

# SUPREME COURT COPY

Court of Appeal, Third Appellate District – Nos. C061011, C061009, C061020  
S183411

## IN THE SUPREME COURT OF CALIFORNIA

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PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT, et al.,  
Plaintiffs and Appellants,

v.

ARNOLD SCHWARZENEGGER, as Governor, etc., et al., Defendants and  
Respondents;

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

SUPREME COURT  
FILED

AUG 23 2010

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CALIFORNIA ATTORNEYS, etc., Plaintiff and Appellant

v.

ARNOLD SCHWARZENEGGER, as Governor, etc., et al., Defendants and  
Respondents;

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

Frederick K. Ohlrich Clerk

Deputy

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SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000, Plaintiff and  
Appellant,

v.

ARNOLD SCHWARZENEGGER, as Governor, etc., et al., Defendants and  
Respondents;

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

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## STATE RESPONDENTS' RESPONSE TO AMICUS CURIAE BRIEF OF KELLY VENT

---

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

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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

## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
I. INTRODUCTION.....	1
II. ARGUMENT .....	2
A. Amicus Vent’s Brief Should Be Disregarded Because It Raises New Issues And Amici Are Not Permitted To Raise Issues Not Previously Present In The Case. ....	2
B. California Government Code Section 19824, Subdivision (a) Does Not Constitute A Continuing Appropriation For All State Employee Salaries And, Therefore, This Court Should Disregard Amicus Vent’s Arguments.....	3
1. California Government Code Section 19824 Does Not Meet The Legal Definition For An Appropriation.....	4
2. Amicus Vent’s Conclusion That Section 19824 Creates A Continuing Appropriation For State Employee Salaries Conflicts Directly With This Court’s Holding In White v. Davis.....	5
C. Government Code Section 18000 Does Not Apply To Furloughs Because It Is A Limitation On Compensation, Not A Guarantee.....	7
III. CONCLUSION .....	9

## TABLE OF AUTHORITIES

	<b>Page</b>
<b>STATE CASES</b>	
<i>Gilb v. Chiang</i> (2010) 186 Cal.App.4th 444 .....	4
<i>Harbor v. Deukemejian</i> (1987) 43 Cal.3d 1078.....	4
<i>Martin v. Henderson</i> (1953) 40 Cal.2d 583 .....	8
<i>Mercury Casualty Co. v. Hertz Corp.</i> (1997) 59 Cal.App.4 <sup>th</sup> 414 .....	2
<i>White v. City of Huntington Beach</i> (1978) 21 Cal.3d 497 .....	2
<i>White v. Davis</i> (2003) 30 Cal. 4th 528 .....	2, 5, 6, 7
<b>STATE STATUTES</b>	
Government Code § 18000 .....	1, 8, 9
Government Code § 19824 .....	1-5
Government Code § 19824(a).....	1, 3, 6, 7

I.

**INTRODUCTION**

Amicus Curiae Kelly Vent (“Amicus Vent”) challenges the Governor Arnold Schwarzenegger’s Executive Orders furloughing state employees at issue in this case on the basis that Government Code section 19824, subdivision (a) creates a continuing appropriation for state employees’ salary outside the Budget Act. Amicus Vent argues that because the appropriations for state employee salaries are continuous, the Governor was without authority to reduce state employee compensation through furloughs because it was unnecessary for the Legislature to make any new appropriation for state employee compensation in the Budget Acts enacted subsequent to the Governor’s Executive Orders. Amicus Vent also argues that Government Code section 18000 makes furloughs illegal.

Amicus Vent’s brief to this Court should be disregarded *in toto* because the arguments concerning Government Code sections 19824 and 18000 are entirely new to this action and, as such, are inappropriate to be raised for the first time in an amicus brief. An amicus curiae is required to take a case “as they find it,” and is not permitted to bring up new issues that were not previously briefed by any of the parties to the case. In this case, none of the arguments raised by Amicus Vent were raised previously in the extensive briefing that has been submitted to this Court. Accordingly, these

new argument raised at the eleventh hour by Amicus Vent should be disregarded.

Even if this Court were to consider Amicus Vent's argument, her characterization of Government Code section 19824 as providing a continuous appropriation for state employee salaries is incorrect. First, section 19824 does not meet the legal definition of an appropriation, as it does not state a specific sum of money to be appropriated. Second, Amicus Vent's interpretation of Government Code section 19824 conflicts directly with this Court's holding in *White v. Davis* (2003) 30 Cal. 4th 528.

Therefore, State Respondents respectfully request that this Court disregard Amicus Vent's improper arguments and uphold the Governor's executive authority to furlough state employees by Executive Order.

## II.

### ARGUMENT

#### A. Amicus Vent's Brief Should Be Disregarded Because It Raises New Issues And Amici Are Not Permitted To Raise Issues Not Previously Present In The Case.

Amicus curiae are not permitted to raise new issues in their amicus briefs that were not briefed, or raised previously, by any of the parties to the action. "Issue not raised by the appealing parties may not be considered if raises for the first time by amici curiae." (*Mercury Casualty Co. v. Hertz Corp.* (1997) 59 Cal.App.4<sup>th</sup> 414, 425.) An amicus curiae "accepts the case as he finds it and may not 'launch out upon a juridical expedition of its own

unrelated to the actual appellate record.” (*White v. City of Huntington Beach* (1978) 21 Cal.3d 497, 512.)

In her brief to this Court, Amicus Vent presents entirely new theories of law and claims that have not been raised in this case up to this point. Therefore, under this general rule, this Court should disregard Amicus Vent’s brief in its entirety.

**B. California Government Code Section 19824, Subdivision (a) Does Not Constitute A Continuing Appropriation For All State Employee Salaries And, Therefore, This Court Should Disregard Amicus Vent’s Arguments.**

Even if this Court were to consider Amicus Vent’s arguments, which State Respondents submit it should not, Amicus Vent’s arguments are incorrect as a matter of law. The majority of Amicus Vent’s brief is based on the incorrect claim that employee salaries are continuously appropriated, outside of the yearly budget process under California Government Code section 19824.

Government Code section 19824, subdivision (a), states, “Unless otherwise provided by law, the salaries of state officers shall be paid monthly out of the General Fund.” Amicus Vent argues that “[g]iven that employee salaries are continuously appropriated when earned pursuant to section 19824, subdivision (a), any appropriations for salary in the 2008 Budget Act are superfluous and, therefore, have no effect on the validity of the Executive Order.” (Vent Brief, p. 3.) Amicus Vent further claims that section 19824 constitutes a continuing appropriation of wages for all state

employees. This assertion is incorrect, because section 19824 does not constitute an appropriation within the legal definition.

1. **California Government Code Section 19824 Does Not Meet The Legal Definition For An Appropriation.**

California Government Code section 19824 does not constitute an appropriation within the legal definition, because it fails to set aside any specific sum of money for state employee salaries. In the recent decision of *Gilb v. Chiang*, (2010) 186 Cal.App.4th 444, 451, the Court of Appeal reaffirmed the long standing definition of an appropriation, finding that “[a]n appropriation is a legislative act setting aside a certain sum of money for a specified object in such a manner that the executive officers are authorized to use that money and no more for such specific purpose.” As this Court held in *Harbor v. Deukemejian* (1987) 43 Cal.3d 1078, 1089, an legislative appropriation is “a specific setting aside of an amount, not exceeding a definite sum, for the payment of certain particular claims or demands not otherwise expressly provided for in the appropriations bill.”

Therefore, under the accepted definition of an appropriation, section 19824 cannot be considered an appropriation because it does nothing more than prescribe the frequency with which state employees are paid. The statute does not purport to set aside or “appropriate” the funds for such payments. It directs only that compensation to state officers shall be paid from the General Fund on a monthly basis, unless otherwise provided by

law.<sup>1</sup> Because there is no specificity within the statute, it does not rise to the level of a specific appropriation of funds for state employee compensation, much less a continuing appropriation.

2. **Amicus Vent's Conclusion That Section 19824 Creates A Continuing Appropriation For State Employee Salaries Conflicts Directly With This Court's Holding In *White v. Davis*.**

Amicus Vent's conclusion that a continuing appropriation exists for all state employees contradicts directly this Court's holding in *White v. Davis*, 30 Cal.4<sup>th</sup> 528. In *White v. Davis*, this Court held,

With regard to the payment of state employee salaries, Government Code section 9610, enacted in 1943, provides: 'The fixing or authorize the fixing of the salary of a State officer or employee is not intended to and does not constitute an appropriation of money for the payment of the salary. *The salary should be paid only in the event that moneys are made available by another provision of law.*' (Italics added; cf. (Italics added; cf. Cal. Const. art III, section 4 [dealing with *elected* state officers].) This statute sets forth the basic understanding that statutes or other measures that set salaries for state employees are not themselves appropriations for such salaries, and further makes clear that the payment of a salary to a state employee depends upon the availability of an appropriation to pay the salary.

The foregoing provisions do not specify that an appropriation for state employee salaries can be made only in the budget act, and in some instances, state employee salaries currently are paid from continuing appropriations, but

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<sup>1</sup> Amicus Vent's brief does not address the state employees who are paid twice a month or paid through special funds and how those facts impact her claim that section 19824 establishes a continuing appropriation of funds for the payment of all state employee compensation.

appropriations for most state employee salaries traditionally have been adopted as part of the annual budget act. In any event, the constitutional and statutory provisions set forth above clearly require that some applicable appropriation be available before a state employee's salary actually may be paid from public funds. (*Id.*, at 567.)

In *White v. Davis*, this Court recognized that while continuing appropriations for state employee salaries do exist in certain and specific circumstances, the appropriations for most state employee salaries are done on a yearly basis, as part of each year's Budget Act. In fact, in footnote 15 to *White v. Davis*, this Court specifically recognized the specific state employees paid from continuing appropriations:

...under current law the salaries of some state employees are payable from a continuing appropriation. (See, e.g., Ins. Code section 11770, et seq. ["The assets of the [State Compensation Insurance Fund] shall be applicable...to the payment of the salaries and other expenses charged against it..."]; see also *Board of Osteopathic Examiners v. Riley* (1923) 192 Cal.158 [218 P. 1018] [ordering Controller to pay salaries of members of the Board of Osteopathic Examiners pursuant to a continuing appropriation from a special fund into which fees paid by osteopaths were deposited.]). (*Id.*, at fn. 15.)

If section 19824, subdivision (a) provided a continuing appropriation of funds for all state employees' wages, there would have been no need for the Legislature to enact specific continuing appropriations for specified groups of state employees. The fact that the Legislature adopted specific

continuing appropriations demonstrates the error in Amicus Vent's interpretation of section 19824, subdivision (a). This Court has already recognized that while some specific state employees are paid under continuing appropriations, the majority of state employees are paid by appropriations that are adopted on a yearly basis during the state budgeting process. Amicus Vent's claims in her brief directly contradict this Court's prior holding.

This Court's holding in *White v. Davis* also disposes of Amicus Vent's claims that "section 19824, subdivision (a) clearly authorizes the Controller to draw monthly warrants for earned salary regardless of whether the Legislature passes a law prohibiting or reducing it, or whether the Legislature does nothing." (Vent Brief, p. 13.) As this Court ruled in *White v. Davis*, the state law "does not afford state employees the right to obtain the actual payment of salary from the treasury *prior to the enactment of an applicable appropriation.*" (*Id.* at 571.) Amicus Vent's interpretation of section 19824, subdivision (a) is incorrect and fails to provide a basis for challenging the Governor's furlough Executive Orders.

C. **Government Code Section 18000 Does Not Apply To Furloughs Because It Is A Limitation On Compensation, Not A Guarantee.**

Amicus Vent alleges incorrectly that furloughs violate Government Code section 18000. Amicus Vent alleges, without any support or authority, "section 18000 stands for the proposition that State employees

are entitled to receive their exact salaries as defined by law when said employees perform services as required by the duties of their respective offices.” (Vent Brief, p. 13.) However, Amicus Vent misinterprets section 18000.

California Government Code section 18000 states, “The salary fixed by law for each state officer, elective or appointive, is compensation in full for that office and for all services rendered in any official capacity or employment whatsoever, during his or her term of office, and he or she shall not receive for his or her own use any fee or perquisite for the performance of any official duty.” Despite Amicus Vent’s insistence to the contrary, this statute provides a *limitation* on compensation for services, not a guarantee. (*Martin v. Henderson* (1953) 40 Cal.2d 583, 589.) In *Martin v. Henderson*, this Court interpreted section 18000 as prohibiting additional payment to *officers* above and beyond the established salary for their position. (*Id.*)

Furthermore, a basic review of the statute establishes that it refers to a limitation on the ability of elective or appointive state officers to accept compensation for their service. The statute states that, for elected or appointed officers, their fixed salary is the only compensation they can receive for their office and they can receive no additional compensation. Additionally, section 18000 does not apply to all state employees. By the plain terms of the statute, it applies only to elected or appointed state

officers. Accordingly, section 18000 does not guarantee the wages of all state employees.

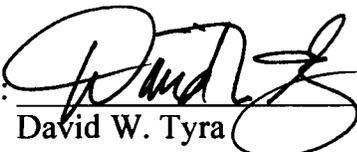
III.

**CONCLUSION.**

For the reasons previously addressed in briefs to this Court, State Respondents respectfully request that this Court affirm the Governor's authority to furlough state employees by Executive Order.

Dated: August 23, 2010

KRONICK, MOSKOVITZ, TIEDEMANN  
& GIRARD  
A Law Corporation

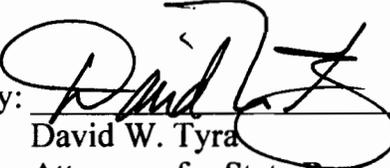
By:   
David W. Tyra  
Meredith H. Packer  
Attorneys for State Respondents  
GOVERNOR ARNOLD  
SCHWARZENEGGER and THE  
DEPARTMENT OF PERSONNEL  
ADMINISTRATION

**CERTIFICATE OF WORD COUNT**

I, David W. Tyra, Attorney for Defendants/Respondents GOVERNOR ARNOLD SCHWARZENEGGER and DEPARTMENT OF PERSONNEL ADMINISTRATION, hereby declare under penalty of perjury that the number of words in State Respondents' Response to Amicus Curiae Brief Of Kelly Vent equals 1,926 words, as per the word count feature in Microsoft Word.

Dated: August 23, 2010

KRONICK, MOSKOVITZ, TIEDEMANN  
& GIRARD  
A Law Corporation

By: 

David W. Tyra  
Attorneys for State Respondents  
GOVERNOR ARNOLD  
SCHWARZENEGGER and THE  
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 August 23, 2010, I served the within documents:

**State Respondents' Response To Amicus Curiae Brief Of Kelly Vent**

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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)

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

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 Plaintiff/Appellant  
California Attorneys,  
Administrative Law Judges and  
Hearing Officers in State  
Employment**

Patrick Whalen  
Law Offices of Brooks Ellison  
1725 Capitol Avenue  
Sacramento, CA 95811  
Fax: (916) 448-5346  
Email: [lobby@ellisonwilson.com](mailto:lobby@ellisonwilson.com)

**Attorneys for Plaintiff/Appellant  
SEIU, Local 1000**

Paul E. Harris, III  
J. Felix De la Torre  
Anne Giese  
SEIU Local 1000  
1808 14<sup>th</sup> Street  
Sacramento, CA 95811  
Telephone: 916-554-1279  
Facsimile: 916-554-1292  
Email: [fharris@seiu1000.org](mailto:fharris@seiu1000.org)  
[fdelatorre@seiu1000.org](mailto:fdelatorre@seiu1000.org)  
[agiese@seiu1000.org](mailto:agiese@seiu1000.org)

**Amicus Curiae Attorney for  
California Constitutional Officers**

Mark R. Beckington  
Deputy Attorney General  
300 South Spring Street, Suite 1702  
Los Angeles, CA 90013  
Fax: (213) 897-1071  
Email: [Mark.Beckington@doj.ca.gov](mailto:Mark.Beckington@doj.ca.gov)

**Attorneys for  
Defendants/Respondents  
Governor Arnold  
Schwarzenegger  
And Department Of Personnel  
Administration**

Will M. Yamada  
Labor Relations Counsel  
Department Of Personnel  
Administration  
1515 S Street  
North Building, Suite 400  
Sacramento, CA 95811-7258  
Fax: (916) 323-4723  
E-mail: [WillYamada@dpa.ca.gov](mailto:WillYamada@dpa.ca.gov)

**Amicus Curiae**

Kelly Vent  
3380 Hartselle Way  
Sacramento, CA 95827

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

California Court of Appeal  
Third Appellate District  
621 Capitol Mall, 10<sup>th</sup> Floor  
Sacramento, CA 95814

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