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DEPARTMENT OF PERSONNEL ADMINISTRATION

**Exempted from Fees
(Gov. Code § 6103)**

16 SUPERIOR COURT OF CALIFORNIA

17 COUNTY OF SACRAMENTO

18 CALIFORNIA ATTORNEYS,
19 ADMINISTRATIVE LAW JUDGES AND
20 HEARING OFFICERS IN STATE
EMPLOYMENT,

21 Petitioners/Plaintiffs,

22 v.

23 ARNOLD SCHWARZENEGGER as
Governor of the State of California; DAVID
24 GILB as Director of the Department of
Personnel Administration; JOHN CHIANG,
25 Controller of the State of California; and
DOES 1 through 10, inclusive,

26 Respondents/Defendants.
27
28

CASE NO. 34-2009-80000134-CU-WM-GDS

**Assigned For All Purposes To
The Honorable Patrick Marlette**

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEMURRER TO VERIFIED PETITIONS
FOR WRIT OF MANDATE AND
COMPLAINTS FOR DECLARATORY
AND INJUNCTIVE RELIEF BY
GOVERNOR ARNOLD
SCHWARZENEGGER, DAVID GILB
AND DEPARTMENT OF PERSONNEL
ADMINISTRATION**

Date: January 29, 2009

Time: 9:00 a.m.

Dept.: 19

1 SERVICE EMPLOYEES
INTERNATIONAL UNION, LOCAL 1000,

2
3 Petitioner/Plaintiff,

4 v.

5 ARNOLD SCHWARZENEGGER, as
Governor, State of California;
6 DEPARTMENT OF PERSONNEL
ADMINISTRATION; JOHN CHIANG, as
7 State Controller; and DOES 1 through 20,
inclusive,

8 Respondents/Defendants.
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1 I.

2 **INTRODUCTION**

3 Respondents/Defendants GOVERNOR ARNOLD SCHWARZENEGGER and
4 DAVID GILB, Director of Department of Personnel Administration, demur to the petition for
5 writ of mandate and complaint for injunctive and declaratory relief filed by Petitioners/Plaintiffs
6 CALIFORNIA ATTORNEYS, ADMINISTRATIVE LAW JUDGES and HEARING OFFICERS
7 IN STATE EMPLOYMENT (“CASE”) and Respondents/Defendants GOVERNOR ARNOLD
8 SCHWARZENEGGER and DEPARTMENT OF PERSONNEL ADMINISTRATION demur to
9 the petition for writ of mandate and complaint for injunctive and declaratory relief filed by
10 Petitioner/Plaintiff SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000
11 (“SEIU”) on the basis that this Court has no jurisdiction over the claims raised in said petitions
12 and complaints. (For ease of this Court’s consideration, Governor Schwarzenegger, Department
13 of Personnel Administration (DPA) and David Gilb will be referred to collectively as
14 “Respondents,” unless the context otherwise requires. Similarly, CASE and SEIU will be
15 referred to collectively as “Petitioners,” unless the context otherwise requires.)

16 Petitioners’ primary claim in this case is that the December 19, 2008 Governor’s
17 Executive Order, (“the Executive Order”), establishing two-day a month furloughs for state
18 employees beginning February 1, 2009, violates Government Code section 19826(b). That code
19 section provides:

20 Notwithstanding any other provision of law, the department shall
21 not establish, adjust, or recommend a salary range for any
22 employees in an appropriate unit where an employee organization
has been chosen as the exclusive representative pursuant to Section
3520.5.

23 Labor relations between the State and Petitioners’ members are governed by the
24 Ralph C. Dills Act (“Dills Act”), Government Code section 3512, *et seq.* Government Code
25 section 19826 is inoperative here because the Petitioners and Respondents are parties to a
26 Memorandum of Understanding (“MOU”). Pursuant to the Dills Act, the MOUs continue to
27 control the terms and conditions of Petitioners’ members’ employment with the State. (See Gov.
28 Code, § 3517.8(a).) As a result, section 19826 is superseded by the MOU and, therefore,

1 inoperable here. (See Gov. Code, § 3517.6.) Because of this fact, the Public Employment
2 Relations Board (“PERB”) possesses exclusive, initial jurisdiction over any dispute involving the
3 Executive Order. (Gov. Code, § 3514.5.) The only cognizable and presently justiciable legal
4 theories for challenging the Executive Order fall squarely within the ambit of the Dills Act.
5 Therefore, PERB, not this Court, has exclusive, initial jurisdiction in this case.

6 Petitioners have failed to exhaust their administrative remedies. Specifically,
7 Petitioner CASE has failed entirely to pursue available remedies to challenge the Executive Order
8 – either as an alleged violation of the parties’ MOU or as an alleged unfair labor practice – before
9 PERB, the administrative agency the Legislature designated to adjudicate such issues. Petitioner
10 SEIU initially filed an unfair labor practice charge with PERB and sought remedial action in the
11 proper jurisdiction. Petitioner SEIU, however, has inappropriately, prematurely, and without
12 cause abandoned the administrative processes available to it in favor of filing with this Court, a
13 judicial body without jurisdiction of the claims asserted. Petitioners’ unsupported contention they
14 are at risk of irreparable harm does not excuse their failure to exhaust administrative remedies
15 prior to filing this petition.

16 Petitioners’ speculative allegations of future harm for possible overtime violations
17 of the Fair Labor Standards Act (“FLSA”) are not ripe for judicial review. Petitioners are asking
18 this Court for what amounts to an improper advisory opinion that Respondents must comply with
19 the law. “Exempt” employees who may hypothetically work in excess of 40 hours during a
20 furlough week cannot establish that the State has or intends to violate the FLSA. Accordingly,
21 Petitioners fail to state a claim on which this Court can grant relief.

22 For these reasons, Respondents respectfully request their demurrer to Petitioners’
23 Petitions and Complaints be granted without leave to amend and this matter be dismissed.

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1 II.

2 SUMMARY OF MATERIAL FACTS

3 On December 19, 2008, Governor Arnold Schwarzenegger issued an Executive
4 Order. (Petitioner CASE's Verified Petition for Writ of Mandate and Complaint for Injunctive
5 and Declaratory Relief, ¶ 7, hereinafter referred to as "CASE Petition"; Petitioner SEIU's
6 Verified Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief, ¶ 8,
7 hereinafter referred to as "SEIU Petition".) In this Executive Order, Governor Schwarzenegger
8 declared that due to the State of California's worsening fiscal crisis, "immediate and
9 comprehensive" action to reduce current spending must be taken. (CASE Petition, ¶ 7, and
10 Exhibit A thereto; SEIU Petition, ¶ 8, and Exhibit A thereto.) The Governor proclaimed that the
11 State of California was in a state of fiscal emergency and, as a result, the State must institute
12 employee furloughs as a cost-saving measure. (*Id.*) The furloughs ordered by the Governor are
13 set to begin on February 1, 2009, and last through June 30, 2010. (*Id.*)

14 On December 22, 2008, state employee unions Professional Engineers in
15 California Government ("PECG") and California Association of Professional Scientists ("CAPS")
16 jointly filed a Verified Petition for Writ of Mandate and Complaint for Injunctive and Declaratory
17 Relief seeking this Court to intervene and enjoin implementation of the furloughs.

18 On December 22, 2008, Petitioner SEIU filed an unfair labor practice charge with
19 PERB alleging, among other things, that Respondent Governor Schwarzenegger's Executive
20 Order and its furlough plan are unlawful. (See Exhibit C to Respondents' Request for Judicial
21 Notice (hereinafter referred to as "Respondents' RJN").) Petitioner SEIU has not pled it has
22 either requested that PERB seek injunctive relief on its behalf or that PERB has refused to do so.
23 (*Id.*)

24 On January 5, 2009, Petitioner CASE filed its Verified Petition for Writ of
25 Mandate and Complaint for Injunctive and Declaratory Relief asking this Court to intervene and
26 enjoin implementation of the furloughs. On January 7, 2009, Petitioner SEIU filed its Verified
27 Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief seeking the
28 same remedy. The claims alleged in the petitions and complaints are dependent on the theory that

1 the Executive Order is precluded by Government Code section 19826. Petitioners also allege
2 implementation of the Executive Order will result in future hypothetical violations of the FLSA.
3 Since there has been no actual violation of the FLSA, the Petitioners are seeking an advisory
4 opinion from the Court reiterating that the Respondents must comply with the relevant provisions
5 of the FLSA.

6 **III.**

7 **SUMMARY OF PETITIONERS' COMMON ALLEGATIONS**

8 Petitioners allege that where an exclusive representative has been selected for an
9 employee organization, section 19826 deprives the Department of Personnel Administration
10 (“DPA”) of authority to adjust salary ranges of represented employees. (CASE Petition, ¶¶ 10,
11 11; SEIU Petition, ¶¶ 17, 18.) Petitioner SEIU argues that Government Code section 19826
12 “specifically forbids the executive branch from altering salaries.” (SEIU Petition, ¶ 17.)
13 Similarly, Petitioner CASE contends that section 19826 establishes that the legislature “withheld
14 from DPA the power to reduce salaries for represented employees.” (CASE Petition, ¶ 11.)

15 Petitioner CASE admits that although the current MOU between it and the State of
16 California expired on July 1, 2007, the terms of the MOU remain in effect while the parties
17 negotiate for a successor agreement. (CASE Petition, ¶ 15, fn. 4, and Exhibit A to Respondents’
18 RJN.) Petitioner CASE admits that to date it has not agreed to a successor MOU or reached
19 impasse. (*Id.*) Similarly, the MOUs with the State of California to which Petitioner SEIU are a
20 party have also expired. The terms, however, indisputably remain in full force and effect until a
21 new agreement is reached or the parties reach impasse. (See Exhibit B to Respondents’ RJN.)

22 Petitioners further contend that the Governor is precluded from overriding the
23 statutory prohibition on salary range reduction contained in section 19826 based on a declaration
24 of fiscal emergency. (CASE Petition, ¶¶ 8, 16; SEIU Petition, ¶¶ 9-11.) In the Executive Order,
25 the Governor relies on the emergency powers granted him by Government Code section 3516.5¹,

26 ¹ Government Code section 3516.5 provides as follows:

27 Except in cases of emergency as provided in this section, the employer
28 shall give reasonable written notice to each recognized employee
organization affected by any law, rule, resolution, or regulation directly

1 a part of the Dills Act, as authority for ordering employee furloughs. Petitioners allege that
2 section 3516.5 does not provide the Governor with the statutory authority to furlough state
3 employees or otherwise cut salary or hours of work. Petitioners argue the Executive Order
4 violates the California Constitution and the constitutional principle of separation of powers².
5 (CASE Petition, ¶ 16; SEIU Petition, ¶ 20.)

6 Petitioners contend that the Governor is attempting to exceed his constitutional
7 authority. (CASE Petition, ¶¶ 16, 17; SEIU Petition, ¶¶ 12-16.) In support of its position,
8 Petitioner SEIU recites Article III, Section 3 of the California Constitution, “The powers of the
9 state government are legislative, executive, and judicial. Persons charged with the exercise of one
10 power may not exercise either of the others except as permitted by this Constitution.” (SEIU
11 Petition, ¶ 15.) Petitioners allege that only the legislature is empowered with the ability to
12 establish state employee salary ranges. (CASE Petition, ¶ 18; SEIU Petition, ¶ 16.)

13 Petitioners also allege that implementation of Governor Schwarzenegger’s
14 Executive Order will result in future FLSA violations. (CASE Petition, ¶ 25; SEIU Petition, ¶¶
15 26, 27.) Petitioners argue that exempt employees, due to the nature of their workload, will be

17 relating to matters within the scope of representation proposed to be
18 adopted by the employer, and shall give such recognized employee
19 organizations the opportunity to meet and confer with the administrative
20 officials or their delegated representatives as may be properly designated
21 by law.

22 In cases of emergency when the employer determines that a law, rule,
23 resolution, or regulation must be adopted immediately without prior
24 notice or meeting with a recognized employee organization, the
25 administrative officials or their delegated representatives as may be
26 properly designated by law shall provide such notice and opportunity to
27 meet and confer in good faith at the earliest practical time following the
28 adoption of such law, rule, resolution, or regulation.

² In its petition and complaint, Petitioner CASE cites a few additional and inapplicable Government Code sections to support its claim that only the Legislature has the power to reduce salaries for represented employees. (CASE Petition, ¶¶ 12 – 15.) However, none of the statutes gives this Court jurisdiction over the subject matter of this action. Government Code section 19997 authorizes state departments to lay off employees, a matter not at issue in this case. (CASE Petition, ¶ 13.) Government Code section 19996.22 concerns the Reduced Worktime Act and allows employees who are coerced into reducing their worktime “contrary to the intent of this article” [The Reduced Worktime Act] to file a grievance with the “department [DPA].” (CASE Petition, ¶ 13.) Government Code section 18500(c)(6) is merely an enumeration of the goals of the civil service system and not relevant to the matter at hand. (CASE Petition, ¶ 14.)

1 forced to work in excess of the scheduled work days. (CASE Petition, ¶ 25; SEIU Petition, ¶ 48.)
2 Petitioners further allege that the exempt employees will lose their exempt status as a result of the
3 furlough plan. (CASE Petition, ¶ 46; SEIU Petition, ¶ 45.) The loss of the exempt status and the
4 requirement to work in excess of the scheduled workdays will result in hourly overtime. (CASE
5 Petition, ¶ 47; SEIU Petition, ¶ 48.) Petitioners contend the Respondents are incapable of
6 accurate record keeping and, as a result, incapable of the proper payment of wages due. (SEIU
7 Petition, ¶ 49; see also CASE Petition, ¶ 48.)

8 Petitioners contend this Court’s intervention is required to prevent the
9 implementation of the furloughs because they have “no plain, speedy, and adequate remedy in the
10 ordinary course of law.” (CASE Petition, ¶ 32; SEIU Petition, ¶ 33.) Petitioners erroneously
11 allege they have no administrative remedy that will allow them to prevent the furlough. (CASE
12 Petition, ¶ 34; SEIU Petition, ¶ 34.)

13 **IV.**

14 **LEGAL ARGUMENT**

15 **A. Standard For Demurrer.**

16 A demurrer tests the sufficiency of a complaint. Under California Code of Civil
17 Procedure section 430.10(a), a defendant may demur to a complaint if the court has no
18 jurisdiction over the subject matter of the cause of action alleged in the petition or pleading. A
19 challenge to the jurisdiction of the court, when the jurisdictional defense is apparent from the
20 complaint or petition, or based upon facts that can be properly judicially noticed, is properly and
21 appropriately addressed via demurrer. (*Satten v. Webb* (2002) 99 Cal.App.4th 365, 374.)
22 Furthermore, respondents may seek a demurrer if the plaintiff/petitioner fails to state facts
23 sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10(e).) A court may sustain a
24 demurrer “on the ground that the complaint fails to allege an actual or present controversy, or that
25 it is not ‘justiciable’.” (*DeLaura v. Beckett* (2006) 137 Cal.App.4th 542, 545.)

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1 **PERB, Not This Court, Has Exclusive, Initial Jurisdiction Over This Labor Dispute.**

2 **1. Government Code Section 19826 Is Superseded By The MOUs Between The**
3 **Parties And By Operation Of The Dills Act.**

4 Petitioners largely base their petitions and complaints on the theory that under
5 Government Code section 19826(b), neither the Governor nor DPA has the authority to alter
6 salary ranges of state employees if an exclusive representative has been selected for the employee
7 organization.³ Petitioners argue Government Code section 19826 and *Department of Personnel*
8 *Administration v. Superior Court (Greene)* (1992) 5 Cal.App.4th 155 (applying Government
9 Code section 19826) “expressly and unambiguously precludes the reduction of represented
10 employee wages.” (CASE Petition, ¶ 11; see also SEIU Petition, ¶ 18.)

11 However, Government Code section 19826 is inapplicable to the case at hand
12 because it is superseded by existing MOUs between the parties. The Dills Act governs the labor
13 relations between the State and its employees. Pursuant to Government Code section 3517.8(a)
14 contained in the Dills Act,

15 If a memorandum of understanding has expired, and the Governor
16 and the recognized employee organization have not agreed to a new
17 memorandum of understanding and have not reached an impasse in
18 negotiations, subject to subdivision (b), *the parties to the agreement*
19 *shall continue to give effect to the provisions of the expired*
20 *memorandum of understanding, including, but not limited to, all*
21 *provisions that supersede existing law, any arbitration provisions,*
22 *any no strike provisions, any agreements regarding matters covered*
23 *in the Fair Labor Standards Act of 1938.” (Emphasis added.)*

24 (Gov. Code, § 3517.8(a).)

25 Both Petitioner CASE and Petitioner SEIU are parties to expired MOUs with the
26 State of California.⁴ Petitioners have not alleged new MOUs have been agreed upon by

27 ³ In addition to the jurisdictional infirmities in the petitions and complaints that warrant sustaining
28 the present demurrer, it also is important to note that nowhere do Petitioners allege how furloughs are
synonymous with the phrase “salary ranges” as used in section 19826. In fact, the Executive Order
attached to the petitions and complaints (which have become part of the pleadings) make no mention of
reducing salary ranges. Thus, the Executive Order on its face does not alter salary ranges but only acts to
reduce the hours state employees work. The petitions and complaints fail to offer any theory
demonstrating the Governor’s lack of authority to reduce the hours worked by state employees.

⁴ This court can take judicial notice of the memoranda of understanding between the Petitioners and
the State of California. Evidence Code section 452(c) authorizes the Court to take judicial notice of
“official acts of legislative, executive, and judicial departments . . . of any state of the United States.” In

1 Petitioners and the State or that the parties have reached a labor impasse in negotiations for a
2 successor MOU. Petitioner CASE not only admits that the terms of its MOU are still controlling,
3 it further states that the provisions of its MOU supersede the Government Code. (CASE Petition,
4 fn. 4.) Respondents agree. Accordingly, pursuant to Government Code section 3517.8(a), the
5 parties must continue to give effect to the expired MOUs, *including all provisions which*
6 *supersede existing law.*

7 As stated in *Department of Personnel Administration v. Superior Court (Greene)*
8 (1992) 5 Cal.App.4th 155, 174-175, a case relied upon by Petitioner CASE,

9 The Dills Act is a ‘supersession statute’, designed so that, *in the*
10 *absence of a MOU*, as is the case when an existing MOU has
11 expired and the parties have bargained to impasse, numerous
12 Government Code provisions concerning state employees’ wages,
hours and working conditions take effect. One of the provisions
which is effective *in the absence of an MOU* is section 19826.”
(Emphasis added.)

13 Thus, the present case is exactly the opposite situation of that in *Greene*. In that case, the State
14 and two of its employee bargaining units had reached impasse in their labor negotiations and,
15 therefore, numerous provisions of the Government Code, including section 19826, had taken
16 effect. Here, in contrast, the parties’ labor relations continue to be governed by a valid and
17 enforceable MOU and, therefore, pursuant to section 3517.8, the parties must continue to give
18 effect to that MOU, *including all provisions which supersede existing law.*

19 California Government Code section 3517.6(a) sets forth those code sections
20 which are superseded by a valid MOU. Among the superseded code sections identified in section
21 3517.6(a) is section 19826. There is no allegation in the petitions that the MOUs between the
22 parties are no longer controlling. Therefore, section 19826 is superseded by the Dills Act and the
23 terms of the expired MOUs. In other words, section 19826 has no legal force and effect between

24 this case, the MOUs between Petitioners and the State are an “official act” of the executive department
25 because DPA, on behalf of the Governor, negotiated the MOU pursuant to the statutory mandate set forth
26 in the Ralph C. Dills Act (Gov. Code § 3512 et seq.; *Pacific Lumber Co. v. State Water Resources Control*
Bd. (2006) 37 Cal.4th 921, 936, fn. 5 [MOU between Regional Water Quality Control Boards, the
27 Department of Forestry and the State Water Resources Control Board is proper subject for a court’s
judicial notice because it is an official act by executive agencies, citing *Brown v. City of Los Angeles*
Dist. (1993) 19 Cal.App.4th 536, 543, fn. 3].)

1 these parties in the face of a valid MOU. Section 19826 has been superseded by the MOUs as
2 specified in the Dills Act. It is inapplicable to the matter at hand and does not control the dispute.

3 **2. PERB Has Exclusive, Initial Jurisdiction Over Disputes Covered By The Dills**
4 **Act.**

5 As a result of the continuing suppression of section 19826, the only potential
6 existing dispute between the parties is whether the Executive Order violates the terms of the
7 existing MOUs or whether the Governor committed an unfair labor practice by declaring a fiscal
8 emergency, thereby bypassing bargaining with the employee organizations over the
9 implementation of employee furloughs as a cost saving measure. The dispute as to whether the
10 Governor failed to meet and confer in good faith is governed exclusively by the Dills Act. (Gov.
11 Code, §§ 3516.5, 3517.)

12 PERB possesses exclusive, initial jurisdiction over the administration of the Dills
13 Act. (Gov. Code, § 3514.5 [“The initial determination as to whether the charges of unfair
14 practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this
15 chapter, shall be a matter within the exclusive jurisdiction of the board”]; *California Association*
16 *of Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371, 381 [“The assignment
17 of exclusive initial jurisdiction in section 3514.5 to the Board means that the only forum to pursue
18 a cause of action for violation of the statutory rights conferred in the Dills Act is before the
19 Board”].)

20 The scope of PERB’s exclusive, initial jurisdiction is construed broadly in favor
21 of allowing the Board to exercise its expertise over public sector labor relations in this state. (*El*
22 *Rancho Unified School District v. National Education Association* (1983) 33 Cal.3d 946, 953;
23 *San Diego Teachers Association v. Superior Court* (1979) 24 Cal.3d 1, 12-14.) PERB’s
24 jurisdiction is broadly construed because “PERB is an expert, quasi-judicial administrative
25 agency” specially entrusted “to protect both employees and the state employer from violations of
26 the organizational and collective bargaining rights” guaranteed by the statutes it administers.
27 (*Banning Teachers Association v. Public Employment Relations Board* (1988) 44 Cal.3d 799,
28 804; *City and County of San Francisco v. International Union of Operating Engineers, Local 39*

1 (2007) 151 Cal.App.4th 938, 943.) It has long been settled that PERB’s “findings within that
2 field carry the authority of an expertness which courts do not possess and therefore must respect.”
3 (*Banning Teachers Association, supra*, 44 Cal.3d at p. 804.)

4 Judicial deference to PERB’s administrative process is both necessary and
5 appropriate to fulfill PERB’s legislatively assigned mission “to help bring expertise and
6 uniformity to the delicate task of stabilizing labor relations.” (*San Diego Teachers Association,*
7 *supra*, 24 Cal.3d at p. 12; *Local 21, International Federation of Professional and Technical*
8 *Engineers, AFL-CIO v. Bunch* (1995) 40 Cal.App.4th 670, 676-679 [discussing the broad scope
9 of PERB’s exclusive, initial jurisdiction]; *City and County of San Francisco, supra*, 151
10 Cal.App.4th at p. 945 [finding that a party may not evade PERB’s jurisdiction through artful
11 pleading]; *El Rancho Unified School District, supra*, 33 Cal.3d at p. 954, fn. 13 [stating that a
12 court must defer to PERB when the underlying conduct alleged “may fall within PERB’s
13 exclusive jurisdiction”].)

14 The only possible existing disputes in this matter fall squarely under PERB’s
15 exclusive, initial jurisdiction over Dills Act disputes. The Executive Order cites to Government
16 Code section 3516.5 of the Dills Act as the basis for the furloughs. Despite this fact, Petitioners
17 have improperly attempted to bring their dispute before this Court, based in large part on section
18 19826(b), a statute that is superseded by the provisions of the existing MOU between the parties
19 and indisputably inoperative here. Thus, this Court lacks subject matter jurisdiction over this
20 dispute. This demurrer should be sustained without leave to amend and the matter dismissed.

21 **3. PERB Possesses The Authority To Furnish The Relief Requested By**
22 **Petitioners.**

23 In addition to possessing exclusive, initial jurisdiction of the dispute presented in
24 the petitions and complaints, PERB possesses the authority to furnish the relief requested by
25 Petitioners. PERB enjoys wide “discretion *to withhold as well as pursue*, the various remedies at
26 its disposal.” (*San Diego Teachers Association, supra*, 24 Cal.3d at p. 13, emphasis added.) The
27 Legislature invested PERB with broad discretion to exercise its remedial powers in order to
28 achieve peace and stability in labor relations. (*San Diego Teachers Association, supra*, 24 Cal.3d

1 at p. 13.) As the court in *San Diego Teachers Association* found, PERB may also conclude it is
2 best to maintain the status quo, and preserve stability in labor relations, by withholding injunctive
3 relief. (*Id.*) Or, to the contrary, seek injunctive relief when necessary. It is not appropriate for a
4 court to intervene and prevent PERB from providing relief it best sees fit “to implement the
5 broader objectives” of California’s public sector labor laws. (*Id.*; Gov. Code, § 3514.5.)

6 Therefore, if PERB is somehow unable to offer the relief necessary, PERB has the authority to
7 seek injunctive relief from the courts on behalf of Petitioners. Title 8 of the California Code of
8 Regulations section 32450 authorizes a complaining party to file a request for injunctive relief
9 with PERB. PERB’s General Counsel has between 24 and 120 hours to investigate the
10 circumstances of the request and issue a recommendation to the Board as to whether to seek an
11 injunction. (8 Cal. Code of Regs., §§ 32455, 3260.)

12 **4. Because PERB Has Exclusive, Initial Jurisdiction Over This Labor Dispute,**
13 **This Court Does Not Have Authority to Issue a Writ.**

14 As PERB has exclusive, initial jurisdiction, this Court does not have authority to
15 issue the writ requested or rule on the merits of the complaints. “Mandate may not issue to
16 compel action which is not within the court’s jurisdiction.” (*Daniels v. Superior Court* (1955)
17 132 Cal.App.2d 700, 701.) Petitioners seek this Court’s intervention in a labor matter centering
18 on the terms and conditions of employment. Issuance of a writ and ruling on the merits of the
19 complaints will cause a significant and continuing divestment of PERB’s exclusive jurisdiction
20 over the Dills Act as it applies to this labor dispute and to these parties. A ruling from this Court
21 will effect a special exemption to the Dills Act applicable only to these parties whereby this Court
22 will supplant PERB and establish itself as arbiter over the parties’ bargaining relationship. Such a
23 ruling will directly frustrate “the Legislature’s purpose in creating an expert administrative body
24 whose responsibility it is to develop and apply a comprehensive, consistent scheme regulating
25 public employer-employee relations.” (*Link v. Antioch Unified School District* (1983) 142
26 Cal.App.3d 765, 769.) The issuance of a writ and retention of jurisdiction in this case would be
27 unwarranted judicial intervention into PERB’s legislatively delegated duty to administer the Dills
28 Act as it applies to the parties’ bargaining relationship. (Gov. Code, §§ 3512, 3514.5.)

1 **C. Petitioners Have Not Exhausted Their Administrative Remedies Before PERB.**

2 In general, a party must be forced to *exhaust* its administrative remedies before
3 resorting to intervention from the courts. (*Coachella Valley Mosquito & Vector Control District*
4 *v. Public Employment Relations Board (Coachella Valley)* (2005) 35 Cal.4th 1072, 1080.) The
5 rule of exhaustion “is not a matter of judicial discretion” but rather a fundamental rule
6 establishing “a jurisdictional prerequisite to resort to the courts.” (*Sierra Club v. San Joaquin*
7 *Local Agency Formation Commission* (1999) 21 Cal.4th 489, 496.)

8 Neither Petitioner has exhausted its available administrative remedies. Petitioner
9 CASE has failed to even seek, let alone exhaust, its administrative remedies with PERB before
10 seeking relief from this Court. No exceptions to the exhaustion rule apply to excuse Petitioner
11 CASE’s failure to exhaust its administrative remedies with PERB.

12 Petitioner SEIU’s conduct in initially filing an unfair practice charge with PERB,
13 complaining of the same issues asserted here, is evidence in support of Respondents’ position that
14 PERB has exclusive, initial jurisdiction. Petitioner SEIU, however, did not exhaust the
15 administrative appeals available to it before PERB. Instead, it prematurely and inappropriately
16 abandoned the governing administrative process in favor of seeking relief improperly before this
17 Court.

18 Petitioner SEIU has squarely presented to PERB the exact claims it presents to this
19 Court (with the exception of the hypothetical FLSA allegations that are neither ripe nor justiciable
20 in any forum at this point). (See Exhibit C to Respondents’ RJN.) In its PERB charge, Petitioner
21 SEIU complained Respondents Governor Schwarzenegger and Department of Personnel
22 Administration failed to meet and confer in good faith before issuance of the Governor’s
23 Executive Order. (*Id.*) Furthermore, Petitioner SEIU charged that the furlough was unlawful and
24 exceeded the Governor’s authority pursuant to Government Code section 3516.5.

25 To date, PERB has not rendered a determination on Petitioner SEIU’s unfair
26 practice charge. Petitioner SEIU filed an unfair practice charge with PERB on
27 December 22, 2008, but failed to plead how or why it did not avail itself of the available motion,
28 pursuant to Title 8 of the California Code of regulations section 32147, to expedite PERB

1 proceedings on the charge. Additionally, Petitioner SEIU has not requested that the PERB Board
2 seek injunctive relief on this issue, even though this remedy is available through PERB. (8 Cal.
3 Code of Regs., § 32450.)

4 This Court has no authority to review how PERB exercises its remedial discretion
5 while Petitioner SEIU's claims are still pending before PERB. This Court must defer to PERB's
6 expertise in exercising its legislatively delegated authority. (*Mt. San Antonio Community College*
7 *District v. Public Employment Relations Board* (1989) 210 Cal.App.3d 178, 190.)

8 Petitioners have made no showing as to why they should be afforded relief from
9 the exhaustion doctrine. Courts have recognized several limited exceptions to the exhaustion
10 rule, such as “[1] situations where the agency indulges in unreasonable delay, ... [2] when pursuit
11 of an administrative remedy would result in irreparable harm, [3] when the agency is incapable of
12 granting an adequate remedy, and [4] when resort to the administrative process would be futile
13” (*Department of Personnel Administration v. Superior Court (Greene)* 5 Cal.App.4th 155,
14 169 [numbering added].) None of these exceptions apply to excuse Petitioners' failure to exhaust
15 their administrative remedies before PERB, and their petitions should therefore be dismissed.

16 Petitioners will not be subject to irreparable harm if they pursue their
17 administrative remedies. The California Supreme Court addressed the “irreparable injury” issue
18 in *San Diego Teachers Association*. There, the school district argued it should not be required to
19 complete the PERB process because “completion of the administrative proceeding would result in
20 irreparable injury.” (*San Diego Teachers Association, supra*, 24 Cal.3d at p. 13.) The court
21 rejected that argument and found PERB has broad discretion “to withhold as well as pursue”
22 whatever remedies it deems appropriate. (*Id.*) Accordingly, Petitioners can claim no “irreparable
23 injury” excusing their failure to exhaust their administrative remedies with PERB. Petitioners'
24 failure to exhaust their administrative remedies bars this Court from exercising jurisdiction over
25 these petitions and complaints and they must, as a result, be dismissed.

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1 **D. Petitioners’ Third Cause of Action In Their Petitions Fails to State a Claim Upon**
2 **Which Relief Can Be Granted Because Petitioners’ Request For Declaratory Relief**
3 **Pursuant To The FLSA Is Not Ripe For Review.**

4 Petitioners’ speculative FLSA allegations amount to nothing more than a
5 hypothetical scenario that fails to state any cause of action. A justiciable cause of action only
6 exists if the complaint or petition alleges facts supporting an “actual controversy.” (*Stonehouse*
7 *Homes v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 540.) Courts will not hear an action
8 that is not founded on an actual controversy, and therefore, ripe for judicial action. (*Id.*)
9 Ripeness is required because the existence of an actual controversy “prevents courts from issuing
10 purely advisory opinions, or considering a hypothetical state of facts in order to give general
11 guidance rather than to resolve a specific legal dispute.” (*In re Joshua S.* (2007) 41 Cal.4th 261,
12 273, quoting *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 998.) Cases are not ripe if they
13 require the court to speculate about “hypothetical future actions.” (*Stonehouse Homes, supra*,
14 167 Cal.App.4th at p. 540.)

15 In order for a case to be ripe and therefore justiciable, “the legal issues posed must
16 be framed with sufficient concreteness and immediacy so that the court can render a conclusive
17 and definitive judgment rather than a purely advisory opinion based on hypothetical facts or
18 speculative future events.” (*Consumer Cause, Inc. v. Johnson & Johnson* (2005) 132 Cal.App.4th
19 1175, 1186, citing *Hayward Area Planning Assn. v. Alameda County Transportation Authority*
20 (1999) 72 Cal.App.4th 95, 102.)

21 In *Younger v. Superior Court of Sacramento County* (1978) 21 Cal.3d 102, 119,
22 the court declared, “the rendering of advisory opinions falls within neither the functions nor the
23 jurisdiction of this court.” The *Younger* court declared that a request from the Attorney General
24 to declare a statute unconstitutional was not ripe and therefore not justiciable because, “no party
25 to any of these proceedings shows that any public agency presently refuses, to his detriment, to
26 obey the terms of that statute.” (*Id.*)

27 Petitioner CASE asks for a declaration that, “...if a furlough is implemented, its
28 members will be entitled to overtime compensation under the FLSA.” (CASE Petition, ¶ 49.)
Petitioner SEIU seeks a declaration that, “... if furloughs are implemented, its FLSA-exempt

1 members will be entitled to overtime compensation under the FLSA for all hours worked to
2 complete their required work.” (SEIU Petition, ¶ 51.)

3 Petitioners’ petitions and complaints are entirely hypothetical and speculative.
4 Petitioners are asking this Court to render an advisory opinion that Respondents should pay
5 overtime compensation to employees, which assumes (1) any employees will in fact work
6 overtime during a week in which the furloughs occur; and (2) the Respondents would fail to pay
7 overtime to employees legally entitled to receive it. Neither Petitioner SEIU nor Petitioner CASE
8 has alleged any actual or concrete failure to pay wages or to keep accurate overtime records.
9 Petitioners fail to allege facts establishing that any employee has been required to, or actually has,
10 worked any uncompensated overtime. Furthermore, Petitioners have failed to allege facts
11 establishing that the Respondents have failed to keep accurate overtime records or pay any
12 overtime benefits owed to any employees. Much like the case in *Younger*, neither Petitioner has
13 stated any facts that show that “any public agency presently refuses, to [their] detriment, to obey
14 the terms of that statute.” (*Younger v. Superior Court of Sacramento County, supra*, at 119.)
15 Petitioners have stated no facts that support a claim the Respondents have any intention to neglect
16 or ignore the overtime requirements under the FLSA.

17 Both Petitioners have failed to state *any facts* sufficient to support a cause of
18 action for an FLSA violation because neither petitioner alleges the Respondents failed to pay *any*
19 legally earned overtime to *any* state employee. By this action, Petitioners are requesting that this
20 Court issue an order compelling the State of California to comply with the terms of the FLSA
21 when the State of California has neither violated the FLSA nor expressed *any intention* to do so.
22 Petitioners have not alleged any justiciable “actual controversy,” and inappropriately seek an
23 advisory opinion from this Court, an action which this Court is powerless to perform.
24 Accordingly, this Court should grant Respondents’ demurrer because Petitioners have failed to
25 state facts sufficient to support a cause of action.

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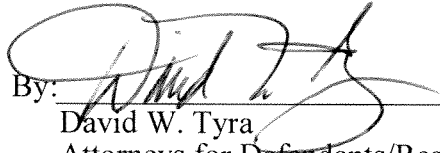
V.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request this Court sustain Respondents' demurrer without leave to amend and dismiss Petitioners' Petitions for Writ of Mandate and Complaints for Injunctive and Declaratory Relief.

Dated: January 13, 2009

KRONICK, MOSKOVITZ, TIEDEMANN &
GIRARD
A Law Corporation

By: 

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ARNOLD SCHWARZENEGGER, as
Governor of the State of California;
DAVID GILB, as Director of the
Department of Personnel Administration;
and DEPARTMENT OF PERSONNEL
ADMINISTRATION

1 **PROOF OF SERVICE**

2 I, Bao Xiong, declare:

3 I am a citizen of the United States and employed in Sacramento County, California. I am
4 over the age of eighteen years and not a party to the within-entitled action. My business address
5 is 400 Capitol Mall, 27th Floor, Sacramento, California 95814. On January 13, 2009, I served a
6 copy of the within document(s):

7 **MEMORANDUM OF POINTS AND AUTHORITIES IN**
8 **SUPPORT OF DEMURRER TO VERIFIED PETITIONS**
9 **FOR WRIT OF MANDATE AND COMPLAINTS FOR**
10 **DECLARATORY AND INJUNCTIVE RELIEF BY**
11 **GOVERNOR ARNOLD SCHWARZENEGGER, DAVID**
12 **GILB AND DEPARTMENT OF PERSONNEL**
13 **ADMINISTRATION**

- 14 by transmitting via facsimile the document(s) listed above to the fax number(s) set
15 forth below on this date before 5:00 p.m.
- 16 by placing the document(s) listed above in a sealed Federal Express envelope and
17 affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal
18 Express agent for delivery.
- 19 by causing personal delivery by Messenger of the document(s) listed above to the
20 person(s) at the address(es) set forth below.
- 21 by placing the document(s) listed above in a sealed envelope with postage thereon
22 fully prepaid, the United States mail at Sacramento, California addressed as set
23 forth below.
- 24 by transmitting via e-mail or electronic transmission the document(s) listed above
25 to the person(s) at the e-mail address(es) set forth below.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on January 13, 2009, at Sacramento, California.


Bao Xiong