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RG 10494800 and RG 10530845

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14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **COUNTY OF ALAMEDA**

16 PROFESSIONAL ENGINEERS IN
CALIFORNIA GOVERNMENT, *et al.*,

17 Petitioners/Plaintiffs,

18 v.

19 EDMUND G. BROWN, JR., *et al.*,

20 Respondents/Defendants.
21

Case No. RG10494800, consolidated with Case
Nos. RG10507922, RG10507081,
RG10503805, RG10501997, RG10516259,
RG10514694, RG10528855, RG10530312 and
RG10530845

ASSIGNED FOR ALL PURPOSES TO
DEPARTMENT 17

PETITIONERS/PLAINTIFFS'
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF JOINT MOTION FOR
PRELIMINARY INJUNCTION

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1 at the time the Governor ordered the furloughs, the Legislature had *not* authorized a furlough
2 program. Thus, under *PECG I*, the furloughs were unlawful when initially implemented and
3 continue to be unlawful unless Respondents can demonstrate that the Legislature validly authorized
4 the furloughs at some subsequent point in time.

5 Respondents previously have asserted that the Legislature authorized the furlough program
6 by passing Budget Act for Fiscal Year 2010-11 (“2010 Budget Act”) in October 2010.¹ However,
7 as Petitioners demonstrate below, the budget legislation does not constitute valid authorization of
8 the furlough program. Petitioners are likely to prevail on their claims that any attempt by the
9 Legislature to adopt the furlough program set forth in Executive Order S-12-10 would be invalid
10 because it would violate the separation of powers doctrine and the single subject rule; and, further,
11 that even if the 2010 Budget Act authorized some use of furloughs to achieve cost savings, the
12 Legislature did *not* authorize a three-day-per-month furlough program for represented employees
13 through the end of the fiscal year that is vastly disproportionate to the wage cuts imposed on other,
14 nonrepresented employees. Additionally, Petitioners are likely to prevail on their claims that the
15 furloughs should end pursuant to the terms of Executive Order S-12-10, and that the furloughs are
16 unlawful under the Labor Code and Government Code section 16310(a). Because the drastic pay
17 cuts caused by the furloughs irreparably harm Petitioners’ members, depriving them of the ability to
18 pay for basic necessities and to provide for their families, Respondents should be preliminarily
19 enjoined from continuing to institute three-day-per-month furloughs pursuant to Executive Order S-
20 12-10 and reducing employees’ pay to reflect unpaid furlough days.

21 PROCEDURAL HISTORY

22 This matter involves ten separate cases challenging the legality of the Governor’s furloughs
23 of public employees. The lead case, *PECG v. Schwarzenegger, et al.*, Case No. RG10494800, was
24 filed on January 21, 2010, and challenged Executive Orders S-16-08 and S-13-09, which were
25 issued by former Governor Schwarzenegger on December 19, 2008 and July 1, 2009 respectively,
26

27 ¹ Even if the October 2010 budget legislation authorized some furloughs (which it did not),
28 that does not cure the fact that state employees were unlawfully furloughed in August and
September 2010 without legislative authorization.

1 and directed the furlough of all state employees for two days, and then three days, each month. This
2 Court consolidated *PECG v. Schwarzenegger* for pretrial purposes with five other cases that also
3 challenged the legality of the furloughs ordered in 2008 and 2009.² The lawsuits generally
4 contended that the furloughs violated: Government Code section 19851, by failing to consider the
5 varying needs of state agencies in reducing employees' work hours; Government Code section
6 16310(a), by facilitating borrowing from Special Funds that interferes with the ability of those funds
7 to fulfill their purposes; and various Labor Code provisions, by requiring employees to work
8 without pay on so-called "self-directed" furlough days.

9 The 2008 and 2009 executive orders expired on June 30, 2010. See Halpert Decl., Exhs. A
10 & B. However, on July 28, 2010, the Governor issued Executive Order S-12-10, re-instituting
11 three-day-per-month furloughs of most state employees. *Id.*, Exh. C. Petitioners in the consolidated
12 cases filed amended complaints and petitions challenging Executive Order S-12-10 and sought a
13 temporary restraining order ("TRO") prohibiting Respondents from implementing the order.

14 On August 9, 2010, this Court issued a TRO enjoining the furlough program mandated by
15 the July 28, 2010 executive order.³ Respondents appealed that order and filed a writ of supersedeas
16 and request for a stay of the TRO. The Court of Appeal denied the writ, but the Supreme Court
17 granted review, staying further trial court proceedings, and deferred further action pending a
18 decision in *PECG I* (2010) 50 Cal.4th 989.

19 As discussed in more detail below, *PECG I* held that the Governor did not have authority
20 unilaterally to reduce represented state employees' pay through a furlough program, and that the
21 furloughs were only valid to the extent they were authorized by the Legislature through budget
22 legislation. 50 Cal.4th at 1047-48. After its decision in *PECG I* became final, the Supreme Court
23 remanded these consolidated cases to the Court of Appeal. Halpert Decl., Exh. F. At Petitioners'
24 request, the Court of Appeal remanded the present cases to this Court for further proceedings in
25

26 ² The cases initially consolidated were: RG10494800, RG10507922, RG10507081,
27 RG10503805, RG10501997, RG10514694.

28 ³ CCPOA and CAPS filed suit on August 11, 2010, and August 13, 2010, respectively. The
Court has consolidated these cases with the other furlough-related matters for pretrial purposes.

1 light of *PECG I*, the enactment of the 2010 Budget Act, and other intervening developments,
2 without passing on the merits of the claims in these actions. *Id.*, Exh. G.

3 On February 11, 2011, Petitioners filed amended petitions and complaints. In light of *PECG*
4 *I*, these petitions contend that there is no valid legislative authorization for the furloughs instituted
5 pursuant to Executive Order S-12-10; and that, alternatively, continuing the furloughs beyond one
6 furlough day in March 2011 will exceed the scope of any valid legislative authorization. Petitioners
7 also allege that the furloughs should end pursuant to the terms of Executive Order S-12-10. The
8 petitions also continue to assert Labor Code violations occasioned by the use of “self-directed”
9 furloughs, and violations of Government Code section 16310(a). Finally, Petitioner CASE contends
10 that the furlough of employees at agencies that do not receive appropriations through the 2010
11 Budget Act is unlawful; and Petitioners *PECG* and *CAPS* allege that the furloughs of employees
12 working on federally funded clean-ups of military bases violates the strict statutory mandates of
13 Water Code section 13177.7 and Health and Safety Code section 25353.5.⁴

14 STATEMENT OF FACTS

15 A. Executive Order S-12-10

16 In 2008 and 2009, then-Governor Schwarzenegger issued two Executive Orders requiring
17 the furloughs of public employees. *See Halpert Decl.*, Exhs. A & B. Furloughs instituted under
18 these orders ended in June 2010. However, on July 28, 2010, the Governor issued a new executive
19 order, Executive Order S-12-10. *Id.*, Exh. C. Executive Order S-12-10 directs DPA to adopt a plan
20 to furlough represented state employees and supervisors for three days each month, beginning in
21 August 2010. *Id.* Eight state agencies are exempted from the Executive Order, as well as
22 represented employees in Bargaining Units 12, 16, 18 and 19. Employees in the bargaining units
23 represented by Petitioners, however, are subject to the furloughs mandated by the Executive Order.

24 Unlike the previous two executive orders, Executive Order S-12-10 establishes no specific
25 date by which the furloughs will end. Instead, it provides that the “furlough period shall end when a

26 _____
27 ⁴ The amended petitions/complaints contain several other causes of action. We highlight
28 here only those causes of actions pursuant to which Petitioners seek preliminary injunctive relief.
Additionally, to the extent not all Petitioners assert the causes of action discussed herein, we note
that in the merits discussion below.

1 2010-11 fiscal year budget is in place and the Director of the Department of Finance determines that
2 there is sufficient cash to allow the State to meet its obligations to pay for critical and essential
3 services to protect public health and safety and to meet its payment obligations protected by the
4 California Constitution and federal law.” *Id.* Executive Order S-12-10 is in effect today, and state
5 employees in the bargaining units represented by the Petitioners continue to be furloughed three
6 days each month.⁵ As discussed below, although the budget for fiscal year 2010-11 was enacted in
7 October 2010, the Director of the Department of Finance has failed to issue a determination
8 regarding the State’s cash status. According to the Governor’s recent budget proposals, three-day-
9 per-month furloughs for employees represented by Petitioners are likely to continue until at least
10 June 30, 2011. Halpert Decl., Exh. V at 177.

11 **B. DPA’s Implementation of Executive Order S-12-10 and Self-Directed Furloughs**

12 On August 5, 2010, DPA issued a memorandum implementing Executive Order S-12-10.
13 Halpert Decl., Exh. R. The memorandum provides that the second, third and fourth Fridays of each
14 month are furlough days, and that state employees’ salaries will be reduced to reflect those three
15 unpaid furlough days each month. *Id.* The memorandum anticipates that agencies may use so-
16 called self-directed furloughs, pursuant to which employees work on the furlough days and accrue
17 deferred furlough days, to be taken at some later point in time. *Id.* According to the memorandum,
18 employees cannot cash out these accrued furlough days. *Id.*

19 On October 21, 2010, DPA issued a second memorandum implementing Executive Order S-
20 12-10. Halpert Decl., Exh. S. This memorandum states that all employees’ furloughs will be self-
21 directed, effective November 2, 2010. *Id.*

22 The state employees represented by Petitioners are thus currently subject to these self-
23 directed furloughs. Employees receive monthly paychecks that are reduced to reflect the three so-
24 called furlough days mandated by Executive Order S-12-10, even if they worked on the “furlough
25

26 ⁵ See Decl. of Peter Flores, Jr. (“Flores Decl.”) ¶3; Decl. of Christopher Voight (“Voight
27 Decl.”) ¶¶4-5; Decl. of Theodore Toppin (“Toppin Decl.”) ¶¶4-5; Decl. of Joan Bryant (“Bryant
28 Decl.”) ¶¶3-4; Decl. of Charles Alexander (“C. Alexander Decl.”) ¶¶6, 8. Although ACSS’
members were not exempted from Executive Order S-12-10, they are now subject to a different
furlough program for supervisory employees, as explained *infra* at p. 6. See Decl. of Rocco
Paternoster (“Paternoster Decl.”) ¶¶5-7.

1 Fridays,” and notwithstanding whether they were able to use all three deferred furlough days during
2 the pay period. Decl. of William Homsany (“Homsany Decl.”) ¶¶6-7, 11; Decl. of Gary Benson
3 (“Benson Decl.”) ¶¶9-10. Many of the employees Petitioners represent are not able to use their self-
4 directed furlough days during the pay period in which those days accrue. C. Alexander Decl. ¶7;
5 Voight Decl. ¶6; Toppin Decl. ¶8; Decl. of Quaint Nguyen (“Nguyen Decl.”) ¶¶6-7, 10; Decl. of
6 Shawn Van Sickle (“Van Sickle Decl.”) ¶10; Decl. of Melissa Mech (“Mech Decl.”) ¶9.

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

8 On October 8, 2010, Senate Bill 870 was signed into law as the 2010 Budget Act. Section
9 3.91 of the bill provides that reductions in employee compensation will be “achieved through the
10 collective bargaining process or through administrative actions for represented employees and a
11 proportionate reduction for nonrepresented employees” Halpert Decl., Exh. T (Senate Bill
12 870, Section 3.91(a)). That section further provides that “[a]ppropriation reductions implemented
13 pursuant to this section may be those related to collective bargaining agreements or other
14 administrative actions put into effect either prior to or subsequent to the enactment of this act. . . .”
15 *Id.* (Section 3.91(e)).

16 **D. Executive Order S-15-10**

17 On October 8, 2010, the same day the 2010 Budget Act was enacted, Governor
18 Schwarzenegger issued Executive Order S-15-10, which implemented revised compensation
19 directives for nonrepresented state employees. That order, which took effect on November 1, 2010,
20 implemented a furlough program that requires affected employees to take one unpaid day each
21 month, and provides for a 3% increase in employees’ pension contributions each month. Halpert
22 Decl., Exh. D. Taking into consideration both Executive Order S-15-10 and the fact that these
23 nonrepresented employees were previously subject to three days of furloughs per month in August,
24 September and October, 2010, the overall net average monthly pay reduction for nonrepresented
25 employees in the 2010-11 fiscal year will be 8.5%. Toppin Decl. ¶5⁶

26 _____
27 ⁶ Executive Order S-15-10 mandates a reduction in nonrepresented employees’
28 compensation of 7.6% as of November 1, 2010. Toppin Decl. ¶5. But because nonrepresented
employees were subject to three furlough days per month in August, September and October 2010,
(continued...)

1 **E. The Effect of the Furloughs**

2 The ongoing furloughs have had significant effects on the employees represented by
3 Petitioners, as well as on the ability of state agencies to fulfill their missions and serve the public.

4 **1. Effects of the Furloughs on Employees Represented by Petitioners**

5 The current three-day-per-month furlough program reduces Petitioners' members' pay by
6 approximately 13.8%. *See, e.g.,* Toppin Decl. ¶4. Petitioners' members have been subject to pay
7 cuts associated with the furloughs since August 2010, and prior to that, from February 2009 through
8 June 2010. *See, e.g.,* C. Alexander Decl. ¶10. Because Petitioners' members in many instances
9 used their savings to cover living expenses when their pay was first reduced in 2009, they are ill
10 able to weather the continued 13.8% pay cut. *See, e.g., id.* ¶¶10-11; Decl. of Peter Hendrix
11 ("Hendrix Decl.") ¶¶8-9; Decl. of John Budroe ("Budroe Decl.") ¶¶9-11; Decl. of Anousheh
12 Rouzbehani ("Rouzbehani Decl.") ¶¶9-10. As the accompanying declarations demonstrate, and as
13 discussed in more detail, *infra* at pp. 31-35, Petitioners' members are struggling to make ends meet,
14 and are in danger of losing housing, foregoing medical care, and being unable to provide for their
15 families. As the furloughs continue and employees lose whatever financial safety nets they may
16 have had, more and more of Petitioners' members likely will be unable to meet their families' basic
17 needs. *See, e.g.,* Decl. of Kirk Bayless ("Bayless Decl.") ¶8; Decl. of Terry Escarda ("Escarda
18 Decl.") ¶10; Van Sickle Decl. ¶¶12-15; Decl. of Dolores Weeks ("Weeks Decl.") ¶¶13, 16.

19 **2. Effects of the Furloughs on Work of State Departments and Agencies**

20 The furloughing of state employees also has had a significant effect on the productivity of
21 the departments and agencies where the furloughed employees work. Although under the current
22 furlough scheme the state offices are no longer closed to the public on "furlough Fridays,"
23 employees are nonetheless instructed to take three unpaid furlough days each month. Halpert Decl.,
24 Exh. S at 3. With state employees working fewer hours, the state agencies are simply not able to be
25 as productive as when their employees were working full 40-hour workweeks. Employees are not
26

27 ⁶(...continued)
28 the overall reduction in nonrepresented employees' compensation for the 2010-11 fiscal year is
8.5%. *Id.*

1 able to carry out a wide variety of agency functions when they are forced to take furlough days,
2 including but not limited to interacting with the public, traveling, or performing safety inspections.
3 *See, e.g.*, Weeks Decl. ¶18; Goodman Decl.; Decl. of David Miller (“Miller Decl.”) ¶¶6-7.

4 For example, the Division of the State Architect (“DSA”) at the Department of General
5 Services, and the Office of Statewide Health Planning and Development (“OSHPD”) have
6 experienced substantial delays in processing and reviewing construction plans for hospitals, K-12
7 schools and community colleges, tasks performed by PEGC members. *See* Decl. of Edward
8 Vergaray (“Vergaray Decl.”) ¶¶9-15; Decl. of Kenneth Knott (“Knott Decl.”) ¶¶8-11. Similarly, the
9 Department of Transportation (“Caltrans”) has had to delay construction schedules of Caltrans
10 capital projects worth \$448 million as a result of the furloughs. Toppin Decl. ¶10. The continued
11 furloughing of represented employees at Caltrans is likely to cause even further delays. *See id.*;
12 Rouzbehani Decl. ¶4; Halpert Decl., Exhs. KK, LL, MM, NN.⁷

13 ARGUMENT

14 The Court should preliminarily enjoin Respondents from implementing the current furlough
15 program and reducing Petitioners’ members’ pay to reflect three unpaid furlough days each month.
16 “[T]he question whether [preliminary relief] should be granted involves two interrelated factors: (1)
17 the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that
18 is likely to result from the granting or denial of interim injunctive relief.” *White v. Davis* (2003) 30
19 Cal.4th 528, 554. The court “must be guided by a ‘mix’” of these factors, and “the greater the
20 plaintiff’s showing on one, the less must be shown on the other to support an injunction.” *Butt v.*
21 *State of California* (1992) 4 Cal.4th 668, 678. Thus, “the more likely it is that plaintiffs will
22 ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does
23 not issue.” *King v. Meese* (1987) 43 Cal.3d 1217, 1227.

24 Here, Petitioners make a strong showing that they will prevail on the merits of their claims
25 that the continued furloughing of Petitioners’ members is unlawful, and has not validly been
26 authorized by the Legislature. Additionally, the substantial pay cuts caused by the furlough program

27 _____
28 ⁷ Additional examples of the effects furloughs have had on Special Fund agencies are
discussed *infra* at pp. 25-27.

1 are harming Petitioners' members, depriving many employees and their families of life necessities.

2 Accordingly, preliminary relief is appropriate and necessary.

3 **I. Petitioners Are Likely to Succeed in Demonstrating that the Current Furloughs are**
4 **Unlawful**

5 **A. *PECG I* Establishes that the Governor and DPA Have No Authority to Institute**
6 **Unilateral Salary Reductions Through a Furlough Program and that Such a**
7 **Program is Only Valid to the Extent it is Validly Authorized by the Legislature**

8 In *PECG I*, the Supreme Court held that the Governor lacks authority unilaterally to reduce
9 represented state employees' compensation by implementing a furlough program that reduces those
10 employees' wages and salaries. 50 Cal.4th at 1039, 1040-41; *see also id.* at 1035 (finding no
11 statutory provision "authorizes the Governor, the DPA, or an appointing authority in the executive
12 branch unilaterally to reduce state employees' wages, or to reduce state employees' hours and
13 wages, due to a lack of funds"). In so holding, the Court reaffirmed that the power to set salaries is
14 legislative in nature, noting that the Legislature expressly reserved this power to itself for union-
15 represented employees through Government Code section 19826(b). *Id.* at 1016-21; *see also id.* at
16 1037 ("the authority or lack of authority of the Governor or the DPA unilaterally to institute the
17 [two-day furloughs] program must be determined under the provisions of section 19826").

18 Government Code section 19826(b) provides that "the DPA shall not establish or adjust the
19 salaries of [represented] employees," unless it does so through a memorandum of understanding
20 ("MOU") with a union. Govt Code §19826(b). *PECG I* explained that mandatory furloughs
21 "clearly . . . significantly reduce the wages or salary that a full-time state employee earns from his or
22 her job – the monetary sum that obviously matters most to employees seeking to pay their rent or
23 mortgages and support their families." *Id.* at 1037. "[I]n this practical sense," the Court found that
24 the furloughs "'adjust' both the salary range and the salary pursuant to which full-time [state]
25 employees actually were compensated." *Id.* Thus, the Court concluded that the two-day-per-month
26 furlough program violated Section 19826(b), and that the Governor had no authority unilaterally to
27 implement the furloughs program. *Id.* at 1000, 1015-1016 (no constitutional authority for Governor
28 unilaterally to impose furloughs), 1024-1037 (no statutory authority for unilateral imposition of
furloughs); 1041-1043 (no authority granted by relevant MOUs). Accordingly, Governor

1 Schwarzenegger's December 19, 2008 executive order requiring furloughs of state employees was
2 invalid at the time it was issued. *Id.* at 1043.⁸

3 Nonetheless, the Supreme Court held that the Legislature's enactment of budget legislation
4 could, in certain circumstances, constitute legislative authorization of a furlough program. *Id.* at
5 1043-44. Specifically, with respect to the furloughs implemented pursuant to the December 19,
6 2008 executive order, the Court found that the Legislature's adoption of the revised 2008 Budget
7 Act and the 2009 Budget Act on February 19, 2009 constituted approval of the furloughs because
8 the reductions to employee compensation contained in that budget legislation anticipated a two-day-
9 per-month furlough program. *Id.*

10 The relevant language in the revised 2008 Budget Act provided for:

11 a reduction in employee compensation achieved through the collective bargaining
12 process for represented employees or through existing administration authority and a
proportionate reduction for nonrepresented employees

13 *Id.* at 1044. The Court acknowledged that this language was ambiguous, but relied on legislative
14 history to conclude that the "reductions in appropriations for employee compensation that were
15 included in the bill *reflected the two-day-a-month furloughs.*" *Id.* at 1046 (emphasis in original);
16 *see also id.* (discussing Legislature's floor analyses of budget act, and Senate Budget Committee
17 chair's statement). Thus, the Court concluded, "[b]y enacting this provision, the Legislature,
18 *through the exercise of its own legislative prerogative,* authorized the substantial reduction in the
19 appropriations for employee compensation, mandated in the revised budget legislation, to be
20 achieved through the two-day-a-month furlough plan." *Id.* at 1047-48 (emphasis in original).

21 _____
22 ⁸ The Court also expressed its doubt whether the Governor or the DPA unilaterally could
23 impose unpaid furloughs to reduce the wages and salaries of nonrepresented employees "in order to
mitigate an anticipated budget shortfall." *Id.* at 1038 n.34. As the Court explained, there are

24 numerous instances in which the Legislature has demonstrated its interest in retaining
25 ultimate control over across-the-board changes in the salaries and wages of all state
26 employees, by frequently rejecting salary recommendations by the State Personnel
Board. That historical experience casts doubt on the proposition that the existing
27 statutes grant the Governor, even in a fiscal emergency, the authority unilaterally to
reduce employee wages in an amount the Governor concludes is appropriate.

28 *Id.* at 1038 n.34; *see also id.* (noting discussion of legislative history in *Tirapelle v. Davis* (1993) 20
Cal.App.4th 1317, 1336-37 n.25, and court's resulting assumption that the "state's financial
condition is not an appropriate factor for the DPA to consider").

1 **B. Petitioners Are Likely to Prevail on Their Claims that Any Legislative**
2 **Authorization of Reductions in Represented Employees' Compensation through**
3 **the Current Furlough Program is Limited to Reductions that are Proportionate**
4 **to Reductions Made for Non-Represented Employees and that Continuing the**
5 **Current Furlough Program Past the First Furlough Day In March 2011 is**
6 **Unlawful⁹**

7 Because the Legislature has reserved to itself the power to make across-the-board
8 adjustments to represented employees' compensation, a furlough program that reduces employees'
9 pay is only valid to the extent it is authorized by the Legislature. Thus, even assuming *arguendo*
10 that the 2010 Budget Act validly authorized some furloughing of state employees (which, for
11 reasons discussed *infra* at pp. 13-16, it does not), the furlough program is lawful only insofar as it is
12 within the scope of what the Legislature authorized.

13 The Legislature did not authorize the Governor to make unlimited reductions in employee
14 compensation. And although Section 3.91 of the 2010 Budget Act identifies a potential total of
15 \$1,557 million in reductions in employee compensation to be achieved through collective
16 bargaining or administrative actions, the budget legislation places clear and specific limits on the
17 manner in which any such reductions could be obtained. Section 3.91(a) of the 2010 Budget Act
18 authorizes "reductions in employee compensation achieved through the collective bargaining
19 process or through administrative actions for represented employees and a proportionate reduction
20 for nonrepresented employees" Halpert Decl., Exh. T. As with the similar language at issue in
21 *PECG I*, this provision is properly read as authorizing reductions in employee compensation for
22 represented employees – whether those reductions be through collective bargaining or
23 administrative action – "*with a proportionate reduction for nonrepresented employees.*" 50 Cal.4th
24 at 1045 (emphasis added); *see also* Halpert Decl., Exh. U, Tab 1 (chair of Senate Budget Committee
25 explaining that budget reflected anticipated savings from SEIU MOUs and "assumes similar savings
26 for other [bargaining] units and non-represented employees"). As such, any reductions for
27 represented employees must be of equal relative weight to reductions for nonrepresented employees.

28 The compensation for nonrepresented employees in the 2010-11 fiscal year has been reduced

⁹ All Petitioners except ACSS assert this claim as a basis for preliminary relief.

1 by 8.5%. Toppin Decl. ¶5. The compensation for employees represented by SEIU also has been
2 reduced by 8.5% for the 2010-11 fiscal year. *Id.* ¶6.¹⁰ And yet the three-day-per-month furloughs in
3 effect for employees in the bargaining units with expired MOUs – those employees represented by
4 Petitioners PECG, CAPS, CASE, CCPOA, and IUOE – will result in an overall reduction in those
5 employees’ compensation for the 2010-11 fiscal year of 12.65%, if the furloughs are permitted to
6 continue through June 30, 2011. *Id.* ¶4.

7 A 12.65% cut in compensation simply is not proportionate to an 8.5% cut. By mandating
8 that the reductions be “proportionate,” the Legislature certainly did not intend to authorize a cut to
9 employee compensation for employees represented by Petitioners that is 150% of the reduction
10 made to nonrepresented employees’ compensation.

11 An annualized reduction of 8.5% in employee compensation for the 2010-11 fiscal year for
12 the employees represented by Petitioners – i.e., a reduction that *is* proportionate to the reduction in
13 nonrepresented employees’ compensation during the same time period – will be achieved through
14 the current furlough program after one unpaid furlough day in March 2011. Toppin Decl. ¶7.
15 Accordingly, the continuation of the furlough program beyond one furlough day in March 2011
16 exceeds the scope of what the Legislature may reasonably be deemed to have authorized and is
17 unlawful.

18 Alternatively, even if the Court were to read Section 3.91’s mandate that the reductions in
19 represented and nonrepresented employees’ compensation be “proportionate” as not requiring that
20 those reductions be exactly identical, Section 3.91 – when read together with the preceding section,
21 Section 3.90 – indicates that the Legislature did not intend to authorize anything greater than an
22 approximate 10% reduction in employee compensation.

23
24
25 ¹⁰ The cuts in employee compensation achieved through the SEIU MOUs are thus
26 proportionate to those made to nonrepresented employees’ compensation. However, the
27 Legislature, by providing that reductions to nonrepresented employees’ compensation be
28 proportionate to cuts to represented employees’ compensation achieved both through bargaining and
through furloughs, clearly contemplated that the reductions to *all* represented employees’
compensation would be of similar proportions. Otherwise, the use of the term “proportionate”
would make no sense. Additionally, there is no evidence that the Legislature intended such a
penalizing effect as would result from a reading of the budget legislation to permit vastly
disproportionate reductions to the compensation of represented employees.

1 In Section 3.90, the Legislature approved an across-the-board “5-percent reduction to
2 departmental personnel costs” that had been mandated by another Executive Order (S-01-10), which
3 had required all department directors to reduce their payrolls by 5%. Halpert Decl., Exh. T (Section
4 3.90). In Section 3.90, the Legislature estimated this would result in reductions of approximately
5 \$800 million. *Id.* Section 3.91 then provides for reductions in employee compensation that are
6 roughly *twice* the amount of those in Section 3.90, or \$1,557 million. This is evidence that the
7 Legislature, in passing Section 3.90, did not intend to authorize more than a *10% reduction* in
8 employee compensation for the 2010-11 fiscal year, a reduction that would be akin to a 2-day-per-
9 month furlough, and *not* the current 3-day-per-month furlough program. An annualized 10%
10 reduction in the compensation of employees represented by PEGC, CAPS, CASE, CCPOA, and
11 IUOE for the current fiscal year will be achieved after two furlough days in April 2011. *See* Toppin
12 Decl. ¶7. Thus, any furloughing of employees after that time without question exceeds the scope of
13 the Legislature’s authorization, and should be enjoined.

14 **C. Plaintiffs Are Likely to Succeed on the Merits of Their Claims that the**
15 **Challenged Furlough Program is Unlawful Because it Was Not Authorized by**
16 **the 2010 Budget Act**

17 **1. The Legislature May Not Grant the Governor Authority Prospectively to**
18 **Furlough State Employees or Adjust Their Salaries in a Budget Act¹¹**

19 **a. Single Subject Rule**

20 The single subject rule is embodied in article IV, section 9 of the California Constitution and
21 provides: “A statute shall embrace but one subject, which shall be expressed in its title.” With
22 respect to the annual budget bill, as the California Supreme Court summarized:

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

27 *PECG I*, 50 Cal.4th at 1049 (internal quotations, brackets, and citations omitted).

28 As relevant here, *PECG I* found that the revised 2008 budget act’s approval of the two-day
furloughs program avoided constitutional infirmities because it did not “purport to grant the

¹¹ All Petitioners assert this claim as a basis for preliminary relief.

1 Governor or the DPA” any additional authority they did not already have; instead, the budget act
2 merely approved an already-existing reduction in work hours with a specified end-date (June 30,
3 2010) as a permissible means of meeting a reduction in appropriations. *See id.* at 1050-51 (“The
4 Legislature exercised its own authority to ratify furloughs, and did not need to expand or modify
5 preexisting executive authority in order to do so”); *id.* at 1051 (“section 3.90 [of the Budget Act] . . .
6 should not be interpreted to expand or modify the Governor’s or the DPA’s authority, under
7 preexisting statutes, in a manner that would raise constitutional questions under the single subject
8 rule”); *id.* at 1049-50 (approval in budget act did not “substantively amend or change any existing
9 statutory provision or expand or restrict the substantive authority of any state agency”).¹²

10 Of particular importance here, the *PECG I* court found that “section 3.90 of the . . . [revised
11 2008] Budget Act does not alter the provisions of Government Code section 19826 or purport to
12 grant the Governor or the DPA authority to impose unpaid furloughs unilaterally” *Id.* at 1050
13 (emphasis added). By contrast, the 2010 Budget Act on its face violates the single subject rule
14 because it purports to grant the Governor open-ended, *prospective* authority to furlough employees.
15 Specifically, it purports to authorize “administrative actions put into effect either *prior to or*
16 *subsequent to the enactment of this act.*” Halpert Decl., Exh. T (Section 3.91(e)) (emphasis added).
17 If upheld, this would impermissibly grant prospective authority to the Executive Branch to decrease
18 employee compensation through *any* method, including adjusting employees salary ranges (which is
19 prohibited by Government Code section 19826), or through other changes the Executive Branch
20 deems appropriate in the future – all without any Legislative approval. But the Supreme Court has
21 flatly rejected such expansions of agency authority in a budget act. *See, e.g., Association for*
22 *Retarded Citizens-California v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 394-395
23 (rejecting agency’s interpretation of certain language in 1992 Budget Act as instructing director of
24 agency to offer spending guidance to regional developmental centers because such reading would
25 violate the single subject rule since, under existing statutory scheme, the agency’s authority did not

26
27 ¹² As Justice Corrigan observed in her concurring opinion: “The Legislature has retained
28 considerable authority over matters of state employee compensation, but is not free to *disregard*
statutory restrictions and grant agencies new authority in a budget bill.” *Id.* at 1053 (Corrigan, J.
concurrence) (emphasis added).

1 extend to control over developmental centers' operations or the violation). Section 3.91 of the 2010
2 Budget Act thus violates the single-subject rule, and cannot be deemed valid authorization of the
3 furloughs.

4 **b. Separation of Powers**

5 Relatedly, the separation of powers doctrine dictates that the Legislature cannot delegate
6 unchecked legislative authority to Executive Branch officers or agencies in the manner it has done
7 in Section 3.91 of the 2010 Budget Act. Rather, "the legislative body must declare the policy of the
8 law and fix some kind of legal principles which are to control It must provide an adequate
9 yardstick for the guidance of the executive or administrative body or officer empowered to execute
10 the law." *Blatz Brewing Co. v. Collins* (1945) 69 Cal.App.2d 639, 645; *Blumenthal v. Bd. of Med.*
11 *Examiners* (1962) 57 Cal.2d 228, 235 ("delegating statute [must] establish an ascertainable standard
12 to guide the administrative body") (internal citations omitted). Additionally, a delegation of
13 legislative authority will only pass constitutional muster if "suitable safeguards are established to
14 guide the power's use and to protect against misuse" or arbitrary action. *See People v. Wright*
15 (1982) 30 Cal.3d 705, 712.

16 To the extent the Budget Act of 2010 purports to authorize the Governor to implement,
17 *prospectively*, any and all measures he may choose to reduce employee compensation, that Act
18 constitutes an impermissibly broad delegation of legislative authority. There are no reasonable
19 principles to guide such future conduct, nor any suitable safeguards to prevent misuse or arbitrary
20 action. It short, it is nothing but a blank check, purporting to permit the Governor to exercise
21 powers that, as recognized in *PECG I*, are reserved to the Legislature. Therefore, any purported
22 authorization of the current furlough program in Section 3.91 of the 2010 Budget Act is invalid.

23 **2. Fundamental Constitutional Principles Prohibit the Governor and/or**
24 **Legislature's Delegation to the Director of Finance Authority to Decide**
25 **When Furloughs End¹³**

26 Executive Order S-12-10 purports to delegate to the Director of Finance authority to
27 determine when the furloughs program will end. To the extent this delegation arguably was

28 ¹³ All Petitioners except ACSS assert this claim as a basis for preliminary relief.

1 incorporated into the Budget Act of 2010, such delegation is void because it violates the single
2 subject rule and delegates legislative authority to the Director without clear guidance and reasonable
3 safeguards.

4 **a. Single Subject Rule**

5 As recognized in *PECG I*, the power to adjust salaries through a furlough program is a
6 legislative one, and one the executive branch may not exercise without legislative authorization. 50
7 Cal.4th at 1038. And as noted, the only possible legislative authority for the implementation of the
8 furlough program set forth in Executive Order S-12-10 is the 2010 Budget Act, which is constrained
9 by the single-subject rule discussed above and may not be used to grant authority to a state agency
10 that it does not otherwise possess. However, an integral component of Executive Order S-12-10 is
11 the transfer to the Director of the authority to determine whether furloughs will end. To the extent
12 the 2010 Budget Act can be read to have implicitly authorized the delegation of that power to the
13 Director – a power she did not otherwise possess – it runs afoul of the single subject rule.

14 **b. Separation of Powers**

15 To the extent the 2010 Budget Act purports to delegate to the Director of Finance the
16 authority to determine the end-date of the furloughs program by incorporating the terms of
17 Executive Order S-12-10, it also violates the separation of powers doctrine. Neither the Budget Act
18 nor the executive order provides any ascertainable standard for the Director of Finance to use in
19 making her determination. Indeed, the remaining condition for the termination of the furloughs
20 pursuant to the executive order, *i.e.*, that the “Director of Finances determines that there is sufficient
21 cash to allow the State to meet . . . payment obligations protected by the California Constitution and
22 Federal law[,]” is so vague as to be meaningless. Decl. of Craig Brown (“Brown Decl.”) ¶4. The
23 2010 Budget Act therefore improperly delegates to the Executive Branch the Legislature’s
24 budgeting and salary-setting powers, without any safeguards or limits on how those powers may be
25 utilized.

1 **D. Petitioners Are Likely to Prevail on Their Claims that the Furloughs Should**
2 **End According to the Terms of the Executive Order and that There is**
3 **Therefore No Lawful Authority to Continue Furloughing Public Employees¹⁴**

4 Petitioners likely will prevail in obtaining a writ of mandate to compel the Director of the
5 Department of Finance to issue a determination that there is sufficient cash to end the furloughs. As
6 noted, Executive Order S-12-10, in addition to mandating three-day-per-month furloughs for most
7 state employees, directed that:

8 the furlough period shall end when a 2010-2011 fiscal year budget is in place and the
9 Director of the Department of Finance determines that there is sufficient cash to
10 allow the State to meet its obligations to pay for critical and essential services to
11 protect public health and safety and to meet its payment obligations protected by the
12 California Constitution and federal law.

13 Halpert Decl., Exh. C. The Executive Order thus established a two-pronged test for ending the
14 furloughs. The first requirement, i.e., the passage of a 2010-2011 budget, occurred on October 8,
15 2010, with the signing of Senate Bill 870. The second prong is a determination by the Director of
16 the Department of Finance regarding the State's cash status. The Director has failed to issue the
17 determination described in the Executive Order, and that failure has resulted in the furloughs
18 continuing well past the time at which they should have ended.

19 A writ of mandate is available if the respondent has a clear, present, and usually ministerial
20 duty and the petitioner has a clear, present, and beneficial interest in the performance of that duty.
21 *Kavanaugh v. W. Sonoma County Union High Sch. Dist.* (2003) 29 Cal.4th 911, 916; *see* Code Civ.
22 Proc. §§1085, 1086. In this case, there can be no dispute that Petitioners have a clear, present, and
23 beneficial interest in the cessation of the furloughs. Moreover, by the express terms of Executive
24 Order S-12-10, the Director of the Department of Finance has a duty to issue the determination of
25 the State's cash status. That duty arose the moment the State's cash situation was such that the
26 relevant determination could have been made. Putting aside the illegality of the delegation in the
27 executive order (*see supra* at pp. 15-16), the Director should not be permitted to disregard her clear
28 duty to issue a determination pursuant to the executive order's terms.

 “A ministerial act is an act that a public officer is required to perform in a prescribed manner

¹⁴ All Petitioners except ACSS assert this claim as a basis for preliminary relief.

1 in obedience to the mandate of legal authority and without regard to his own judgment or opinion
2 concerning such act's propriety or impropriety, when a given state of facts exists." *Kavanaugh*, 29
3 Cal.4th at 916 (internal quotations omitted). Here, the Director need not exercise any discretion in
4 complying with her duty. She is not called upon to decide whether or not furloughs should end.
5 Rather, the Director's sole obligation is to issue a determination that a certain set of facts exist, *i.e.*,
6 that there is sufficient cash to allow the State to pay for critical and essential services and to meet its
7 payment obligations under state and federal law.¹⁵

8 In this case, it cannot be disputed that the State's cash situation has satisfied the terms of the
9 Executive Order since at least December, 2010.¹⁶ According to two former Directors of the
10 Department of Finance, Michael Genest and Craig Brown, the Department of Finance's own
11 publicly available documents demonstrate that the State has had and continues to have sufficient
12 cash to meet the threshold articulated in the Executive Order. Specifically, after borrowing
13 approximately \$10 billion in October and November, 2010, the State has and will continue to have
14 positive cash flow for the remainder of the fiscal year. Decl. of Michael Genest ("Genest Decl.")
15 ¶8; Brown Decl. ¶8. In addition, the State will be able to repay that \$10 billion and still have a
16 positive cashflow of more than \$4.5 billion at the end of the fiscal year. Genest Decl. ¶9; Brown
17 Decl. ¶8. Based on the Department of Finance's own documentation, the former Directors of the
18 Department of Finance have concluded that the State has had sufficient cash as articulated in the
19 Executive Order since December 2010 and continues to have sufficient cash. Genest Decl. ¶10;
20 Brown Decl. ¶8. Moreover, the amount of cash available to the State throughout the remainder of
21 the fiscal year is more than sufficient to meet its obligations to pay for critical and essential services
22

23 ¹⁵ Even if the Director were required to exercise some discretion, a writ of mandate may
24 compel a particular act if, as here, the failure to act in that manner was a clear abuse of discretion.
25 *Cuadra v. Millan* (1998) 17 Cal.4th 855, 871; *Sequoia Union High Sch. Dist. v. Aurora Charter*
High Sch. (2003) 112 Cal.App.4th 185, 195.

26 ¹⁶ Although the trigger in Executive Order S-12-10 for the Director of the Department of
27 Finance to end furloughs is so vague as to be meaningless (*see supra* at p. 16), as Petitioners
28 demonstrate here, the condition has been met under any rational construction. However, that the
Director has refused to act certainly highlights the vagueness of the standard in the Executive Order,
as well as the lack of any "suitable safeguards . . . to guide the power's use and to protect against
misuse" or arbitrary inaction. *See Wright*, 30 Cal.3d at 712.

1 to protect public health and safety and to meet its payment obligations protected by the California
2 Constitution and federal law. Genest Decl. ¶¶9-10; Brown Decl. ¶8.

3 In short, there is no basis for the current Director of the Department of Finance to refrain
4 from issuing a determination that the State has sufficient cash as described in the Executive Order.
5 Because the Director has failed in her duty to issue the cash determination, a duty that is “plain and
6 unmixd with discretionary power or the exercise of judgment” (*Texas Co. v. Superior Court*
7 (1938) 27 Cal.App.2d 651, 654), Petitioners are likely to prevail on their request that a writ of
8 mandate issue compelling the Director to make a determination regarding the State’s cash status,
9 thus ending the furlough program pursuant to the terms of Executive Order S-12-10.

10 **E. Petitioners Are Likely To Prevail on Their Claims that Implementation of the**
11 **Furlough Program Violates Respondents’ Mandatory Duty to Pay Employees**
12 **for All Hours Worked at their Designated Hourly Rate and in Negotiable**
13 **Form¹⁷**

14 Petitioners will also likely prevail on their claim that “self-directed” furloughs, as
15 implemented, violate numerous provisions of the California Labor Code.

16 **1. Respondents Must Pay the Harmed Employees Their Full Hourly Rate**
17 **for Every Hour or Fraction Thereof Worked Each Month**

18 Although in theory state employees are entitled to take all self-directed furloughs within the
19 pay period in which they are accrued, in practice many employees represented by Petitioners are
20 being denied that right, instead accruing deferred “furlough credits,” ostensibly for future use. *See,*
21 *e.g.,* Homsany Decl. ¶¶7, 11; Benson Decl. ¶10; Nguyen Decl. ¶¶7, 10; Van Sickle Decl. ¶10; *see*
22 *also* Toppin Decl. ¶8; Voight Decl. ¶6. Thus, employees are working without pay for up to three
23 days per month, subjecting them to a *de facto* reduction of up to approximately 13.5% in their
24 hourly rate of pay.

25 This reduction not only violates Government Code section 19826(b), but also runs afoul of
26 Labor Code sections 222 and 223. Section 222, which applies to wage rates set forth in an MOU,
27 provides:

28 It shall be unlawful, in case of any wage agreement arrived at through collective

¹⁷ All Petitioners except CASE assert this claim on behalf of their members who have unused, accrued furlough credits.

1 bargaining, either willfully or unlawfully or with intent to defraud an employee, a
2 competitor, or any other person, to withhold from said employee any part of the wage
agreed upon.

3 Labor Code §222. And Section 223, which applies to wage scales set by means other than an
4 operative MOU, provides:

5 Where any statute or contract requires an employer to maintain the designated wage
6 scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the
wage designated by statute or by contract.

7 Labor Code §233.¹⁸ As interpreted, Sections 222 and 223 proscribe deductions whereby an
8 employer appears to pay wages according to an applicable contract or statute but, in fact, pays less.
9 *Steinhebel v. L.A. Times* (2005) 126 Cal.App.4th 696, 707; *see Armenta v. Osmose, Inc.* (2005) 135
10 Cal.App.4th 314, 323 (concluding that certain wage and hour provisions of the Labor Code,
11 including section “222[] and 223 articulate the principal [sic] that all hours must be paid at the
12 statutory or agreed rate”).

13 Here, the required wage rates are those contained in the MOUs for the various bargaining
14 units, even if such MOUs have expired by their own terms. *See* Gov’t Code section 3517.8(a)
15 (MOUs continue in effect beyond its facial expiration date by operation of law until the parties
16
17
18

19 ¹⁸ Labor Code sections 223, 222 and 212 (discussed *infra*) apply to Respondents by
operation of Labor Code section 220, which provides, in pertinent part, as follows:

20 Sections 201.3, 201.5, 201.7, 203.1, 203.5, 204, 204a, 204b, 204c, 204.1, 205,
21 and 205.5 do not apply to the payment of wages of employees directly employed
by the State of California.

22 Pursuant to the canon of statutory construction *expressio unius est exclusio alterius* (*In re J.W.*
23 (2002) 29 Cal.4th 200, 209), the Legislature must be deemed to have intended that non-excluded
24 provisions apply to the State as an employer. Indeed, Assembly Bill 2410, which amended Labor
Code section 220 in 2000, confirms:

25 Existing law prescribes requirements respecting employer payment of wages,
26 including timely payment thereof, that are applicable to all employers, other than the
state, counties, cities, and other municipal corporations....

27 *This bill would delete specified exemptions for the state as an employer from these
provisions.*

28 Halpert Decl., Exh. W (emphasis added).

1 bargain to impasse and the State imposes its last, best, and final offer).¹⁹ These wage rates, as well
2 as those established by DPA for the supervisory employees represented by Petitioners,²⁰ are
3 published by DPA in the “Civil Service Pay Scale.”²¹ When employees are prevented from taking
4 furlough days off, their average hourly pay is nonetheless reduced (because total pay is reduced
5 while work hours are not), notwithstanding Respondents’ insistence that the furlough program does
6 not change an “employee’s base salary rate.” See Domingo Decl., Exh. B. at 3; see also Homsany
7 Decl. ¶¶6, 10-11; Benson Decl. ¶¶9-10; Nguyen Decl. ¶¶6-7, 10; Van Sickle Decl. ¶¶6, 10.

8 In summary, Respondents are violating their duties under Labor Code sections 222 and 223
9 to pay employees for all hours worked each month at the rates fixed by their MOU and/or by DPA’s
10 “Civil Service Pay Scale.”

11 **2. Payment at the Required Wage Rate Must be in Negotiable Form**
12 **Payable in Cash on Demand**

13 That Respondents award “furlough credits” for missed furlough days does not excuse these
14 violations of law. Labor Code section 212 imposes a mandatory duty on Respondents to
15 compensate employees for all hours worked in a form that is payable in cash on demand. Labor
16 Code §212 (prohibiting payment of wages due in the form of “[a]ny order, check, draft, note,
17 memorandum, or other acknowledgment of indebtedness, *unless it is negotiable and payable in*
18 *cash, on demand*”) (emphasis added). This statute expressly and unequivocally prohibits payment
19 in the form of some deferred ostensible benefit “purporting to be payable or redeemable otherwise
20 than in money,” with absolutely no cash value. *Id.* (prohibiting payment of wages due in the form
21 of “[a]ny scrip, coupon, cards, or other thing redeemable, in merchandise or purporting to be
22

23 ¹⁹ Even after impasse, the executive branch may not change the previously-bargained wage
24 rates without legislative approval. See *Dep’t of Personnel Admin. v. Superior Court (Greene)*
(1992) 5 Cal.App.4th 155.

25 ²⁰ Although Government Code section 19826(b) does not apply to supervisory employees
26 represented by some Petitioners, Section 223 nonetheless protects their salaries because their pay
27 rates are designated by DPA’s “Civil Service Pay Scale,” and DPA has never purported to change
those rates.

28 ²¹ The “Civil Service Pay Scale” is published by DPA at:
http://www.dpa.ca.gov/pv_obj_cache/pv_obj_id_B3B43B40CAD23C53C064807E8BB2BB8CB9D50F00/filename/section-15.pdf, last visited Mar. 1, 2011.

1 payable or redeemable otherwise than in money”). Furlough credits that “cannot be cashed out”
2 (Halpert Decl., Exh. R) and are by design non-negotiable, fall squarely within section 212’s
3 prohibitions.

4 **3. Respondents’ Furloughs Plan Also Violates the State’s Mandatory Duty**
5 **to Comply with California’s Minimum Wage Laws Because Harmed**
6 **Employees Are Not Paid For Up To Three Days Of Work Every Month**

7 Employees’ inability to take all of their self-directed furloughs within a given pay period
8 also violates California’s minimum wage laws. Under Labor Code sections 1171 *et seq.*
9 (particularly 1182.12),²² and Title 8, section 11000 of the California Code of Regulations, (the
10 Industrial Welfare Commission’s (“IWC’s”) General Minimum Wage Order),²³ “[e]very employer
11 shall pay to each employee wages not less than . . . eight dollars (\$8.00) per hour for all hours
12 worked . . .” *Id.* at subd. 2.

13 As to pay periods in which state employees are unable to take all of their self-directed
14 furloughs but Respondents nevertheless reduce employees’ salaries as if they had, such employees
15 are effectively paid exactly *zero* dollars per hour on each furlough day worked, in violation of the
16 minimum wage requirements. In *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 323, the
17 court properly rejected the argument that, when some work time is compensated but other time is
18 not (as here), a minimum wage violation occurs only when the effective *average* hourly rates falls

19 ²² Labor Code section 1182.12, in relevant part, provides:

20 Notwithstanding any other provision of this part, on and after January 1, 2007, the
21 minimum wage for all industries shall be not less than seven dollars and fifty cents
22 (\$7.50) per hour, and on and after January 1, 2008, the minimum wage for all
23 industries shall be not less than eight dollars (\$8.00) per hour.

24 ²³ Pursuant to a legislative grant of power, the IWC promulgated regulations known as
25 “wage orders” that define and enforce wage and hour protections, including the California minimum
26 wage law. *See, e.g.*, Labor Code §1173. The IWC has promulgated wage orders that expressly
27 apply the California minimum wage to workers employed by the State. Although, in the past, IWC
28 General Minimum Wage Order expressly excluded State employees (*see* Domingo Decl., Exh. A),
in 2001, the IWC amended that General Wage Order to expressly “repeal[] . . . full and partial
exemptions from the minimum wage for . . . employees of the State or local governments and any
political subdivision thereof.” *See* Halpert Decl., Exh. X and 8 Cal. Code Regs. § 11000 (General
Wage Order “MW-2001”). The IWC’s “Statement as to the Basis of the General Minimum Wage
Order” further confirms that “[t]his Order is applicable to all workers in the State unless specifically
exempt.” *See* Halpert Decl., Exh. Y. *See also* *Sheppard v. North Orange Co. Reg. Occupational*
Prog. (Dec. 23, 2010) 191 Cal.App.4th 289, *9-10 (Legislature intended IWC Wage Orders to apply
to public employers).

1 below \$8.00 per hour. *Armenta* specifically rejected the “averaging method utilized by the federal
2 courts,” instead adopting a broader California standard that “expresses the intent to ensure that
3 employees be compensated at the minimum wage for each hour worked.” *Id.* at 323-24 (noting
4 California’s “strong public policy in favor of full payment of wages for all hours worked”). The
5 Court read the State’s minimum wage laws as “articulat[ing] the principal [sic] that all hours must
6 be paid at the statutory or agreed rate and no part of this rate may be used as a credit against a
7 minimum wage obligation.” *Id.* Thus, an employer may not “average” hours over a pay period to
8 avoid paying minimum wage, and must instead compensate every hour and fraction thereof worked
9 by an employee at least at the statutory minimum wage. *Id.*; see also *Fitz-Gerald v. SkyWest*
10 *Airlines, Inc.* (2007) 155 Cal.App.4th 411, 417 (“employer may not invoke a federal wage
11 averaging formula to defend against a minimum wage claim”).

12 For these reasons, the current furlough program violates California’s minimum wage laws to
13 the extent employees are unable to take their self-directed furloughs within the pay period in which
14 they are accrued.

15 **4. To the Extent the Budget Act of 2010 Purported To Eliminate These**
16 **Labor Code Protections, The Act Violates the Single Subject Rule**

17 Even if the Budget Act of 2010 authorized the current furlough program, nothing in that Act
18 authorized Respondents to implement self-directed furloughs in a manner that prevents employees
19 from actually taking those furlough days during the relevant pay period. And to the extent the
20 Budget Act of 2010 could be read to have implicitly condoned this practice notwithstanding the
21 Labor Code provisions discussed above, the Act could not abrogate these statutes or sanction their
22 violation without running afoul of the single subject rule. *See supra* at pp. 13-14.

23 **F. Petitioners Are Likely to Prevail on Their Claims that Respondents Violated**
24 **Government Code §16310(a) by Ordering and Implementing Furloughs of State**
25 **Employees at Special Fund Agencies that Interfere with Agency Operations²⁴**

26 Respondents’ continued furloughing of employees at agencies receiving Special Fund
27 revenues (“Special Fund agencies”) also violates Respondents’ duties under Government Code
28 §16310(a). Respondents have asserted that the furlough of employees at Special Fund agencies is

²⁴ All Petitioners except CCPOA assert this claim.

1 intended to free up Special Fund monies for borrowing by the General Fund. Halpert Decl., Exh.Z.
2 However, Section 16310(a) forbids borrowing from a Special Fund that “will interfere with the
3 object for which a special fund was created.” Gov’t Code §16310(a). Because the General Fund
4 borrowing occasioned by the furloughs interferes with the ability of Special Fund agencies to fulfill
5 the objects of the Special Funds, Respondents have violated the clear mandate of Section 16310(a)
6 and Petitioners are likely to prevail on this claim. *See* Halpert Decl., Exh. L at 11 (*UAPD* Order
7 finding that “[p]lainly, a writ may lie to correct a failure to comply with section 16310”); *see also*
8 *Scott v. Common Council of San Bernardino* (1996) 44 Cal.App.4th 684, 694-95 (writ of mandate
9 may invalidate a budgetary decision preventing government officials from performing mandatory
10 duties).

11 1. Petitioners’ Members Are Employed at Special Fund Agencies

12 Petitioners, with the exception of CCPOA, represent numerous employees at state agencies
13 and departments that are predominantly funded by Special Funds. Although the State’s General
14 Fund is the “principal operating fund for the majority of governmental activities” (Halpert Decl.,
15 Exh. AA), many state agencies receive a majority of their revenues from Special Funds, and not
16 from the General Fund. Special Funds commonly are supported by discrete funding sources such as
17 fees, licenses and charges, and their expenditures are generally limited to serving or remediating
18 activities in which the payers participate. *See, e.g.*, Halpert Decl., Exh. DD.²⁵

19 The state agencies at which employees represented by Petitioners PECG, CAPS, CASE,
20 ACSS, and IUOE work receive a significant portion of their revenues or all of their revenues from
21 Special Funds. Halpert Decl., Exhs. BB, CC & YY; *see also* Flores Decl. ¶¶2-65; Decl. of Voight
22 Decl. ¶8; D. Alexander Decl. ¶7; Paternoster Decl. ¶¶2, 4 & Exh. A; Bryant Decl. ¶2. For example,
23 during the 2010-11 budget year, the Air Resources Board, which employs approximately 951
24 PECG-represented employees, received more than 97.66% of its budget from Special Funds. D.

25
26
27 ²⁵ Thus, for example, the Air Pollution Control Fund receives penalties and fees collected
28 from sources of air pollution, and its monies are in turn made available to the Air Resources Board
to carry out its duties and functions. *Id.*; *see also* Flores Decl. ¶39 (positions at California
Integrated Waste Management Board entirely funded by user fees); Kimerling Decl. ¶12 (describing
unit at Department of Industrial Relations funded entirely by fees).

1 Alexander Decl. ¶5; Halpert Decl., Exh. YY.²⁶ Similarly, the Office of Statewide Health Planning
2 and Development (“OSHPD”), which employs 542 members of ACSS, 165 PECG-represented
3 employees, and a handful of CAPS employees, receives almost 90% of its revenue from Special
4 Funds, with most of its remaining revenue coming from federal funds or funds other than the
5 General Fund. Halpert Decl., Exh. YY; Paternoster Decl., Exh. A; D. Alexander Decl. ¶16; Voight
6 Decl. ¶29.

7 **2. The Furlough Program Interferes with Special Fund Agencies’ Ability to**
8 **Fulfill the Goals of the Special Funds**

9 The current furlough program, and the General Fund borrowing permitted by that program,
10 impedes Special Fund agencies’ ability to carry out their missions by reducing the number of hours
11 agency personnel are available to serve the public. Judge Roesch held the Governor’s previous
12 furlough program to be illegal, reasoning that the elimination of three work days per month “is at
13 least a prima facie showing of interference with the object of the special fund agencies, specifically
14 the agencies’ ability to carry out their respective missions.” Halpert Decl., Exh. M at 10 (*CASE*
15 *Order*). By reducing the number of hours worked by employees at Special Fund agencies, the
16 furloughs also necessarily reduce the ability of the agencies and their employees to carry out their
17 various public functions. *See, e.g.*, Rouzbehani Decl. ¶4; Kimerling Decl. ¶12; Miller Decl. ¶¶6-7.

18 The evidence proffered by Petitioners at this preliminary stage supports a finding that the
19 furlough program interferes with the Special Fund agencies’ productivity and their ability to carry
20 out the purposes of the Special Funds that are the source of the agencies’ revenues. For example,
21 Caltrans receives revenues from numerous Special Funds that are dedicated to funding, planning
22 and research for transportation projects. *See* Halpert Decl., Exhs. CC & DD; *see also* Toppin Decl.
23 ¶9. And yet, the furloughs have interfered with Caltrans’ ability to implement a large number of
24 these projects and have caused delays in projects’ planned delivery dates. Toppin Decl. ¶10, Exh.
25 A. Additionally, as a result of the furloughs, PECG members performing bridge inspections for
26 Caltrans are back-logged. *See* Rouzbehani Decl. ¶4 (noting that “dozens of bridges statewide
27

28 ²⁶ Revenue sources for other agencies at issue in this litigation are detailed in the
Declaration of Caitlin Halpert and the Declaration of Rocco Paternoster.

1 . . . are overdue for . . . federally required inspections).²⁷

2 Similarly, the functioning of OSHPD, an agency funded almost exclusively by Special
3 Funds,²⁸ has been impeded by the furloughs. OSHPD is responsible for reviewing and approving
4 plans for hospital construction, in particular to ensure their seismic safety. Decl. of Kenneth Knott
5 (“Knott Decl.”) ¶3. The furloughs directly have affected the ability of OSHPD to carry out the plan
6 review and approval activities funded by the Special Funds, and have caused a drop in productivity.
7 Halpert Decl., Exhs. FF, GG; *see also id.*, Exh. HH (furloughs “affect productivity” and noting
8 “inefficiencies that result from the furlough process). In particular, the Facilities Development
9 Division (“FDD”) at OSHPD has had to adjust the timelines in which it commits to reviewing and
10 approving projects. Knott Decl. ¶¶9-10.

11 Similarly, at the Department of Toxic Substances Control (“DTSC”), where scientists and
12 engineers represented by CAPS and PECG work, the furloughs “have had a detrimental impact on
13 [the department’s] ability to efficiently and effectively carry out its core functions,” resulting in
14 “losses in performance” in each of the department’s major programs. Miller Decl. ¶¶6-7 (noting
15 that coordination of program activities became more challenging when the “self-directed” furlough
16 system was implemented). For example, there is a backlog of hazardous waste management permit
17 renewals, and the department’s ability to pursue formal enforcement actions has decreased. *Id.* ¶7;
18 *see also* Halpert Decl., Exh. UU (DTSC’s Green Chemistry Initiative delayed as a result of
19 furloughs).

20 At the Workers’ Compensation Appeals Board, the furloughs of employees, including
21 members of CASE, have meant the statutory timelines for hearing workers’ compensation cases are
22 not being met, “resulting in delay of the delivery of benefits to injured workers.” Decl. of Donna
23

24 ²⁷ *See also* Halpert Decl., Exh. KK (noting that Caltrans’ response time, as well as time for
25 processing environmental documents, may be delayed because of furloughs); Exh. LL (Caltrans’
26 processing of permits delayed because of reduced staffing levels); Exh. MM (Caltrans’ response to
27 maintenance service requests “may be slower than normal” “[b]ecause of the mandatory furlough
days”); Exh. NN (furloughs have contributed to increasing Caltrans’ backlog of culverts requiring
preventative repairs).

28 ²⁸ OSHPD’s Director has stated that the Office is “virtually an entirely special fund
supported department.” Halpert Decl., Exh. EE at 2; *see also id.*, Exh. YY.

1 David; Decl. of Howard Goodman. And at the Department of Real Estate, an agency financed
2 exclusively through a Special Fund, the furloughs have created a “huge backlog of cases.” Weeks
3 Decl. ¶18. Employees are not able to meet departmental goals, and “caseloads have climbed to a
4 level that is a risk to the public.” *Id.*²⁹

5 In short, the last two years of mandatory furloughs have shown that furloughing of
6 employees at Special Fund agencies for the sole purpose of permitting increased borrowing by the
7 General Fund actually impairs those agencies’ ability to carry out their missions, in direct
8 contravention of Section 16310(a).³⁰

9 **G. Petitioner CASE is Likely to Prevail on its Claim That Furloughs Have Never**
10 **Been Authorized for Employees in Departments Not Funded by the Annual**
11 **Budget Act**

12 Section 3.91 of Senate Bill 870, which was enacted as the 2010 Budget Act, provides:
13 “Notwithstanding any other provision of this act, each item of appropriation in this act . . . shall be
14 reduced, as appropriate, to reflect a reduction in employee compensation. . . .” Thus, any legislative

15 ²⁹ There are numerous other examples of the way in which the furloughs have impaired state
16 agencies’ to fulfill their core functions. For example, at the Department of General Services,
17 Division of the State Architect (“DSA”), an agency that receives Special Fund money and almost no
18 General Fund revenues, and which inspects and approves school construction projects, the furloughs
19 have meant that PECCG-represented employees perform fewer plan reviews and new school
20 construction projects have been delayed. Vergaray Decl. ¶¶9-15; *see also* Halpert Decl., Exh. TT
21 (noting that furloughs are factor in “slowdowns” in Office of Public School Construction’s review
22 of projects). The scientific work of the Calfed Bay-Delta Program has been affected by the
23 furloughs. Halpert Decl., Exh. PP. The Department of Water Resources’ Municipal Water Quality
24 Investigations Program has had to delay and change priorities as a result of the furloughs and the
25 corresponding reduction in staff time. *Id.*, Exhs. QQ and RR. The State Water Resource Control
26 Board has detailed a number of effects from the furloughs, including an inability adequately to
27 respond to public inquiries, delays in issuance of permits, and an inability to provide adequate
28 feedback to regional boards. *Id.*, Exh. SS. A report to the California Senate Rules Committee
describes the effects of the furloughs at the Department of Motor Vehicles, including “backlogs on
many license applications, investigations and audits.” *Id.*, Exh. JJ. *See also id.*, Exh. XX
(Department of Public Health committee minutes noting backlog of applications for laboratories as
a result of furloughs); *id.*, Exhs. VV, WW (Energy Commission documents noting delays in projects
as a result of furloughs).

³⁰ *See, e.g.*, Decl. of Will J. Arcand ¶¶5-9 (position of PECCG-represented employee at
California State Mining and Geology Board at the Department of Conservation is funded by fees
paid by mine operators, but as a result of furloughs, employee is not able to carry out all of his job
functions and review process is delayed); Kimerling Decl. ¶12 (although unit at Department of
Industrial Relations’ Division of Occupational Health is funded by fees charged to companies,
furloughs mean that unit is unable to perform necessary number of inspections).

1 authority for the current furlough plan is necessarily limited to those “item[s] of appropriation” in
2 the budget act. Obviously, the 2010 Budget Act does not purport to “reduce[.]” the appropriations
3 for any state agencies that are *not* appropriated through the annual budget act. The Legislature thus
4 cannot be said to have ratified the furloughs at those agencies.

5 Several state departments which employ CASE members are not subject to appropriations in
6 the annual budget act. For example, there are approximately three CASE members employed at the
7 California State Lottery Commission, which is not funded through the annual budget act. Flores
8 Decl. ¶4. Proposition 37 amended the State Constitution to establish a state lottery. *Horan v. State*
9 *of California* (1990) 220 Cal.App.3d 1503, 1507. It established a Lottery Commission (Gov’t Code
10 §8880.15), and gave the Commission “all powers” to act with respect to the operation of the lottery
11 (Gov’t Code §8880.24). Thus, it is the Commission, and not the Legislature, which has the power
12 to adjust the budget of the lottery. The Lottery Commission is not subject to any legislative
13 appropriation. Gov’t Code sec. 8880.3. Rather, there was instead created a special fund in the
14 treasury, funded by ticket sales, which is “continuously appropriated.” Gov’t Code §8880.61, subd.
15 (a). Moreover, no state money may be transferred to the State Lottery Fund. Gov’t Code §8880.61,
16 subd. (b). Nor can any money from the State Lottery Fund be transferred to any account other than
17 the California State Lottery Education Fund. Gov’t Code §8880.65. These provisions illustrate that
18 the State Lottery is not subject to the annual budget appropriation process by the Legislature, and
19 thus was not impacted by the provision relied upon by the Supreme Court in *PECG I*. In short, the
20 Lottery does not have an item of appropriation “in this act.” Accordingly, employees at the Lottery
21 should not be subject to furloughs.

22 In addition, there are approximately two CASE members employed at the California
23 Earthquake Authority (“CEA”), which is also not funded through the annual budget act. Flores
24 Decl. ¶4. The CEA is a specially created entity that transacts earthquake insurance business. Ins.
25 Code §10089.6. The CEA is governed by a three-member board (Ins. Code §10089.7, subd. (a)),
26 which has the power to “perform all acts necessary” and “[w]ithout limitation” (Ins. Code §10089.7,
27 subd. (c)). The CEA is funded by the California Earthquake Authority Fund, which is not a fund in
28 the State Treasury, and is continuously appropriated without regard to fiscal years. Ins. Code

1 §10089.22, subd. (b). The money generated by the sale of insurance is “not state money.” Ins.
2 Code §10089.22, subd. (e). Thus, CEA is not subject to any appropriation “in this act” and thus the
3 holding in *PECG I* cannot be read to authorize furloughs as to CEA. Accordingly, no employees at
4 the CEA should be subjected to furloughs.

5 Similarly, there are approximately eight CASE members employed at the California
6 Housing Finance Authority (“CalHFA”), which, like the agencies discussed above, is not funded
7 through the annual budget act. Flores Decl. ¶4. CalHFA is an entirely “fiscally self-sufficient”
8 entity (Health & Safety Code §50956), and is supported by the sale of bonds and fees from its
9 mortgage lending operations. *See* Health & Safety Code §§51060, 51333. The operations of
10 CalHFA (including salaries) are paid for out of the revenues the authority generates. Health &
11 Safety Code §§50154, 51333. CalHFA funds cannot be transferred to the General Fund. Health &
12 Safety Code § 51625, subd. (b). CalHFA is not subject to an appropriation in the annual budget act
13 and thus CalHFA is not subject to furloughs. Accordingly, no employees at CalHFA should be
14 subject to furloughs, as there is no authorization for them.

15 Finally, there are approximately 20 CASE members employed at the Prison Industry
16 Authority. Flores Decl. ¶4. This agency is entirely self-supporting through the sale of goods and
17 services provided by prison inmates. The agency is not subject to the annual budget act. On the
18 contrary, there was a one-time permanent revolving fund established that funds the Prison Industry
19 Authority, and which is replenished by the ongoing sale of goods and services. Penal Code §2806.
20 From time to time, money is transferred from the revolving fund to the General Fund, but there is no
21 appropriation from the General Fund to the Prison Industry Authority. *Id.*

22 In the absence of any proffered authorization for furloughs at the California State Lottery
23 Commission, the California Earthquake Authority, the California Housing Finance Authority, and
24 the California Prison Industry Authority, the furloughs there must end immediately, and the affected
25 employees made whole.

26 **H. Petitioners PECCG and CAPS are Likely to Prevail on Their Claims That the**
27 **Furloughs Constitute “Personal Services Limitations” Prohibited by Water**
28 **Code Section 13177.7 and Health & Safety Code Section 25353.3**

Water Code Section 13177.7 and Health & Safety Code Section 25353.5 both prohibit the

1 Controller and the Department of Finance from imposing “any hiring freeze or *personal services*
2 *limitations*” on certain state employees. (Emphasis added.)³¹ Petitioners PECG and CAPS
3 represent numerous employees holding such positions. D. Alexander Decl. ¶¶12, 15; Voight Decl.
4 ¶¶11, 13; Escarda Decl. ¶4. As to these employees, the current furloughs are prohibited because
5 they are a “personal services limitation,” in violation of clear statutory language. *See Cal. Teachers*
6 *Ass’n v. Governing Bd. of Hilmar Unified Sch. Dist.* (2002) 95 Cal.App.4th 183, 191 (when
7 construing statute, “[w]e begin by examining the statutory language, giving the words their usual
8 and ordinary meaning”).

9 Even if the meaning of the phrase “personal services limitation” were not clear on its face,
10 the legislative history behind these statutes demonstrates the Legislature’s intent to prohibit
11 reductions in wages and working hours. The positions at issue are either federally funded or funded
12 from another non-State source. *See Water Code Section 13177.7; Health & Safety Code Section*
13 *25353.5.* Because these positions cost the state nothing and instead bring in non-State funding, the
14 statutes were enacted in 2003 to protect these positions from reductions – specifically, at the time, a
15 state hiring freeze and a 10% across-the-board cut in personnel services. *See Sen. Appropriations*
16 *Comm., Fiscal Summary of A.B. 1700 (2003-04 Reg. Sess.), as amended Aug. 13, 2003; Assem.*

18 ³¹ Specifically, Water Code Section 13177.7 provides:

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

23 Health & Safety Code Section 25353.5 provides:

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

1 Floor Analysis of A.B. 1700 (2003-04 Reg. Sess.), as amended Sept. 2, 2003.³² The Legislature
2 clearly intended to insulate these positions from precisely the type of personnel reductions the
3 current furloughs represent.

4 Finally, should Respondents contend that the 2010 Budget Act, in purporting to authorize
5 the present furlough program, somehow eliminated the protections of Water Code Section 13177.7
6 and Health & Safety Code Section 25353.5, the Budget Act would thereby violate the single subject
7 rule. *See supra* at pp. 13-14.

8
9 **II. Petitioners' Members Will Be Irreparably Harmed By the Furloughs and the Balance
10 of Harms Tips Sharply in Favor of Maintaining the Status Quo Pending a Preliminary
11 Injunction Hearing**

12 The purposes of preliminary injunctive relief are to preserve the status quo and to prevent
13 interim harm until the merits are determined. *See White v. Davis*, 30 Cal.4th at 554; *IT Corp. v.*
14 *County of Imperial* (1983) 35 Cal.3d 63, 73.³³ Here, the furloughs reduce the wages paid to
15 Petitioners' members by approximately 14 percent. In other cases addressing state furloughs
16 resulting in similar wage and salary reductions, three different Superior Court judges have found
17 that the furloughs cause irreparable injury to state employees.³⁴ This is consistent with California
18 legal authority, which has found less severe economic injuries to constitute irreparable harm. *See,*

19 ³² Tellingly, the relevant statutes also require the Controller and Department of Finance to
20 exclude "from the department's base for purposes of calculating any budget or position reductions
21 required by any state agency of any state law" the amounts and the positions of these employees.
22 Water Code Section 13177.7(c); Health & Safety Code Section 25353.5(c).

23 ³³ The "[t]he status quo is the last uncontested status which preceded the pending
24 controversy." *Tanner Motor Livery, Ltd. v. Avis, Inc.* (9th Cir. 1963) 316 F.2d 804, 809; *accord*
25 *People v. Hill* (1977) 66 Cal.App.3d 320, 331. Here, Petitioners challenged Executive Order S-12-
26 10 before it was even implemented, and thus maintenance of the status quo would require ceasing
27 the furloughs.

28 ³⁴ *See Halpert Decl.*, Exh. N at 3 (Order Granting in Part Motion for Relief from Automatic
Stay, Case No. RG09456750, Mar. 23, 2010, Roesch, J.) ("It is clear to the Court that irreparable
harm will occur to the members of Petitioner's organization."); *id.*, Exh. P at 3 (Order in Case No.
RG09456684) (same); *id.*, Exh. O at 3-4 (Order in Case No. RG09453982) (same); *id.*, Exh. H at 2
(Order Lifting Automatic Stay, Case No. CPF-09-509205, Jul. 9, 2009, Busch, J.) (plaintiffs "have
made an adequate showing of irreparable harm"); *id.*, Exh. I at 3 (Order Granting Writ and
Injunction, Case No. CPF-09-509580, Sep. 10, 2010, Woolard, J.) (same). The order in Case No.
RG09456750 also points out that taxpayers would suffer irreparable injury if they would "lose the
benefit of these employees' work" but then be forced to pay wages for unlawful furloughs. Halpert
Decl., Exh. N at 3-4. That is an additional ground for finding irreparable harm here.

1 e.g., *Social Servs. Union, SEIU Local 535 v. County of San Diego* (1984) 158 Cal.App.3d 1126,
2 1131 (stay of writ of mandate requiring county to pay employees for two holidays would have
3 caused “irreparable damage to the employees”); see also *Barajas v. City of Anaheim* (1993) 15
4 Cal.App.4th 1808, 1813 (ordinance prohibiting vending from vehicles in residential areas, which
5 plaintiffs contended would destroy their livelihoods, would cause irreparable injury justifying
6 preliminary injunction); *Butt*, 4 Cal.4th at 692-93 (upholding finding of irreparable harm where
7 early closure of schools would require low income families to arrange for expensive child care).

8 The pay cuts experienced by Petitioner’s members have caused and are continuing to cause
9 irreparable injuries. Although Respondents may argue that these injuries are primarily economic in
10 nature and therefore not irreparable, Respondents also have taken the position (in related litigation)
11 that backpay would *not* be available as a remedy were Petitioners to prevail on their claims. The
12 possibility that backpay will not be an available remedy for Respondents’ unlawful institution of the
13 furlough program weighs heavily in favor of preliminary injunctive relief. See *Cal. Pharmacists*
14 *Ass’n v. Maxwell-Jolly* (9th Cir. 2009) 563 F.3d 847, 851-52 (monetary injury irreparable where,
15 because of sovereign immunity, later recovery of damages is barred).

16 Petitioners, in support of their application for a TRO, previously presented evidence of the
17 severe effects furloughs had on their members. Here again, Petitioners have produced specific
18 evidence that the furloughs have caused, and are continuing to cause significant harm to the
19 represented employees, including by depriving many employees and their families of life
20 necessities. The furloughs are continuing to cause injuries that cannot later be remedied.

21 For example, the furloughs have rendered and will continue to render employees and their
22 families unable to cover basic expenses, and will result in bankruptcies and long-term damage to
23 employees’ credit. Officer Romeo Lugo, a member of CCPOA, is on the brink of filing for
24 bankruptcy due to the furloughs. Decl. of Romeo Lugo ¶¶14-15. Mark Dawkins, a member of
25 IUOE, and his family also face financial ruin having run up over \$6,000 in credit card bills to cover
26 basic living expenses. Decl. of Mark Dawkins ¶11.

27 Similarly, Lilia Bowman, an employee at the Department of Industrial Relations represented
28 by PECG, has been unable to secure credit after she was late in paying her bills, as a result of the

1 furloughs. Decl. of Lilia Bowman ¶9. In order to afford the necessities for her family, she
2 “routinely [has] to borrow money through check advances,” and then “struggle[s] to pay [those] off
3 on a monthly basis.” *Id.* ¶9. She and her husband have also incurred substantial medical bills
4 relating to the treatment of life-threatening conditions, and they are not able to pay those bills. *Id.*
5 ¶11. Ms. Bowman also has had to forego her prescription medications on numerous occasions
6 while the furloughs’ pay cuts have been in effect, because she did not have money to pay for her
7 medications. *Id.*³⁵ The inability to pay for basic necessities is not the type of injury that can
8 adequately be remedied by a subsequent back pay order. *See Hernandez v. Stabach* (1983) 145
9 Cal.App.3d 309, 315 (eviction from residence is irreparable harm); *see also Dominguez v.*
10 *Schwarzenegger* (9th Cir. 2010) 596 F.3d 1087, 1098 (wage loss affecting “ability to afford such
11 basic necessities as food, clothing, utilities, and rent” would cause irreparable injury); *Wonderland*
12 *Shopping Ctr. Venture Ltd. P’ship v. CDC Mortg. Capital, Inc.* (6th Cir. 2001) 274 F.3d 1085, 1097
13 (foreclosure is irreparable injury); *Polaski v. Heckler* (8th Cir. 1984) 751 F.2d 943, 952 (loss of
14 public benefits would cause irreparable harm when recipients faced potential foreclosure
15 proceedings on homes, utility cutoffs, and difficulty purchasing food and medical care), *vacated and*
16 *remanded on other grounds*, 476 U.S. 1167 (1986); *Garrett v. City of Escondido* (S.D. Cal. 2006)
17 465 F.Supp.2d 1043, 1052 (granting TRO where irreparable harm established based on eviction
18 threat).

19 Perhaps worse, the furloughs ordered by Executive Order S-12-10 will force some state
20 employees to forego necessary medical care for themselves and/or their relatives. For example,
21 Officer Shawn Van Sickle, is the sole provider for his wife and three children. Van Sickle Decl. ¶2.

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24 ³⁵ *See also* Decl. of Gary Roche ¶13 (will lose house if furloughs continue); Rouzbehani
25 Decl. ¶9 (as a result of furloughs, “struggle[s] to make . . . mortgage payment”); Hendrix Decl. ¶9
26 (as a result of furloughs, incurred significant credit card debt and struggles to make mortgage
27 payments); Bayless Decl. ¶¶7-8 (as a result of furloughs, sole provider for family has incurred credit
28 card debt which he is unable to pay down, took out special line of credit, and struggles to make
mortgage payments); Decl. of Edmund Kennedy ¶8 (unable to make minimum credit card payments,
resulting in soaring interest on debts); Decl. of A. Marc Commandatore ¶10 (as a result of
furloughs, employee could not afford to live in the Bay Area, and so sold house to move to
Sacramento and are renting in an attempt to “ride out the furloughs”); Mech. Decl. ¶¶14-15
(defaulted on all credit cards and forced to choose between food, gas or paying her mother’s
expenses each month); Bryant Decl. ¶¶5-6; Nguyen Decl. ¶13; Van Sickle Decl. ¶¶12-13.

1 He has already had to declare bankruptcy and short-sell his home as a result of furloughs, and
2 struggles every month to afford basic living expenses for his family and the necessary medical
3 treatment for his son, who has been diagnosed with leukemia. *Id.* ¶¶12-15. If any unexpected
4 medical costs arise, Officer Van Sickle will have no way to pay for them. *Id.* ¶14. Similarly,
5 Dolores Weeks fears that if the furloughs continue she will be unable to support her infirm father
6 and help pay for his cancer treatment and medications. Weeks Decl. ¶¶13, 16.³⁶ This deprivation of
7 medical care also cannot later be remedied by an economic award. *See Beltran v. Meyers* (9th Cir.
8 1982) 677 F.2d 1317, 1322 (irreparable injury when plaintiffs showed challenged rule would deny
9 them “needed medical care”); *see also Schalk v. Teledyne, Inc.* (W.D. Mich. 1990) 751 F.Supp.
10 1261, 1268 (irreparable harm where “distinct possibility that retirees living on such limited means
11 might chose to forego necessary medical treatment” because of cost of co-pays and deductibles).

12 State workers will also be harmed by the furloughs in a number of other ways. Some will
13 deplete savings, borrow money to cover expenses, take on credit card debt at high interest, and be
14 left without any means to deal with unexpected financial events. For example, the furloughs have
15 placed Anousheh Rouzbehani, a member of PECG, and his family in a precarious situation. As a
16 result of the furloughs, his “savings have been exhausted” and he was “forced to borrow \$10,000 to
17 stay current on [his] mortgage and other bills.” Rouzbehani Decl. ¶¶9-10. “If the furloughs
18 continue, [he] will be unable to repay this \$10,000 and will not be able to pay [his] bills on an
19 ongoing basis.” *Id.* ¶10. Similarly, as a result of the pay cuts occasioned by the furloughs, Terry
20 Escarda, a PECG member working at Caltrans, borrowed \$45,000 to cover mortgage payments and
21 other bills. Escarda Decl. ¶9. He also went without heat this winter because he could not afford the
22 furnace repair, and has generally stopped home repairs and maintenance. *Id.* ¶10. If the furloughs
23 do not end, he will “not be able to make . . . home repairs and begin to get out of the debt the

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26 ³⁶ *See also* Nguyen Decl. ¶14 (wife foregoing medicine for diabetes); Lugo Decl. ¶16
27 (foregoing necessary dental work); Hendrix Decl. ¶¶8-9 (furloughs have eroded ability to respond to
28 family’s medical expenses, including \$1,000 in medical bills which worker cannot afford to pay);
Bayless Decl. ¶9 (anxiety, panic and hypertension caused by furloughs has resulted in major
depressive order, requiring medical treatment); Kimerling Decl. ¶10 (longer hours worked on non-
furlough days a factor in repetitive stress injury).

1 furloughs have caused.” *Id.*³⁷

2 Other employees may be forced to stop paying for family members’ education. Decl. of
3 James McKrell ¶9 (as a result of furloughs, family unable to pay for daughter’s preschool); Miller
4 Decl. ¶12 (employee unable to afford wife’s college tuition). *See Miller v. Carlson* (N.D. Cal.
5 1991) 768 F. Supp. 1331, 1339-41 (treating withdrawal of education as irreparable injury).

6 The California Supreme Court has made clear that the balance of harms “dramatically
7 favor[s]” preserving wages for state employees who would otherwise be “deprived of vital funds,
8 frequently necessary to obtain the necessities of life,” when – as here – a contrary result “would
9 threaten the continued delivery of a wide range of essential public services.” *White*, 30 Cal.4th at
10 561. The hardships Petitioners’ members would endure if the Executive Order were to continue far
11 outweigh the financial injury that a temporary injunction would cause the State. *See Hunt v.*
12 *Superior Ct.* (1999) 21 Cal.4th 984, 999-1000 (balance of hardships favors plaintiffs who would be
13 deprived of medical services when county would suffer only financial injury); *Golden Gate Rest.*
14 *Ass’n v. City and County of San Francisco* (9th Cir. 2008) 512 F.3d 1112, 1126 (economic injuries
15 outweighed by “preventable human suffering”); *Lopez v. Heckler* (9th Cir. 1983) 713 F.2d 1432,
16 1437 (“physical and emotional suffering. . . is far more compelling than the possibility of some
17 administrative inconvenience or monetary loss to the government”).

18 CONCLUSION

19 For the foregoing reasons, this Court should issue a preliminary injunction terminating the
20 furloughs ordered pursuant to Executive Order S-12-10 and prohibiting the pay cuts occasioned by
21 the furloughs.

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23 ³⁷ *See also* Kennedy Decl. ¶8 (has used up family’s savings, cashed out retirement savings,
24 and refinanced family’s home to satisfy accumulated debts); Decl. of James McKrell ¶10 (forced to
25 cash out a \$14,000 IRA to cover debts that had accrued since commencement of furloughs, and
26 family unable to cover necessary living expenses such as medical bills and car repairs without
27 accruing additional debt); Hendrix Decl. ¶¶8-9 (as a result of furloughs, “savings have been
28 exhausted,” and not able to cover family’s expenses such as heater repairs and medical bills); Decl.
of John Budroe ¶¶9-10 (furloughs have depleted savings, and employee has had to borrow money to
make unexpected and necessary repairs to home); Kimerling Decl. ¶9 (unable to pay off credit card
debt, and no money to do necessary home repairs); Bayless Decl. ¶8 (savings exhausted as a result
of furloughs); Bowman Decl. ¶8 (same); *see also* C. Alexander Decl. ¶¶9-11; Bryant Decl. ¶¶5-6;
Homsany Decl. ¶¶12-13; Shaw Decl. ¶11; Lugo Decl. ¶¶11-12; Nguyen Decl. ¶¶12-13; Rocke Decl.
¶¶12-13; Van Sickle ¶¶12-14; Decl. of Mark Dawkins ¶¶10-12; Decl. of George Haley ¶¶10-12.

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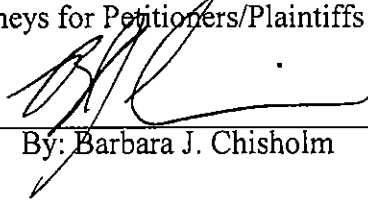
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Respectfully Submitted,

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