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 15 Cross-Complainants JOHN CHIANG,
 16 in his official capacity as CONTROLLER OF
 THE STATE OF CALIFORNIA
 and the OFFICE OF THE STATE CONTROLLER

17 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 18 **COUNTY OF SACRAMENTO**

19 DEBBIE L. ENDSLEY; CALIFORNIA)
 20 DEPARTMENT OF PERSONNEL)
 21 ADMINISTRATION)

22 Petitioners/Plaintiffs)

23 v.)

24 JOHN CHIANG, sued herein in his)
 25 official capacity only; OFFICE OF)
 STATE CONTROLLER)

26 Respondents/Defendants)

Case No. 34-2010-80000591

**OPPOSITION OF RESPONDENTS/
 DEFENDANTS JOHN CHIANG AND
 THE OFFICE OF THE STATE
 CONTROLLER TO PETITIONERS/
 PLAINTIFFS DEBBIE L. ENDSLEY AND
 THE DEPARTMENT OF PERSONNEL
 ADMINISTRATION'S *EX PARTE*
 APPLICATION FOR A TEMPORARY
 RESTRAINING ORDER AND ORDER
 TO SHOW CAUSE RE PRELIMINARY
 INJUNCTION**

27 _____)
 28 JOHN CHIANG, in his official capacity)
 as CONTROLLER OF THE STATE OF)
 CALIFORNIA; and the OFFICE OF THE)

[Filed concurrently with the Declarations of
 John Chiang, Don Scheppman, John Harrigan,
 Lisa Crowe, Jim Lombard and Brent Erhman]

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STATE CONTROLLER
Cross-Complainants,

v.

DEBBIE L. ENDSLEY, sued herein in
her official capacity only; CALIFORNIA
DEPARTMENT OF PERSONNEL
ADMINISTRATION

Cross-Defendants.

Assigned to: Hon. Patrick Marlette

Hearing Date: July 16, 2010

Time: 11:00 a.m.

Dept: 19

Trial Date: None yet assigned

Complaint Filed: July 6, 2010

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1 The circumstances of this case involve substantial elements of tragedy, complexity, and
2 simplicity:

3 -- Tragedy, because state workers are being asked by their employer, the state of
4 California, to continue to work during a budget impasse not of their making, for an indeterminate
5 period, at a minimum wage, or without pay, while their mortgages, other debts, and living
6 expenses incurred on the basis of their stated wages continue apace.

7 -- Complexity, because the federal and state laws and regulations applicable to state
8 employees' wages and the exigencies of unexpected (but required) overtime work by state
9 employees combine with the state's antiquated computerized payroll system to make the process
10 far too difficult to change except in limited and incremental ways, and only then with many
11 months of advance planning.

12 -- Simplicity, because it is simply impossible for the Controller (sometimes referred to
13 herein as the "SCO," for the State Controller's Office) to comply with the terms of the Pay Letter
14 issued by the Department of Personnel Administration ("DPA"). Even an attempt at compliance
15 would itself massively and adversely affect the ability of the state to issue its payroll. This is
16 despite the fact that efforts have been ongoing for a decade -- efforts over which the Governor,
17 DPA, and other executive agencies have had notably greater control than the SCO -- to replace
18 the state's outdated payroll system in a way that would meet the state's current needs.

19 At the end of the day, the inability of the state to lower state employee wages as set out in
20 the current DPA Pay Letter, and then to raise them again in a matter of weeks, is the result of a
21 payroll system that has massive gaps and needs massive changes. Maybe, at some point in the
22 future, that level of functionality will be attainable -- but not now, and not absent an agreement by
23 all of the executive agencies and the Legislature that systems with the necessary level of
24 functionality will be procured and placed into operation.

25 I. BACKGROUND

26 As detailed in *White v. Davis*, 30 Cal. 4th 528, 533 (2003), and *Gilb v. Chiang*, No.
27 C061947, 2010 WL 2637734, at *1 (Cal. Ct. App. July 2, 2010), so-called "budget impasses"
28 have unfortunately become common in California. In such circumstances the Controller has been
placed in an extremely difficult situation.

In *White v. Davis*, the California Supreme Court addressed a set of budget impasse issues,
holding (a) that state employees are constitutionally entitled ultimately to receive their full wages
or salaries via a retrospective payment after termination of the impasse, but (b) that the Controller

1 may not make payments to employees during an impasse -- *i.e.*, without the appropriations that
2 are inherent in a timely budget. *White v. Davis*, 30 Cal. 4th at 535. However, the Court specified
3 that there exist three exceptions to the latter prohibition: payments may be made during a budget
4 impasse (1) if they are authorized by continuing appropriations enacted by the Legislature, (2) if
5 they are “authorized by a ‘self-executing’ provision of the California Constitution (for example,
6 the payment of elected state officers’ salaries under art. III, § 4 of the Cal. Const.),” and (3) when
7 “payment is mandated by federal law (for example, the prompt payment of those wages mandated
8 by the federal Fair Labor Standards Act)” (“FLSA”). *Id.* at 538-45.

8 *White v. Davis* raised, but did not decide, another issue -- namely, whether there would be
9 a different result if it were infeasible or impossible for the Controller to pay the minimum wages
10 specified by the FLSA while still complying with the overtime-related requirements of the FLSA.
11 The infeasibility of doing both, as asserted by the Controller in *White v. Davis*, was founded on
12 the fact that the state employs a “negative” payroll system, whereby wages are actually paid on
13 the last day of a pay period, based upon the payroll that is computed on a “cut-off” date some ten
14 days before the end of that pay period. In such a system, payment calculations must be made on
15 the cut-off date so that pay can actually issue on the last day of the period. Employees in such a
16 system may work overtime after the cut-off date, but they will not receive the payment due under
17 the FLSA, since the FLSA mandates that employees who work overtime must receive in prompt
18 fashion on payday not just their minimum wages for all time worked in a pay period, but their full
19 regular rates of pay on which the overtime rate is calculated. *Id.* at 577-78. In dictum, the *White*
20 *v. Davis* court indicated that while it was “skeptical” of this particular infeasibility argument, it
21 added that “we do not believe it would be appropriate to attempt to definitively resolve the claim
22 at this juncture.” *Id.* at 578-79.

21 In *Gilb v. Chiang*, the Superior Court for Sacramento County reached the infeasibility
22 issue on the facts presented at the time, which related to the state’s 2008 budget impasse. The
23 Superior Court held that “the defense of impossibility may apply if performance is impracticable
24 because of extreme and unreasonable difficulty or expense.” *Gilb v. Chiang*, No. 34-2008-
25 8000026, slip op. at 15 (Sacramento Superior Court March 18, 2009) (emphasis deleted). Indeed,
26 the Court held that the “impossibility defense [asserted by the Controller] exists” *Id.*
27 However, the Court also concluded, on the basis of the evidence presented concerning
28 infeasibility in 2008, that the Controller had failed to establish the factual predicates of the
defense. *Id.*

1 In its recent July 2, 2010 decision on appeal, the Third Appellate District specifically
2 declined to affirm the Superior Court's infeasibility holding in *Gilb*:

3 We decline to consider the feasibility issue, because it involves variables that may
4 or may not occur in the future, depending on the content of any future pay letter
5 by DPA, and the state of the evidence in any future litigation. We will not
speculate as to the future capabilities of the payroll system that will be in place at
the time of future budget impasses.

6 *Gilb v. Chiang*, 2010 WL 2637734 at *8. (emphasis added). Thus, even leaving aside the fact
7 that the decision in *Gilb v. Chiang* is reviewable by the California Supreme Court, *Gilb* involves
8 only a trial court ruling on infeasibility based on evidence produced in 2008, which the Court of
9 Appeal did not affirm. The Court of Appeal decision requires that the infeasibility issue in future
10 budget impasse situations be decided pursuant to the evidence presented at that time, not on the
basis of the 2008 evidence.

11 As the Court is aware, there now exists yet another budget impasse. DPA has issued a
12 Pay Letter to the Controller, purporting to require payment to state employees of only the
13 amounts that DPA believes reflect the minimum wages required by the FLSA.

14 DPA's request for relief should be denied for multiple reasons. First, DPA is unlikely to
15 succeed on the merits of its claim. To begin with, it is simply impossible for the Controller to
16 comply with the Pay Letter -- not just impossible to comply both with the Pay Letter and the
17 overtime provisions of the FLSA, but wholly impossible period -- because of the many problems
18 with the state's antiquated payroll computer system. Also on the merits, the Pay Letter
19 impermissibly violates the law as enunciated in *White v. Davis* for three separate reasons, which
we will detail below.

20 Second, DPA's claim fails to satisfy the standards for issuance of a TRO or a preliminary
21 injunction. A TRO may be issued only to preserve the status quo, while DPA seeks a TRO that
22 would dramatically alter the status quo. As to the preliminary injunction issue, the ineffable
23 "harm" claimed by DPA is clearly outweighed by the harm that an injunction would inflict upon
the Controller, the state as a whole, and a multitude of state employees.¹

24
25
26 ¹ For purposes of this opposition, prepared very quickly and necessarily limited in scope,
27 the SCO could not present in detail all of its legal bases for challenging the lawfulness of the Pay
28 Letter. The Controller specifically reserves the right to assert his other defenses to the complaint
herein at later stages of the case.

II. DPA IS UNLIKELY TO SUCCEED ON THE MERITS

A. The Uncontradicted Evidence Shows that It Would Be Impossible for the Controller to Comply with the Pay Letter

As we have explained, the appellate decision in *Gilb v. Chiang* requires that this Court consider the Controller's impossibility defense on the basis of the evidence presented to the Court. We note at the outset that in other decisions involving an impossibility defense, the defense was considered only after an extensive hearing or trial on the merits. *See Washington v. Bd. of Supervisors*, 18 Cal. App. 4th 981 (Cal. Ct. App. 1993); *Bd. of Supervisors v. McMahon*, 219 Cal. App. 3d 286 (Cal. Ct. App. 1990). Here, the SCO's Chief Administrative Officer is available for examination, as is the SCO's Division Chief of Personnel Payroll Services Division and the independent experts who have analyzed the SCO's ability to implement a minimum wage plan.

The law is clear that a court cannot order relief that is impossible or impractical because of "extreme and unreasonable difficulty." Indeed, "[t]he law never requires impossibilities." Cal. Civ. Code § 3531. *See also McMahon*, 219 Cal. App. 3d at 299-300 ("Impossibility means not only strict impossibility but also impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved") (citation omitted).

Moreover, the Controller's determination that it is infeasible to comply with the Pay Letter is due considerable judicial deference. There is no dispute that the Controller is an elected state officer, vested by the California Constitution with responsibility for paying the state's lawful debts, *see* Cal. Const. Art. 16, § 7, and by statute with the authority to operate the state's payroll system (with exceptions not relevant here). And although the courts have sufficient "authority to enforce their constitutional judgments, . . . comity and separation of powers place significant restraints on courts' authority to order or ratify acts normally committed to the discretion of other branches or officials." *Butt v. California*, 4 Cal. 4th 668, 695 (1992).

In the context of a proceeding seeking judicial review of the Governor's reversal of the State Parole Board's decision to order parole of a prisoner, the California Supreme Court concluded that the Governor's determination must be upheld if it is supported by "some evidence." *In re Rosenkrantz*, 29 Cal. 4th 616, 666-67 (2002). As the court explained, "[t]he 'some evidence' standard is extremely deferential and reasonably cannot be compared to the standard of review involved in undertaking an independent assessment of the merits . . ." *Id.* at 665. In much the same way, the Controller's management of the state's fiscal and payroll

1 systems involve the exercise of judgment or discretion with respect to the capability of the payroll
2 system to accomplish specified ends, entitling the Controller to similar deference.

3 **1. An Independent Expert Report Demonstrates that Compliance With**
4 **DPA's Requested TRO is Not Feasible**

5 In March 2010, the SCO directed the retention of Crowe Horwath LLP ("Crowe"), one of
6 the largest consulting and accounting firms in the United States, to provide an independent
7 feasibility assessment of the SCO's legacy payroll and personnel systems' capacity to comply
8 with Business Requirements that are premised upon application of the FLSA and the California
9 Supreme Court's ruling in *White v. Davis*, in the event the state should enter a fiscal year without
10 an approved budget. Declaration of Brent M. Ehrman ("Ehrman Decl.") ¶¶ 2, 6. To undertake
11 this analysis, Crowe evaluated the SCO's systems in light of 28 Budget Impasse Business
12 Requirements which the SCO's legacy payroll and personnel systems must be able to satisfy to
13 comply with the FLSA and *White v. Davis*. Crowe conducted an in-depth analysis of the SCO's
14 legacy systems and processes, identified high-level gaps in those systems and processes, and
15 assessed the capacity for compliance with the Budget Impasse Business Requirements. *Id.* ¶ 8.

16 Crowe identified numerous and substantial gaps in SCO's existing legacy systems and
17 processes rendering them unable to satisfy the budget impasse payroll and payroll recovery
18 Budget Impasse Business Requirements, and definitively concluded that SCO cannot now satisfy
19 those Requirements. *Id.* ¶ 10. Based upon its independent analysis, Crowe identified and
20 assessed alternative (partial) "solutions" to satisfy the Budget Impasse Business Requirements
21 with recognition that any alternative "solution" identified would not provide the SCO with the
22 ability to simultaneously satisfy all Business Requirements at all times. *Id.* ¶ 11. In its
23 Alternative Solutions Assessment Report (*id.* Ex. B), Crowe explains its independent analysis of
24 the potential, albeit partial, solutions, including proposals made by DPA in 2008, and provides
25 details on the three most promising alternative (partial) solutions identified. The leading
26 alternative would require dozens of complex system process and design changes to be
27 implemented. *Id.* ¶ 12.

28 That partial solution would take an estimated 22-48 months (most likely estimate of 27.5
months), 33,000 to 69,000 hours of resource efforts (most likely estimate of 50,847 hours) and
between \$5,600,000 to \$11,700,000 (most likely estimate of \$8,695,021). *Id.* Ex. B at 4.
However, it is critical to note that in its Feasibility Assessment Report, Crowe identified the
problems of logical mutual exclusivity whereby no solution can simultaneously satisfy all
Business Requirements at all times, regardless of the level of technical automation. This finding

1 of “infeasibility” is explained in Section 4 of the Feasibility Assessment Report (*id.* Ex. A) at
2 pages 12-16. Infeasibility is the direct consequence of the negative pay system by which the SCO
3 is required to operate. *Id.* ¶ 10. The only way to reconcile the various conflicting legal
4 requirements is to enact a change in the law. Declaration of Jim Lombard (“Lombard Decl.”) ¶ 20.

5 **2. DPA Has Ignored Its Understanding of the Limitations in the Payroll**
6 **Infrastructure**

7 DPA has long known about the infeasibility of doing anything like what it asks.
8 Declaration of John Harrigan (“Harrigan Decl.”) ¶¶ 7-11, 18. It has, in fact, been a party to the
9 statewide upgrade effort known as the 21st Century Project. Harrigan Decl. ¶ 11, Lombard Decl.
10 ¶ 19. Also during the 2008 budget impasse, DPA itself proposed three (partial) solutions, all
11 three of which have been addressed by Crowe. Erhman Decl., Ex. B at 7. Further, DPA has long
12 experience with SCO’s technical inability to implement a number of payroll system changes, such
13 as flexibility in deferred compensation. Declaration of Don Scheppmann (“Scheppmann Decl.”)
14 ¶ 15, Harrigan Decl. ¶ 9. Further, DPA has frequently modified its contractual offers based on
15 feedback from SCO regarding the technical limitations of the payroll system. Harrigan Decl.
16 ¶¶ 8-9.

17 The inability to offer a “positive” pay option with pay lag is particularly relevant to this
18 suit. As described in detail at page 6 of the Crowe feasibility report, a “positive” pay option with
19 pay lag would allow SCO to pay individuals based on actual hours worked. Ehrman Decl. Ex. B.
20 at 6. Therefore, DPA is specifically aware that the SCO cannot implement the Pay Letter,
21 because it knows from past work with the SCO of the limitations inherent in the existing negative
22 payroll system. Harrigan Decl. ¶¶ 8-9.

23 **3. The Expense of Replacing Old Systems Can Render Government**
24 **Performance Infeasible**

25 The California Supreme Court has held that the cost of upgrading a system can render
26 performance impossible. In *Vernon v. Los Angeles*, 45 Cal. 2d 710 (1955), the City of Vernon
27 had contracted to dispose of its sewage through the Los Angeles City sewer system that
28 discharged sewage, untreated, offshore. *Id.* at 713, 717. However, the state later sued Los
Angeles for creating a public health nuisance, and Los Angeles was forced to build a new sewage
system at great expense. *Id.* at 719. Vernon contended that despite the vastly increased expense,
Los Angeles should be forced to continue to accept its sewage. Los Angeles argued that “since
further use of the facilities contemplated by the parties would be unlawful and the use of new

1 facilities . . . would be unreasonably excessive in cost, further performance under said contracts
2 by Los Angeles is excused.” *Id.* at 719. In accepting that argument, the Supreme Court stated:

3 The controlling principles as to legal impossibility excusing performance have been
4 long recognized in this state and are stated in *Mineral Park Land Co. v. Howard*
5 (1916), supra, 172 Cal. 289, 293 . . . : “A thing is impossible in legal contemplation
6 when it is not practicable; and a thing is impracticable when it can only be done at
7 an excessive and unreasonable cost.”

8 *Id.* at 719-20 (emphasis added). That is the case here. DPA seeks to force the SCO to
9 implement a pay letter that cannot be implemented without the expenditure of millions of
10 dollars of systems upgrades. Ehrman Decl. ¶ 14. To attempt to implement the pay letter
11 without the necessary upgrades would lead to certain failure. Harrigan Decl. ¶¶ 19-21.

12 **4. The Fact that Government Moves Slowly Does Not Preclude an**
13 **Impossibility Defense**

14 It is undisputed that the SCO’s payroll system is antiquated. The Legislature has settled
15 that question with Government Code § 12432, which provides as follows:

16 The Legislature hereby finds and declares that it is essential for the state to
17 replace the current automated human resource/payroll systems operated by the
18 Controller to ensure that state employees continue to be paid accurately and on
19 time and that the state may take advantage of new capabilities and improved
20 business practices. To achieve this replacement of the current systems, the
21 Controller is authorized to procure, modify, and implement a new human resource
22 management system that meets the needs of a modern state government. This
23 replacement effort is known as the 21st Century Project.

24 It is also undisputed that the 21st Century Project has been in progress for nearly a decade
25 but was stalled twice during that time. Initially, there was a delay of four years due to budgetary
26 constraints. Harrigan Decl. ¶ 15. Thereafter, there were further delays due to the bankruptcy of a
27 key contractor. Harrigan Decl. ¶ 16; Lombard Decl. ¶¶ 16-17. Further, the intermittency of the
28 project has created additional barriers to completion, due to the loss of key knowledgeable state
personnel, as well as contractors. Harrigan Decl. ¶ 16; Scheppmann Decl. ¶ 8. These delays are
in no way attributable to the SCO. Further, the SCO is not alone responsible for the project. To
the contrary, it involves numerous state agencies, including DPA. Lombard Decl. ¶ 19, Harrigan
Decl. ¶ 11. Indeed, the Steering Committee of the 21st Century Project is without doubt
controlled by the Governor, as 4 of the 6 members of the committee are hand-picked appointees
of the Governor. Lombard Decl. ¶ 10; Harrigan Decl. ¶ 11; Scheppmann Decl. ¶ 21. Hence DPA
cannot now be heard to complain about the fact that the project has not been completed.

1 It is a fact of life that government sometimes moves slowly. Indeed, the California
2 Supreme Court has held that slow government action can give rise to the legal defense of
3 impossibility. In *Christin v. Superior Court*, 9 Cal. 2d 526 (1937), the defendants had brought a
4 petition to prevent the superior court from proceeding with an action that had not been brought to
5 trial within 5 years, as required by the Code of Civil Procedure. *Id.* at 528. *Christin* held that the
6 delay could not be held against the plaintiff because of the practical impossibility of proceeding to
7 trial during the appeal, stemming from a jurisdictional issue. While the Supreme Court noted that
8 there were a number of ways trial could have theoretically proceeded, such as a trial in the wrong
9 venue, doing so where substantial uncertainty existed would have been an “unnecessary expense”
10 and potentially a “useless proceeding.” *Id.* at 531-32. Thus, the plaintiff was not held responsible
11 for the delay.

12 Here, the SCO cannot be charged with the delay in implementing an upgraded system.
13 The upgrade is a massive undertaking specifically called for by the Legislature, which the
14 Legislature has funded intermittently. The SCO has worked diligently with the other departments
15 and stakeholders to implement the 21st Century Project. Lombard Decl. ¶¶ 10-19; Scheppmann
16 Decl. ¶¶ 21-24; Harrigan Decl. ¶¶ 11-16. The fact that several years have passed since the project
17 was started does not make the DPA’s proposed action any less impossible.

18 **5. Implementing the Crowe Report Recommendations Would Require** 19 **Legislative Action**

20 If the Court were to order the SCO to implement the Crowe recommendations, rather than
21 direct the parties to await legislative action that would address the permanent infeasibility
22 findings in the Crowe report, legislative action would still be required before the SCO could
23 proceed. In order to support such an urgently needed expenditure of this size, the SCO would
24 need to make an emergency request pursuant to Budget Act item 9840 in the form of a deficiency
25 request. Lombard Decl. ¶ 5. Since an emergency appropriation would involve upgrades to
26 existing state technology, however, the SCO would first need to petition the State’s Chief
27 Information Officer for approval. *Id.* This would be done by preparing and presenting a Special
28 Project Report. If the Chief Information Officer were to approve the Special Project Report, then
the SCO would present the emergency request to the Department of Finance. Based upon past
experience, this process could take anywhere between three to six months to complete. *Id.*

While it is possible to make an emergency request pursuant to Budget Act item 9840, the
SCO has sought appropriations for this very purpose in the past, and has been turned down by the
Department of Finance. Lombard Decl. ¶ 6. Most recently, on August 21, 2009, the SCO sent a

1 request to the Department of Finance for a late Budget Change Proposal, or a deficiency request,
2 seeking funds to implement minimum wage scenarios in the event of a budget impasse. Lombard
3 Decl. ¶ 7. The Department of Finance rejected that request on August 25, 2009. *Id.*

4 **B. The Pay Letter is Inconsistent with *White v. Davis* in Three Respects**

5 Quite apart from the issue of impossibility, which in and of itself is dispositive, there are
6 three other reasons DPA cannot succeed on the merits of its claim.

7 **1. The Pay Letter Contains No Exception for Self-Executing Provisions**
8 **of the State Constitution**

9 *White v. Davis* specifically acknowledges that “the Controller may authorize the payment
10 of state funds” when “payment is authorized by a self-executing provision of the California
11 Constitution (for example, . . . the payment of elected state officers’ salaries” under article III, § 4
12 of the state Constitution). *White v. Davis*, 30 Cal. 4th at 533, citing *White v. Davis*, 108 Cal. App.
13 4th 197 (Cal. Ct. App. 2002). However, the Pay Letter contains no exception for such state
14 employees and therefore purports to require the Controller to violate the Constitution with respect
15 to the elected officials who are recipients of state salary payments. The relief sought by DPA
16 accordingly should be denied.

17 **2. The Pay Letter Would Require Clear Violations of the FLSA’s**
18 **Overtime Provisions**

19 As *White v. Davis* holds, the FLSA requires that nonexempt employees who work
20 overtime during a pay period be paid their full regular rates of pay for that pay period plus time-
21 and-a-half for the overtime. *See White*, 30 Cal. 4th at 577-78, 29 U.S.C. § 207(a)(1); 29 C.F.R.
22 § 778.315. Moreover, the FLSA requires that amounts due by way of wages must be paid
23 promptly -- *i.e.*, on the payday when they are due. *Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993).
24 *White v. Davis* recognizes that as to persons who work overtime, therefore, payment of the
25 minimum wage at the end of the pay period in question is insufficient to comply with the FLSA’s
26 overtime provisions. *See White v. Davis*, 30 Cal. 4th at 577-78. However, the Pay Letter purports
27 to require the Controller to pay only the minimum wage to all employees (except those in six
28 exempted bargaining units), thus compelling a violation of the overtime provisions of the FLSA.
This conclusion is applicable to two categories of state employees who work overtime during a
pay period.

The conclusion is clear beyond any conceivable doubt with respect to employees who
work overtime before the cut-off date. Their identity is clearly known, yet under the Pay Letter
they will receive at the end of the pay period only the federal minimum wage, not the notably

1 larger amount required under the FLSA's overtime provisions. Under the basic reasoning of
2 *White v. Davis*, DPA simply is not authorized to issue such a directive.

3 The same conclusion is applicable also to the second category of state employees who
4 work overtime -- those who do so after the cut-off date and whose inclusion in the group of
5 employees who work overtime therefore is not known as of the cut-off date. The *White v. Davis*
6 court said in dictum that it was "skeptical" whether an FLSA violation would result from late
7 payment of full wages and overtime to such employees in certain circumstances, but it did not
8 decide the issue -- and in fact that court's reasoning indicates that such late payment would
9 indeed be a violation in the current factual context. *See id.* at 578-79. The dictum in *White*
10 suggested only that there may not be an FLSA violation if the full amounts of the overtime
11 portion of pay owed to overtime workers are paid in "the following pay period." *See id.* Here,
12 however, it is entirely unclear whether the current budget impasse will be resolved before the next
13 pay period, so that the hypothesizing of the *White v. Davis* court, even if correct, does not yield
14 the conclusion that the Pay Letter does not violate the FLSA.² It is also noteworthy in this respect
15 that if the Controller in fact were to reduce an overtime worker's wages or salary to the minimum
16 wage for the current pay period, it would be impossible for the SCO to increase that employee's
17 compensation to the full required amount until a time far after the end of a single pay period.
18 Declaration of Hon. John Chiang ("Chiang Decl.") ¶ 3; Declaration of Lisa Crowe ("Crowe
19 Decl.") ¶¶ 5-6; Harrigan Decl. ¶¶ 19-20.

20 Furthermore, as to the second category of state employees who work overtime, the *White*
21 *v. Davis* dictum does not properly distinguish (a) payment of full wages to employees who work
22 overtime, from (b) payment of the 50 percent overtime component of compensation. Although
23 there exists a grace period in certain circumstances -- arguably where "the correct overtime
24 compensation cannot be determined," *see White* at 579 -- permitting later payment of the 50
25 percent overtime component, 29 C.F.R. § 778.106, there is no such explicit grace period for the

26 ² The *White v. Davis* dictum also confirms the unassailable conclusion that failure to pay
27 full wages due to employees who worked overtime before the cut-off date, and whose identity is
28 known as of that date, clearly would violate the FLSA. That dictum specifically addressed
circumstances in which the state "pays full regular wages and overtime compensation to those . . .
employees who it reasonably anticipates will work overtime during a given pay period . . ." *Id.*
at 578-79. As to employees who work overtime before the cut-off date, however, the state not
only "reasonably anticipates" that they will work overtime -- it has actual knowledge that they in
fact worked overtime.

1 payment of full regular wages to such employees. *See* 29 C.F.R. § 778.315; *Biggs*, 1 F.3d at
2 1541-44. Thus, even as to state employees who work overtime only after the cut-off date,
3 compliance with the Pay Letter would violate the FLSA. Such violations of the FLSA could
4 result in very substantial liabilities for liquidated damages under the FLSA.³

5 **3. The Pay Letter Would Violate State and Federal Laws That Require**
6 **Deductions From Employee Wages**

7 Under federal and state law, various deductions must be made from the salary or wages
8 paid to state employees. Some examples of this are deductions for federal income tax, 26 U.S.C.
9 § 3402, state income tax, Cal. Unemp. Ins. Code § 13020, Social Security tax (in certain
10 circumstances), 26 U.S.C. § 3102, and Medicare tax, *id.* The Pay Letter says nothing about
11 whether such deductions are to be made from state employees' paychecks or, if so, in what
12 amount.

13 This puts the Controller in a quandary. Since the deductions in question are legally
14 mandated, the Controller is obligated to make them, but their amount is unclear. They could be
15 calculated (a) on the basis of each employee's full salary or wages, or (b) on a pro rata basis
16 reflecting the reduction in pay that the Pay Letter purports to dictate. Under option (b), the
17 complexities that already make compliance with the Pay Letter infeasible will be multiplied, in
18 that the deductions otherwise required by law will have to be recalculated in pro rata fashion for
19 each employee. Nor is it clear that pro rata deductions will comply with the federal and state laws
20 requiring mandatory deductions. Under option (a), on the other hand, the consequences are even
21 more chaotic, since the deductions based on full wages or salary will in many if not most
22 instances exceed the minimum wage/salary payment dictated by the Pay Letter. These

23 ³ For example, during the budget impasse in 2008, notwithstanding the Governor's plea
24 for restraint in authorizing overtime for employees, 72,485 State employees across all
25 departments worked overtime, for a total of 3,931,112 hours, at a total cost of \$166,185,035.20.
26 Crowe Decl. ¶ 4. Using these 2008 numbers, the average monthly salary for nonexempt
27 employees working overtime would be approximately \$5,000. *Id.* ¶ 5. As directed by the Pay
28 Letter, the minimum wage is an average of \$1,247, yielding a \$3,753 shortfall in the regular rate
of pay that, to comply with the FLSA, must be paid during the pay period in which the employee
works overtime. If the overtime numbers were the same for this year, the potential penalty for
FLSA violations (*i.e.*, a doubling of the underpayment) would be at least \$272,036,205 (\$3,753
monthly salary gap multiplied by the 72,485 employees who worked overtime at least once a
month). *Id.* ¶ 5.

1 consequences, no matter which option is taken by the Controller, counsel strongly against
2 granting the relief sought by DPA.

3 **III. QUITE APART FROM LIKELIHOOD OF SUCCESS, NEITHER A TRO NOR A**
4 **PRELIMINARY INJUNCTION SHOULD ISSUE**

5 **A. The TRO Sought by DPA is Inappropriate Because it Would Change the**
6 **Status Quo**

7 It is hornbook law that a “TRO is not a favored remedy [I]t should be requested only
8 in the most urgent circumstances.” 2 CEB California Civil Procedure Before Trial, § 32.41 (4th
9 ed. 2010). Here, DPA is not entitled to a TRO because of the nature of the relief it seeks, which
10 would not preserve the status quo but would change it.

11 The status quo of course involves the current situation in which state employees are paid
12 their full salary or wages. DPA wants to change that via issuance of a TRO. However, a TRO is
13 “an interlocutory order to keep the subject of litigation in status quo pending a full hearing to
14 determine whether the applicant is entitled to a preliminary injunction.” *Landmark Holding*
15 *Group, Inc. v. Superior Court*, 193 Cal. App. 3d 525, 528 (Cal. Ct. App. 1987) (emphasis added).
16 Hence DPA is not entitled to a TRO that would change the status quo. *See also Gray v. Bybee*, 60
17 Cal. App. 2d 564, 571 (Cal. Ct. App. 1943) (“a temporary restraining order . . . amounts to a mere
18 preliminary or interlocutory order to keep the subject of litigation in status quo”) (emphasis in
19 original).

20 **B. No TRO or Preliminary Injunction Should Issue Because the Harm It Would**
21 **Inflict Exceeds Any Harm that Would Otherwise Exist**

22 The determination of whether a preliminary injunction or TRO should be granted
23 generally calls for consideration of two interrelated factors: (1) the likelihood that the plaintiff
24 will prevail on the merits, and (2) the relative balance of harms that is likely to result from the
25 granting or denial of interim injunctive relief. *White v. Davis*, 30 Cal. 4th at 554. “The ultimate
26 goal of any test to be used in deciding whether a preliminary injunction should issue is to
27 minimize the harm which an erroneous interim decision may cause.” *Id.*, quoting *IT Corp. v.*
28 *County of Imperial*, 35 Cal. 3d 63, 73 (1983) (emphasis in original).

Moreover, the standard for irreparable harm is heightened when, as here, an injunction or
restraining order is sought against a public agency or officer. In such cases, a “significant”
showing of irreparable harm is required because of the “general rule against enjoining public
officers from performing their duties.” *Tahoe Keys Property Owners Ass’n v. State Water*
Resources Control Bd., 23 Cal. App. 4th 1459, 1471 (Cal. Ct. App. 1994); *see Agric. Labor*

1 *Relations Bd. v. Superior Court*, 16 Cal. 3d 392, 401 (1976); see also *O'Connell v. Superior Ct.*,
2 141 Cal. App. 4th 1452, 1464 (Cal. Ct. App. 2006) (“principles of comity and separations of
3 powers place significant restraints on courts’ authority to order or ratify acts normally committed
4 to discretion of other branches or officials”).

5 The balance of harms in this case tips dramatically in favor of denying DPA’s request for
6 a preliminary injunction. As described in the declaration of Controller Chiang, the Controller has
7 concluded that even an attempt to comply with the terms of the July 1 pay letter would
8 “massively and adversely” affect the SCO’s ability to issue the state’s payroll in a timely,
9 accurate, and lawful manner for many months. Chiang Decl. ¶ 3. Thus, the granting of a
10 preliminary injunction requiring that the SCO make such an attempt would throw the state’s
11 payroll system into disarray, resulting in missed and/or late pay and jeopardizing the finances of
12 many thousands of hard-working state employees who depend on their salaries to provide for
13 daily necessities and to support their families. Moreover, such missed or late pay, among other
14 things, potentially may expose the state of California to lawsuits and penalties for violations of
15 the FLSA. See note 3, *supra*.

16 Moreover, the *White v. Davis* court, in denying a preliminary injunction against the
17 Controller, underscored that the “courts must be especially sensitive about intruding upon the
18 Legislature’s fundamental -- and essentially political -- legislative and budget powers . . .” 30
19 Cal. 44 at 558. The Supreme Court warned against exactly what DPA is seeking from this court:
20 “lend[ing] support to an effort to increase the leverage on the Legislature to pass a budget bill.”
21 *Id.*

22 By contrast to the very real and substantial harm that a multitude of state employees will
23 suffer should a preliminary injunction issue, DPA does not even attempt to specify in its TRO
24 papers any actual harm that would result from the denial of a preliminary injunction.⁴ Instead,
25 DPA argues that the court may ignore the balance of harms inquiry and simply assume that
26 “public harm” will result from the denial of injunctive relief. DPA Br. at 10-11. However,
27 DPA’s suggestion that the Court should simply skip the balance of harms inquiry in determining
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⁴ DPA asserts in its complaint that the failure of the Controller to implement the terms of the Pay Letter during the budget impasse will, in some undefined way, impinge on the authority of DPA with respect to personnel matters. Complaint ¶ 40. Such generalized assertions are entirely insufficient to show any actual harm to DPA if a preliminary injunction is denied.

1 whether to grant an injunction is foreclosed under *White*. Moreover, as described below, the
2 authorities cited by DPA for this remarkable proposition do not support it.

3 Although DPA entirely fails to discuss this aspect of *White v. Davis*, that decision
4 confirms that the harm to state employees who depend on the State's payroll must be considered
5 in determining whether an injunction should issue. *White v. Davis* concluded that the trial court
6 abused its discretion in granting a preliminary injunction barring the then-Controller from making
7 payments from the state treasury in the absence of a budget bill or an emergency appropriation
8 "without considering the relative harms that would be imposed by denying or granting a
9 preliminary injunction." *White v. Davis*, 30 Cal. 4th at 560 ("As discussed above, the controlling
10 authorities make it clear that in evaluating a request for a preliminary injunction a court must
11 consider two factors -- both the likelihood of success on the merits, and the relative harms that
12 would flow from denying or granting a preliminary injunction"). In particular, the Court found
13 that a taxpayer's "general interest . . . in not having public funds disbursed unlawfully" was
14 insufficient to show immediate harm. *Id.* at 561. By contrast, in language directly applicable to
15 this proceeding, the Court found:

14 [G]ranteeing the preliminary injunction would cause great immediate harm to the
15 many persons who would be deprived of vital funds, frequently necessary to
16 obtain the necessities of life, and would threaten the continued delivery of a wide
17 range of essential public services.

16 *Id.*

17 Avoiding any mention of the relevant aspects of *White*, DPA claims, on the basis of *IT*
18 *Corp.*, *supra*, and *People v. Pac. Land Research Co.*, 20 Cal. 3d 10 (1977), that a court may grant
19 and uphold injunctive relief without examining actual harm, where the party seeking relief is a
20 governmental entity seeking to enjoin a violation of law. DPA Br. at 10-11. But neither *IT Corp.*
21 nor *Pacific Land Research* supports this proposition. First, DPA mischaracterizes *IT Corp.* by
22 selectively quoting certain portions of the decision. The holding in *IT Corp.* was carefully
23 cabined:

24 Where a governmental entity seeking to enjoin the alleged violation of an
25 ordinance which specifically provides for injunctive relief establishes that it is
26 reasonably probable it will prevail on the merits, a rebuttable presumption arises
27 that the potential harm to the public outweighs the potential harm to the
28 defendant.

1 *IT Corp.*, 35 Cal. 3d at 72 (emphasis added).⁵ Here, DPA seeks to enforce its own Pay Letter
2 rather than a statute that specifically provides for injunctive relief.⁶ *Pacific Land Research*
3 similarly fails to support DPA's broad assertion. In that case, the California Supreme Court
4 considered a trial court's grant of a preliminary injunction prohibiting the defendants from
5 making misrepresentations in violation of the Subdivided Lands Act, which, like the statute at
6 issue in *IT Corp.*, specifically provided for enforcement by injunction. *Pac. Land Research*, 20
7 Cal. 3d at 14-15. Moreover, the Court in *Pacific Land Research* stated that "the issue before the
8 court was whether defendants would suffer greater harm from [the] issuance [of an injunction]
9 than the People would suffer from its refusal." *Id.* at 21 (emphasis added).⁷

10 **IV. CONCLUSION**

11 DPA is entitled to no relief. It cannot succeed on the merits of its claims for multiple
12 reasons, chief among which is that the relief it seeks is precluded on impossibility grounds. In
13 addition, DPA's Pay Letter would require action that would directly contravene *White v. Davis* in
14 three key respects. In addition, the TRO sought by DPA is barred because it would change rather
15 than preserve the status quo. And with respect to a preliminary injunction, the injunction
16 requested by DPA would inflict far greater harm on the Controller, the state, and state employees
17 that is far greater than the supposed harm that would result absent an injunction.

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23 ⁵ *City of Los Angeles v. Silver*, 98 Cal. App. 3d 745 (Cal. Ct. App. 1979), also cited by
24 DPA, likewise concerned violations of a zoning ordinance.

25 ⁶ Moreover, contrary to DPA's position, at least one California court has balanced the
26 relative harms to parties in a case where a governmental entity sought injunctive relief for alleged
27 statutory violations. *See State Bd. of Barber Examiners v. Star*, 8 Cal. App. 3d 736, 739 (1970).

28 ⁷ Two 19th century decisions cited by DPA -- *Winn v. Shaw*, 87 Cal. 631 (1891) and *Santa
Rosa Lighting Co. v. Woodward*, 119 Cal. 30 (1897) -- are likewise inapposite.

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Respectfully submitted,

OFFICE OF THE STATE CONTROLLER

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