force and effect pursuant to Government Code section 3517.8(a).

offering to bargain over the impacts of their implementation. (JA, Vol. III, Tab MM, JA000563; JA, Vol. III, Tab NN, JA000567 – JA000578.) After sending out the letter, DPA met with various bargaining units to meet and confer over the impact of the furloughs. (JA, Vol. III, Tab MM, JA000563 – JA000564.)

**B. Procedural History.**

**1. Action by State Public Employee Unions Challenging Executive Order S-16-08.**

Less than one month following the Governor's issuance of Executive Order S-16-08, state employee organizations filed suits in Sacramento County Superior Court challenging the Governor's authority to furlough state employees. (JA, Vol. III, Tab XX, JA000661.) On December 22, 2008, the first petition for writ of mandate and complaint for injunctive and declaratory relief was filed in Sacramento County Superior Court by Appellants PECG and CAPS, Case No. 2008-80000126, against the same Respondents named here. PECG and CAPS represent, and filed their petitions on behalf of, all state employees in Bargaining Units 9 and 10. (JA, Vol. I, Tab A, JA00001 – JA 000020.)

On January 5, 2009, a second petition was filed against Respondents by California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment ("CASE") in the Sacramento County Superior Court, Case No. 2009-80000134. (JA, Vol. III, Tab XX, JA000661.) CASE

represents, and filed its petition on behalf of, all state employees in Bargaining Unit 2.

On January 7, 2009, a third petition was filed against Respondents in Sacramento County Superior Court by Service Employees International Union, Local 1000 (“SEIU”), Case No. 2009-80000135. (JA, Vol. III, Tab XX, JA000661.) SEIU represents, and filed its petition on behalf of, all state employees in Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20, and 21.

On January 9, 2009, the parties in Case No. 2008-80000126 (PECG/CAPS), Case No. 2009-80000134 (CASE) and 2009-80000135 (SEIU) appeared and stipulated that a hearing on the merits in those cases would be heard on January 29, 2009. (JA, Vol. I, Tab J, JA000093 – JA000094.)

## **2. The Trial Court’s Ruling.**

On January 29, 2009, the Sacramento County Superior Court held oral argument on the three cases. (JA, Vol. III, Tab WW, JA000652.) All parties were present and appeared at the hearing. (*Id.*) On January 30, 2009, the Sacramento trial court issued an amended and final order denying all three of the petitions and entering judgment for Respondents. (JA, Vol. III, Tab XX, JA000660-JA000671.) The Sacramento trial court’s Final Order states in relevant part:

The Court accordingly rules that, with regard to the issues raised by all petitioners regarding the Governor’s authority to make the challenged order, the petitions for writ of mandate are

denied and judgment shall be entered for the defendants (respondents) on the complaints for declaratory relief. This ruling applies to both state employees represented by all of the petitioners under the Dills Act and to those state employees represented by petitioners PECG and CAPS who are excluded from the Dills Act by law, as the authorities on which the Court has relied in finding that the Governor has the authority to take the challenged action apply to both classes of employees.

(*Id.*, at JA000669.) The trial court ruled the provisions of the Executive Order constitute “a rule in that they establish a standard of general application to state employees.” (*Id.*, at JA000666.)

The trial court specified two separate grounds for its ruling affirming the Governor’s authority to furlough state employees pursuant to Executive Order S-16-08. First, the court found “[t]he Governor has the statutory authority to reduce the hours of state employees pursuant to Government Code section 19851 and 19849.” (*Id.*, at JA000665.) With respect to the application of these two statutes, the trial court stated:

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.

(*Id.*, at JA000666.)

Second, the trial court found “on two separate bases, that the Governor has authority to reduce the work hours of the state employees represented by the petitioners in these actions pursuant to the terms of the MOUs the State entered into with the petitioner employee organizations ... .” (*Id.*, at JA000666.) In the first of these two separate bases, the trial court ruled,

[E]ach of the petitioners’ MOUs expressly incorporates the terms of sections 19849 and 19851 into the agreement between the parties, and the terms of the MOU do not conflict with these statutes, notwithstanding that the MOUs call for a normal work week of 40 hours. Thus, these provisions of law are not superseded by the MOUs, and the Governor retains the authority, pursuant to law and contract, to take any actions he would be permitted to take pursuant to Government Code sections 19849 and 19851 as described above.

(*Id.*)

The trial court also ruled “certain of the petitioners’ MOUs expressly permit the State either to reduce hours in case of lack of funds or to take all necessary action to carry out its mission in emergencies.” (*Id.*, at JA000667.) In applying these provisions of the MOUs between the parties, the trial court found “that the current fiscal emergency, which is amply documented in the evidence the respondents have submitted, authorizes the

Governor to reduce the working hours of state employees under these cited terms of the various MOUs.” (*Id.*, at JA000667 – JA000668.)

Based upon the above findings, the trial court ruled “both statutory law and the provisions of the petitioners’ MOUs authorized the Governor to reduce the work hours of state employees through a furlough in the current fiscal emergency.” (*Id.*, at JA000668.) In so ruling, the court specifically found Government Code section 19826(b) “does not preclude the Governor from taking such action.” (*Id.*)

Judgment was entered by the trial court on February 11, 2009. (JA, Vol. IV, Tab CCC, JA000696 – JA000711; JA, Vol. IV, Tab DDD, JA000715 – JA000729.)

### III.

#### ARGUMENT

A. **CalSTRS’ Application to File an Amicus Brief Should Be Denied Due to the Fact that CalSTRS Raises New Factual and Legal Issues Not Addressed by the Parties in the Trial Court or in Their Briefs to this Court.**

“It is a general rule that an amicus curiae accepts a case as he or she finds it. (*California Association for Safety Education v. Brown, supra*, 30 Cal.App.4th 1264, 1274.) “Amicus curiae may not launch out upon a juridical expedition of its own unrelated to the actual appellate record.” (*Id.* Internal citations omitted.) As stated by the court in *California Association for Safety Education, supra*,

California courts refuse to consider arguments raised by amicus curiae when those arguments are not presented in the trial court, and are not

urged by the parties on appeal. Amicus curiae must accept the issues made and propositions urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered.

(*Id.* at 1275.)

While it is true that California courts have found the above rule to not be absolute (see *Neilson v. City of California City* (2005) 133 Cal.App.4th 1296, 1310, fn. 5), it is equally true that the exceptions to the general rule have been narrowly applied under circumstances not present here. (See e.g., *E.L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 510-11, in which the court agreed to consider new arguments raised by amicus curiae because (1) the appellate posture of the case was an appeal from a judgment of dismissal following the sustaining of a general demurrer without leave to amend requiring the court to affirm the judgment if correct on any legal theory, and (2) amicus curiae raised a question of “jurisdictional dimension.”)

CalSTRS’ proposed amicus brief raises substantive issues neither addressed by the parties in the trial court, nor raised by the parties in their briefs to this Court. The principal issues addressed by the parties both in the trial court and in their briefs to this Court were whether the Governor had any inherent executive authority or discretion to order the temporary furloughs of state employees and whether furloughs of state employees amounted to a *de facto* salary reduction in violation of Government Code section 19826(b). In contrast to these issues, CalSTRS’ proposed amicus

brief focuses on three entirely different issues: (1) whether the Governor abused the discretion conferred upon him by Government Code section 19851 by including CalSTRS' employees in the furlough program; (2) the impact of furloughs on CalSTRS operations; and (3) the alleged violation of Proposition 58 by the Governor's Executive Order. While there has been some discussion of the third issue in the briefs by the parties to this Court, the first and second issues proffered by CalSTRS were not addressed in the trial court below and were not addressed in the parties' briefs to this Court. Accordingly, CalSTRS is attempting by its proposed amicus brief to raise new factual and legal issues on which the parties have had no opportunity to submit evidence in the trial court or to brief to this Court. CalSTRS' proposed amicus brief is, therefore, improper and its application should be denied on this basis.

**B. The Governor Has Broad Statutory Authority to Direct the Schedules and Working Hours of State Employees.**

**1. Section 19851 Provides the State with Authority to Establish Work Schedules to Meet the Varying Needs of Different State Agencies.**

Even if this Court chooses to permit CalSTRS to file its amicus brief, CalSTRS has failed to present this Court with grounds for reversing the judgment of the court below. As the trial court properly found, Government Code sections 19851 and 19849 provide the Governor with the discretion to direct furloughs of state employees.

Government Code section 19851(a) states in relevant 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 shall be 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. (Emphasis added.)

On its face, section 19851 grants the State the discretion to establish workdays and workweeks of a “different number of hours,” *i.e.*, less than 40 hours a workweek, to meet the varying needs of different state agencies. The fact that section 19851 was intended to provide the State with flexibility to establish work schedules of differing hours depending on operational needs is well established in the legislative history of the code section. As early as 1945, at the time of the adoption of the predecessor code section, section 18020, the Legislature demonstrated a clear intent to create a flexible policy surrounding the adoption of workday and workweek schedules for state employees and expressly provided for exceptions to the 40-hour workweek when the operational demands of the various state agencies required it. Nothing in the statute requires individualized analyses of each state agency before altering work schedules or hours to address, in part, a financial crisis of the unprecedented proportions faced by the State at the time of the issuance of the subject Executive Orders.

2. **Section 19849(a) Also Provides the State with Authority to Promulgate Rules Regarding Work Hours.**

Whereas section 19851 provides the State with the overall flexibility to establish work schedules of varying numbers of hours, Government

Code section 19849(a) provides the State with authority to promulgate rules regarding work hours that must be enforced by the varying agencies of the State. That code section provides that DPA “shall adopt rules governing hours of work.”

Read together, sections 19851 and 19849 provide the state employer with the statutory authority to establish hours of work including workweeks of less than 40 hours to meet the varying needs of the State. These statutes also establish the Governor’s authority, acting as the state employer, to issue the Executive Orders temporarily furloughing state employees. This conclusion also is consistent with the language of Government Code section 19816.10(a), which provides:

In order to secure substantial justice and equality among employees in the state civil service, the department [DPA] may provide by rule for days, hours and conditions of work, taking into consideration the varying needs and requirements of the different state agencies and the prevailing practices for comparable service in other public employment and private business.

These statutes provide the Governor with the authority for issuing the subject Executive Orders furloughing state employees.

**C. The Governor Is Not Required to Engage in an Agency-By-Agency Analysis in Exercising the Discretion Conferred Upon Him by the Aforementioned Government Code Sections.**

CalSTRS argues that Government Code section 19851 requires any work schedule that differs from the state policy of 8-hour workdays/40-hour workweeks, may only be adopted to meet the “varying needs of the

different state agencies.” In order to meet this standard, CalSTRS argues that the Governor must engage in a “particularized,” agency-by-agency analysis to determine whether, in this case, furloughs meet the varying needs of each and every state agency.

CalSTRS’ argument ignores the magnitude of the State’s fiscal and cash crisis at the time the Governor issued the Executive Order. On December 19, 2008, the very day the Governor issued Executive Order S-16-08, the Controller released a statement urging the Governor and Legislature to reach a resolution in order to prevent the State from running out of cash in late February. (JA, Vol. III, Tab II, JA000536.) On December 22, 2008, the Controller sent a letter to the Governor and the Legislature, reiterating the severity of the fiscal crisis the State was facing. (JA, Vol. III, Tab JJ, JA000538 – JA000540.) In that letter, the Controller stated,

[I]f current projections hold true, the State is less than seventy days from running out of cash. Worse, my office’s analyses indicate there will be no shelter from the storm as the State’s cash position will remain negative throughout the remainder of the fiscal year. As I indicated during the recent Legislative Budget Session, the failure of the Governor and the Legislature to quickly arrive at an agreement to responsibly address the State’s \$41 billion budget crisis would begin a cascading series of regrettable actions necessary to conserve the State’s dwindling case reserves.

*Id.*

CalSTRS cannot ignore the dire, unprecedented fiscal crisis that existed at the time of the issuance of the Executive Order. The Controller's analysis was that the State was on the brink of running out of cash, which affected the ability of *all* state agencies and departments to meet their financial obligations (such as being able to pay vendors and contractors for their services). The reasonable conclusion is that each state agency, regardless of function (with limited exemptions expressly anticipated), *needed* the Governor to implement statewide furloughs as one measure to ensure the fiscal solvency of the State.

While section 19851 allows the hours of work to be different in different agencies and departments in order to meet the varying needs of the different state departments, the language of the code section in no way singularly limits the Governor to this agency-by-agency or department-by-department approach in exercising his discretion as the chief executive of the State as CalSTRS contends. There is no language in the statute, nor any indication in its legislative history, suggesting the Governor is prohibited from determining that the needs of the state agencies and departments are best met through implementation of statewide furloughs as one measure to ensure the fiscal solvency of the State. CalSTRS fails to offer any cogent argument for finding that section 19851 does not authorize the Governor to furlough state workers under the facts present at the time of the issuance of the Executive Order.

**D. CalSTRS' Argument Regarding Alleged Harm to it From the Furloughing of its Employees Must Be Disregarded as Based Entirely on "Evidence" Not Introduced in the Trial Court.**

CalSTRS argues that the judgment of the trial court should be reversed because furloughs have impeded its ability to carry out its constitutional duties. (See Proposed Amicus Brief, at pp. 8-12.) CalSTRS argument on this point is based entirely on "evidence"<sup>3</sup> which was not part of the record in the trial court and which CalSTRS it is attempting to introduce for the first time on appeal.

As noted above, an amicus brief cannot raise new issues not raised by the parties in the trial court or briefed by the parties to the appellate court. In addition, it is beyond dispute that "statements in briefs based on matter improperly included in the record on appeal" must be disregarded by the appellate court. (*Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 632.) The entirety of CalSTRS argument with respect to the alleged impact on it from furloughs is based on unsubstantiated statements, which find no evidentiary support in the record before this Court. Those statements must, therefore, be disregarded.

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<sup>3</sup> In fact, even referring to the facts on which CalSTRS relies as "evidence" is giving it more credit than it is due. CalSTRS makes any number of unsubstantiated averments in its brief regarding the nature and scope of the services it performs and the alleged impact on those service resulting from furloughs. None of this information was submitted to the trial court. Thus, not only does this constitute new matter, but there is *no* evidence in the record supporting CalSTRS arguments on this point.

**E. The Governor's Authority to Issue the Subject Executive Order Is Not Limited by the Provisions of Proposition 58.**

CalSTRS argues that the Governor's authority to issue the subject Executive Order is limited by the provisions of Proposition 58 in that the Governor's options under the constitutional provisions adopted pursuant to that Proposition to address a fiscal emergency are limited.

On December 1, 2008, the Governor exercised his authority pursuant to Article IV, section 10(f) of the California Constitution, enacted in 2004 pursuant to Proposition 58, to issue a proclamation declaring a fiscal emergency. The Governor issued this proclamation less than three weeks prior to issuing Executive Order S-16-08. (JA, Vol. III, Tab GG, JA000530 – JA000531.) CalSTRS argues that when the Governor issues such a proclamation, the *only* action he may take is to call a special session of the Legislature to address the crisis and that the issuance of an Executive Order directing furloughs of state employees goes beyond the scope of the Governor's authority to address a fiscal emergency. (See Proposed Amicus Brief, at p. 13, *et seq.*)

CalSTRS' argument is irrelevant to the issue before this Court. While Proposition 58 gives the Governor the authority to call a special session of the Legislature to address a fiscal emergency, the Governor may issue a fiscal emergency proclamation only if the following conditions are met: the Governor determines that for the current fiscal year, General Fund revenues will decline substantially below the estimate upon which the

budget bill for the current fiscal year, as enacted, was based on General Fund expenditures will increase substantially above the estimate of General Fund revenues, or both. It is the conditions giving rise to the Governor's fiscal emergency proclamation that are relevant to the issue before this Court. The undisputed evidence presented to the trial court regarding the satisfaction of the conditions for proclaiming a fiscal emergency created a presumption – unrebutted by the petitioners in the trial court or by CalSTRS here – that the State was indeed facing a budget and fiscal deficit in the current fiscal year and needed extraordinary action to address the fiscal emergency. (See *Sonoma County Organization v. County of Sonoma* (1991) 1 Cal.App.4th 267.)

There is nothing in the constitutional provisions enacted as part of Proposition 58 suggesting the otherwise inherent executive powers the Governor possesses as the Chief Executive Officer of the State of California (see Cal. Const. Art. V, § 1) or as the state employer (see Gov. Code § 19816(a)) are in any way diminished in the face of a fiscal crisis. This is made clear by the language of the Ballot Argument in favor of Proposition 58 cited by CalSTRS on page 18 of its brief. This language speaks in terms of permissive authority being granted to the Governor (“Proposition 58 will *allow* the Governor ..., ” etc.) There is nothing in the language of Proposition 58 that evinces an intent to limit the Governor's already existing authority, however. The Governor relied upon the

authority granted to him pursuant to Government Code sections 19851 and 19849, which was in no way limited by Proposition 58, in order to realize the necessary savings via the temporary furloughs of state employees. As such, the Executive Order falls squarely within his executive powers and the powers he exercised by issuing the Executive order are in no way diminished or impaired by the passage of Proposition 58 as CalSTRS suggests. The Executive Order is a constitutional exercise of the Governor's executive power.

#### IV.

#### CONCLUSION

Based on the foregoing discussion, Respondents Governor Arnold Schwarzenegger and Department of Personnel Administration respectfully submit that the application of CalSTRS to file an amicus curiae brief should be denied. CalSTRS' proposed brief raises new factual and legal issues not addressed in the trial court and is, therefore, improper.

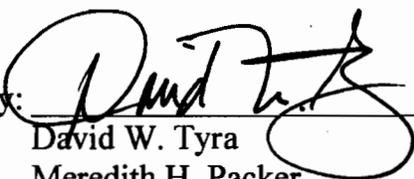
Even if this Court grants the application, however, there are no persuasive arguments in CalSTRS' proposed amicus brief warranting reversal of the trial court's judgment. The Governor's issuance of the subject Executive Order was a proper exercise of his constitutional and

statutory authority as the Chief Executive Officer and state employer.

Accordingly, this Court should affirm the judgment of the trial court.

Dated: January 14, 2010

KRONICK, MOSKOVITZ, TIEDEMANN  
& GIRARD  
A Law Corporation

By: 

David W. Tyra

Meredith H. Packer

Attorneys for Defendants/Respondents

GOVERNOR ARNOLD

SCHWARZENEGGER, STATE OF

CALIFORNIA, and DEPARTMENT

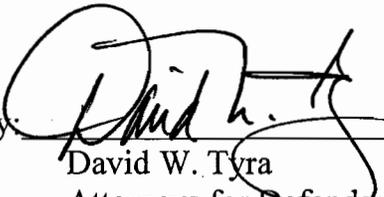
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ADMINISTRATION

**CERTIFICATE OF WORD COUNT**

I, David W. Tyra, Attorney for Defendants/Respondents ARNOLD SCHWARZENEGGER, as Governor of the State of California and CALIFORNIA DEPARTMENT OF PERSONNEL ADMINISTRATION hereby declare under penalty of perjury that the number of words in the Response Of Respondents Governor Arnold Schwarzenegger And Department Of Personnel Administration To Application And Brief Of Amicus Curie Teachers' Retirement Board Of The California State Teachers' Retirement System equals 6,049 words, as per the word count feature in Microsoft Word.

Dated: January 14, 2010 KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD  
A Law Corporation

By:   
David W. Tyra  
Attorneys for Defendants/Respondents  
GOVERNOR ARNOLD  
SCHWARZENEGGER, STATE OF  
CALIFORNIA, and CALIFORNIA  
DEPARTMENT OF PERSONNEL  
ADMINISTRATION

## PROOF OF SERVICE

I, May Marlowe, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 400 Capitol Mall, 27th Floor, Sacramento, CA 95814-4416. On January 14, 2010, I served the within documents:

### **RESPONSE OF RESPONDENTS GOVERNOR ARNOLD SCHWARZENEGGER AND DEPARTMENT OF PERSONNEL ADMINISTRATION TO APPLICATION AND BRIEF OF AMICUS CURIAE TEACHERS' RETIREMENT BOARD OF THE CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM**

- by transmitting via facsimile from (916) 321-4555 the above listed document(s) without error to the fax number(s) set forth below on this date before 5:00 p.m. A copy of the transmittal/confirmation sheet is attached.
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**Attorneys for Plaintiffs/Appellants  
Professional Engineers in  
California Government, et al.**

Gerald A. James  
455 Capitol Mall, Suite 501  
Sacramento, CA 95814  
Fax: (916) 446-0489  
Email: [gjames@pecg.org](mailto:gjames@pecg.org)

Robin B. Johansen  
Remcho, Johansen & Purcell, LLP  
201 Dolores Avenue  
San Leandro, CA 94577  
Fax: (510) 346-6201  
Email: [rjohansen@rjp.com](mailto:rjohansen@rjp.com)

**Attorneys for Amicus Curiae  
Applicant**

Harvey L. Leiderman  
Jeffrey R. Rieger  
REED SMITH  
101 Second Street, Suite 1800  
San Francisco, CA 94105  
Fax: (415) 391-8269

Hon. Patrick Marlette  
Sacramento County Superior Court  
720 Ninth Street – Dept. 19  
Sacramento, CA 95814

**Attorney for  
Respondent/Defendant State  
Controller John Chiang**

Richard J. Chivaro  
OFFICE OF THE STATE  
CONTROLLER  
300 Capitol Mall, Suite 1850  
Sacramento, CA 95814  
Fax: (916) 322-1220  
Email: [rchivaro@sco.ca.gov](mailto:rchivaro@sco.ca.gov)

**Attorneys for  
Defendants/Respondents**

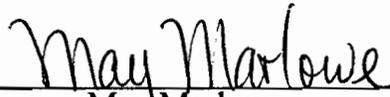
Will M. Yamada  
Labor Relations Counsel  
DEPARTMENT OF  
PERSONNEL  
ADMINISTRATION  
1515 S Street, North Building,  
Suite 400  
Sacramento, CA 95811-7258  
Facsimile: (916) 323-4723  
E-mail:  
[WillYamada@dpa.ca.gov](mailto:WillYamada@dpa.ca.gov)

Supreme Court of California (4  
copies)  
350 McAllister Street  
San Francisco, CA 94102-4797

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

Executed on January 14, 2010, at Sacramento, California.

  
\_\_\_\_\_  
May Marlowe