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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HAWAII STATE TEACHERS ASSOCIATION and UNITED PUBLIC WORKERS AFSCME, Local 646, AFL-CIO, Plaintiffs, vs. LINDA LINGLE, Governor, State of Hawaii; MARIE LADERTA, Director, Department of Human Resources Development, State of Hawaii; and GEORGINA KAWAMURA, Director, Department of Budget and Finance, State of Hawaii, Defendants.	CIVIL NO. 09-1-1372-06 KKS (Other Civil Action) DEFENDANTS'OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER FILED JUNE 23, 2009; DECLARATION OF GEORGINA KAWAMURA; DECLARATION OF JAMES E. HALVORSON; DECLARATION OF MARIE C. LADERTA; EXHIBITS "A" – "K"; CERTIFICATE OF SERVICE <u>Hearing</u>: Date: July 2, 2009 Time: 9:15 a.m. Judge: Honorable Karl K. Sakamoto

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INTRODUCTION

The unions' motion for a temporary restraining order on the grounds that the Governor is violating the Hawaii Constitution should be denied.[1] As detailed below, the unions cannot show they are likely to prevail on the merits—indeed they *cannot* prevail because:

- Hawaii Revised Statutes (HRS) § 89-9(d), adopted in 1970, gives the Governor—the employer of the workers under her control—certain **absolute nonnegotiable management rights**, including the right to "relieve an employee from duties because of lack of work or other legitimate reason[.]" HRS § 89-9(d)(5). Governor Lingle's management rights under this statute authorize her to furlough executive branch employees under her supervision, as, pursuant to the plain language of the statute, she is relieving employees from duty for legitimate reasons.[2] That is the essence of a furlough.[3]
- Under the Hawaii Constitution, Art. XIII §2, the right of **public sector** employees to bargain collectively is not unlimited. It is "**as provided by law**." This law obviously includes the management rights under § 89-9(d), including the right to relieve employees from work for legitimate reasons, and thus to furlough. Indeed, at the time Art. XIII § 2 was added to the Constitution in 1968, the concept of collective bargaining for **public**

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[1] UPW and HSTA, Plaintiffs, are together referred to as the unions.

[2] These nonnegotiable management rights also include the right to "determine [the] methods, means, and personnel by which the employer's operations are to be conducted …." and to "take such action as may be necessary to carry out the missions of the employer in cases of emergencies." HRS § 89-9(d)(7), (8). The Governor is also exercising these rights.

Negotiability is key, because if a matter must be negotiated with the unions, by definition it cannot be a management right. A matter cannot be both negotiable *and* a management right—it is one or the other. Here, § 89-9(d) clearly identifies non-negotiable management rights. This principle of non-negotiable management rights has already been sanctioned as constitutional by the Hawaii Supreme Court. "Pursuant to [Art. XIII § 2], the legislature is given broad discretion in setting the parameters for collective bargaining. **Indeed, the legislature has constitutionally exercised such discretion on previous occasions.** *See* . . . **HRS § 89-9(d) (1993) (specifying matters that are not subject to collective bargaining**)[.]" <u>UPW v. Yogi</u>, 101 Hawaii 46, 55, 62 P.3d 189, 198 (2002) (controlling opinion of three justices) (emphases added).

[3] The unions' Ex. 24-3 notes that federal law defines a furlough as "the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons."

sector employees *already included* management rights nearly identical to those now found in § 89-9(d). See Exec. Order No. 10,988, 27 Fed. Reg. 551 (1962). Adoption of § 89-9(d) in 1970, part of the implementing legislation following passage of Art. XIII § 2, made these management rights explicit in Hawaii.

- **"[T]he right to negotiate wages, hours and conditions of employment is subject to, not balanced against, management rights**." United Public Workers v. Hanneman, 106 Hawaii 359, 365, 105 P.3d 236, 242 (2005) (emphasis added). Under Hanneman, the exercise of management rights is not subject to negotiation. Indeed, since HRS § 89-9(d) and Hanneman are so clear, this Court could not find that exercising a statutory management right violates the Constitution without overruling Hanneman.
- The Hawaii Labor Relations Board (HLRB) has "**exclusive original jurisdiction**" over "any controversy concerning" practices prohibited by Chapter 89. HRS § 89-14. The unions concede the Governor is in compliance with Chapter 89 because they raise only constitutional claims.[4] Under HRS § 89-14, they could not raise a Chapter 89 claim here.
- That constitutional claim faces an insurmountable hurdle as "every enactment of the legislature is presumptively constitutional, and a party challenging the statute has **the burden of showing unconstitutionality beyond a reasonable doubt**[.] The infraction should be plain, clear, manifest, and unmistakable." Blair v. Cayetano, 73 Haw. 536, 542, 836 P.2d 1066, 1069 (1992) (emphasis added). As HRS § 89-9(d) has already been explicitly sanctioned as *constitutional* by the Hawaii Supreme Court, the unions cannot demonstrate beyond a reasonable doubt that HRS § 89-9(d) is *unconstitutional*.

Further, the unions completely fail to show any *irreparable* harm—they have shown a possible monetary loss. And the public interest lies with avoiding layoffs and maximizing the ability of the executive branch to fulfill its many missions, all of which serve the public interest. The unions fail to meet any of the prongs for injunctive relief. Their motion should be denied.

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[4] The unions admit this: "if statutes purported to authorize the unilateral furloughs … the statutes would be unconstitutional." Mem. at 12. The unions do not claim HRS § 89-9(d) does not authorize furloughs, both because it so clearly does, and because such a claim would be within the exclusive jurisdiction of the HLRB.

FACTUAL BACKGROUND

A. The State's Economic Situation

On June 1, 2009, the Council on Revenues starkly described the current global economic situation in a letter to the Governor:[5] "No historical precedent for such broad economic deterioration, in valuation across all asset classes from stocks to commodities and with global macroeconomic scope, exists in the modern record." Ex. A. The global economic crisis has greatly affected the State's economy. From March 2008 through May 2009, the Council issued projections showing that the State would have a cumulative projected revenue decline of **$2.7 billion** through the end of June 2011 (for the 7/1/09-6/30/10 fiscal year, the projected decrease amounted to *19.22%* for tax and non-tax revenue). Kawamura Decl. at ¶¶5-6; Ex. B. The impact of this projected revenue decline on the General Fund Financial Plan is that the State will have a deficit of $729 million by the end of fiscal year 2011 if no action is taken, and the Council projected revenue declines of an *additional* $2.1 billion for the following two fiscal years. Id. at ¶7, Exs. B and C. The situation is dire.

Faced with this enormous shortfall and the obligation to balance the budget, the Governor decided to furlough certain State executive branch employees three days each month as a step to address this fiscal crisis.[6] This step was taken *after* billions of dollars in other cuts and reductions were made in the budget and the six-year financial plan. Kawamura Decl. at ¶16, Exs. C and D. Implementing the furlough and equivalent budget restrictions elsewhere in the executive branch will save an estimated $688 million over the next two years, and will likely allow the State to avoid the far more drastic step of having to lay off thousands of employees. Id. at ¶14.

The Governor must balance the budget. Haw. Const. Art. VII §§ 8, 9; Atty. Gen. Op. 97-1. To try to help cover the $2.1 billion shortfall estimated as of March 2009, the Governor: 1) Restricted general fund discretionary spending by 8%; 2) Froze most hiring, travel and new equipment purchases; 3) Restructured long-term debt and debt payments; 4) Transferred or will

[5] Hawaii law requires that revenue estimates prepared by the Council on Revenues be considered by the Department of Budget and Finance in budget preparation, funding authorization, and expenditure controls. Haw. Const. Art. VII, § 7; HRS §§ 37-111, 37-112.

[6] These references are to the approximately 15,000 employees under the Governor's authority as "public employer" under HRS § 89-2, Kawamura Decl. ¶16, and excludes employees in the Department of Education (DOE), Hawaii Health Systems Corporation, the University of Hawaii, the Judiciary, and the Legislature. Id. The Governor's June 24 Executive Order, Ex. E, makes clear that no DOE or teacher furloughs have been announced or set in motion.

transfer balances from certain special funds into the general fund; and 5) Utilized and will utilize federal stimulus money. Kawamura Decl. ¶8.

The State's Roadmap to Rebalancing FY 2009-2011 Financial Plan (Ex. D) shows substantial further actions including: 1) Executive agency discretionary spending reduction by an average of 14%; 2) Debt restructuring; and 3) Increasing income, transient accommodations, cigarette, and conveyance taxes. See also Kawamura Decl. at ¶8, including detailed summary of the State's financial plan.[7] The Roadmap to Rebalancing FB 2009-2011 Financial Plan itself shows that the State has closed a $2.1 billion budget shortfall without materially reducing labor costs except through attrition, despite the fact that ***70% of the State's budget*** is dedicated to wages and benefits for budgeted full-time-equivalent General Fund State positions. Kawamura Decl. ¶17). But it is not enough: The Council's most recent revenue projection shows the additional and very substantial revenue reduction that will result in a projected $729 million deficit, and actual tax revenue collection *after* that May 2009 projection indicate that even that amount is understated. Id. at 7.

B. The Furlough Plan

On June 1, 2009, Governor Lingle announced how she would meet the State's fiscal emergency and additional $729 million budget shortfall. The Governor ordered the three furlough days per month for the next two years, restricted spending for the DOE and the University of Hawaii (in an amount equivalent to the three-day-per-month furlough), and reduced Medicaid expenditures by $42 million. Kawamura Decl. at ¶11. Even after implementation of the furlough plan and spending restrictions, the State will have a projected negative balance by the end of fiscal year 2011. Absent further reduction in spending, and with evidence of an even further revenue decline, there will be an even deeper budget gap. Id. at ¶15.

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[7] Included in this Roadmap to Rebalancing are federal stimulus funds of $494 million covering fiscal years 2009, 2010 and 2011, that the State used to close the General Fund budget gap. This stimulus money enabled the State, up to now, to avoid more draconian measures. However, this stimulus money is *one time only* and will not be available to meet the coming shortfall. Kawamura Decl. ¶9.

ARGUMENT[8]

A. The Governor Has Authority to Furlough Unionized Workers and Therefore the Unions Are Not Likely to (and Indeed Cannot) Prevail on the Merits

The Governor has authority to furlough unionized workers as a public employer under HRS § 89-9(d), including her right to "relieve an employee from duties because of lack of work or other legitimate reason[.]" Because the constitutional right of public sector employees to bargain collectively includes management rights like those under HRS § 89-9(d), this statute is clearly constitutional. It is certainly not unconstitutional "beyond a reasonable doubt," as it has already been sanctioned as constitutional. Blair, Yogi, supra.

1. The Management Rights in Section 89-9(d) Give the Governor Authority to Furlough Unionized Workers

There are three separate compelling reasons why this Court should consider the Governor's statutory authority under chapter 89 when ruling on the unions' motion for preliminary injunction. First, the unions cannot prevail before this Court because the Hawaii Labor Relations Board (HLRB) has "exclusive original jurisdiction" over controversies related to practices prohibited by chapter 89. HRS § 89-14; Hawaii Administrative Rules (HAR) § 12-42-9(a) (declaratory rulings "as to the applicability of any statutory provision or of any rule or order of the board.")[9] Second, in general, courts should avoid deciding constitutional questions unless

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[8] The State agrees with the unions that a party seeking temporary injunctive relief must show likelihood of success on the merits and that the balance of irreparable harm supports an injunction. The court must also determine if the public interest supports granting an injunction.

[9] The unions' allegations about inadequate bargaining and violations of the CBAs are committed to HLRB's exclusive jurisdiction. This exclusive jurisdiction includes complaints that the employer has "Refuse[d] to bargain collectively in good faith;" "Refuse[d] to participate in good faith in the mediation and arbitration procedures set forth in section 89-11;" "Refuse[d] or fail[ed] to comply with any provision of [chapter 89] or "Violate[d] the terms of collective bargaining agreement." HRS § 89-13(a)(5)-(8). "Primary jurisdiction ... comes into play whenever enforcement of the claim requires the resolution of issues which ... have been placed within the special competence of an administrative body. ... *[T]he judicial process is suspended pending referral of such issues to the administrative body for its views*." Kona Old Hawaiian Trails v. Lyman, 69 Haw. 81, 93, 734 P.2d 161, 168-69 (1987) (emphasis added). Though the unions claim that the HLRB has jurisdiction only over "run-of-the-mill" cases, Mem. at 12, neither HRS § 89-14 nor the doctrine of primary jurisdiction make any exceptions. Though the unions are correct that only a court can rule on the constitutional questions, they ignore the well-settled precept that a court should avoid constitutional questions unless absolutely necessary. Sherman, infra. *Denying* this motion will not infringe upon HLRB's jurisdiction, because such a denial simply requires the finding that injunctive relief is not warranted.

absolutely necessary: "[a] fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." City and County of Honolulu v. Sherman, 110 Hawaii 39, 56, 129 P.3d 542, 559 (2006) (internal quotation marks and citations omitted).[10] And third, and most compelling, a straightforward analysis of the history of **public sector** collective bargaining shows that the management rights in HRS § 89-9(d) (explained below) are part of—not separate from—the constitutional right to bargain collectively. The unions' Art. XIII § 2 claims therefore cannot serve as a basis for establishing a likelihood of prevailing on the merits.

The unions argue at length about the history of collective bargaining, but focus on collective bargaining in the **private** sector. These arguments are not germane because the Hawaii Constitution makes a clear distinction between the rights to collectively bargain in the public and private sectors. The constitutional rights in the public sector are "**as provided by law,**" whereas that textual limitation does not exist for the private sector.[11] Compare Art. XIII § 1 ("Persons in private employment shall have the right to organize for the purpose of collective bargaining.") with Art. XIII § 2 ("Persons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law.") (emphases added).

Despite the unions' attempt to avoid even discussing the controlling law, HRS § 89-9(d) serves as the critical backdrop for this case. This statute reserves certain rights to the public employers, rights that are so fundamental and essential to the exercise of governmental powers that they cannot be bargained away. These rights are designated by statute as ***non-negotiable***. HRS § 89-9(d). The Governor's furlough plan clearly falls within the scope of these rights.

Included within these management rights are the public employer's right to "relieve an employee from duties because of lack of work or other legitimate reason[,]" "[d]etermine the methods, means, and personnel by which the employer's operations are to be conducted[,]" and "[t]ake such actions as may be necessary to carry out the missions of the employer in cases of

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[10] Even if this Court elects to decide the constitutional questions presented by the unions' motion now, it should do so based on the assumption that the Governor's action complies with chapter 89, because only HLRB can decide *that* question. HRS § 89-14.

[11] Thus, irrespective of the Legislature's ability to limit *private* employee collective bargaining rights, its right to limit *public* employee collective bargaining rights is written into our Constitution, and not barred by it. As discussed below, Yogi, infra, prohibits only "unfettered" discretion by the Legislature in defining this right. Yogi itself recognizes that the Legislature has constitutionally exercised this discretion in enacting § 89-9(d). 101 Hawaii at 55, 62 P.3d at 198.

emergencies." HRS § 89-9(d)(5), (7) and (8). Collective bargaining negotiations may not "interfere with the rights and obligations of a public employer[.]" HRS § 89-9(d).

A furlough is when "an employee [is] placed in a temporary status ***without duties and pay*** because of lack of work or funds." Black's Law Dictionary, 6th ed. 1990 at 675 (emphasis added).[12] The Governor's decision to furlough employees therefore falls squarely within § 89-9(d)(5), which explicitly reserves an employer's ability to "relieve an employee from duties because of lack of work or other legitimate reason[.]" A budget loss of more than $2.7 billion is unquestionably a "legitimate reason." <u>DeLury v. City of New York</u>, 381 N.Y.S. 2d 236, 240 (App. Div. 1976). "Relieve from duty" includes *temporarily* relieving an employee from duty. Applying a *nearly identical* management rights statute, the District of Columbia PERB found that "[m]anagement's authority to furlough its employees is codified under D.C. Code § 1-618.8(a)(3), to 'relieve employees of duties because of lack of work or other legitimate reasons.'" <u>In re University of D.C. Faculty Ass'n v. Univ. of D.C.</u>, PERB Case No. 97-U-12 (D.C. PERB 1997) (Ex. F).[13] Furloughs are clearly within this management right. <u>See</u> <u>also</u> <u>In re Arbitration Between County of Sullivan and Teamsters Local No. 445</u>, 714 N.Y.S.2d 541, 543 (App. Div. 2000) (unilateral change from full time to part time within employer's right to "relieve employees from duties because of lack of work or other legitimate reason."); <u>In re Civil Service Employee Ass'n v. New York State Public Employment Relations Bd.</u>, 615 N.Y.S.2d 502, 591 n.1 (App. Div. 1994) (describing furlough as being "relieved from duty").

The Governor's furlough authority also falls within the management right to "determine methods, means, and personnel by which the employer's operations are to be conducted[.]" HRS § 89-9(d)(7). The furlough plan is the "method" and "means" of implementing the executive branch's operations, consistent with the Governor's obligation to balance the budget and supervision over the executive branch. Const. Art. V § 6, Art. VII §§ 8, 9. The furlough plan also determines the "personnel" to "conduct" the "employer's operations." HRS § 89-9(d)(7).

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[12] Even the unions' own citation—Robert's Dictionary of Industrial Relations—says that "The Civil Service Reform Act defines furlough as 'the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.'" Union Ex. 24-3. This is just what the Governor has done.

[13] These management rights are now codified at D.C. Code Ann. § 1-617.08 (West 2009)—Ex. G. This statute is strikingly similar to HRS § 89-9(d).

Finally, the public employer may "[t]ake such actions as may be necessary to carry out the missions of the employer in cases of emergencies." HRS § 89-9(d)(8). The missions of the executive branch are many, including: to ensure the public safety, run the prisons, protect Hawaii's natural resources, maintain major roads, protect vulnerable children, elders, and the mentally ill, promote Hawaii's agriculture, administer welfare and safety-net programs, protect consumers, run the State harbors, and regulate insurance and other industries.[14]

It is the Governor's job to "faithfully execute" the laws of this State, and to see that the many missions of the executive branch agencies continue to be pursued as best as possible despite the present economic difficulties. Haw. Const. Art V § 5. The Governor's authority under HRS § 89-9(d)(8) therefore supports the furlough plan.

HRS § 89-9(d) does not limit "emergencies" to natural disasters. Addressing a budget shortfall of this magnitude can be every bit as exigent as almost any natural disaster, and poses potentially more of a disruption to the State's ability to "carry out the missions" of the executive branch. An emergency should not be discounted just because it takes the shape of a financial crisis, rather than a naturally-occurring one. A financial crisis is both an "emergency" under HRS § 89-9(d)(8) and a "legitimate reason" under HRS § 89-9(d)(5). As one court observed:

> Clearly, the dire financial circumstances facing the City of New York come within the phrase "other legitimate reasons" and arise to the de facto status of an emergency. ***To hold otherwise is to avoid reality***. DeLury, 381 N.Y.S.2d at 240 (emphasis added).

HRS § 89-9(d)(8) fully supports the Governor's authority to furlough executive branch workers.

Implementing furloughs, rather than large layoffs (or other drastic measures), maximizes the State's ability to fulfill the missions of the executive branch and complies with the Governor's constitutional obligations to "faithfully execute" the laws of this State. Haw. Const. Art. V § 5. The Constitution leaves to the Governor to determine how to faithfully execute the laws, and § 89-9(d) provides her certain non-negotiable management rights as tools to do so. Given the clear fiscal exigency (highlighted by the $2.7 billion revenue decrease), the Governor

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[14] This is not an exhaustive list. See, e.g., HRS chapter 26 (executive agencies); HRS §§ 26-9(b) (protection of consumers, regulate insurance); 26-10(b) (collect taxes); 26-23(a) (protect physical and mental health of people of the State); 26-14(b) (child and adult welfare, economic assistance, rehabilitation); 26-14.6 (administer correctional facilities); 26-15(b) (administer the public lands and ocean activities); 26-16(c) (conservation of agricultural lands, assist farmers, enforce rules on labeling of agricultural products); 26-18(a) (encourage the development of industry and energy); 26-19 (establish and maintain State highways, harbors and airports); 26-20 (protect workers, regulate private employers); 26-21(a) (protect people of State from natural disaster).

does not bear the burden of proving that her choice as to how to execute the laws is the best possible one. Thousands of employees would have to be laid off to realize equivalent savings, Kawamura Decl. ¶16, and using furloughs instead is certainly a "legitimate reason."[15]

The recent decision by the Superior Court of California upholding Governor Schwarzenegger's right to impose furloughs followed language very similar to HRS § 89-9(d). *See* Professional Engineers in California Government et. al., v. Arnold Schwarzenegger, Governor, State of California, et. al., Superior Court of California (January 30, 2009) (amended minute order) (Ex. H). The court found, on two separate bases, that the California governor had the authority to furlough state employees. The court relied in part on language in the MOUs between the government and the unions, which set out the governor's rights to "relieve its employees from duty because of lack of work, lack of funds, or for other legitimate reasons . . . [and to] take all necessary actions to carry out its mission in emergencies." The court held this was sufficient to authorize the furloughs: the "fiscal emergency … authorizes the Governor to reduce the work hours of state employees under these cited terms of the ... MOUs….[T]he state employee furloughs …are both necessary and reasonable under the circumstances." Id. at 8-9.[16]

Here, §§ 89-9(d)(5) and (8) are nearly identical, so the California case is directly on point. Just as the California governor could order furloughs because the California MOUs allowed him to "relieve … employees from duty because of lack of work, lack of funds, or other legitimate reasons," chapter 89 allows Governor Lingle to "relieve an employee from duties because of lack of work or other legitimate reason." HRS § 89-9(d) confirms that Governor Lingle has at least three independent bases for implementing the furlough, and any one of them is enough.

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[15] If furloughs are prohibited, the actual layoffs across all of State government could be far larger. Kawamura Decl. at ¶16. Without furloughs, other state government entities' (like DOE) options to close budget gaps of this size are limited, and will almost certainly involve layoffs.

[16] The application of management rights is far stronger here than in the California case. In the California case, the language was in the relevant agreements. Here, ***by law*** the management rights are excluded from collective bargaining entirely. The unions have acknowledged these management rights in their contracts. See UPW CBA (BU 1) (Ex. I) at § 9 ("The Employer reserves and retains, solely and exclusively, all management rights, powers and authority, including the right of management to manage, control, and direct its work forces and operations except those that may be granted under this Agreement."); UPW CBA (BU 10) (Ex. I) at § 9 (same). HRS § 89-9(d) prohibits any contract from interfering with management rights (parties "shall not agree to any proposal . . . that would interfere" with the management rights listed).

2. The Governor's Management Rights Under HRS § 89-9(d) Are Not Subject to Collective Bargaining

In 2005 the Supreme Court held that "the right to negotiate wages, hours and conditions of employment is ***subject to*, not balanced against, management rights**." Hanneman, 106 Hawaii at 365, 105 P.3d at 242 (emphasis added). This case establishes—unequivocally—that the decision to furlough is not subject to negotiation. Hanneman controls.

In Hanneman, the City sought to unilaterally transfer refuse workers from one base yard to another. The union demanded negotiation, arguing that transfer was a mandatory subject of collective bargaining. Id. at 362, 105 P.3d at 239. The City refused, executing its authority as public employer to "[h]ire, promote, transfer, assign, and retain employees[.]" HRS § 89-9(d)(3). The Court ruled that the duty to negotiate extends ***only so far*** as it does not "infringe upon an employer's management rights under section 89-9(d)":

> HRS § 89-9 does not expressly state or imply that an employer's right to transfer employees is subject to a balancing of interests. Contrary to the HLRB's interpretation, our holding in [University of Hawaii Professional Assembly v. Tomasu, 79 Hawaii 154, 900 P.2d 161 (1995)] does not approve of the HLRB's balancing test. Rather, we believe Tomasu stands for the proposition that, in reading HRS §§ 89-9(a), (c) and (d) together, parties are permitted and encouraged to negotiate all matters affecting wages, hours and conditions of employment ***as long as the negotiations do not infringe upon an employer's management rights under section 89-9(d). In other words, the right to negotiate wages, hours and conditions of employment is subject to, not balanced against, management rights***. Accordingly, in light of the plain language of HRS § 89-9(d), we hold that the HLRB erred in concluding that the City's proposed transfer was subject to collective bargaining under HRS § 89-9(a). Id. at 365, 105 P.3d at 242 (emphasis added, footnote omitted). [17]

Under Hanneman, therefore, collective bargaining negotiations may not "infringe upon," for example, the Governor's management rights to "relieve . . employee[s] of duties because of lack of work or other legitimate reason[.]" Collective bargaining over wages, hours and conditions of employment is ***subject to*** these rights, not the other way around. Under Hanneman, if there is a conflict between management rights and the ability to bargain collectively over wages, hours, and conditions of employment, the management rights prevail. Hanneman is dispositive. See also In re Grievance Arbitration State of Hawaii Organization of Police Officers v. Hawaii County Police Dep't, 101 Hawaii 11, 61 P.3d 522 (App. 2002) (HRS § 89-9(d) **precludes** bargaining over classification issues).

[17] The unions not only do not attempt to distinguish Hanneman—they do not even cite it.

The language interpreted in Hanneman was not changed by the 2007 amendments to HRS § 89-9(d). 2007 Haw. Sess. L. Act 58. The same management rights are still excluded from collective bargaining, as they were before the amendment. Id. The specific language discussed above was not changed by Act 58. Id. Instead, the 2007 amendment confirmed that certain topics are *permissive* subjects of collective bargaining. Id. Management rights, on the other hand, are beyond the scope of collective bargaining entirely. Hanneman.[18]

3. The Furlough Order is Consistent with Art. XIII § 2 of the Hawaii Constitution

The unions carry a significant burden: The unconstitutionality of statutes must be proven "beyond a reasonable doubt[.] The infraction should be plain, clear, manifest, and unmistakable." Blair, 73 Haw. at 542, 836 P.2d at 1069. The unions add to their heavy burden by attempting to challenge the constitutionality of the Governor's actions, without also addressing the *statute* that clearly authorizes her actions. By disregarding it, the unions transform what would be an as-*applied* challenge to the constitutionality of the Governor's actions under HRS § 89-9(d) (*after* the statutory question has been resolved at HLRB) into a *facial* constitutional challenge. Facial challenges are more difficult still: "to succeed in facial challenge, challenger must establish that *no set of circumstances exists under which the Act would be valid*." State v. Maugaotega, 115 Hawaii 432, 456, 168 P.3d 562, 586 (2007), quoting United States v. Salerno, 481 U.S. 739, 745 (1987) (emphasis added).

The Hawaii Supreme Court has already specifically held that ***the Legislature retains significant authority*** over defining the scope of collective bargaining, consistent with Art. XIII § 2. The Court has already confirmed that HRS § 89-9(d) falls within that authority:

> [Under Art. XIII § 2,] the legislature is given broad discretion in setting the parameters for collective bargaining. Indeed, the legislature has ***constitutionally exercised such discretion on previous occasions***. See Hawaii Revised Statutes (HRS) § 89-6 (1993) (establishing bargaining units); ***HRS § 89-9(d) (1993) (specifying matters that are not***

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[18] The out-of-state authority cited by the unions is inapposite. Long Island Day Care Services, 303 NLRB 112 (1999) has no reference to management rights. It is irrelevant that an employer *without* the management right to unilaterally furlough must negotiate furloughs. Pennsylvania v. Pennsylvania Labor Relations Bd., 557 A.2d 1112 (Pa. Commw. Ct. 1989) and In re Town of Farmington, Dec. No. 3237 (Conn. Bd. Labor Rel. 1994), Mem. at 9, 11, both apply balancing tests that were rejected by Hanneman. In re Union County, 17 N.J. Pub. Employee Rep. ¶22214 turns on the extent of a statutory power to layoff employees, and does not address management rights. New Jersey also applies the Hawaii-barred balancing test. In re Hunterdon County Bd. of Chosen Freeholders, 561 A.2d 597 (N.J. 1989). Rules from these jurisdictions are inconsistent with clear Hawaii law.

> ***subject to collective bargaining)***; HRS § 89-10(c) (1993) (determining the expiration date for collective bargaining agreements and proscribing the reopening of cost items during the term of the agreement).

United Public Workers v. Yogi, 101 Hawaii 46, 55, 62 P.3d 189, 198 (2002) (controlling opinion of three justices) (emphases added).[19] Because the Hawaii Supreme Court has already stated that this statute is constitutional, it is impossible for the unions to demonstrate that "no set of circumstances exists under which the Act would be valid." Maugaotega, 115 Hawaii at 456, 168 P.3d at 586. The Supreme Court has already categorically rejected that premise (and in Hanneman, the Court confirmed that public employers' management rights are non-negotiable).

Indeed, an examination of the public sector constitutional right to bargain collectively shows that not only are the management rights in HRS § 89-9(d) *consistent with* Art. XIII § 2, they are *inherent in* the constitutional right itself. As explained below, at the time Art. XIII § 2 was enacted, the right to bargain over wages, hours and conditions of employment in the public sector was subject to management rights, such as those confirmed in HRS § 89-9(d).

The language that now appears in HRS § 89-9(d) was added in 1970. 1970 Haw. Sess. L. Act 171 pt. of § 2, new § 9 [Unions' Ex. 18-3]. The relevant language was the ***same*** as it is now. Act 171 confirmed a public employer's right to "relieve an employee from duties because of lack of work or other legitimate reason[,]...determine methods, means, and personnel by which the employer's operations are to be conducted; and take such actions as may be necessary to carry out the missions of the employer in cases of emergencies." Id.

Act 171 was enacted to "implement Section Article XII [now XIII] of the Constitution of the State of Hawaii," as adopted in 1968. Hse. Stand. Comm. Rep. No. 662-70, in 1970 Hse. Journal at 1121. The Legislature acknowledged that in setting the scope of negotiations, the public employer must be able to meet its responsibilities. "Your Committee concurs that there is no reason to limit the scope of negotiations insofar as the terms agreed to .... **does not interfere with the rights of a public employer to carry out its public responsibilities**." Sen. Stand. Comm. Rep. No. 745-70, in 1970 Sen. Journal at 1330, 1332. See also Hse. Stand. Comm. Rep. Nos. 761-70 & 752-70, in 1970 Hse. Journal at 1170 and 1164. The Hawaii Supreme Court

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[19] Justice Nakayama's quoted concurrence was the only opinion in Yogi in which a majority of the court joined, and thus it is controlling. See Greene v. Massey, 384 So.2d 24 (Fla. 1980) (concurring opinion is law of the case if majority of the court concurs). "Views expressed in a separate concurring opinion . . . are not the views of the court, unless it appears that the majority of the court concurred in such . . . views." Anderson v. Sutton, 293 S.W. 770, 773 (Mo. 1927).

confirmed this interpretation in State of Hawaii Organization of Police Officers v. Society of Prof. Journalists, 83 Hawaii 378, 927 P.2d 386 (1996). "[T]he scope of negotiable topics is tempered by an employer's public responsibilities[.]" Id. at 403, 927 P.2d at 411.

In Yogi, Justice Ramil noted that the phrase "collective bargaining as provided by law" had a well recognized meaning, usage, and application under both federal and state laws as well as case law. At the time article XII, [now XIII] section 2 was amended, there were federal, state, and case laws to which the phrase "collective bargaining as provided by law" could refer." Id. at 51, 62 P.3d at 194. Yogi points specifically to federal law. Id.

Federal law shows that the same management rights as now appear in HRS § 89-9(d) were part of a common understanding of public sector collective bargaining well before Art. XIII § 2 was added to the Hawaii constitution. In 1962—six years before Art. XIII § 2 was ratified—President Kennedy signed Executive Order No. 10,988, entitled Employee-Management Cooperation in the Federal Service. Ex. J. While this order provided federal employees with the opportunity to organize and negotiate agreements with the federal-agency employers, section 7 listed rights that management retained. This language—from 1962—is *virtually identical* to HRS § 89-9(d) today, and specifically reserved management rights:

> (c) **to relieve employees from duties because of lack of work or for other legitimate reasons, ...** (e) **to determine the methods, means and personnel by which such operations are to be conducted; and** (f) **to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency.**

Id. § 7(2) (emphases added). This executive order was repealed and replaced with a 1969 executive order that retained identical language. Exec. Order No. 11,491, 34 Fed. Reg. 17605, §12, *reprinted as amended in* 5 U.S.C.A. § 7101. Ex. K.

The 1962 executive order has proven to be enormously influential.[20] It has been described as "the foundation for future public sector labor laws[.]" Taryn M. Byrne, Note, *Executive Power, National Security & Federal Employee Collective Bargaining Rights*, 21 Hofstra Lab. & Emp. L.J. 293, 303 (2003). It was "a watershed event in the public sector labor movement." John Patrick Piskulich, *Collective Bargaining in State and Local Government* 1 (1992), *quoted in* Note, 83 Cornell L. Rev. 194, 259 n. 24 (1997).

[20] Many states have similar management rights in their collective bargaining laws. See, e.g., D.C. Stat. Ann. § 1-617.08 (West 2009); Fla. Stat. Ann. § 447.209 (West 2009); Iowa Code Ann. § 20.7 (West 2009); Kan. Stat. Ann. § 75-4326 (West 2009); Md. Code Ann. § 11.5-110 (West 2009); Mont. Code Ann. § 39-31-303 (West 2009); R.I. Gen. Law § 42-56-10 (West 2009).

Importantly, the framers of the 1968 amendment were well aware of President Kennedy's executive order, which was discussed repeatedly during the 1968 convention debates. One delegate noted: "Since 1950, Mr. Chairman, public employees of Hawaii have gone a long way. Significant changes have taken place. In 1962, President Kennedy issued Executive Order 10-9-88 which permitted federal employees to organize unions of their own choosing[.]" Debate in the Committee of the Whole, 2 *Proceedings of the Constitutional Convention of 1968*, at 476 (Delegate Yamamoto). See also Id. at 478, 481, 482, 483, 485, 486 (discussing executive order). The 1962 executive order was clearly part of the "law" discussed in Yogi, that defines the scope of Art. XIII § 2. Yogi, 101 Hawaii at 51, 62 P.3d at 194. The management rights in President Kennedy's executive order were inherent in the public-sector right to bargain collectively as it was considered during the constitutional convention. These management rights now appear in HRS § 89-9(d). They reflect the contemporary understanding of the limits of the public-sector constitutional right to bargain collectively.

The marked distinction between the two state constitutional provisions governing collective bargaining further supports this conclusion. Art. XIII § 1 provides: "[p]ersons in private employment shall have the right to organize for the purpose of collective bargaining." Art. XIII § 2, on the other hand, reads: "[p]ersons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law." (emphasis added). As acknowledged by the Hawaii Supreme Court in Yogi, this provision specifically contemplates that other "law" will define the scope of that right. HRS § 89-9(d) is part of that law.[21]

[21] The difference between these two provisions shows that **the history and law of collective bargaining in the public sector is not equivalent to that in the private sector.** For example, the National Labor Relations Act does **not** cover public employees, and has **no statutory management rights provision**. See 29 U.S.C.A. § 152(2). Public sector collective bargaining is guided by its own rules and history, which includes the 1962 executive order and its successor. As the Supreme Court of Florida noted, commenting on Florida's constitutional right to bargain collectively, "[a] *public employee's constitutional right to bargain collectively is not and cannot be coextensive with an employee's right to so bargain in the private sector*. Certain limitations on the former's right are necessarily involved. For instance, a wage agreement with a public employer is obviously subject to the necessary public funding which, in turn, necessarily involves the powers, duties and discretion vested in those public officials responsible for the budgetary and fiscal processes inherent in government." State of Fla. Police Benev. Ass'n, Inc., 613 So.2d 415, 419 (Fla. 1992) (citation omitted, emphasis added). The private sector collective bargaining authority cited by the unions is thus entirely inapposite and should be disregarded.

Because the existence of management rights is inherent in the concept of collective bargaining, § 89-9(d) is constitutional under Art. XIII § 2. The Supreme Court has already acknowledged this. In the controlling opinion in Yogi, discussed above, where the Court explicitly stated that HRS § 89-9(d) was a constitutional exercise of the Legislature's discretion under Art. XIII § 2. Yogi, 101 Hawaii at 55, 62 P.3d at 198. The Court quoted this same language with favor in Malahoff v. Saito, 111 Hawaii 168, 186, 140 P.3d 401, 419 (2006).

The unions' arguments that the furloughs inherently affect wages, hours and conditions of employment ignore the conclusive significance of § 89-9(d) and its history as related to Art. XIII § 2. The public-sector right to bargain collectively has *never* been devoid of management rights. The right to bargain over wages, hours, and conditions of *public* employment has *always* been ***subject to*** the powers that are reserved to management, including rights that by their very nature may impact wages or hours. See Exec. Order 10,988 ("relieve employees due to lack of work"). Ex. I. Rather than completely forbid *any* collective bargaining over cost items, possibly "for two decades," as did the legislative action struck down in Yogi, 101 Hawaii at 54, 62 P.3d at 197, the Governor's furlough plan instead exercises powers that the public employers have *always* had under Hawaii law, powers that the Hawaii Supreme Court has **already described as constitutional**. Yogi; Malahoff. There is ***no*** legal similarity between the then-newly enacted statute struck down in Yogi, and the forty-year old management rights provision at issue here, whose constitutionality has already been confirmed by the Supreme Court.

Yogi and Malahoff have already confirmed the constitutionality of § 89-9(d). The unions ignore this, and instead claim that the furloughs must be unconstitutional under these cases. This is wrong. Neither case *forbids* the Legislature from exercising discretion in "setting the parameters for collective bargaining[.]" Malahoff, 111 Hawaii at 186, 140 P.3d at 419. What these cases preclude is "unfettered" legislative discretion over collective bargaining. Id. Using management rights to define the scope of bargaining, as in HRS § 89-9(d), is not "unfettered" at all. Instead it is a mirror image of the management rights that existed in public sector bargaining law at the time Art. XIII § 2 was added in 1968. There is no constitutional violation.

B. No Separation of Powers Problems Can be Presented by Chapter 37 Because It Was Separately Required by the Hawaii Constitution[22]

[22] The unions also contend the § 37-37 does not authorize restriction of the DOE budget, because the restriction would allegedly stop DOE from meeting "valid obligations or commitments incurred against the allotted funds." Mem. at 14. This claim, even if brought by an entity with

The Director of Finance and the Governor will restrict the funds of DOE and the University of Hawaii (technically "reduce the allotment") pursuant to HRS § 37-37, because they have determined that "the probable receipts from taxes or any other sources for any appropriation will be less than was anticipated, and that consequently the amount available for the remainder of the term of the appropriation or for any allotment period will be less than the amount estimated or allotted therefor." Kawamura Decl. at ¶13; HRS § 37-37(a). The unions' claim (Mem. at 14) that the Governor has used the restriction to "require mandatory furloughs" of DOE employees is simply false. As the public employer under HRS § 89-2, the Board of Education will decide how to manage its expenses—the Governor's furlough order does not extend to employees of DOE.

Regardless, the unions' nondelegation argument is a legal *non sequitur*, because Chapter 37 is *required* by the Hawaii Constitution, and thus *cannot* violate that Constitution. "Provision for the control of the rate of expenditures of appropriated state moneys, and for the reduction of such expenditures under prescribed conditions, shall be made by law." Art. VII, § 5. The proceedings of the 1950 constitutional convention confirm this interpretation. "[Y]our Committee is of the opinion that there should be vested in the chief executive the authority to reduce the level of expenditures when conditions dictate such action as essential in the interest of preserving financial stability." Stand. Comm. Rep. No. 51, 1 *Proceedings of the Constitutional Convention of Hawaii 1950*, 191, 194. One delegate's comments addressed this concern directly: this constitutional provision "would not be construed as an encroachment by the governor on the power of the legislature since the appropriations made were based on estimated revenues submitted by him. Such a delegation of power must be provided in the Constitution in order to be effective." Committee of the Whole Debates, 2 *Proceedings of the Constitutional Convention of Hawaii 1950*, 451 (remarks of Delegate Henry White).

HRS § 37-37(a) was enacted to implement Art. VII, § 5 of the Constitution. <u>See</u> Stand. Comm. Rep. No. 99, House Journal 238, First Special Session Laws of Hawaii 1959. This authority also has a long pedigree. Since 1925, Hawaii has had a statutory provision that allowed the Governor <u>not</u> to expend appropriations made by the legislature. <u>See</u> 1925 Haw. Sess. L. Act 56 § 12; Rev. L. Haw. ch. 18, § 641 (1935); Rev. L. Haw. ch. 25 § 1634 (1945).

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standing, is unripe, and in any case, is wholly unsupported by any facts relating to DOE's budget and obligations. If DOE (or any other instrumentality of the State) at some point fails to meet a valid financial obligation, a party to whom such obligation is owed can raise such a claim then.

Given this history, the unions' contention that § 37-37 violates the nondelegation doctrine is inherently illogical (indeed, absurd). Art. VII § 5 is a separate constitutional authorization. In Chiles v. Children A, B, C, D, E & F, 589 So.2d 260, 265 (Fla. 1991)—cited by the unions—the court recognized that the nondelegation doctrine ***does not apply*** when there is a separate constitutional authorization—identifying legislative power over appropriations "except where the Constitution controls to the contrary[.]" Here, Art. VII § 5 *requires* that "provision" for "the reduction of expenditures" "shall be made by law." The nondelegation doctrine is simply inapplicable, because another constitutional command is at work. That renders all out-of-state authority cited by the unions irrelevant. Not only does the Hawaii Constitution allow the Legislature to provide the Governor the power to restrict expenditures, ***it requires it***: "Provision for the control of the rate of expenditures of appropriated state moneys, and for the reduction of such expenditures under prescribed conditions, shall be made by law." Art. VII § 5.

In addition to the explicit constitutional requirement authorizing chapter 37, the unions misunderstand the nature of the Governor's authority over the budget as chief executive. The Governor's own *executive* authority belies any claim that the exercise of that power is somehow an improper delegation of *legislative* authority. The Supreme Court has already acknowledged the Governor's authority over the State budget in Board of Education v. Waihee, 70 Haw. 253, 768 P.2d 1279 (1989). The Governor has "statewide policy-making and executive powers" and "authority over the executive budget." Id. at 264, 768 P.2d at 1286. "These powers are described in sections 37-32 to 37-42 … which establish an allotment system whereby appropriated moneys are made available for expenditure[.] . . . [The Director of Finance's] approval is no assurance that the allotted sums will be available for expenditure, for **the director is empowered under HRS §§ 37-36 and 37-37 to modify or reduce the allotted sums under given conditions**." Id. at 265-66, 768 P.2d at 1287 (emphasis added).

Even *without* the explicit constitutional provision, or the Waihee decision, authority over the budget is inherent in the executive power conferred by the Constitution. See Bowsher v. Synar, 478 U.S. 714, 733 (1986) (executive function included "the ultimate authority to determine the budget cuts to be made."); McInnish v. Riley, 925 So.2d 174, 182 (Ala. 2005) ("discretion in determining . . . how to distribute funds is an executive function."); Hunter v. State, 865 A.2d 381, 392 (Vt. 2004) ("[A]ppropriation is a legislative power, but spending is an executive power."). The Governor's actions are premised on her own inherent authority and as specifically authorized by Art. VII § 5. When acting under direct constitutional prerogatives, there can be no separation of powers challenge.

C. The Furlough Order Has No Impact on the Benefits Attributable to Past Services and Therefore Art. XVI, § 2 Does Not Apply

The furlough order will not diminish or impair any ERS member's *accrued* retirement benefits because the benefits attributable to past services will not be reduced. Because the value of *past* years are unaffected by the furlough order, the furloughs will not violate Art. XVI, § 2 of the Hawaii Constitution. An employee has no constitutionally-protected entitlement to retirement benefits attributable to a *future* salary based on *future* services. The proceedings of the 1950 constitutional convention confirm this interpretation (although the provision's language is so plain, and the meaning of "accrued" so clear, resort to legislative history is unnecessary):

> [The] provision would not limit the legislature in effecting a reduction in the benefits of a retirement system provided the reduction did not apply to benefits already accrued. . . . [T]he legislature could reduce benefits . . . ***as to persons already in the system in so far as their future services were concerned***. ***It could not, however, reduce the benefits attributable to past services***. . . . [T]he section would not limit the legislature in making general changes in a system, applicable to past members, so long as the changes did not necessarily reduce the benefits ***attributable to past services***.

Comm. Report No. 18, *Journal of the Const. Con. of 1950* at 330 (emphases added). This history indicates that "benefits already accrued" refers to "benefits attributable to past services." Id. It does not include benefits for future services. "[W]e conclude that the provision was meant to protect an employee from a reduction in *accrued* benefits." Chun v. Employees' Retirement System, 61 Haw. 596, 605-06, 607 P.2d 415, 421 (1980) (emphasis added).[23]

An employee's retirement benefits are based on a percentage of "average final compensation," the average of the employee's compensation during the three (or sometimes five) highest paid years of credited service. HRS § 88-81. An employee's pay for future services can never be forecast with certainty. An employee could work less overtime or transfer to a lower-paid position. Even if an employee's future retirement benefit is reduced (for whatever reason), the employee's average final compensation is not changed, as the "average final compensation" is calculated based on *services already rendered*. Thus, the benefits *attributable to past services*

[23] Accrued benefits are generally defined as "benefits of the type that increase or grow over time—such as a pension payment or retirement allowance that increases in amount along with the number of years of service[.]" Studier v. Mich. Pub. Sch. Employees' Ret. Bd, 698 N.W.2d 350, 355-58 (Mich. 2005). It is not possible to "accrue" a benefit before the service is rendered.

are not reduced. That is all Art. XVI § 2 requires.

The State will make its required retirement system contribution on July 6, 2009. Kawamura Decl. ¶12. The unions' claim that a few days' delay in paying ERS contributions (from the last day of June to July 6) weakens the source of State employees' retirement benefits is speculative at best (and the unions do not even identify any document that requires the payment on the last business day in June, as opposed to July 6).[24] A few days' delay is not a permanent reduction in contributions, and speculation about lost investment opportunities is just that, speculation, and should be disregarded. Mem. at 14.

Furthermore, the unions' demand that the Governor be ordered to pay certain bills prior to the expiration of the fiscal year is requesting particularly disfavored mandatory relief:

> A mandatory injunction is distinguishable from a prohibitory injunction in that a mandatory injunction commands performance of certain acts whereas a prohibitory injunction prohibits the performance of certain acts. . . . [M]andatory preliminary relief which goes well beyond the status quo is particularly disfavored[.]

Stop Rail Now v. DeCosta, 120 Hawaii 238, 244, 203 P.3d 658, 664 (2008) (citations, internal quotation marks omitted). The unions fail to either identify or meet this standard.

D. The Unions Have Not Shown That They Will Suffer Irreparable Damage If the Preliminary Injunction is Denied

No constitutional rights have been denied. The Governor's actions comply with Art. XIII, § 2. The unions' arguments about "accrued" retirement benefits and nondelegation are based on fundamental misunderstandings of the relevant constitutional provisions. The unions' claim that they are entitled to an injunction because of alleged constitutional violations is wrong.

The unions make no real argument that they are entitled to injunctive relief due to the financial impact of the furloughs. Nor can they, for it is hornbook law that financial loss by itself does not constitute irreparable harm. See, e.g., Suffolk County Ass'n of Mun. Employees, Inc. v. County of Suffolk, 557 N.Y.S.2d 946 (App. Div. 1990) (no injunctive relief for furloughs); Novak v. Commonwealth of Pennsylvania, 523 A.2d 318 (Pa. 1987) (same). In addition, an injunction cannot be based on speculation. Korean Philadelphia Presbyterian Church v. Cal. Presbytery, 77 Cal. App. 4th 1069, 1084 (2000). The unions' vague allegations that furloughs will put employees' financial affairs at risk are insufficient to support injunctive relief.

Not only do the unions fail to show irreparable harm, but the harm to the State and the

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[24] As exclusive representatives, the unions represent employees. Chapter 89 makes no mention of retirees. HRS §§ 89-2, 89-8(a). The unions do not have standing to assert this argument.

public is grave if the furlough plan is halted. The State has an enormous budget shortfall. Granting the motion would cause imminent harm by forcing the State to layoff employees and/or cut services. In determining whether to issue an injunction the Court must balance the hardships. Even if the unions showed a likelihood of success on the merits (which they assuredly have not), the real harm to the State is far greater than the speculative harm alleged by the unions.

E. The Public Interest Requires Denying the Injunction

The balance of irreparable harm and public interests overwhelmingly favors denying the unions' motion. Injunctive relief is "to be used sparingly, and only in a clear and plain case." Rizzo v. Goode, 423 U.S. 362, 378 (1976). A court should grant the government the "widest latitude in the dispatch of its own internal affairs." Id. at 378-79. Here, the harm to the public far exceeds the harm to the unions and their members. The State is facing an unprecedented fiscal crisis that affects every citizen of the State. There is a **$2.7 billion** revenue shortfall, just in the near term. In California, the state's financial crisis justified the furloughs:

> [Given] the current fiscal crisis, the reduction in the workweek of state employees under the furlough order is indisputably related to the needs of the various state agencies, which . . . run the imminent risk of running out of money and thus being unable to carry out their missions, if immediate action is not taken[.]

Schwarzenegger at 7. The same is true here. The furloughs are necessary and reasonable under the circumstances, but even if different people could reach different judgments, the public interest could not be served by barring furloughs and thus requiring layoff and program cuts.

CONCLUSION

The State's fiscal crisis is unprecedented, and the unions cannot begin to demonstrate that the statute which clearly authorizes the Governor's actions is unconstitutional beyond a reasonable doubt. (Any question of whether her actions comply with Chapter 89 is committed to HLRB's exclusive jurisdiction.) The unions cannot show likelihood of success on the merits. They have demonstrated neither irreparable injury, that the balance of hardships tips in their favor, nor that the public interest is served by an injunction. The motion should be denied.

Dated: Honolulu, Hawaii, June 29, 2009.

Respectfully submitted,

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HAWAII STATE TEACHERS ASSOCIATION and UNITED PUBLIC WORKERS AFSCME, Local 646, AFL-CIO, Plaintiff, vs. LINDA LINGLE, Governor, State of Hawaii; MARIE LADERTA, Director, Department of Human Resources Development, State of Hawaii; and GEORGINA KAWAMURA, Director, Department of Budget and Finance, State of Hawaii, Defendants.	CIVIL NO. 09-1-1372-06 KKS (Other Civil Action) CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 29, 2009, a copy of the foregoing document was duly served via hand-delivery as follows:

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