

Case No. _____

0001011

FILED

FEB 9 2009

COURT OF APPEAL - THIRD DISTRICT
DEENA C. FAWCETT Clerk

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT;
CALIFORNIA ASSOCIATION OF PROFESSIONAL SCIENTISTS

Plaintiffs and Appellants,

v.

ARNOLD SCHWARZENEGGER, GOVERNOR, STATE OF
CALIFORNIA; DEPARTMENT OF PERSONNEL ADMINISTRATION;
STATE CONTROLLER JOHN CHIANG

Defendants and Respondents.

On Appeal from the Superior Court, County of Sacramento
Honorable Patrick Marlette
Case No. 34-2008-80000126 CU-WM-GDS

**CAPS PETITION FOR WRIT OF SUPERSEDEAS OR OTHER
APPROPRIATE STAY ORDER;
REQUEST FOR IMMEDIATE STAY**

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Attorney for Plaintiff and Appellant,
CALIFORNIA ASSOCIATION OF
PROFESSIONAL SCIENTISTS

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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: Professional Engineers in California Government, et al.

v.

Governor Schwarzenegger, et al.

Court of Appeal Case Number: C0 _____

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. California Association of Professional Scientists	Exclusive bargaining representative of state employee professional scientists
2. Professional Engineers in California Government	Exclusive bargaining representative of state employee professional engineers
3.	
4.	

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


Signature of Attorney or Unrepresented Party

Date: February 5, 2009

Printed Name: Gerald James
State Bar No: 179,258
Firm Name & Address: 660 J Street, Suite 445
Sacramento, CA 95814

Party Represented: Appellant and Respondent California Association of Professional Scientists

ATTACH PROOF OF SERVICE ON ALL PARTIES WITH YOUR CERTIFICATE

**PETITION FOR WRIT OF SUPERSEDEAS
OR OTHER APPROPRIATE STAY ORDER;
POINTS AND AUTHORITIES**

TO THE HONORABLE PRESIDING JUSTICE AND TO THE HONORABLE
ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA, THIRD APPELLATE DISTRICT:

Petitioner and Appellant, CALIFORNIA ASSOCIATION OF
PROFESSIONAL SCIENTISTS, respectfully petitions this Court for a writ of
supersedeas and a stay of the implementation of certain portions of Governor
Arnold Schwarzenegger's December 19, 2008 Executive Order S-16-08, and by
this verified petition allege that:

1. Petitioners and Appellants are one of the Petitioners and Plaintiffs in an action originally filed in Sacramento County Superior Court, entitled *Professional Engineers in California Government; California Association of Professional Scientists v. Arnold Schwarzenegger, et al.*, Sacramento Superior Court Case No. 34-2008-80000126-CU-WM-GDS. The Respondents and Defendants Governor Schwarzenegger and the Department of Personnel Administration are named in this petition as Respondents.

2. On December 19, 2008, the Governor issued Executive Order S-16-08 (Executive Order). (A true and correct copy of the Executive Order is attached as **Exhibit A** and is incorporated herein by reference.) In the Executive Order, among other items, the Governor orders the DPA to adopt a plan to implement a “furlough” of represented state employees and supervisors for two days per month beginning February 1, 2009 and ending June 31, 2010. Through this furlough employees would have their hours reduced by two days per month. This reduction in hours would be accompanied by a cut in pay of 9.23 percent.
3. On December 22, 2008, CAPS and the Professional Engineers in California Government (PECG) filed a Petition for Writ of Mandate and Complaint for Declaratory Relief. A true and correct copy of the Petition for Writ of Mandate and Complaint for Declaratory Relief is attached as **Exhibit B**. Two other state employee unions, the California Attorneys, Administrative Law Judges and Hearing Officers in State Employment and the Service Employees International Union, Local 1000 filed related cases in the first week of January 2009. The superior court ultimately heard and ruled on those petitions and complaints at the same time as the CAPS petition and

complaint.

4. On January 6, 2009, CAPS filed its opening brief in support of the petition and complaint. A true and correct copy of CAPS' opening brief is attached as **Exhibit C**.
5. On January 9, 2009, Respondents Governor Schwarzenegger and DPA filed a Request for Judicial Notice. Respondents requested the court take notice of six items. Those items included the agreement between the State of California and Professional Engineers in California Government covering Bargaining Unit 9 Professional Engineers, Effective July 2, 2003 through July 2, 2008 and the agreement between the State of California and California Association of Professional Scientists covering Bargaining Unit 10 Professional Scientific, Effective July 1, 2006 through June 30, 2008. The other four items in the request for judicial notice were Unfair Practice Charges filed by various state employee unions with the Public Employment Relations Board concerning the Executive Order and furlough of state employees. A true and correct copy of the agreement between the State of California and CAPS is attached as **Exhibit D**.
6. On January 20, 2009, Respondents filed an opposition to the Petition for

Writ of Mandate. A true and correct copy of the opposition is attached as **Exhibit E.**

7. On January 22, 2009, CAPS filed its reply to opposition brief. A true and correct copy of the reply to opposition is attached as **Exhibit F.**
8. Following a hearing on the Petition for Writ of Mandate and Complaint for Declaratory Relief, the Superior Court issued a minute order dated January 29, 2009 which constituted “the Court’s final rulings on the demurrers and petitions for writ of mandate and complaints for declaratory relief...”. On January 30, 2009, the Superior Court issued a revised version of its final ruling. The revision made no substantive changes in the ruling, but corrected an editing error in the last sentence of the third paragraph from the end of the ruling, regarding the State Controller, by deleting the word “incidental”. A true and correct copy of the revised final ruling is attached as **Exhibit G.**
9. The Superior Court’s ruling denied the petition for writ of mandate and complaint for declaratory relief. The Superior Court found that the Governor’s Executive Order reduces the normal work hours of state employees for a temporary period due to the state’s current fiscal crisis.

The Superior Court found that the emergency measure will result in an accompanying deduction from pay for the hours not worked, but that the order does not change established salary ranges. The Court reasoned that “[T]he Governor’s authority for this action is found in statutes in the Government Code and in the employment contracts of the unions challenging the order.”

10. State scientists will be “locked out” of their work by the state employer on the first and third Friday of every month and will not be able to do the important work they are employed to do - protecting Californians from life threatening diseases, safeguarding California’s wildlife and natural resources, and protecting our air and water from toxic waste and pollution.
11. On February 3, 2009, CAPS filed a Notice of Appeal of the Superior Court’s January 29, 2009 final ruling on the petition for writ of mandate and complaint for declaratory relief, as amended by the court on January 30, 2009. A true and correct copy of the appeal is attached as **Exhibit H**.
12. CAPS’ appeal in this action will challenge the Superior Court’s conclusion that the statutes and the CAPS labor agreement with the state allow the state employer to alter the 40 hour workweek and to cut the pay of state

employed scientists. The labor contracts and the Government Code sections do not provide the state employer the authority to cut hours or to cut pay and the Governor and DPA's action constitutes an illegal act in violation of the separation of powers and an illegal impairment of contract.

REQUEST FOR STAY

13. Petitioner and appellant CAPS petitions this court for an immediate STAY of enforcement of the final ruling on the petition for writ of mandate and complaint for declaratory relief of the Superior Court of California, County of Sacramento, on January 29, 2009 as amended on January 30, 2009, and all further proceedings thereon, until determination by this court of the pending appeal from the judgment and further petitions that this court STAY enforcement of the Governor's Executive Order to the extent that it calls for a reduction in the hours of work of state employed scientists and a reduction in the salaries of state employed scientists. A stay of enforcement of the judgment and of the challenged portions of the Executive Order would serve to maintain the status quo of state scientists working the full 40 hour workweek and receiving their full salaries as called for in their labor contract during the pendency of the appeal and the challenge to the

Governor's Executive Order.

IRREPARABLE INJURY

14. A stay of the judgment is necessary to protect the petitioners/appellants from the irreparable injury they will sustain in the event that their hours of work and their salaries are reduced.
15. Damages for such a violation would be impossible to quantify and simply do not satisfy the harm to Petitioners.
16. Respondents Governor Schwarzenegger and DPA will suffer no injury from a stay. A stay will simply maintain the status quo of continuing the legislatively recognized normal 40 hour workweek which is incorporated into the labor contract between CAPS and the State and to continue to pay employees their full salaries out of the approved state budget as required by the labor contract between CAPS and the state until this Court decides the merits of CAPS' appeal.

PRAYER

WHEREFORE, petitioner and appellant prays that:

1. A writ of supersedeas issue under the seal of this Court staying enforcement of the January 29, 2009 ruling, as amended on January 30, 2009, and all

further proceedings thereon, until determination by this court of the pending appeal from the ruling and staying enforcement of the Governor's Executive Order to the extent that it calls for a reduction in the hours of work of state employed scientists and a reduction in the salaries of state employed scientists.

2. Petitioners recover the costs of this action.
3. The Court grant such other relief as may be just and proper.
4. **PETITIONER AND APPELLANT FURTHER PRAYS THAT THE COURT GRANT A TEMPORARY STAY OF THE TRIAL COURT'S RULING AND THE CONTESTED PORTIONS OF THE GOVERNOR'S EXECUTIVE ORDER PENDING DETERMINATION OF THIS PETITION.**

Dated: February 5, 2009

Respectfully submitted,



GERALD JAMES

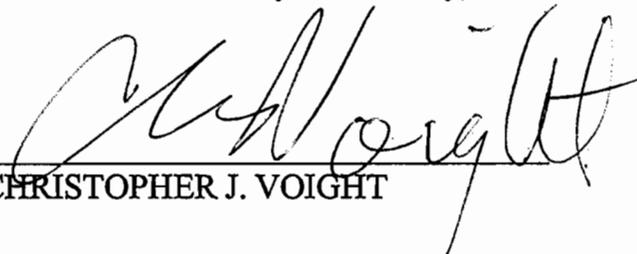
Attorney for Petitioner/Appellant
CALIFORNIA ASSOCIATION OF
PROFESSIONAL SCIENTISTS

VERIFICATION

I am the Executive Director of the Petitioner in this action. All facts alleged in the above petition, not otherwise supported by citations to the record, exhibit or other documents, are true of my own personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and if called to testify, I would do so truthfully and competently from my own knowledge as set forth above.

Executed in Sacramento, California on this 5th day of February, 2009.


CHRISTOPHER J. VOIGHT

MEMORANDUM OF POINTS AND AUTHORITIES

I. A WRIT OF SUPERSEDEAS IS NECESSARY IN THIS CASE TO MAINTAIN THE STATUS QUO AND PROTECT APPELLATE JURISDICTION

Code of Civil Procedure section 923 expressly permits this court to issue a writ of supersedeas as prayed for by Petitioner/Appellant herein. Section 923 provides:

“The provisions of this chapter shall not limit the power of a reviewing court or of a judge thereof to stay proceedings during the pendency of an appeal or to issue a writ of supersedeas or to suspend or modify an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction.”

A writ of supersedeas is issued usually to protect the appellate court’s jurisdiction. (*Nuckolls v. Bank of California, National Assn.*, (1936) 7 Cal.2d 574, 578.) The purpose of the writ is to maintain the subject of the action in status quo until final determination of the appeal. (*Dry Cleaners & Dyers Institute v. Reiss* (1936) 5 Cal.2d 306, 310; *Sacramento Newspaper Guild v. Sacramento County Bd. Of Supervisors* (3rd Dist., 1967) 255 Cal.App.2d 51, 53.) The status quo “has been defined to mean ‘the last actual, peaceable, uncontested status which preceded the pending controversy.’” (*Voorhies v. Greene* (1983) 139 Cal.App.3d 989, citing *United Railroads v. Superior Court* (1916) 172 Cal.80, 87.)

In this case, the status quo - the last uncontested status preceding this controversy - includes no reduction in state scientists hours, which are scheduled to be reduced beginning February 6, 2009. Prior to the challenged Executive Order, state employed scientists worked a full 40 hour workweek and received their full salaries. With the Executive Order taking effect, state employed scientists will

have their workweeks cut short every twice per month and will have their monthly salaries reduced by 9.23 percent.

Petitioner and Appellant CAPS asserts the right to a 40 hour workweek and to the payment of full salaries is guaranteed by the labor contract between the parties and that for those not covered by labor contracts, only the Legislature, not the Governor, can cut the hours of work and cut the pay of state scientists.

Petitioner and Appellant CAPS request this Court issue a writ of supersedeas under its inherent power to issue such if necessary or proper to complete the exercise of its appellate jurisdiction. A determination whether to issue a writ of supersedeas is based upon the consideration of the respective rights of the litigants, which contemplates the possibility of an affirmance of the decree as well as of a reversal. (*Food & Grocery Bureau v. Garfield* (1941) 18 Cal.2d 174, 177.)

A stay of the judgment is necessary to protect the appellants from the irreparable injury they will necessarily sustain in the event their appeal is deemed meritorious. (*Mills v. County of Trinity* (3rd Dist., 1979) 98 Cal.App.3d 859, 861.) Thus, the purpose of the writ of supersedeas is to maintain the subject of the action in status quo until the final determination of the appeal, in order that the appellant may not lose the fruits of a meritorious appeal.

Here, unless the Executive Order is stayed, state employed scientists will have their hours of work cut and their pay cut. Any subsequent ruling by the appellate court on the merits of CAPS' appeal as it pertains to the denied opportunity to work the bargained for and otherwise statutorily provided for workweek, would be rendered moot. State scientists will be "locked out" of work by the state employer and will not be able to do the important work they are employed to do - protecting Californians from life threatening diseases, safeguarding California's wildlife and natural resources, and protecting our air and water from toxic waste and pollution. Additionally, while employees could receive backpay for the time they were illegally prevented from working, the denial of the right to a significant portion of their full monthly salary on pay day cannot be cured.

On the other hand, the State will suffer no harm by continuing the status quo of having state employed scientists work full 40 hour workweeks and paying those employees their full salaries as called for in the labor contract and as approved in the state budget. The state will suffer no risk of loss by continuing its operation of not furloughing state employees. If the state were to lose this appeal, it would owe backpay and would not have received the benefit of the work of its

employees. It is settled that on a petition for writ of supersedeas, the merits of the appeal are not brought before the appellate court for decision. (*Bowers v. Department of Employment* (1960) 183 Cal.App.2d 686, 687.)

In conclusion, this Court should issue a writ of supersedeas pursuant to Code of Civil Procedure section 923. A writ of supersedeas is necessary where, absent the writ, damage will be done that cannot be corrected pending the determination of the merits of the appeal. Here, absent a stay of enforcement of the trial court's ruling and a stay of the contested portions of the Executive Order, the state will prevent state scientists from working their full 40 hour workweeks and will not pay state scientists their full salaries. Once employees are illegally forced to stay home, they will not be able to retrieve those lost hours of work. State scientists will be "locked out" of work by the state employer and will not be able to do the important work they are employed to do - protecting Californians from life threatening diseases, safeguarding California's wildlife and natural resources, and protecting our air and water from toxic waste and pollution. While they can recoup money damages, they will be improperly denied a large percentage of their full salaries for the pendency of this appeal. Thus, issuing a writ of supersedeas is appropriate in this case.

Accordingly, petitioner and appellant prays that this court stay enforcement of the ruling and all proceedings on the judgment pending this appeal in this action and stay the contested portions of the Executive Order.

Petitioner and appellant further prays that the court grant a temporary stay pending determination of this petition.

Dated: February 5, 2009

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gerald James", is written over a horizontal line.

GERALD JAMES
Attorney for Petitioner/Appellant
CALIFORNIA ASSOCIATION OF
PROFESSIONAL SCIENTISTS

CERTIFICATE OF WORD COUNT

I, Gerald James, am counsel for Petitioners and Appellants in the above referenced appeal. The foregoing writ and brief consists of 2,602 words. I am relying on the computer program, Corel Word Perfect X4, for this word count.

Dated: February 5, 2009

A handwritten signature in black ink, appearing to read "Gerald James", is written over a horizontal line.

GERALD JAMES
Attorney for Petitioner/Appellant
CALIFORNIA ASSOCIATION OF
PROFESSIONAL SCIENTISTS