

CASE NO. _____

**IN THE COURT OF APPEALS OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT**

JERRY B. EPSTEIN, A. REDMOND DOMS, and DONALD A. CASPER
Petitioners/Plaintiffs,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

ARNOLD SCHWARZENEGGER, Governor of the State of California,
RON DIEDRICH, Acting Director of the Department of General Services, and
DEPARTMENT OF GENERAL SERVICES,
Real Parties in Interest.

San Francisco Superior Court Action No. CGC-10- 505436
Honorable Charlotte Walter Woolard, Presiding
Department 302: (415) 551-3823

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PETITION FOR WRIT OF WRIT OF MANDAMUS
EMERGENCY STAY AND RELIEF REQUESTED
BY TUESDAY, DECEMBER 14, 2010, AT 12:00 NOON
(PROPERTY SALE TO CLOSE DECEMBER 15, 2010)**

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On *December 15, 2010*, eleven historic and essential state properties will be sold by the State to private – and in some cases, foreign – investors. Once that happens, these critical and historic properties will no longer be under public ownership, control, or management, but will instead be subject to alteration and management at the whim of those private investors.

As detailed in the briefing before the Superior Court and discussed more fully below, the sale is of substantial public and Constitutional importance and must be afforded proper judicial examination – not simply rushed through before an arbitrary deadline. **The December 15, 2010 deadline is not fiscally necessary.** Because the transaction is unconstitutional and illegal, a writ reversing the Superior Court's order denying Petitioners' request for a preliminary injunction – **and most critically at this juncture, an immediate stay of the transaction pending appellate review** – is necessary to preserve the status quo and allow proper judicial review of the sale.

**II. WRIT RELIEF AND AN IMMEDIATE STAY
OF THE STATE'S PROPOSED SALE IS NECESSARY
TO RESOLVE ISSUES OF CRITICAL IMPORTANCE
TO PETITIONERS AND ALL CALIFORNIA RESIDENTS**

A. WRIT RELIEF IS APPROPRIATE

Writ relief is appropriate where review of a superior court's interlocutory order until after a final judgment is entered is an inadequate remedy and will result in irreparable harm. (*See Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1274.) Indeed, where a superior court ruling "will result in a trial on nonactionable claims, a writ of mandate will lie to preserve the resources of the court and the parties." (*Feminist Women's Health Center v. Superior Court* (1997) 52 Cal.App.4th 1234, 1238.) Additionally, a court may grant writ relief where the issue presented is of widespread interest (*Brandt v. Superior Court* (1985) 37 Cal.3d 813, 816) or presents a significant and novel constitutional issue (*Britt v. Superior Court* (1978) 20 Cal.3d 844, 851-52). This case presents all of these elements.

This action challenges the State's sale of properties which house the California Supreme Court, state appellate courts, Attorney General offices, and critical state law enforcement and executive branch facilities. These properties also possess historical and cultural significance to California residents.

In the underlying proceedings, Petitioners sought a preliminary injunction, enjoining the State's proposed sale-leaseback from going forward as planned on December 15, 2010. In their briefs, Petitioners argued that the proposed transaction is unlawful in that it seeks to sell appellate court facilities without approval of the Judicial Council, is an unconstitutional gift of public goods, constitutes a waste of public funds, and was procured through an impermissible delegation of legislative authority, is not in the best interests of the state, and violates Proposition 58. The Superior Court denied Plaintiffs' request for a preliminary injunction, finding that Plaintiffs lacked standing to obtain prejudgment relief and were not likely to prevail on the merits.

Writ relief is necessary to resolve these critical issues. Absent immediate review of the Superior Court's order, Petitioners and California residents will suffer irreparable injury. If the order stands and the transaction is allowed to move forward, these important state properties will no longer be under any form of public control. Indeed, absent immediate review, Petitioners will be deprived of the very relief they seek.

B. AN IMMEDIATE STAY IS NECESSARY TO PRESERVE THE STATUS QUO AND THE EFFECTIVENESS OF THIS COURT'S JURISDICTION

Given that the sale of the properties at issue is **set to close in two days**, an immediate stay is the **only** way that this Court will be able to provide relief should it ultimately determine that the Superior Court erred

in denying Petitioners' request for a preliminary injunction. Given the substantial public importance of these issues, Petitioners respectfully urge this Court to issue an immediate stay of the transaction, so this matter may be briefed and decided on the merits prior to the sale.

California has long recognized the inherent power of the appellate courts to issue stays to preserve their own jurisdiction. (*Ohaver v. Fenech* (1928) 206 Cal. 118, 123-124.) Code of Civil Procedure section 923 expressly states that a reviewing court may "stay proceedings during the pendency of an appeal ... or to make any other order appropriate to preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction."

A reviewing court's authority under section 923 includes the authority to issue an injunction. (*See People ex rel San Francisco Conservation and Development Commission v. Town of Emeryville* (1968) 69 Cal.3d 533, 538; *Agricultural Labor Relations Board v. Tex-Cal Land Management, Inc.* (1987) 43 Cal.3d 696, 710; *County of San Bernardino v. City of San Bernardino* (1997) 15 Cal.4th 909, 920 (on motion of appellants under section 923, court enjoined respondent pending final decision on appeal).) Such an order is appropriate where it is necessary to preserve the status quo and the effectiveness of any order to be entered by the court. (*Id.*; *see also Voorhies v. Greene* (1983) 139 Cal.App.3d 989, 995-96.) As one court explained, "it would be a terrible situation if in a proper case an

appellate court were powerless to prevent a judgment from taking effect during appeal, if the result would be a denial of the appellant's rights if his appeal were successful." (*Deepwell Homeowners Protective Assn. v. City Council* (1965) 239 Cal.App.2d 63, 65-66.)

Here, the last peaceable, uncontested status quo was November 14, 2010, the day before final executive branch approval of DGS' agreement to sell the Eleven Properties to California First. If escrow closes, the status quo will be turned on its head. Title to the property will change, the private owner will get the keys, and the transaction cannot be undone.

Closing on December 15, 2010 is not required in order to fulfill the sale's stated purpose, which is to help patch a budget deficit for the current fiscal year. Rather, **as both State Treasurer Bill Lockyer and State Controller John Chiang have indicated, the December 15, 2010 deadline is fiscally meaningless.** (Deposition Transcript of Treasurer Bill Lockyer ("Lockyer Tr.") 18:11-20:12, Vol.VII, Exh.54, pp.01518-20; Declaration of Controller John Chiang ("Chiang Decl.") at ¶¶3-4, Vol.VIII, Exh.64, p.01743.) Indeed, Petitioners believe that the deadline is nothing more than an effort by the current administration to charge ahead and complete the transaction before a new administration can take office. Allowing a transaction of such major public importance to be pushed through despite serious questions of constitutionality and legality would do a disservice to the taxpayers and the citizens of the State.

Because the December 15 closing date is artificial – and given the merits of this action – this Court should issue a stay to preserve the status quo enjoining the State from closing the sale and allowing title to change hands before this Court can address the issues raised in this Petition.

**III. PETITIONERS AND INTERVENORS
HAD SUFFICIENT STANDING**

**A. THE TRIAL COURT’S ORDER THAT TAXPAYERS
LACKED STANDING TO PREVAIL ON THE MERITS WAS
INCORRECT**

The trial Court erroneously held that “[a]s taxpayers, plaintiffs lack sufficient standing to prevail on the merits,” citing *Cohen v. Bd. of Supervisors*, (1986) 178 Cal.App.3d 447 and *White v. Davis*, (2003) 30 Cal.4th 528. Petitioners have sufficient standing to prevail on the merits for a Writ of Mandamus and for declaratory and injunctive relief. This was never disputed in the Superior Court. The only question before the Superior Court was whether Plaintiffs had sufficient standing to obtain prejudgment relief.

**B. PETITIONERS AND INTERVENORS HAVE STANDING TO
BE AWARDED A PRELIMINARY INJUNCTION**

Importantly, neither *Cohen* nor *White* is controlling here and neither case prohibits prejudgment relief to a taxpayer plaintiff.

First: Neither *Cohen* nor *White* is a standing case, and therefore neither case supports the Court's conclusion on standing.¹ (Reporter's Transcript of Proceedings Dated Friday, December 10, 2010, ("Hearing Tr.") 9:26-28, Vol.VIII, Exh.69, p.01791.)

Second: Defendants rely heavily on *Cohen* for the proposition that prejudgment relief may not be awarded to taxpayer petitioners.

(Defendants' Opposition to Motion for Preliminary Injunction

("Opposition"), Vol.V, Exh.34, pp.00931-32; "Hearing Tr., 11:25-12:25,

Vol.VIII, Exh.69, pp.01793-94. However, Defendants' reading of *Cohen* is

far too expansive to be legally sound. In *Cohen*, the Court found that

plaintiff had "claimed no further actual or threatened harm to himself

personally." *Cohen*, 178 Cal.App.3d at 454. Here, Petitioners have

suffered personal, individualized harm as the result of the sale-leaseback.

Petitioners were terminated from long-held public office by Defendants, as

a direct consequence of their opposition to the sale that is the subject of this

litigation. (Declaration of Jerry B. Epstein, ¶¶3,6, Vol.I, Exh.7, p.00174;

Declaration of A. Redmond Doms, ¶¶3-4, Vol.I, Exh.8, p.00184.)

Third: The *Cohen* court also reflected on the absence, in that case, of any "affidavits or other documents ... to show that persons in the community at large felt imminently threatened." (*Id.* at 454.) Here,

¹ White and Cohen are "irreparable harm" cases. They hold that the mere expenditure of taxpayers dollars in and of itself is generally insufficient to establish irreparable injury.

Petitioners have presented the court with evidence of harm beyond that of taxpayer harm, including:

- **Permanent harm to the community:** Evidence that the citizens and State of California will forever lose ownership of eleven iconic and historic properties that are slated to be sold by Defendants. This is not a situation where the mere enforcement of an ordinance during the course of litigation is at issue (as in *Cohen*). Here, plaintiffs seek to temporarily halt the sale of state assets which sale cannot be undone if it proceeds on Wednesday.
- **Illegality:** The Declaration of Justice Huffman, who, as a member of the Judicial Council, has attested to the fact that the requirements of Government Code Section 69204 have not been met. (Declaration of Justice Richard D. Huffman (“Huffman Decl.”), Vol.I, Exh.5, p.00153-54.).
- **Violation of Separation of Powers/Potential Harm to the Court System:** The Judicial Council of California Administrative Office of the Court’s Brief, and the Declaration of Burt Hirschfeld in Support thereof plainly state the harm to the Judicial Council and Judiciary of proceeding with a sale that violates the Separation of Powers Doctrine. (Brief of Judicial Council, Vol.VII, Exh.57, pp.01674-88;

Declaration of Burt Hirschfeld (“Hurschfeld Decl.”) Vol.VIII, Exh.58, pp.01689-01695; *See*, Five DGS Letters (reflecting the DGS’ own admission that the Judicial Council’s authority over appellate court facilities stems from the Separation of Powers Doctrine) Vol.I, Exh.6, pp.00157-72.) The AOC also outlines potential harm to the court system. (Brief of Judicial Council, Vol.VII, Exh.57, pp.01683-87.)

- **Harm to government employees:** Evidence of mass lay-offs of government employees that will result from the sale-leaseback. (Declaration of Joseph Cotchett, Vol.II, Exh.12, pp.00220-26.)
- **Potential criminal activity:** Evidence of illegal kick-backs to government officials (Lockyer Tr. 33:9-34:15, Vol.VII, Exh.54, pp.01533-34; *see e.g.*, Various News Articles attached to Expert Report of Jane Nettesheim (“News Reports”), Vol.VII, Exh.55, pp.01624-33.) and evidence of potential bid rigging. (Preliminary Injunction Tr., 40:6-25, Vol.VIII, Exh.69, pp.01819-20; Letter from Legislative Analyst’s Office, November 5, 2010 (“November 5, 2010 LAO Letter”), Vol.I, Exh.1, pp.00045-46; News Reports, Vol.VII, Exh.55, pp.01631-33; Declaration of Donald A. Casper, ¶¶13-15, Vol.VI, Exh.49, pp.01410,01415.)

Fourth: Defendants' reliance of *White v. Davis*, (2003) 30 Cal.4th 528, 555-556, is inapposite because that decision does not stand for an outright prohibition of prejudgment injunctive relief in a taxpayer case – in fact, the Court expressly states:

In this case, however, **we need not decide whether interim harm to a taxpayer's interest is ever in itself sufficient to justify a preliminary injunction...**

White 30 Cal.4th at 557 (emphasis added.)

Fifth: As stated during oral argument, in California, the fundamental inquiry is **always whether the plaintiff has sufficiently plead a cause of action, not whether the plaintiff has some entitlement to judicial action separate from proof of the substantive merits of the claim advanced.**

Jasmine Networks, Inc. v. Superior Court (2009) 180 Cal.App.4th 980.

(Preliminary Injunction Tr., 8:17-9:3, Vol.VIII, Exh.69, p.01790.)

Petitioners have sufficiently pled causes of action for both writ injunctive relief. As discussed in *Jasmine Networks*, our state courts should be careful not to infuse a federally-derived concept of standing (which is rooted in the constitutionally limited subject matter jurisdiction of those courts) into state decisional law, which should be based on Cal. Const., Art. VI, §10, which empowers our superior courts to adjudicate any “cause” brought before it.

(*Jasmine Networks* 180 Cal.App.4th at 990.)

**IV. PETITIONERS ARE LIKELY TO
PREVAIL ON THE MERITS BECAUSE THE
SALE-LEASEBACK IS ILLEGAL**

Petitioners, demonstrated five separate grounds for determining that the sale-leaseback is an illegal transaction:

- (1) The sale-leaseback violates section 69204²;
- (2) The sale-leaseback constitutes an unconstitutional gift of public assets to a private company³;
- (3) Section 14670.13 constitutes an impermissible delegation of legislative power to a state agency⁴;
- (4) DGS violated the authorizing statute (section 14670.13) which requires that any sale-leaseback be in the best interests of the state⁵;
- (5) The sale-leaseback violated Proposition 58 which was designed to prevent the use of long-term debt to plug short term budget shortfalls;

The trial court **did not rule on the fourth and fifth grounds** for finding the sale-leaseback illegal. (Order Denying Preliminary Injunction (“Final Order”) Vol.VIII, Exh.70, pp.01829-31.)

² See Section IV.C, *infra*.

³ See Section IV.B, *infra*.

⁴ See Section IV.D, *infra*.

⁵ The trial court’s order states only that “the “best interests of the state” direction is permissible” – this goes to the court’s finding that there was not an improper delegation, not to the issue of whether the DGS met the statutory mandate. See Section IV.E, *infra*.

A. THE SALE-LEASEBACK CONSTITUTES WASTE

Plaintiffs demonstrated that the sale represents waste as defined in *Sundance v. Municipal Court*, (1986) 42 Cal.3d 1101.

First: Plaintiffs submitted an expert economic analysis of the transaction by Stanford Consulting Group. (Expert Report of Stanford Consulting Group (“Stanford Report”) Vol.VII, Exh.55, pp.01590-01666.) This was not rebutted by the opposing party. The report reviewed the economic analyses done by DGS, the LAO and the Chair of the Council of Economic Advisors to the Controller and concluded that the sale represented waste.

Second: Defendants’ contention that the transaction has a “public benefit” and therefore cannot be waste is incorrect. Plaintiffs demonstrated that there is no public benefit in this case. Defendants’ position requires that the Court look only to the immediate impact of the transaction, not the overall effect. Because the transaction causes significant fiscal harm to the state in perpetuity, there is no public benefit.

B. THE SALE-LEASEBACK IS AN UNCONSTITUTIONAL GIFT OF PUBLIC ASSETS

The court held that “Plaintiffs do not demonstrate an illegal gift under *Community Memorial Hospital v. County of Ventura* (1996) 50 Cal.App.4th 199.” (Final Order, Vol.VIII, Exh.70, pp.01830.)

Community Memorial Hospital held that the County of Ventura had the authority to compete with non-governmental hospitals and physicians for paying customers. (*Id.*) The court held that while gifts of public money are prohibited under Cal. Const. Article XVI section 6, money expended in the generation of revenue is not a gift. The decision states: “Money spent for public purposes is not a gift even though private persons may benefit. [citation omitted] The determination of what constitutes a public purpose is primarily a matter for the Legislature and will not be disturbed as long as it has a reasonable basis.” (*Community Memorial Hospital*, 50 Cal.App.4th at 207.)

The trial court’s ruling is in error because, the sale-leaseback does not in fact generate revenue and does not have a reasonable basis. (November 5, 2010 LAO Letter, Vol.I, Exh.1, pp.00035-47; Stanford Report, Vol.VII, Exh.55, pp.01592-1614.)

The standard for interpreting whether an expenditure is a gift is based upon the public or private character of the action. Where the action is intended to serve a public purpose it is generally not a gift. (*Jordan v. Department of Motor Vehicles*, (2002) 100 Cal.App.4th 431, 450 (finding that a payment of \$88 million arbitration award settlement related to an \$18 million dispute was a gift of public funds).)

Despite the claims and posturing of Defendants’ arguments that the sale to California First serves a public purpose by closing the budget gap,

there are serious questions about its timing, its intent and whether the sale was designed to benefit private individuals. Defendants are in a needless and unnecessary hurry to race to complete the transaction during this calendar year despite the fact that the fiscal year does not end until June 2011. (Chiang Decl., ¶¶3-4, Vol.VIII, Exh.64, pp.01743.) This hurry, combined with the **payment of finders' fees**, and the lack of checks on DGS' authority to select a purchaser raises serious questions regarding the true purpose of the transaction. (Lockyer Tr. 33:9-34:15, Vol.VII, Exh.54, pp.01533-34; *see e.g.*, News Reports, Vol.VII, Exh.55, pp.01624-33.)

Further, **the transaction largely benefits only private parties and actually significantly harms the taxpayers of the state and the public at large**. Defendants argue that the existence of "consideration" proves that this is not a "gift." However, this argument, like Defendants' other contentions regarding the economic impact of the transaction, ignores plain facts from the state's non-partisan economic experts about the sale. The existence of the \$2.3 billion sale price and its characterization as "consideration" is misleading. "Consideration" in this case merely means that a private party will provide cash up front for both the right to own highly valuable property throughout the state and to be paid by the state over a term of fifty years at an exceptionally high rate.

Defendants' arguments regarding deference to the legislature are irrelevant in this context for two reasons. First, the legislature did not make

any findings that the sale-leaseback at issue was for a public purpose. It delegated away all of its oversight and had no authority to change the terms of the sale. Second, Defendant DGS is the only party who has conducted an economic analysis of the sale which indicates that the transaction provides any public purpose or benefit to the state. The short-sighted belief that generating revenue must be done prior to the end of the calendar year provides no long-term public benefit and in fact will cause significant harm to the public.

Petitioners are entitled to prejudgment relief as the sale-leaseback constitutes a gift of public funds to a private party. Furthermore, as Petitioners have uncovered evidence of potentially illegal kick-backs as well as bid-rigging. (Preliminary Injunction Tr., 40:6-25, Vol.VIII, Exh.69, pp.01819-20; Lockyer Tr. 33:9-34:15, Vol.VII, Exh.54, pp.01533-34; Declaration of Donald A. Casper, ¶¶13-15, Vol.VI, Exh.49, pp.01410,01415; *see e.g.*, News Reports, Vol.VII, Exh.55, pp.01624-33.). A preliminary injunction will serve the additional function of permitting discovery to be completed related to the existence of bribes and the methods used by DGS to prevent corruption or the funneling of public goods to private persons.

C. **THE SALE OF THE APPELLATE COURT FACILITIES WITHOUT JUDICIAL COUNCIL APPROVAL VIOLATES SECTION 69204 AND THE SEPARATION OF POWERS DOCTRINE**

The trial court's ruling that the sale-leaseback does not violate Gov. Code §69204 constitutes error. The trial court's reasoning relies on two premises, both of which are erroneous. First, that Gov. Code §14670.13 states that "notwithstanding any other law", the sale can go forward, and second, that Gov. Code §69204 does not designate the Judicial Council as the owners of the properties, and its authorization is not required. (Final Order, Vol.VIII, Exh.70, pp.01829-31.)

The reasoning for the order is erroneous because §§69204 and 14670.13 can be harmonized and because the Judicial Council enjoys authority irrespective of actual ownership.

1. **Section 69204 Requires Judicial Council Approval to Sell the Appellate Court Facilities**

Defendants argue that the Judicial Council does not have actual ownership of the appellate court facilities, and that, therefore, approval of the Judicial Council is not required to sell those facilities. This contention, and the trial court's ruling, misses the point of the argument and of section 69204. The trial court and Defendants are correct in asserting that section 69204 does not transfer title of the properties to the Judicial Council. But, the argument wholly ignores that the Judicial Council's **approval is still required to sell the properties**. Section 69204 gives all responsibilities

and authority "as an owner would have" to the Judicial Council. The section makes the Judicial Council the *de facto* owner.

As *de facto* owner of the appellate court facilities, the Judicial Council is the state body that is empowered **and required** to consider the proposed sale and its terms as they relate to appellate court facilities. As stated in the AOC's brief and during oral argument, the Judicial Council must be afforded a reasonable opportunity to consider the impact of the proposed sale-leaseback on court operations and must ultimately approve the transaction. (Brief of Judicial Council, Vol.VII, Exh.57, p.01679-87; Preliminary Injunction Tr., 36:13-37:2; Vol.VIII., Exh.69, p.01816.)

2. **Section 69204 and Section 14670.13 Must Be Read In Harmony**

Section 14670.13, makes no reference to the Judicial Council's ownership responsibilities over appellate facilities. A question therefore arises whether the Legislature impliedly repealed section 69204 with respect to the Council's legal responsibilities and vested the DGS with unfettered discretion to consummate the sale regardless of the Judicial Council's statutory ownership responsibilities.

The trial court relies on the "notwithstanding any other law" language of section 14670.13 in ruling that the sale can proceed without Judicial Council consideration and approval. (Final Order, Vol.VIII, Exh.70, pp.01829-31.) The trial court's reliance is error because section

69204 and section 14670.13 are not in conflict and can be harmonized thus avoiding questions of constitutional infirmity. *Hughes Electronics Corp. v. Citibank Delaware* (2004) 120 Cal.App.4th 251, 269 (“The law abhors repeal by implication.”); *Barratt American, Inc. v. City of San Diego* (2004) 117 Cal.App.4th 809, 816-817 (all presumptions lie against implied repeal); *Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1153 (courts attempt to adopt “the construction that best harmonizes the statute internally and with related statutes”); *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 569 (“[t]he courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together.”); *Sacramento Newspaper Guild, etc. v. Sacramento County Board of Supervisors*, (1968) 263 Cal.App.2d 41, 55 (the Legislature’s use of ‘notwithstanding any other law’ language “subordinates or repeals existing law only to the extent that the two laws are irreconcilable.”)

Here, it is entirely possible to “maintain the integrity” of both the Judicial Council’s ownership role regarding appellate court facilities, as reflected in section 69204, and the authority to sell specified state-owned properties extended to the DGS through section 14670.13. The status quo should be preserved to allow the Judicial Council, as the *de facto* owner of the appellate court facilities, to participate, consider and decide whether the sale-leaseback should be approved.

3. **To The Extent Section 14670.13 Authorizes DGS to Sell the Court Facilities Without Judicial Council Consideration, the Section Would Fail As an Unconstitutional Violation of the Separation of Powers Doctrine**

The trial court's ruling that "selling the buildings does not implicate the separation of powers doctrine or affect a core function of the judicial branch" is in error. (Final Order, Vol.VIII, Exh.70, pp.01829-31.)

The Legislature cannot divest the Judiciary of control and authority over our state's court facilities. As a separate, independent, and co-equal branch of government, the Judicial Branch must have inherent power to consider whether its appellate facilities – including its branch headquarters – will be sold to private interests and, if so, on what terms. (Brief of Judicial Council, Vol.VII, Exh.57, p.01679-87; Preliminary Injunction Tr., 36:13-37:2; Vol.VIII., Exh.69, p.01816.) *See Brierton v. Department of Motor Vehicles*, (2006) 140 Cal.App.4th 427, 433 (the Judicial Branch is one of three separate, co-equal branches of state government); Article III, section 3 of the California Constitution (the powers of the state government are "legislative, executive and judicial" and "[p]ersons charged with the exercise of one power may not exercise either of the others except as permitted in the Constitution"); *Professional Engineers in California Government v. Schwarzenegger*, (2010) 50 Cal.4th 989, 1013 (Art. III, sec. 3 is the embodiment of the Separation of Powers Doctrine); *People v. Engram*, (2010) 50 Cal.4th 1131, 1147 (Judicial Branch has "all the

inherent and implied powers necessary to properly and effectively function as a separate department in the scheme of our state government” and the Legislature’s ability to promulgate rules that fall within the authority of the courts is limited by the Separation of Powers Doctrine).

The inherent powers of the judiciary are substantial. “A court set up by the Constitution has within it the power of self-preservation, indeed, the power to remove all obstructions to its successful and convenient operation.” *Millholen v. Riley*, (1930) 211 Cal. 29, 33; *see also, People v. Shelley*, (1984) 156 Cal.App.3d 521, 530 (courts have the power to promote the administration of justice and to protect the dignity and respect of the court). The AOC’s brief to the trial court outlined specific concerns that arise in connection with the proposed sale-leaseback. (Brief of Judicial Council, Vol.VII, Exh.57, p.01679-87.)

The only authority cited by the trial court for its determination that the Separation of Powers Doctrine is not implicated by the sale of the appellate court facilities is *Superior Court of Mendocino v. County of Mendocino* (1996) 13 Cal.4th 45. The situation presented in *Superior Court of Mendocino* is vastly different than here. All that was decided there was that the furlough of court employees on six days during the 1993-1994 fiscal year was not a violation of the Separation of Powers Doctrine because the furlough did not defeat or impair the courts’ exercise of its constitutional duties. (*Sup. Ct. of Mendocino* 13 Cal.4th at 49-50.) There,

the court would be closed on a Friday, but would re-open the next Monday. Here, the Supreme Court and Courts of Appeal facilities will be sold and gone forever. But the important point is that the Judicial Branch is being denied the opportunity to consider and approve (or disapprove) the sale, as mandated by section 69204.

As discussed, no constitutional clash need arise because section 69204 and section 14670.13 can be interpreted in harmony.

D. THE SALE CONSTITUTES AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY

1. The Sale is Patently Illegal

Although Government Code section 14670.13 purports to delegate to the Director of General Services the authority to sell eleven enumerated state properties, that delegation of authority is illusory. Through section 14670.13, the Legislature has abdicated its power by both failing to make basic policy decisions and by failing to ensure that such decisions are implemented as made, rendering the purported delegation unconstitutional and void. (*Kugler v. Yocum*, (1968) 69 Cal.2d 371, 384; *California State Auto. Ass'n. Inter-Ins. Bureau v. Downey*, (1950) 96 Cal.App.2d 876, 901 (statute delegating legislative authority is invalid unless it “provide[s] an adequate yardstick for the guidance of the ... administrative body or officer empowered to execute the law”).) Because the Director cannot lawfully exercise this authority, on this ground alone, the Court should issue a

preliminary injunction halting the sale of California's courthouses and administrative buildings.

2. **The Determination of What is "For the Best Interest of the State" Is a Core Legislative Function That Cannot Be Delegated to Subordinate Agencies or Administrators**

Through the California Constitution, the People have vested the Legislature with all legislative power, save the powers of initiative and referendum. (Cal. Const., Art. IV, §1 ("The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum.")) As a cornerstone of representative democracy, this legislative power necessarily includes the power and duty to determine public policy, and to determine which actions are "for the best interest of the state." (See, e.g., *Cleland v. National College of Business* (1978) 435 U.S. 213, 221 (legislative branch responsible for determining what will promote the state's general welfare); *Foundation for Taxpayers Rights v. Garamendi* (2005) 132 Cal.App.4th 1354, 1365 (Legislature responsible for determining whether program serves public purpose); *California Radioactive Materials Management Forum v. Department of Health Services* (1993) 15 Cal.App.4th 841, 871 (Legislature declares public policy), disapproved of on other grounds by *Carmel Valley Fire Protection Dist v. State of California* (2001) 25 Cal.4th 287.) And the sale of state property is uniquely within the Legislature's discretion. As the California

Supreme Court has explained, “[t]he Legislature has full control over the sale of property belonging to the state, which it may direct sold, and to regulate or change at any time the method of its disposition.” (*Buck v. Canty* (1912) 162 Cal. 226, 233.)

As a matter of settled law, the Legislature may not delegate its responsibility over these core legislative functions to others: “[T]he legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others” (*Kugler, supra*, 69 Cal.2d at pp. 376-377.) But this is precisely what the Legislature has done. Government Code section 14670.13(a) purports to delegate to DGS the authority to determine whether any of the properties at issue should be sold at all. That section provides, in relevant part, that “the Department of General Services may enter into the sale or long-term lease of the properties specified in subdivision (b).” And by using the permissive “may,” – instead of the mandatory “shall,” which appears in the same subdivision – the Legislature transferred the discretion over the disposition of the properties to DGS. (*Id.*, (“Any sale of property pursuant to this section shall be for no less than fair market value”); *In re Richard E.* (1978) 21 Cal.3d 349, 353-354, (“When the Legislature has . . . used both “shall” and “may” in close proximity in a particular context, we may fairly infer the Legislature intended mandatory and discretionary meanings, respectively. The ordinary import of “may” is a grant of

discretion.”.) Accordingly, rather than affirmatively directing DGS to sell the enumerated properties – and thereby resolving the fundamental issue of *whether* to sell them – the Legislature has handed that question to DGS and said, “you decide.”⁶

The Legislature’s instruction that the sale be “for the best interest of the state,” is equally infirm. Determination of what is in the State’s best interests is a core legislative function, which the Director of General Services cannot perform. (See, e.g., *Cleland, supra*, 435 U.S. at 221; *Garamendi, supra*, 132 Cal.App.4th at 365; *California Radioactive Materials Management Forum, supra*, 15 Cal.App.4th at 871; *Kugler, supra*, 69 Cal.2d at 376-377.).

Because the Legislature cannot delegate its responsibility over making fundamental policy decisions relating to the treatment of these significant state properties, its attempt to do so by enactment of section 14670.13 is unconstitutional, and is of no effect. (*People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 632-33 (“[a]n unconstitutional delegation of legislative power occurs when the

6 Notably, in their opposition to the motion for preliminary injunction, Real Parties in Interest argued that the Legislature elsewhere empowered DGS to negotiate land-sales that are in the best interest of the state. This further highlights the impropriety of the attempted delegation here, which is not a delegation of the power to negotiate a sale in the State’s best interests, but instead the determination of whether *any* sale would be within the state’s best interest. The latter is a much more fundamental question of policy than the requirement that the Director fulfill his or her duty as a fiduciary of the State.

Legislature confers upon an administrative agency unrestricted authority to make fundamental policy decisions.”.) On this ground alone, this Court should immediately stay the transaction and issue a writ prohibiting the State from completing the transaction.

3. **Even If the Legislature Could Constitutionally Delegate Its Determination of Fundamental Issues to the Department, Its Attempt to Do So Here Fails**

Proper delegation of matters within the scope of legislative authority can occur only where the Legislature resolves the fundamental policy issues **and** “establishes an effective mechanism to assure the proper implementation of its policy decisions.” (*Kugler, supra*, 69 Cal.2d at 376-77.) “Thus, a delegation of authority must be accompanied by safeguards that insure that the delegate does not act arbitrarily,” (*Wilkinson v. Madera Community Hosp.* (1983) 144 Cal.App.3d 436, 442), and “must include sufficiently definite directions for the administrative body in the manner of exercising its delegated powers.” (*City of Burbank v. Burbank-Glendale-Pasadena Airport Authority* (1999) 72 Cal.App.4th 366, 376-77.) As shown above, the Legislature utterly failed to resolve the fundamental policies at issue in the sale of these properties. The Legislature also has failed to provide any standards or safeguards to prevent abuse of that purported grant of authority.

Government Code section 14670.13 does not provide any guidance regarding the exercise of those powers beyond the exhortation that the sale

“shall be no less than fair market value,” that any actual sale may include a provision permitting repurchase by the State, and that certain conditions may apply in the event the property subject to the proposed sale is subject to bond debt. (*Id.*) Notably, section 14670.13 is silent as to when, whether, or under what conditions the DGS may consider selling the properties, or what considerations to take into account in determining whether the sale would be “for the best interest of the State.” This lack of guidance regarding the manner in which the DGS and its Director are to exercise the delegated authority is fatal to the delegation. (*City of Burbank, supra*, 72 Cal.App.4th at 377 (Legislature’s abdication of authority by delegation to Airport Authority unfettered discretion to exercise legislative powers was void).)

It is true that courts may infer a modicum of legislative guidance from the stated statutory purpose of delegating legislation. (*Wilkinson, supra*, 144 Cal.App.3d at 442.) But far from providing any guidance, directly, or indirectly, section 14670.13 calls for the DGS and its Director *alone* to decide whether a sale is in the state’s best interests, and AB22 provides no further direction.

In their papers below, Real Parties in Interest nevertheless argued that section 14670.13 contained adequate safeguards for abuse of discretion in the determinations of whether and how to sell the eleven properties because the statute contained a provision they claim establishes “oversight”

and “supervision” by legislators. Under the circumstances presented here, that “supervision” is effectively no supervision at all.

Section 14670.13 contains no mechanism for oversight or supervision of the sale of these properties by the Legislature. The closest thing to oversight in that statute is the requirement, in section 14670.13(e) that *after* the sale has been struck, but *before* it become final, the Director shall report the terms and conditions of the transactions not to the Legislature, not even to a legislative committee, but to the two *chairs* of the financial oversight committees. (*Id.* (“Thirty days prior to executing a transaction for a sale or lease of any of the real property or buildings listed in subdivision (b), the Director of General Services shall report to the chairs of the fiscal committees of the Legislature the terms and conditions of the transaction, including, but not limited to, the financial terms.”).)

All that these two individuals might be able to do would be to convene their respective committees to hold hearings on the proposed sale. Anything beyond holding impotent hearings would require a tangle of Executive- and Legislative-branch maneuverings worthy of Byzantium. Because no mechanism exists for the Legislature’s involvement in the sale, halting it or compelling DGS to negotiate different terms would require either an amendment to or repeal of section 14670.13. The sale in this matter was reported to the two chairs on October 11, 2010 (Declaration of Robert McKinnon, Vol.IV, Exh.16, pp.00694-713.), six weeks after the

August 31, 2010 deadline for passage of any bills by the Legislature, and two weeks after the deadline for the Governor to sign any bill into law. (See the 2010 Legislative Calendar, available at <http://www.assembly.ca.gov/govdev/acs/searchables/WhatsNew/LegCal/2010AssemblyCalendar.pdf>.) Because the Legislature finally adjourned on August 31, 2010 until the new regular session began on December 6, 2010 (*Id.*), it could only reconvene through an extraordinary session called by the Governor pursuant to Article IV, section 3(b) of the California Constitution. Accordingly, any substantive legislative action on the proposed sale would require the Finance Committee chairs to convince the Governor to recall the entire Legislature.

And the complexity does not improve if the Legislature is recalled. Section 14670.13 permits the sale to close thirty days following the notification of the committee chairs, in this case as early as November 10. (*Id.* at subdiv. (e).) But legislation other than urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State go into effect on January 1 following passage, making standard legislative action moot. (Cal. Const. Art. II, §8(c).) And the safe-harbor for “urgency legislation” provides little if any aid. For the Legislature to enact urgency legislation here, it would have to find that the problems with the sale are so severe that they call for immediate preservation of the public peace, health, or safety. (*Id.* at §8(d).)

Even if the concerns with the sale reached this threshold, the Legislature would still have to approve the urgency legislation by a two-thirds vote.

Because section 14670.13 provides no explicit guidance as to the manner in which DGS and the Director are to exercise the delegated powers, because no guidance may be inferred from the statutory purpose or surrounding and related legislation, and because the legislation provides no safeguards against the potential abuse of the discretion over the sale of these properties, the Legislature's delegation is invalid. (*Downey, supra*, 96 Cal.App.2d at 901.)

E. EVEN IF THE DELEGATION AT ISSUE WERE CONSTITUTIONAL, REAL PARTIES IN INTEREST CANNOT ESTABLISH THAT THE SALE-LEASEBACK TRANSACTION WAS IN THE "BEST INTERESTS OF THE STATE"

In its Order denying Petitioners' request for a preliminary injunction, the Superior Court glossed over the argument that the sale of the eleven state properties at issue was not in "the best interest of the state." Indeed, the Court's order of December 10 does not even specifically address this point. (Final Order, Vol.VIII, Exh.70, pp.01829-31.)

An important consideration here is that Petitioners were not simply asserting that the Respondent Court should invalidate the sale merely because they do not approve of the sale. Rather, the Legislature specifically included in Government Code §14670.13 language indicating that the DGS "may" sell the properties at issue **only** if the sale is "for the

best interest of the state.” Accordingly, the requirement that the sale be “for the best interest of the state” is a statutory prerequisite to the sale being made; it is not simply a standard that Petitioners have dredged up to express their disapproval of the sale.

As Petitioners argued below, Government Code §14670.13 does not define what is meant by “best interest of the state.” But under any objective scenario, the sale of the eleven state properties to the bidder selected by DGS cannot be considered to be in the State’s best interest.

First, the non-partisan LAO twice identified substantial and innumerable problems with the sale-leaseback and concluded that the sale is poor fiscal policy that will cost the state billions of dollars, both in the short-term and long-term. Second, DGS’ complete lack of transparency in the sale and bidding process has resulted in the acceptance of a seriously flawed transaction over other – potentially superior – bids, at least one of which would have generated similar revenue to the state without the state having to relinquish ownership of the properties. Moreover, DGS’ deviation from usual and standard bidding procedures has essentially precluded any reasonable determination by the courts or the public as to the value of the bid selected versus the other bids or versus not selling properties at all. For these reasons, DGS cannot objectively demonstrate that the sale of the properties to the chosen bidder is “for the best interest of the state,” as required by Government Code §14670.13.

1. Terms/Conditions of the Transaction

As detailed by the LAO, the total cost to the state and taxpayers if the proposed sale goes forward would be \$5.5 billion greater than continued state ownership of the properties over a thirty-five year period. (April 27, 2010 Report by Legislative Analyst's Office, ("LAO Report"), Vol.I, Exh.1, p.00095.) Accordingly, the LAO opined that such a sale would exacerbate the state's structural deficit and was poor fiscal policy and recommended other solutions. (*Id.*, Vol.I, Exh.1, p.00084.)⁷

Among a host of unfavorable terms, the sale-leaseback contains a guaranteed 10 percent escalator in rents every five years. While the rent is to be set at market rates at the beginning of the state's initial 20-year rental period, it is easy to see that rents will quickly surpass market rates, to the detriment of California's taxpayers who spent decades paying for these properties.

Perhaps the most egregious aspect of the sale is that many of the state properties at issue are nearly paid off. Thus, the state will be incurring

⁷ The details of the terms and conditions of the transaction are discussed at length in the Verified Complaint and in the four economic analyses submitted with this Petition and Memorandum. (*See* Verified Complaint, ¶¶31-49 Vol.I, Exh.1, pp.00014-26; LAO Report, Vol.I, Exh.1, pp.00082-97; November 5, 2010 LAO Letter, Vol.I, Exh.1, pp.00036-47; ("A Bad Deal: An Analysis of the Pending California State Office Building Sale/Leaseback Program" Authored by Christopher Thronberg, Ph.D., Principal, Beacon Economics, Vol.IV, Exh.33, p.00879-918); and, Stanford Report, Vol.VII, Exh.55, 01593-614.)

outrageous rental fees for doing the equivalent of going to a loan shark to fill a temporary hole in the budget that will almost immediately be surpassed by major and ongoing losses over the next several decades. This is **exactly** what Proposition 58 was designed to prevent. The LAO has estimated the cost of the transaction in present-value terms as being equivalent to a loan with an effective interest rate of 10.2 percent – a figure that is about double the rate the state is currently paying on the properties' outstanding lease-revenue bonds and greater than the interest rates on the state's recently issued general obligation bonds. (Lockyer Tr., 21:8-22:11, Vol.VII, Exh.54, pp.01521-22.)

2. **DGS' Lack of Transparency and Deviation From Normal Bidding Procedures**

Beyond the scathing criticism of the terms and conditions of the transaction from the LAO, DGS's secrecy, lack of transparency and acute departure from normal bidding procedures makes it even more likely that the terms/conditions of the sale-leaseback were not "for the best interest of the state." Indeed, LAO expressed strong concerns about the bidding and award procedures used in this transaction:

While we acknowledge the potential risks associated with the usual procedures for governmental transparency, we find the paucity of information regarding this major state financial transaction to be troubling.

(November 5, 2010 LAO Letter, Vol.I, Exh.1, p.00046)

The testimony of State Treasurer Lockyer further underscores the problems with the lack of transparency in the proposed transaction. In noting his objections to the bidding process, Lockyer testified that the law [Government Code §14670.13] “allowed unusual discretion to not use the traditional competitive bidding process.” (Lockyer Tr., 53:14-54:2, Vol.VII, Exh.54, pp.01553-54.)

While Treasurer Lockyer’s statements corroborate the concerns of the LAO, his testimony may misstate one aspect. That is, while he testified that the law allowed “unusual discretion” to DGS not to use normal bidding procedures, nowhere in section 14670.13 is that indicated. Instead, the statute suffers from the opposite problem: there are no guidelines or criteria at all. The statute does not specify which kind of bidding and award procedures DGS was to use; rather, it simply dumps a massive chunk of legislative authority onto DGS to sell the billions of dollars worth of properties if it determines that it is “for the best interest of the state.”

The failure to document any sort of reasonably transparent bidding and scoring procedures, coupled with the limited information that has been obtained, further supports the contention that the DGS-approved transaction was not in the best interest of the state. Indeed, there is no way to demonstrate – nor has DGS demonstrated – that the bid that was ultimately selected, from California First LLC, was even the best bid. In fact, the information available is to the contrary. As discussed in the LAO report, a

so-called “public option” bid would have provided a “[p]otential net present value savings to the state of over \$700 million compared to the private buyer” and included a reversion of the properties to the state at the end of the lease. If the property reverted to the state at the end of a 50-year lease, the result would be a “potential net present value savings to the state of approximately \$250 million to \$400 million.” (November 5, 2010 LAO Letter, Vol.I, Exh.1, p.00046.) Accordingly, it is very conceivable that the state could have entered into a transaction that would have helped plug the immediate budget shortfall while still permitting the state to retain long-term ownership of the properties.

Lastly, the LAO has stated that the sale-leaseback “is not an ideal budget solution because it would add to the state’s structural deficit.” (*Id.*, p.00037.) It also has characterized the transaction as “poor fiscal policy” and strongly recommended that other solutions be found. Nevertheless, there has been virtually no indication – at least not publically – that DGS took the LAO’s advice or even seriously considered other alternatives. Notably, State Treasurer Lockyer, who voted against the transaction, did so, in part, because “[i]t seemed to me there were alternative ways to raise the necessary cash, and refinancing debt and other things that wouldn’t be an interest charge of in excess of 10 percent was probably available.” (Lockyer Tr., 22:8-11, Vol.VII, Exh.54, p.01522.) However, given the grave harm that will be caused by the sale fiscally, there has been no

indication that DGS took steps to reduce and/or mitigate the extremely negative reviews of sale; rather, it charged ahead in the face of not one, but two adverse reports from the LAO and simply fired would-be dissenters on the Los Angeles and San Francisco State Building Authorities to push this sale through.

Because the terms and conditions of the sale are demonstrably **not** in the "best interest of the state," the sale contravenes the requirements of the statute that would purport to authorize it, Government Code §14670.13.

V. **THE BALANCING OF HARDSHIPS WEIGHS
IN FAVOR OF PETITIONERS**

The trial court erroneously found that there was an insufficient showing that the balancing of hardships favors plaintiffs. (Final Order, Vol.VIII, Exh.70, pp.01829-31.)

Courts have variously defined the degree of harm or hardship required to justify the issuance of a preliminary injunction and temporary restraining order. The California Supreme Court stated that "[t]he term 'irreparable injury' . . . means that species of damages, whether great or small, which ought not to be submitted to on the one hand or inflicted on the other." (*Anderson v. Souza*, (1952) 38 Cal.2d 825, 834.) Additionally, courts have since held that "the word 'irreparable' is . . . used in expressing the rule that an injunction may issue to prevent wrongs of a repeated and

continuing character." (*Christopher v. Jones*, (1964) 231 Cal.App.2d 408, 416.)

The harm to the taxpayers threatened by the actions of DGS is sufficient to meet the standards set out above as it would result in injuries that defy precise calculation, should not be inflicted on the taxpayers and is of a continuing nature. Additionally, the harm caused cannot be left unchallenged because it undermines the statutory authority of the Judicial Council to "[e]xercise full responsibility, jurisdiction, control and authority as an owner would over appellate court facilities" (Gov. Code §69204) and interferes with the Separation of Powers between the Judicial and Executive branches of government. (See, Five DGS Letters, Vol.I, Exh.6, pp.00157-72; Brief of Judicial Council, Vol.VII, Exh.57, pp.01674-88.) It is vital to preserve the Judicial branch's independence, an important aspect of which is allowing the Judiciary, through the Administrative Office of the Courts ("AOC") and Judicial Council to control the facilities in which it operates.

A. THE BURDEN ON THE PETITIONERS

As the court noted in *Right Site Coalition v. Los Angeles Unified School Dist.*, (2008) 160 Cal.App.4th 336, if the party seeking an injunction shows a strong likelihood of success on the merits, the court has discretion to issue the injunction notwithstanding a deficiency of harm. To hold otherwise would render the sliding-scale and mix of factors meaningless, and parties could engage in obviously illegal activity without court

limitation if they demonstrated that the activity did not cause significant harm. Because Petitioners are likely to succeed on the merits, the legal burden with respect to the harm suffered is diminished.

The balance of hardships favors Petitioners in this case because of the difficulty in ascertaining the precise damages to taxpayers of the state, the continuing nature of the harm and the permanence of the transaction.

B. HARM TO THE PETITIONERS IS IRREPARABLE, UNASCERTAINABLE AND OF A CONTINUING NATURE

Defendants contend that the harm to the Petitioners cannot be "irreparable" because they are not the owners of the property being sold and because the economic modeling suggests that the economic profits and losses related to the transaction can be ascertained. This is incorrect for at least four reasons.

First: In transactions involving land sale contracts, a damage award is generally an inadequate remedy for breaches of real estate contracts. (*See e.g., Real Estate Analytics, LLC v. Vallas*, (2008) 160 Cal.App.4th 463.) While the Petitioners are not the direct owners of the properties, the logic of the argument remains the same. Once the transaction closes and the land is sold, there will be no way to "unring the bell" to revert back to the status quo. This is true irrespective of who owns the land. Additionally, while the Joint Powers Authorities have actual title to the property, the land and the properties are owned by the JPAs on behalf of

the taxpayers of the state of California. These are publicly owned properties. Selling them to a private party deprives each taxpayer, including Petitioners, of their current ownership interest.

Second: The harm to the taxpayers does not arise solely from their ownership interests. The harm suffered by the Petitioners is not limited to loss of title. The harm also arises from the waste of limited state assets and money and unwise and illegal public action.

Third: The harm is unascertainable and irreparable because there will be no way to get damages after the transaction is completed. Despite the contention by Defendants that the economic analysis of the transactions demonstrate that the harm is ascertainable, those various economic analyses come to significantly different conclusions about how much money the state will lose in the long term if the transaction is completed. Thus, even if it is ascertainable in theory, it is not ascertainable until at least twenty years into the future. Additionally, if a court concludes that the sale is illegal after the sale has happened, the State will not be able to either "undo" the sale or somehow pay back taxpayers. Defendants allege that the sale is "necessary" because of the budget deficit in the state. The idea that the state will somehow be able to repay the damages taxpayers suffer if the sale is found to be illegal seems dubious, at best.

Fourth: The harm to the Petitioners is irreparable because it is of a continuing nature. In *Wind v. Herbert*, (1960) 186 Cal.App.2d 276, the

court noted that wrongs of a repeated and continuing character may also be sufficient grounds for issuing a preliminary injunction. (*Id.*, at 285.) By usurping control over the sale-leaseback of Appellate Court Facilities and moving forward with the sale of the Eleven Properties, Respondents'/Defendants' actions will cause harm to Petitioners which extends continually into the future. The state will no longer own the property and will be contractually obligated to pay a private landlord rent under oppressive terms for a period of at least twenty years, costing taxpayers billions of dollars.

Fifth: There is significant harm to third parties if the transaction is completed. These harms weigh in favor of an injunction. Defendants acknowledge that at least five-hundred people are likely to lose their jobs as a result of the transaction. Additionally, the long-term budget problems which plague the state will be significantly worsened by the transaction. (Stanford Report ¶ 27, Vol.VII, Exh.55, p.01607) Also, the Judicial Council and the Judicial Branch of government are likely to have their ability to perform their constitutional and administrative functions usurped and limited. These harms are also irreparable once the transaction is completed and must be weighed in favor of Petitioners in this matter.

Defendants also assert that the Governor and Legislature deem the transaction a benefit. This has no bearing on the balance of hardships. Further, the Legislature did not approve of the specific transaction at issue.

The Legislature delegated away all of its authority and oversight responsibility on this matter to DGS. DGS was merely required to report the terms of the sale to the Legislature, but the Legislature had not ability to change or override those terms. The Legislature made no findings regarding the benefit or harm caused by the sale, it merely authorized DGS to pursue the sale. There is nothing to suggest that the Legislature believes that the sale of the properties is in the best interests of the state.

C. **HARM TO RESPONDENTS/DEFENDANTS IS NON-EXISTENT**

The issuance of an injunction at this time does not harm the state even in the method the state alleges. (Chiang Decl., ¶ 4, Vol.VIII, Exh.64, pp.01743.) The alleged purpose of the sale is to inject money to reduce the budget deficit of the state. However, the fiscal year does not end until June 30, 2011. Therefore, an injunction almost six months prior to that to allow for further information about the legality and structure of the sale and bidding process to come to light does not prevent the state from being able to raise the capital in the future.

Finally, preventing the state from going forward with an illegal transaction because they failed to act in accordance with the laws and duties already imposed by the Constitution and statutes does not cause harm to the Defendants. Alleging that Defendants have suffered harm by being forced

to comply with the laws of the state they have sworn to uphold does not withstand scrutiny.

For the foregoing reasons, the balance of hardships tips strongly in favor of Petitioners.

VI. CONCLUSION

The two individuals responsible under the Constitution for the fiscal policy of the state have both stated under penalty of perjury that the sale is fiscally unnecessary and unwise and that there is no fiscal reason to proceed prior to the artificially created deadline of December 15, 2010.

*The law locks up the man or woman
Who steals the goose from off the common,
But leaves the greater villain loose
Who steals the common from under the goose.*
– 17th Century Protest Against English Enclosure Acts

For the reasons stated herein, the Court should issue and **Emergency Writ** preventing the sale from closing on December 15, 2010.

Dated: December 13, 2010

COTCHETT, PITRE & McCARTHY

By:

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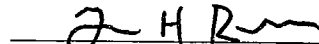


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