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No. _____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ST. JOHN'S WELL CHILD AND FAMILY CENTER, et al.,

Petitioners,

v.

ARNOLD SCHWARZENEGGER as Governor, etc., et al.,

Respondents;

DARRELL STEINBERG, individually and as President pro Tempore, etc., et al.,

Interveners.

After an Opinion by the Court of Appeal, First Appellate District, Division Two, No. A125750

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

CALIFORNIA CONSTITUTION:

CALIFORNIA CONSTITUTION OF 1879:

MISCELLANEOUS:

QUESTIONS PRESENTED FOR REVIEW

1. Does the Governor's constitutional authority pursuant to article IV, section 10(e) of the California Constitution to "reduce or eliminate one or more items of appropriation" apply to a bill provision that reduces a previously enacted appropriation?

2. Does the Governor's attempt to apply his line-item veto power to bill provisions whose sole effect is to reduce previously enacted items of appropriation violate the separation of powers required by article III, section 3 of the California Constitution?

INTRODUCTION

This case raises important constitutional issues of first impression arising from the Governor's unprecedented application of the line-item veto power. The crux of the issue is whether the Court of Appeal correctly ruled that, for purposes of the Governor's line-item veto power under article IV, section 10(e), the term "items of appropriation" includes not only bill provisions that grant spending authority but also bill provisions that only reduce existing spending authority, and thus have the opposite legal effect. If the Court of Appeal's published opinion is allowed to stand, it will significantly alter the meaning of constitutional guidelines that have long governed the operation of the legislative branch of California State government, including the manner in which the State deals with future budget crises for years to come.

Article IV, section 10(e) of the California Constitution provides that the Governor may "reduce or eliminate one or more items of appropriation while approving other portions of a bill." The plain meaning of this provision, consistent with its longstanding interpretation by the California courts, is that when the Legislature presents to the Governor a

bill containing a provision that would grant authority to spend State funds, the Governor may modify that specific provision in order to reduce or eliminate that grant of spending authority.

In July 2009 the Legislature, sitting in special session to address a fiscal emergency, passed a bill that, among other things, made *reductions* in a number of General Fund appropriations that had been previously approved by the Governor and enacted as part of the 2009-10 Budget Act. The Governor then purported to use his line-item veto power to increase the size of those reductions, notwithstanding the language in article IV, section 10(e) of the Constitution that he may only "reduce or eliminate . . . items of appropriation."

To the Legislature's knowledge, no sitting Governor had ever before attempted to apply the line-item veto to a bill provision that does no more than to make reductions in previously authorized expenditures. Because the Governor's increased spending cuts targeted the most vulnerable members of our society, St. John's Well Child and Family Center, along with other groups and individuals, filed a petition for writ of mandate directly in the Court of Appeal for the First Appellate District, seeking to overturn eight of the Governor's line-item vetoes. The Senate President pro Tempore and Assembly Speaker[1] intervened not only to

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[1] Karen Bass was Speaker of the California Assembly at the time the writ petition was filed, and intervened in her personal and official capacities. In February of 2010, Assemblymember John A. Pérez was elected to replace the termed-out Ms. Bass as Speaker of the California Assembly. By motion filed simultaneously with this petition for review, Speaker Emeritus Bass seeks to withdraw from this action, and Speaker Pérez seeks to join in his personal and official capacity as her substitute.

protect these vulnerable groups but also to check the Governor's unwarranted intrusion into the authority of the Legislature.

The Court of Appeal upheld the Governor's use of the line-item veto, finding no difference between a bill provision that makes an appropriation and a bill provision that instead reduces a previously enacted appropriation. Both types of provisions, the court held, constitute "items of appropriation" within the meaning of article IV, section 10(e), and both types are subject to the Governor's line-item veto.

The Court of Appeal's analysis fundamentally misconstrues the language and purpose of the line-item veto power. Article IV, section 10(e) of the Constitution authorizes the Governor to "reduce or eliminate . . . items of appropriation" in particular provisions of a bill. A provision of a bill makes an "appropriation," by the plain meaning of the term, only if it has the legal effect of setting aside money for expenditure for a public purpose. (*See Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1089; *Los Angeles v. Post War Public Works Review Board* (1945) 26 Cal.2d 101, 116-117; *Wood v. Riley* (1923) 192 Cal. 293, 303.) By contrast, a bill provision that does no more than *reduce* the amount of a previously enacted appropriation cannot reasonably be said to make an appropriation; its effect in law is, in fact, the opposite of an appropriation. To interpret article IV, section 10(e) of the Constitution to authorize the Governor to modify such a provision pursuant to his line-item veto power, as the Court of Appeal has done, directly contravenes the meaning of that constitutional provision.

The appropriation of public funds is a legislative function (*Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 302), and the Governor's role in exercising the line-item veto represents a

departure from his ordinary role in exercising power within the parameters of the executive branch of State government. Consistent with the principle of separation of powers, this Court has held that the line-item veto is a narrow exception that allows the Governor to act "in a legislative capacity," and that the veto power is to be strictly construed. (*Harbor v. Deukmejian*, *supra*, 43 Cal.3d at 1089.) The Governor's use of the line-item veto in this case is an attempt to expand his role in the legislative process well beyond anything that this Court has previously allowed.

The Court of Appeal's interpretation of the term "items of appropriation" also implicates other provisions of the Constitution, according meanings to those provisions that conflict with both judicial precedent and longstanding legislative practice. First and foremost, the Court of Appeal's determination that spending reductions are items of appropriation means that such spending reductions require a two-thirds vote for passage by the Legislature, given the requirement of article IV, section 12(d) of the Constitution that "[a]ppropriations from the General Fund of the State, except appropriations for the public schools, are void unless passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring." The notion that a reduction to existing State spending authority cannot be passed except upon an extraordinary vote of both houses of the Legislature contradicts the very purpose of the line item veto, which is to provide a check on legislative spending.

There is more. The Court of Appeal's opinion suggests, for example, that the single subject rule otherwise bars the use of a single bill to make multiple reductions to the Budget Act, and that bills making minor, nonsubstantive changes to existing appropriations are themselves

appropriations measures, requiring a two-thirds vote for passage in the Legislature and providing the Governor a second opportunity to apply the line-item veto to appropriations he previously approved.

As demonstrated below, the consequences of the Court of Appeal's decision are far reaching – and wholly unnecessary. Had the Court of Appeal confined the term "items of appropriation" to its original and intended meaning, this case would raise none of the concerns that flow from the opinion below. The Court of Appeal erred in its interpretation of that term and, in order to justify that interpretation, significantly altered the meaning of constitutional guidelines under which the Governor and Legislature have operated for decades. This Court's review is necessary to correct those mistakes.

SUMMARY OF THE CASE

The Budget Act of 2009 (Stats. 2009, 3d ex. sess., ch. 1) was passed by a two-thirds vote of the Legislature and signed into law by the Governor on February 20, 2009.[2] When he signed the Budget Act into law, the Governor exercised his constitutional prerogative under article IV, section 10(e) of the California Constitution to "reduce or eliminate" a number of the more than two thousand "items of appropriation" set forth in section 2.00 of the Budget Act.

As the State's finances further deteriorated, on July 1, 2009, the Governor declared a fiscal emergency pursuant to article IV, section 10(f) of the Constitution, thereby calling the Legislature into special

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[2] Relevant excerpts of the Budget Act were included as Exhibit A to Interveners' Request for Judicial Notice.

session for the sole purpose of passing legislation pertaining to that crisis. On July 23, 2009, the Legislature passed Assembly Bill 1 of the Fourth Extraordinary Session. (Stats. 2009, 4th ex. sess., ch. 1.)[3] The bill included significant cuts to appropriations made in the Budget Act, additional new appropriations, transfers among funds, and changes to control provisions stating how certain funds could be used. Because some of the bill's provisions made new appropriations, that fact was reflected in the bill's title and digest.

The Governor signed the bill into law on July 28, 2009. He also purported to exercise his authority under article IV, section 10(e) to line-item veto 27 of the provisions contained in AB 1, including a number of provisions that only made reductions to appropriations that were previously enacted into law as part of the Budget Act. In doing so, the Governor increased the amount of some of the cuts that the Legislature had made, proclaiming that this was a proper exercise of his article IV, section 10(e) authority to "reduce or eliminate . . . items of appropriation." In his veto message, the Governor explained that his increases to the legislatively enacted spending reductions were intended "to increase the reserve and to reduce the state's structural deficit."[4]

On August 12, 2009, petitioners St. John's Well Child and Family Center filed an original petition for writ of mandate in the First District Court of Appeal, challenging eight of the Governor's line-item

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[3] Relevant excerpts of A.B. 1 were included as Exhibit B to Interveners' Request for Judicial Notice.

[4] The Governor's veto message was included as Exhibit C to Intervener's Request for Judicial Notice.

vetoes of AB 1. The challenged vetoes are described at pages 6 through 8 of the Court of Appeal opinion. For example, AB 1 enacted the following reduction to the Department of Aging:

> SEC. 568. Section 17.50 is added to the Budget Act of 2009, to read: [¶] Sec. 17.50. The amount appropriated in Item 4170-101-0001 of Section 2.00 is hereby reduced by $9,483,000.
>
> (Interveners' RJN, Exh. B, p. 540 [Assem. Bill No. 1 (2009-2010 4th Ex. Sess.) ch. 1, § 568, enacted by Stats. 2009, 4th ex. sess., ch. 1].)

The Governor's veto reads:

> SEC. 17.50–. I am reducing the item of General Fund appropriations in this section by $6,160,000 as opposed to approving the item as presented without reduction. Thus, I am increasing the General Fund reduction from $9,483,000 to $15,643,000.
>
> * * *
>
> "Sec. 17.50. The amount appropriated in Item 4170-101-0001 of Section 2.00 is hereby reduced by ~~$9,483,000~~ $15,643,000."
>
> (Interveners' RJN, Exh. C, p. 8 [Governor's Message to Assem., § 17.50].)

On September 14, 2009, the Court of Appeal granted the motion of Senator Steinberg and then-Assembly Speaker Bass to intervene

in the St. John's suit.[5] After briefing and oral argument, on March 2, 2010 the Court of Appeal issued its opinion denying the petition for writ of mandate and upholding the challenged vetoes.

In an opinion certified for publication, the Court of Appeal stated that the "dispositive issue . . . is whether the seven sections of Assembly Bill 4X 1 that the Governor further reduced here, were 'items of appropriation' (Cal. Const., art. IV, § 10, subd. (e)), upon which the Governor could exercise his line-item veto power." (Slip Opn. at 11.) In determining that they were, the court reviewed the case law that uniformly holds that an appropriation involves the setting aside of a sum of money for a specific purpose. (*Id.* at 11-16.) Nonetheless, the court concluded that the case law does not require "that *only* items that add amounts to funds already provided constitute 'items of appropriation.'" (*Id.* at 17.) Instead, the Court of Appeal held that "[w]hether spending authority is increased or decreased, it is still spending authority." (*Id.*) As such, the court concluded, it constitutes an item of appropriation that is subject to line-item veto.

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[5] On August 10, 2009 Senate President pro Tempore Steinberg filed suit in San Francisco Superior Court, challenging more than 20 of the Governor's line-item vetoes. (*Steinberg v. Schwarzenegger*, No. CPF-09-509721.) The Superior Court action includes the vetoes at issue here, but it also includes others to which this challenge, and the analysis contained herein, are equally applicable. (*See* Interveners' RJN, Exh. B [Stats. 2009, 4th ex. sess., ch. 1, §§ 223, 283, 299, 473, 518, 541, 546, 547, 548, & 549].) When the Court of Appeal indicated its intent to address the issues raised by the *St. John's* petitioners and granted Senator Steinberg's motion to intervene, the parties agreed to await the outcome of the *St. John's* case before proceeding with the Superior Court action.

Because the Court of Appeal's opinion turns entirely on questions of law, neither interveners nor petitioners filed a petition for rehearing.

REASONS FOR GRANTING REVIEW

I.

REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THE GOVERNOR'S LINE-ITEM VETO POWER APPLIES TO BILL PROVISIONS THAT REDUCE APPROPRIATIONS

This Court has never before had occasion to address the circumstance presented here, in which the Governor sought to apply his authority to "reduce or eliminate . . . items of appropriation" to increase *reductions* to previously enacted appropriations.

Article IV, section 10(e) of the Constitution reads:

> The Governor may reduce or eliminate one or more items of appropriation while approving other portions of a bill. The Governor shall append to the bill a statement of the items reduced or eliminated with the reasons for the action. The Governor shall transmit to the house originating the bill a copy of the statement and reasons. Items reduced or eliminated shall be separately reconsidered and may be passed over the Governor's veto in the same manner as bills.

In holding that the Legislature's reductions to previously enacted appropriations were themselves items of appropriation, the Court of Appeal ignored the fact that the Governor had already exercised his veto power as to provisions making an appropriation when the Budget Act was first passed. Thus, when he took his blue pencil to the provisions in Assembly Bill 1, the Governor was in fact *increasing* the amount of a

reduction rather than reducing or eliminating a legislative proposal to provide new or additional spending authority.

A. The Constitution Does Not Authorize the Governor to Apply the Line-Item Veto Power to Bill Provisions that Reduce Appropriations

Nothing in the wording of article IV, section 10(e) of the Constitution, or in the legislative history of the line-item veto power, supports the Court of Appeal's conclusion that such a use of the veto power is sanctioned by the Constitution. Instead, both the constitutional language and this Court's interpretation of it mandate that the Governor's line-item veto applies only to bill provisions that would actually make an appropriation.

As noted above, a provision of a bill makes an "appropriation," by its plain meaning, insofar as the provision has the legal effect of setting aside money for expenditures for a public purpose. (*Harbor v. Deukmejian*, *supra*, 43 Cal.3d at 1089; *Los Angeles v. Post War Public Works Review Board*, *supra*, 26 Cal.2d at 116-117; *Wood v. Riley*, *supra*, 192 Cal. at 303.)

Harbor v. Deukmejian, *supra*, represents this Court's most comprehensive examination of the Governor's veto power. *Harbor* involved the Governor's purported veto of a single provision in a budget trailer bill that allowed certain AFDC recipients to receive benefits from the date their application was received rather than from the date the application was processed. The Governor explained that he had vetoed that provision as a "conforming change[ ]" because he had reduced the augmentation covering it in the budget act. (43 Cal.3d at 1083.) He argued that the term "item of appropriation" as used in article IV, section 10 should be

construed broadly to include the veto of the trailer bill provision in order to prevent a legislative evasion of the Governor's veto power. (*Id.* at 1092.)

The *Harbor* Court easily rejected the Governor's argument that his line-item veto power should be broadly construed,[6] and concluded instead that "in exercising the power of the veto the Governor may act only as permitted by the Constitution. That authority is to veto a 'bill' (art. IV, § 10, subd. (a)) or to 'reduce or eliminate one or more items of appropriation' (*id.*, subd. (b))." (43 Cal.3d at 1089, footnote omitted.)

That language notwithstanding, in the present case the Court of Appeal adopted a broad definition of "item of appropriation" that is at odds with both the definition articulated by this Court in *Harbor* and the plain meaning of the term "appropriation." Although in *Harbor* this Court acknowledged that the term "item of appropriation" had been defined in various ways in prior cases, this Court made clear that the term did not extend nearly so far as the Governor desired in that case:

> We do not see how it can be seriously claimed that section 45.5 qualifies as an item of appropriation under any of these definitions. It does not set aside money for the payment of any claim and makes no appropriation from the public treasury, nor does it add any additional amount to funds already provided for.
>
> (43 Cal.3d at 1089.)

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[6] 43 Cal.3d at 1088, fn. 9 ("We disagree with respondents' claim that the veto power should be liberally construed.").

As the quotation demonstrates, this Court's definition of an item of appropriation focuses on the legal effect of the provision in question. The provision at issue in *Harbor* "does not set aside money for the payment of any claim and makes no appropriation from the public treasury, nor does it add any additional amount to funds already provided." (43 Cal.3d at 1089.) Each of these things – setting aside, appropriating, adding additional amounts – is a positive act that results in a grant of spending authority that did not yet exist in law – i.e., an item of appropriation. Indeed, this Court made very clear that an appropriation cannot occur unless the legislative provision in question itself sets aside a sum of money:

> [N]o definition of that term – including the one employed in *Wood* itself[7] – can reasonably embrace a provision like section 45.5, which does not set aside a sum of money to be paid from the public treasury.
>
> (*Id.* at 1092.)

Thus, under the plain language of the Constitution, the Governor may only "reduce or eliminate" the dollar amount of "items of appropriation," a term that cannot "reasonably embrace a provision . . . which does not set aside a sum of money to be paid from the public treasury." (43 Cal.3d at 1092.) Here, by contrast, the Governor's veto increased the dollar amount of spending *cuts* made by the bill provisions in question, for which the sole legal effect was to reduce spending authority that already existed in law.

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[7] *Wood v. Riley* (1923) 192 Cal. 293.

The "appropriation" had been made back in February when the money was authorized for expenditure by the Governor's approval of the Budget Act. This is clear from the language that the Legislature used first in February and then in July. The Governor's increase to the Legislature's cuts for the Department of Aging is an excellent example. Section 1.80(a) of the February, 2009 Budget Act provides that "[t]he following sums of money and those appropriated by any other sections of this act, or so much thereof as may be necessary unless otherwise provided herein, are hereby appropriated for the use and support of the State of California for the 2009-10 fiscal year beginning July 1, 2009, and ending June 30, 2010." (Interveners' RJN, Exh. A, p. 12.) One of the many sums of money that follows is found in Item 4170-101-0001, which states "For local assistance, Department of Aging – $44,870,000," followed by a schedule showing how that money is to be spent. (*Id.*, p. 274.) The spending cut that the Legislature made in July, however, was worded very differently:

> SEC. 568. Section 17.50 is added to the Budget Act of 2009, to read:
>
> Sec. 17.50. The amount appropriated in Item 4170-101-0001 of Section 2.00 is hereby reduced by $9,483,000.
>
> (Interveners' RJN, Exh. B, p. 540 [Stats. 2009, 4th ex. sess., ch. 1, § 568].)

The February language clearly granted spending authority, creating items of appropriation that the Governor could have reduced or eliminated prior to signing the Budget Act. The July language did not have any such effect. Rather than "hereby appropriat[ing]" a sum of money, it *reduced* amounts for which appropriation authority already existed in law.

The Governor purported to reduce those amounts even further, going beyond the amount of the program reductions made by the Legislature. Because the Governor's action did not reduce or eliminate bill provisions that would grant authority to spend State funds, those provisions were not items of appropriation, and the Governor exceeded his constitutional power.

This understanding of the term "items of appropriation" is reflected in the history of article IV, section 10. As originally included in the 1879 Constitution, the line-item veto only allowed the Governor to "object to one or more items" of appropriation. (Cal. Const. of 1879, art. IV, § 16.) The Governor was granted the authority to reduce as well as eliminate an appropriation by an initiative constitutional amendment, Proposition 12, approved by the voters in 1922 as part of a broader effort to move the State toward a more formal budgeting process and stricter financial accountability. Prior to the 1922 amendment, the Legislature simply appropriated whatever funds were deemed necessary to run the various agencies and departments of government, without any formal comparison between State revenues and expenditures. Through the 1922 amendment, the Governor was required to submit a formal State budget to the Legislature and, at the same time, he was given the authority to limit appropriations if insufficient funds were available.

> Under the budget system, every state department would submit in advance its estimated requirements and these estimates would be correlated by trained economists under the direction of the Governor. The extravagant and wasteful practice of having the legislature appropriate specific amounts for definite purposes without consideration of

> available funds to meet these costs would be done away with, and the taxpayers would know fairly accurately just what the state will spend in any year and where the funds will go.
>
> (Ballot Pamp., Gen. Elec. (Nov. 7, 1922), argument in favor of Prop. 12, p. 78.)[8]

The ballot materials described the line-item veto power as follows:

> The budget system will save the taxpayer money, because all state appropriations will be handled in a business way, duplications prevented and extravagance avoided. The proposed measure will also enable the Governor to reduce an appropriation to meet the financial condition of the treasury, which under our present system he can not do. Frequently a worthy measure is vetoed because the legislature passes a bill carrying an appropriation, for which sufficient funds are not available. Under present conditions the Governor is compelled to veto the act, no matter how meritorious, because of the excessive appropriation, whereas, if he had the power given by the proposed constitutional amendment, he could approve the bill with a modified appropriation to meet the condition of the treasury.
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> (*Id.*, pp. 78-79.)

Thus, the ballot pamphlet described the line-item veto as a means by which the Governor could adjust an "excessive appropriation" made by the Legislature. Nothing in those materials suggested that the

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[8] The 1922 ballot pamphlet materials for Proposition 12 were included as Exhibit E to Interveners' Request for Judicial Notice.

Governor could exercise the line-item veto when the Legislature *reduces* existing spending authority. The clear purpose was to provide a check when the Legislature passes a bill containing provisions that would place a new spending burden upon the State treasury.

Both the wording of article IV, section 10(e) and the history of the line-item veto demonstrate that the Governor's limited role in the legislative process authorizes him to modify a particular bill provision only when the provision has the legal effect of conveying authority to make expenditures of State funds.

B. The Court of Appeal Erred in Concluding that a Reduction in an Existing Appropriation is an Item of Appropriation Subject to the Governor's Line-Item Veto

The Court of Appeal's conclusion is inconsistent both with the meaning of the term "items of appropriation" and with the separation of powers principles upon which our form of government is based. The Governor's fundamental role is to serve as the head of the executive branch of State government. (Cal. Const., art. V, § 1.) By contrast, "'[e]nactment of a state budget is a legislative function . . . [I]t is, and indeed must be, the responsibility of the legislative body to weigh [ ] needs and set priorities for the utilization of the limited revenues available.'" (*Carmel Valley Fire Protection Dist. v. State*, *supra*, 25 Cal.4th at 302, quoting *Anderson v. Superior Ct.* (1998) 68 Cal.App.4th 1240, 1249.) The Governor's power to exercise the line-item veto thus represents a narrow exception to the separation of powers (Cal. Const., art. III, § 3), allowing the Governor to "act[ ] in a legislative capacity." (*Harbor v. Deukmejian*, *supra*, 43 Cal.3d

at 1089.)[9] By broadly construing the Governor's authority to allow the Governor to apply his line-item veto not only to a bill provision that grants spending authority, but also to a bill provision that reduces the scope of existing spending authority, the Court of Appeal allowed the line-item veto to intrude into the legislative sphere far beyond the limits permitted by the Constitution.

In defining the term "items of appropriation" for purposes of the line-item veto, the Court of Appeal ignored *when* the line-item veto must be exercised. It is undisputed that the Governor's power to reduce or eliminate spending authority must be exercised at the time he signs the bill that contains the items of appropriation, i.e., the provisions that actually grant spending authority. (Cal. Const., art. IV, § 10(e), setting deadlines for gubernatorial signature.) The Governor gets only one bite at the apple; once he has signed the bill that grants spending authority, his power to reduce that appropriation is gone.

In this case, the Governor argued, and the Court of Appeal agreed, that his line-item veto power is *revived* when the Legislature reduces an already existing appropriation. The Court of Appeal reasoned that, by passing the reduction, the Legislature granted new spending authority that was subject to line-item veto. (Slip Opn. at 17 ["Whether spending authority is increased or decreased, it is still spending authority."].) This was error. Article IV, section 10(e) makes no provision

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[9] That the people wish to keep the Governor's role a limited one is also apparent from the fact that they defeated two recent initiative efforts that would have expanded it. (*See* Interveners RJN, Exhs. F-I [ballot materials and Statement of Vote for Prop. 76 (Nov. 2005) and Prop. 1A (May 2009)].)

for a revival of the Governor's line-item veto power simply because a previously enacted appropriation is the subject of subsequent legislation. The spending authority in question had already been granted in the Budget Act, and under existing law that spending authority would continue until the Budget Act expires on June 30, 2010. In no way did the mid-year reductions proposed by the Legislature in Assembly Bill 1 expand, extend, or otherwise confer that existing spending authority.

The Court of Appeal asserted that the difference between an "appropriation" and a reduction, and between increase and "reduce or eliminate," was nothing more than "wordplay." (Slip Opn. at 30.) As the Court of Appeal put it:

> There is no substantive difference between gubernatorial reduction of an item of appropriation in the original 2009 Budget Act, to which interveners and petitioners do not object, and gubernatorial reduction of such item in a subsequent amendment to the 2009 Budget Act, i.e., Assembly Bill 4X 1. Both involve changes in spending authority.
>
> (*Id.* at 17, fn. omitted.)

Simply because the original appropriation and a bill provision reducing it "[b]oth involve changes in spending authority" does not mean that they are constitutionally equivalent. In fact, they have significantly different effects in law. A reduction in an existing appropriation does not "set aside" the amount, because that act has already occurred pursuant to a prior legislative enactment. A reduction made by the Legislature to an existing appropriation not only does not involve a grant of spending authority – the only proposal to which the Governor's line-item veto power

may properly be applied – but, in reducing the scope of existing spending authority, has exactly the opposite effect in law.

The Court of Appeal's construction is not only wrong as a matter of law, but it carries the consequence that the Governor could use his line-item veto power to eliminate altogether a particular bill provision that makes a spending cut, thereby *increasing* the amount of State funding for the program at issue. The Court of Appeal tried to downplay the problem by noting that the Governor could have vetoed the entire measure before him, the effect of which would have been to continue State funding at the higher level enacted in the February 2009 Budget Act. (Slip Opn. at 32, fn. 23.) That is true, but in so doing he would be exercising the veto as it is traditionally understood: as a negative power that rejects the Legislature's carefully crafted package of spending reductions rather than as a power that allows him to increase those reductions, thereby creating an entirely different bill than the one passed by the Legislature.

In addition, the holding by the Court of Appeal would broaden the legal definition of the term "appropriation," long understood to mean a legislative provision that grants new or additional authority to spend public moneys, to apparently include any case in which a legislative provision simply addresses a previously enacted appropriation in some unspecified manner. Not only would this result contradict well-established California case law on the subject, but it would create tremendous uncertainty in the legislative process, both with regard to the application of article IV, section 10(e) of the Constitution and with respect to a variety of other constitutional consequences, as discussed below.

II.

REVIEW SHOULD BE GRANTED TO AVOID THE ADVERSE CONSTITUTIONAL CONSEQUENCES THAT WOULD RESULT FROM THE COURT OF APPEAL'S DECISION

The Court of Appeal's determination that spending reductions are "items of appropriation" affects the interpretation of the term "appropriation" used elsewhere in article IV of the Constitution, particularly with respect to the vote required in each house of the Legislature to pass a bill that makes an appropriation. Article IV, section 12(d) of the Constitution states: "Appropriations from the General Fund of the State, except appropriations for the public schools, are void unless passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring." The Court of Appeal's conclusion that a bill provision that would reduce state spending is an "appropriation" would mean, therefore, that a bill containing such a provision requires the affirmative vote of two-thirds of the membership of each house in order to pass. Indeed, the Court of Appeal said as much: "If spending reductions are not items of appropriation, a simple legislative majority could not only overturn a two-thirds vote on the annual budget act, but insulate its new determinations from gubernatorial oversight. This cannot be." (Slip Opn. at 18.)

This result, that a bill containing a provision to *reduce* State spending may not be passed except upon an extraordinary vote of both houses of the Legislature, directly contravenes the purpose of article IV, section 12(d) of the Constitution, which is to protect the State treasury by raising the vote threshold for the granting of expenditure authority.

The effect is particularly troublesome on special sessions called by the Governor for State fiscal emergencies pursuant to article IV,

section 10(f) of the Constitution. In 2004, the voters approved Proposition 58, a legislative constitutional amendment supported by the Governor that set forth a specific process for reducing State expenditures mid-year in times of fiscal crisis.[10] As amended, the Constitution now allows the Governor to declare a fiscal crisis and call a special session of the Legislature to consider bills addressing that crisis. (Cal. Const., art. IV, § 10(f).)

Article IV, section 10(f), reads in its entirety as follows:

> (f)(1) If, following the enactment of the budget bill for the 2004-05 fiscal year or any subsequent fiscal year, the Governor determines that, for that fiscal year, General Fund revenues will decline substantially below the estimate of General Fund revenues upon which the budget bill for that fiscal year, as enacted, was based, or General Fund expenditures will increase substantially above that estimate of General Fund revenues, or both, the Governor may issue a proclamation declaring a fiscal emergency and shall thereupon cause the Legislature to assemble in special session for this purpose. The proclamation shall identify the nature of the fiscal emergency and shall be submitted by the Governor to the Legislature, accompanied by proposed legislation to address the fiscal emergency.
>
> (2) If the Legislature fails to pass and send to the Governor a bill or bills to address the fiscal emergency by the 45th day following the issuance of the proclamation, the Legislature

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[10] As noted above, the legislation that is in dispute in the instant case was enacted pursuant to a special session called by the Governor under this authority. (Interveners' RJN, Exh. B [Stats. 2009, 4th ex. sess., ch. 1].)

> may not act on any other bill, nor may the Legislature adjourn for a joint recess, until that bill or those bills have been passed and sent to the Governor.
>
> (3) A bill addressing the fiscal emergency declared pursuant to this section shall contain a statement to that effect.[11]

In their argument in support of Proposition 58, Governor Schwarzenegger and then-Assembly Speaker Wesson wrote:

> As California faced unprecedented budget deficits for the last 3 years, the problem was ignored, spending exceeded revenues, and there was no process in place to address the fiscal crisis. Proposition 58 will allow the Governor to call a Special Session of the Legislature to deal with future fiscal crises. If the Legislature fails to act within 45 days, then they will not be able to recess and they will not be able to pass any other legislation. This will force the Governor and the Legislature to work together to find a solution to the problem BEFORE IT IS TOO LATE.
>
> (Supp. Ballot Pamp., Primary Elec. (Mar. 2, 2004), argument in favor of Prop. 58, p. 14.)[12]

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[11] Nothing in section 10(f) suggests any intent on the part of the voters to expand the Governor's line-item veto power. The measure did not, for example, amend the California Constitution to read: "The Governor may reduce or eliminate one or more items of appropriation ***or increase one or more reductions to items of appropriation*** while approving other portions of a bill . . . ."

[12] The then-Chairwoman of the Assembly Budget committee also signed the argument in support of Proposition 58. The ballot pamphlet materials for Proposition 58 were included as Exhibit D to Respondents' Request for Judicial Notice.

The intent of Proposition 58 was to require the Governor and the Legislature to address a fiscal emergency in an expedited manner, thus requiring the Legislature to assemble in special session and prohibiting it from taking action on other legislative matters or adjourning for a joint recess, if it failed to pass legislation to address the problem.

If allowed to stand, the Court of Appeal's opinion would clearly thwart the voters' intent. As noted above, the Court of Appeal's decision has the logical consequence that a bill containing a spending reduction requires a two-thirds vote of each house of the Legislature for passage. The entire purpose of Proposition 58, however, is to provide a speedy and effective way for the Legislature and the Governor to work together to find a comprehensive solution to a mid-year budget crisis.[13] Developing the consensus necessary to pass remedial legislation in the midst of a fiscal emergency is sufficiently challenging even under the status quo. However, imposing a two-thirds vote requirement upon the passage of a spending reduction bill means that concerns of a minority party or other legislative voting bloc must be met for any such bill to pass, making the task much more difficult. Further, the failure to reach such a consensus would preclude the Legislature from turning its attention to other legislative matters. (Cal. Const., art. IV, § 10(f).) Because the enactment of

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[13] Because a bill passed in a special session takes effect the 91st day following the adjournment of the special session (Cal. Const., art. IV, § 8(c)(1)), such a bill does not require the two-thirds vote that applies to a bill containing an urgency clause. (Cal. Const., art. IV, § 8(d).) The statute at issue here required and received a two-thirds vote because it contained an urgency clause and because some of its provisions constituted new appropriations.

legislation that makes spending reductions is clearly a primary purpose of a fiscal emergency special session called under article IV, section 10(f), the interpretation that such legislation requires an extraordinary vote in each house for passage directly undermines the operation of this constitutional provision as well.

The holding of the Court of Appeal creates additional confusion. First, the court concluded that the rule contained in article IV, section 9 that "[a] section of a statute may not be amended unless the section is re-enacted as amended" applies to a reduction in an existing item of appropriation. (Slip Opn. at 23.) Second, the Court of Appeal reasoned that if "the many reductions at issue here did not constitute items of appropriation . . . then, because each item involves a different statutory program, the entire bill might be invalid as a violation of the single-subject rule." (*Id.* at 27.) That is because, the court said, it would be "a budget bill dealing with more than the single subject of appropriations." (*Id.* at 23.)[14]

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[14] The court wrote:

> [I]f, as interveners claim, Assembly Bill 4X 1 amendments to the 2009 Budget Act do not reenact the items of appropriation they purport to change, the measure would violate the directive of article IV, section 9 of the California Constitution, that "[a] section of a statute may not be amended unless the section is re-enacted as amended." Second, if the reduced Assembly Bill 4X 1 items at issue are not items of appropriation, Assembly Bill 4X 1 would seemingly violate the single-subject requirement of article IV, section 9, as a budget bill dealing with more than the single subject of appropriations. Finally, if Assembly Bill 4X 1
>
> (continued . . .)

Putting aside the faulty logic of these pronouncements, their implications are far-reaching, not just for Proposition 58 sessions but for every bill provision that affects an existing item of appropriation. If even technical changes to a prior-enacted appropriation allow the Governor to blue pencil that appropriation a second time, then the Legislature will be reluctant to make even the most salutary of such changes. Moreover, if a bill passed to reduce State spending results in a re-enactment of the entirety of section 2.00 of the annual Budget Act simply because it makes reductions to one or more of the hundreds of appropriations contained in that section, then the Governor may argue he can take a second bite at each of the hundreds of items of appropriation in the re-enacted section 2.00, not just those as to which the Legislature has made a reduction. And if the single subject rule applies to deficit reduction bills, then the Legislature would be required to pass a blizzard of bills, one for every program or agency in order to make a range of spending cuts; again, such a requirement would be of particular concern in the context of a fiscal emergency special session called pursuant to Proposition 58.

By opening this Pandora's Box of ill effects, the Court of Appeal's opinion creates considerable uncertainty regarding the constitutional guidelines that direct the legislative process and changes the

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(. . . continued)

> is not a "budget bill," as petitioners claim, it violates the provisions of article VI [sic], section 12, subdivision (d), that only a budget bill may contain more than one item of appropriation.
>
> (Slip Opn. at 23.)

interaction between the Legislature and Governor in ways never contemplated by the voters. Rather than discourage attempts to do an end-run around the Governor's veto power, the court's focus on the form of a provision of a bill rather than its legal effect surely will increase those attempts. The Court of Appeal's approach invites disputes between the Legislature and Governor over exactly what provisions are re-enacted through a particular series of cuts, whether they are properly packaged to avoid single-subject issues, whether they open the entirety of the budget bill to a second round of cuts by the Governor, and whether they are cuts that require a two-thirds vote to enact. Legislators who know that the Governor may make deeper cuts may be even more disinclined to make any funding reductions to a currently funded program.[15]

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[15] This Court's ruling in *Harbor v. Deukmejian*, *supra*, was driven, in part, by its concern over just such a result. In *Harbor*, this Court expressed its concern that allowing the Governor to veto portions of a bill on a subject-by-subject basis would create ongoing conflict between the executive and legislative branches.

> Not only would we be violating the plain words of the Constitution if we were to adopt the unwarranted definition proposed by respondents, but we would place an intolerable burden on the relations between the executive and legislative branches of government. If, as respondents suggest, the Governor has the power to exercise his veto as to any portion of a substantive bill which in his view constitutes a "subject," the result would be a continual conflict between the Governor and the Legislature over whether the scope of the veto power was exceeded because the Governor

(continued . . .)

None of this uncertainty – much less the wholesale revision of constitutional ground rules that have guided interaction between the Governor and the Legislature for decades – was warranted. A construction of the Governor's power to "reduce or eliminate . . . items of appropriation" that applies that power only to bill provisions whose effect in law is to provide authorization to spend State funds will avoid these outcomes. Only this Court can apply such a construction now.

CONCLUSION

The Court of Appeal's decision contravenes the plain meaning of the Constitution, violates the separation of powers principles requiring that the Governor's line-item veto power be interpreted narrowly, and creates serious constitutional consequences for the future operation of the legislative process. Not least among these consequences is the apparent imposition of a requirement that the Legislature may not pass a bill reducing current levels of spending authority, even in a fiscal emergency, by majority vote.

To reaffirm the scope of the line-item veto power and avoid disrupting fundamental constitutional principles that have guided California's legislative process for years, petitioners respectfully request that the Court grant review and reverse the decision of the Court of Appeal.

(. . . continued)

> failed to confine his disapproval to a single subject encompassed in a bill.
>
> (43 Cal.3d at 1093.)

Dated: April 12, 2010

Respectfully submitted,

LEGISLATIVE COUNSEL BUREAU

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By: 
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BRIEF FORMAT CERTIFICATION PURSUANT TO
RULE 8.504(d) OF THE CALIFORNIA RULES OF COURT

Pursuant to Rule 8.504(d) of the California Rules of Court, I certify that this brief is proportionately spaced, has a typeface of 13 points or more and contains 7,287 words as counted by the Microsoft Word 2003 word processing program used to generate the brief.

Dated: April 12, 2010

Robin B. Johansen

OPINION

Filed 3/2/10

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ST. JOHN'S WELL CHILD AND FAMILY CENTER et al.

Petitioners,

v.

ARNOLD SCHWARZENEGGER as Governor, etc., et al.,

Respondents;

DARRELL STEINBERG, Individually and as President pro Tempore, etc., et al.,

Interveners.

A125750

INTRODUCTION

The current economic downturn affects all Californians, but those suffer most who receive essential health and welfare assistance from agencies dependent upon state tax revenues. The needs of such vulnerable citizens so exceed the state's diminished ability to pay for them that "Sophie's choices" are presented. Government must choose between and among equally needy groups, knowing those not favored will be devastated. The responsible decision makers are the Legislature and the Governor. In the context of the constitutionally prescribed budget process, the power of the purse—i.e., the power to appropriate public funds—belongs only to the Legislature. With respect to a bill containing appropriations, the Governor can only sign or veto the measure in its entirety or "reduce or eliminate one or more items of appropriation." (Cal. Const., art IV, § 10,

subd. (e).) The question in this case is whether the Governor exceeded these limited powers.

In this original writ proceeding, we consider constitutional challenges to the Governor's use of the line-item veto authority provided in article IV, section 10, subdivision (e) of the California Constitution to increase the amount of midyear reductions (further reducing the reductions) made by the Legislature to the Budget Act of 2009. (Stats. 2009, 3d Ex. Sess., ch. 1, approved by Governor Feb. 20, 2009 (hereafter "2009 Budget Act").) We shall conclude the Governor's exercise of the challenged veto power does not exceed his constitutional authority.

Petitioners include St. John's Well Child and Family Center, a nonprofit network of five community health centers and six school-based clinics in medically underserved areas of Los Angeles County, and other entities and individuals throughout the state whose programs and lives will be drastically affected by the further reductions at issue here.[1]

Respondents are Arnold Schwarzenegger, the Governor of the State of California, and John Chiang, who, as the Controller of the State of California, is responsible for administration of the state's finances, including disbursement of funds appropriated by law.[2] The Controller does not take a position on the merits of this litigation.

Interveners are Darrell Steinberg, in his official capacity as President pro Tempore of the California State Senate, and in his personal capacity as a resident and taxpayer of

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[1] Other petitioners are Rosa Navarro and Lionso Guzman, individual residents of Los Angeles County who have received medical treatment from St. John's Well Child and Family Center; California Foundation for Independent Living Centers (the Foundation), a statewide, nonprofit organization made up of 25 Independent Living Centers providing services and advocacy by and for people with all types of disabilities; Nevada Sierra Regional IHSS (In Home Supportive Services) Public Authority, a public agency whose purpose is to make the IHSS component of the foundation work better for consumers; Californians for Disability Rights, California's oldest and largest membership organization of persons with disabilities; and Liane Yasumoto and Judith Smith, who each receive IHSS to assist with daily living tasks.

[2] The Governor and Controller are sued in their official capacities only.

Sacramento County, and Karen Bass, in her official capacity as Speaker of the California Assembly, and in her personal capacity as a resident and taxpayer of Los Angeles County.

Several amici curiae have filed briefs supporting the various parties.[3]

Petitioners and interveners contend that the Governor's action exceeded constitutional limits because the individual budget cuts he further reduced were not "items of appropriation" (Cal. Const., art. IV, § 10, subd. (e)) that could be individually vetoed or reduced. They further contend that the Governor attempted to exercise authority belonging solely to the Legislature in violation of article III, section 3 of the California Constitution.

Petitioners and interveners seek original relief in this court pursuant to article VI, section 10 of the California Constitution, Code of Civil Procedure sections 387 and 1085, and California Rules of Court, rule 8.485 et seq. They seek to enjoin the Controller from enforcing or taking any steps to enforce the Governor's vetoes of certain provisions of Assembly Bill No. 1 (hereafter "Assembly Bill 4X 1"), as embodied in the Budget Act of 2009—Rēvisions (Stats. 2009, 4th Ex. Sess. 2009-2010, ch. 1, hereafter "Revised 2009 Budget Act"). (See Assem. Bill 4X 1, as amended by Sen., July 23, 2009 and approved by Governor July 28, 2009 [with certain deletions, revisions and reductions (hereafter "Governor's Veto Message")].) Although we customarily decline to exercise such

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[3] Amicus curiae briefs on behalf of petitioners have been filed by the following amici curiae: Santa Clara County; SEIU California State Council, United Domestic Workers, and California United Homecare Workers; Children Now, Valley Community Clinic, Eisner Pediatric & Family Medical Center, the Saban Free Clinic, YWCA Monterey County, Westside Family Health Center, Community Clinic Association of Los Angeles County, and The Legal Aid Association of California; Aids Project Los Angeles; and the Los Angeles County Democratic Central Party and the Riverside County Democratic Central Committee.

An amicus brief in support of respondents Governor Schwarzenegger and Controller Chiang has been filed by amici curiae George Deukmejian, Pete Wilson, Gray Davis, the California Chamber of Commerce, the California Taxpayers' Association and the California Business Roundtable (collectively, "amici curiae former California governors").

jurisdiction, preferring initial disposition by the superior court, this case involves issues of sufficient public importance and urgency to justify departing from the usual course. The significance of the issues and need for prompt resolution warrant exercise of our original jurisdiction. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 500; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 340; see also *Planned Parenthood Affiliates v. Van de Kamp* (1986) 181 Cal.App.3d 245, 262-265.) Therefore, on September 21, 2009, we issued an order to show cause why the relief sought should not be granted and thereafter held oral argument.[4]

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[4] At oral argument, we expressed our intention to take judicial notice (Evid. Code, §§ 451, 452) upon interveners' request of various materials relating to the passage of the 2009 Budget Act, Assembly Bill 4X 1 and the Revised 2009 Budget Act. Interveners' request for judicial notice was unopposed. Accordingly, we take judicial notice of the following materials:

a. Senate Bill No. 1 (2009-2010 3d Ex. Sess.) approved by the Governor on February 20, 2009;

b. Assembly Bill 4X 1 (2009-2010 4th Ex. Sess.) as amended by the Senate on July 23, 2009;

c. Assembly Bill 4X 1 (2009-2010 4th Ex. Sess.) as approved by the Governor on July 28, 2009 (containing the Governor's Veto Message);

d. Legislative Counsel Opinion No. 0920928 (Aug. 5, 2009) Governor's Line-Item Veto Authority: Reductions to Existing Appropriations;

e. Ballot Pamphlet, General Election, November 7, 1922, text and arguments in favor of Proposition 12 ("State Budget Amendment"), which enacted a constitutional amendment expanding the scope of the line-item veto;

f. Voter Information Guide, General Election, November 8, 2005, text and analysis of voter initiative Proposition 76 ("State Spending and School Funding Limits");

g. Secretary of State's "Statement of Vote" on Proposition 76;

h. Voter Information Guide, Special Election, May 19, 2009, text and analysis of Proposition 1A ("State Budget Changes. California Budget Process. Limits State Spending. Increases 'Rainy Day' Budget Stabilization Fund");

i. Secretary of State's "Statement of Vote" on Proposition 1A.

We also take judicial notice (Evid. Code, §§ 459, 452) at the Governor's request, of the following ballot materials presented to the voters when they were considering two measures: (1) Proposition 58: Voter Information Guide, Supplemental, Primary Election, March 2, 2004, text and analysis of Proposition 58 ("The California Balanced Budget Act"), adding article IV, section 20, subdivision (f) to the California Constitution; (2) Proposition 12: Ballot Pamphlet, General Election, November 7, 1922, text and arguments in favor of Proposition 12 (same material as (e), *ante*, in different format).

BACKGROUND

On February 20, 2009, the Governor signed into law the 2009 Budget Act, which set forth various appropriations of state funds for the 2009-2010 fiscal year. California's economy worsened, the revenue assumptions on which the 2009 Budget Act was based proved to be far too optimistic, and the state's overall cash flow positions continued to worsen. The Governor proclaimed a fiscal crisis pursuant to the California Constitution, article IV, section 10, subdivision (f),[5] and the Legislature assembled in a special session to address the fiscal emergency. After months of negotiations, the Legislature passed Assembly Bill 4X 1 on July 23, 2009. The final budget package enacted as Assembly Bill 4X 1 contained $24.2 billion in budget solutions, including $15.6 billion in cuts, $3.9 billion in additional revenues, $2.1 billion in borrowing, $1.5 billion in fund shifts, and $1.2 billion in deferrals and other adjustments.

On July 28, 2009, the Governor exercised his line-item veto to reduce or eliminate several items contained in Assembly Bill 4X 1, and then signed the measure into law. (Rev. 2009 Budget Act.) The Governor vetoed 27 different line items of sections of Assembly Bill 4X 1. The effect of these vetoes was to further reduce the total amount appropriated in the 2009 Budget Act by more than $488 million. Many of the items

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[5] California Constitution, article IV, section 10, subdivision (f), provides: "(1) If, following the enactment of the budget bill for the 2004-05 fiscal year or any subsequent fiscal year, the Governor determines that, for that fiscal year, General Fund revenues will decline substantially below the estimate of General Fund revenues upon which the budget bill for that fiscal year, as enacted, was based, or General Fund expenditures will increase substantially above that estimate of General Fund revenues, or both, the Governor may issue a proclamation declaring a fiscal emergency and shall thereupon cause the Legislature to assemble in special session for this purpose. The proclamation shall identify the nature of the fiscal emergency and shall be submitted by the Governor to the Legislature, accompanied by proposed legislation to address the fiscal emergency.

"(2) If the Legislature fails to pass and send to the Governor a bill or bills to address the fiscal emergency by the 45th day following the issuance of the proclamation, the Legislature may not act on any other bill, nor may the Legislature adjourn for a joint recess, until that bill or those bills have been passed and sent to the Governor.

"(3) A bill addressing the fiscal emergency declared pursuant to this section shall contain a statement to that effect."

reduced by the Governor had already been reduced by the Legislature from the amounts appropriated in the 2009 Budget Act. The Governor's signing message explained that his cuts and eliminations to the spending bill were for the most part designed "to increase the reserve and to reduce the state's structural deficit." (Rev. 2009 Budget Act, Governor's Veto Message for §§ 18.00, 18.10, 18.20, 18.40; see also *id.*, §§ 17.50, 18.50.)

This original mandamus action by petitioners and interveners followed,[6] in which they challenge the Governor's use of the line-item veto on seven sections of Assembly Bill 4X 1, specifically, sections 568 and 570 through 575.[7] These vetoes impact the seven sections of Assembly Bill 4X 1 as follows:

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[6] On August 10, 2009, intervener Steinberg filed a complaint in the San Francisco Superior Court, seeking a writ of mandate addressing the same issue presented herein and challenging the Governor's use of the line-item veto on items in Assembly Bill 4X 1. On August 17, 2009, Steinberg informed this court that his petition was pending in the superior court and explained that it challenged not only the items challenged here by petitioners, but an additional 14 uses of the line-item veto. Following our August 17, 2009 request to respondents to address all issues raised by the petitioners' writ petition, Steinberg and Assembly Speaker Bass sought to intervene and urged this court to issue the original writ as sought by petitioners. On September 14, 2009, we granted their motion to intervene and accepted their writ petition for filing.

[7] As enacted by the Legislature, and submitted to the Governor, the relevant provisions of Assembly Bill 4X 1 provide in pertinent part:

"SEC. 568. Section 17.50 is added to the Budget Act of 2009, to read: [¶] Sec. 17.50. The amount appropriated in Item 4170-101-0001 of Section 2.00 is hereby reduced by $9,483,000." (Assem. Bill 4X 1, § 568 [Dept. of Aging].)

"SEC. 570. Section 18.00 is added to the Budget Act of 2009, to read: [¶] Sec. 18.00 (a) The amount appropriated in Item 4260-101-0001 of Section 2.00 is hereby reduced by $2,789,402,000. [¶] . . . [¶] (e) The amount appropriated in Item 4260-111-0001 of Section 2.00 is hereby reduced by $4,303,000." (Assem. Bill 4X 1, § 570 [Dept. of Health Care Services].)

"SEC. 571. Section 18.10 is added to the Budget Act of 2009, to read: [¶] Sec. 18.10 [¶] . . . [¶] (c) The amount appropriated in Item 4265-111-0001 of Section 2.00 is hereby reduced by $62,967,000." (Assem. Bill 4X 1, § 571 [Dept. of Public Health].)

"SEC. 572. Section 18.20 is added to the Budget Act of 2009, to read: [¶] Sec. 18.20. (a) The amount appropriated in Item 4280-101-0001 of Section 2.00 is hereby reduced by $125,581,000." (Assem. Bill 4X 1, § 572 [for local assistance Managed Risk Medical Insurance Board, for Healthy Families Program].)

- Section 17.50, further reducing the general fund reduction for the Department of Aging by $6,160,000;
- Section 18.00, subdivision (a), further reducing general fund funding for local assistance of the Medi-Cal program by $60,569,000; and section 18.00, subdivision (e), eliminating funding for Community Clinic Programs;
- Section 18.10, further reducing the funding for various programs administered by the Office of AIDS by $52,133,000, further reducing funding for the Domestic Violence Program by $16,337,000,[8] further reducing funding for the Adolescent Family Life Program by $9,000,000, and further reducing funding for the Black Infant Health Program by $3,003,000;
- Section 18.20, further reducing the Healthy Families Program by $50,000,000;
- Section 18.30, further reducing Regional Center Purchase of Services for children up to age five by $50,000,000;

"SEC. 573. Section 18.30 is added to the Budget Act of 2009, to read: [¶] Sec. 18.30. (a) The amount appropriated in Item 4300-101-0001 of Section 2.00 is hereby reduced by $214,828,000." (Assem. Bill 4X 1, § 573 [Dept. of Developmental Services, for Regional Centers].)

"SEC. 574. Section 18.40 is added to the Budget Act of 2009, to read: [¶] Sec. 18.40. [¶] . . . [¶] (e) The amount appropriated in Item 4440-111-0001 of Section 2.00 is hereby reduced by $3,547,000." (Assem. Bill 4X 1, § 574 [Dept. of Mental Health, for caregiver resource centers serving families of adults with acquired brain injuries].)

"SEC. 575. Section 18.50 is added to the Budget Act of 2009, to read: [¶] Sec. 18.50. [¶] . . . [¶] (d) The amount appropriated in Item 5180-111-0001 of Section 2.00 is hereby reduced by $643,248,000." (Assem. Bill 4X 1, § 575 [for local assistance, Dept. of Social Services].)

[8] At the Governor's request, and over the objection of interveners, we take judicial notice of Senate Bill No. 13, passed by the Legislature after the Governor's veto, and signed by the Governor. (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 29, approved by Governor Oct. 21, 2009.) That bill transferred $16.3 million from the Alternative and Renewable Fuel and Vehicle Technology Fund to the general fund as a loan to appropriate those funds to the California Emergency Management Agency to support domestic violence shelters for the 2009-2010 fiscal year.

- Section 18.40, further reducing funding of the Caregiver Resource Centers by $4,082,000; and
- Section 18.50, further reducing general fund funding to the In-Home Supportive Services Program by $37,555,000.

I. Constitutional Framework of the Veto Power

The question presented as a matter of first impression is whether the Governor's line-item veto power encompasses the ability to further reduce mid-year reductions made by the Legislature to appropriations originally made in the 2009 Budget Act. Although the particular issue may be novel, we are not without guidance, as the California Supreme Court, in *Harbor v. Deukmejian* (1987) 43 Cal.3d 1078 (*Harbor*), extensively described the constitutional framework within which the Governor exercises the line-item veto.

"The California Constitution declares that the legislative power of the state is vested in the Legislature (art. IV, § 1) and the executive power in the Governor (art. [V], § 1). Unless permitted by the Constitution, the Governor may not exercise legislative powers. (Art. III, § 3.) He may veto a bill 'by returning it with any objections to the house of origin,' and it will become law only if 'each house then passes the bill by rollcall vote . . . two thirds of the membership concurring. . . .' [(Art. IV, § 10, subd. (a).)] If the Governor fails to act within a certain period of time, the measure becomes law without his signature. (Art. IV, § 10, subd. [(b)].) The Governor's veto power is more extensive with regard to appropriations. *He may 'reduce or eliminate one or more items of appropriation while approving other portions of a bill.'* Such items may be passed over his veto in the same manner as vetoed bills. (Art. IV, § 10, subd. [(e)].)" (*Harbor, supra,* 43 Cal.3d at p. 1084, italics added.)[9]

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[9] Article IV, section 10 of the California Constitution provides in part: "(a) Each bill passed by the Legislature shall be presented to the Governor. It becomes a statute if it is signed by the Governor. The Governor may veto it by returning it with any objections to the house of origin, which shall enter the objections in the journal and proceed to reconsider it. If each house then passes the bill by rollcall vote entered in the journal, two-thirds of the membership concurring, it becomes a statute.

[¶] . . .[¶]

The *Harbor* court agreed with the petitioners there that "in vetoing legislation, the Governor acts in a legislative capacity, and that in order to preserve the system of checks and balances upon which our government is founded, he may exercise legislative power only in the manner expressly authorized by the Constitution. Since that document only authorizes the Governor to veto a 'bill' or to reduce or eliminate 'items of appropriation' the Governor may not veto part of a bill which is not an 'item of appropriation.' " (*Harbor, supra*, 43 Cal.3d. at p. 1084.)

Tracking the historical development of the veto power from its origins in Rome, where the tribune of plebeians had the power to disapprove measures recommended by the senate, *Harbor* explained that "[t]he word, 'veto' means 'I forbid' in Latin. Then, as now, the effect of the veto was negative, frustrating an act without substituting anything in its place." (*Harbor, supra,* 43 Cal.3d at p. 1085, citing Zinn, The Veto Power of the President (1951) 12 F.R.D. 209.) Evolving in the United States as "an integral part of the system of checks and balances" (*Harbor*, at p. 1085), the veto power at the federal level is circumscribed by the limitation that the President may approve or reject a bill in its entirety, but may not select portions of a bill for disapproval. "As a much-quoted early case commented, 'the executive, in every republican form of government, has only a qualified and destructive legislative function, and never creative legislative power.' (*State v. Holder* (1898) 76 Miss. 158 [23 So. 643, 645].) [¶] While the rule prohibiting selective exercise of the veto is unyielding in the federal system, most states have provided an exception for items of appropriation." (*Harbor*, at p. 1086; see *Thirteenth Guam Legislature v. Bordallo* (D. Guam 1977) 430 F.Supp. 405, 410.)

"In California, the constitution of 1849 included a gubernatorial veto provision similar to that contained in the United States Constitution. (Cal. Const. of 1849, art. IV,

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"(e) The Governor may reduce or eliminate one or more items of appropriation while approving other portions of a bill. The Governor shall append to the bill a statement of the items reduced or eliminated with the reasons for the action. The Governor shall transmit to the house originating the bill a copy of the statement and reasons. Items reduced or eliminated shall be separately reconsidered and may be passed over the Governor's veto in the same manner as vetoed bills."

§ 17 . . . .) The Constitution of 1879 added the item veto power, allowing the Governor to 'object to one or more items' of appropriation in a bill which contained several 'items of appropriation.' (Cal. Const. of 1879, art IV, § 16.) By constitutional initiative in 1922, the Governor was empowered *not only to eliminate 'items of appropriation' but to reduce them,* while approving other portions of a bill. (Art. IV, § 10, subd. ([e]).) The 1922 amendment also directed the Governor to submit a budget to the Legislature containing his recommendation for state expenditures. (Art. IV, § 12, subd. (a).)" (*Harbor, supra,* 43 Cal.3d at p. 1086, italics added.)[10]

The item veto and the line-item veto allowing the Governor to eliminate or reduce items of appropriation do not confer the power to selectively veto *general* legislation. (*Harbor, supra,* 43 Cal.3d at p. 1087; *Lukens v. Nye* (1909) 156 Cal. 498, 501-503.) The Governor may not veto part of a bill that is not an "item of appropriation." (*Harbor,* at pp. 1084-1085, 1088-1089.)

"[A]rticle III, section 3 provides that one branch of government may not exercise the powers granted to another 'except as permitted by this Constitution.' Case law, commentators, and historians have long recognized that in exercising the veto the Governor acts in a legislative capacity. [Citations.] . . . [¶] It follows that in exercising the power of the veto the Governor may act only as permitted by the Constitution. That authority is to veto a 'bill' (art. IV, § 10, subd. (a)) or to 'reduce or eliminate one or more

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[10] The ballot argument in favor of the 1922 constitutional initiative that empowered the Governor to exercise the line-item veto to reduce an item of appropriation stated in relevant part: "The budget system will save the taxpayer money, because all state appropriations will be handled in a business way, duplications prevented and extravagance avoided. *The proposed measure will also enable the Governor to reduce an appropriation to meet the financial condition of the treasury, which under our present system he cannot do. Frequently a worthy measure is vetoed because the legislature passes a bill carrying an appropriation for which sufficient funds are not available. Under present conditions the Governor is compelled to veto the act, no matter how meritorious, because of the excessive appropriation, whereas, if he had the power given by the proposed constitutional amendment, he could approve the bill with a modified appropriation to meet the condition of the treasury.*" (Ballot Pamp., Gen. Elec. (Nov. 7, 1922), argument in favor of Prop. 12, pp. 78-79, italics added.)

items of appropriation' (*id.*, subd. ([e]).)" (*Harbor, supra,* 43 Cal.3d at p. 1089, fn. omitted.)

The dispositive issue, then, is whether the seven sections of Assembly Bill 4X 1 that the Governor further reduced here, were "items of appropriation" (Cal. Const., art. IV, § 10, subd. (e)), upon which the Governor could exercise his line-item veto power. We are convinced that they are.

II. "Item of Appropriation"

Petitioners and interveners contend that, because the challenged items in Assembly Bill 4X 1 reduced the amounts previously appropriated in the 2009 Budget Act, these items were not "appropriations." They maintain that a "reduction" cannot be an "appropriation," and point out that there are no instances in which a California governor has ever before exercised the line-item veto in this manner.

Since the passage of the 1922 constitutional amendment empowering the Governor to exercise the line-item veto, our Supreme Court has addressed the question of what constitutes an "item of appropriation" subject to the Governor's line-item veto power in two important cases, *Harbor, supra,* 43 Cal.3d 1078, and *Wood v. Riley* (1923) 192 Cal. 293, and we turn to them for guidance.

A. *Judicial definitions of "item of appropriation"*

Wood v. Riley, supra, 192 Cal. 293, was decided in 1923, shortly after the Constitution was amended to allow the Governor to use the line-item veto to reduce as well as eliminate "items of appropriation." In that case, the Legislature added to a budget bill a proviso requiring the Controller to transfer one percent of the appropriations set aside for salaries and support of several teachers' colleges and special schools to the state department of education as the administrative allotment of the department. (*Id.* at pp. 294-296.) The Governor vetoed the proviso. (*Id.* at p. 296.) The director of education sought to enforce the proviso, notwithstanding the Governor's disapproval, arguing that the Governor was attempting to veto part of a sentence in an appropriation bill that did not appropriate money, but simply provided for a transfer, as a matter of bookkeeping, of a percentage of funds already appropriated. (*Id.* at p. 297; see *Harbor,*

supra, 43 Cal.3d at p. 1091, fn. 13.) The Supreme Court upheld the veto, holding that *although it took no new money from the state treasury*, the proviso "was a specific setting aside of an amount, not exceeding a definite fixed sum, for the payment of certain particular claims or demands . . . . It appears in no other light than as amounting to an item of appropriation in that it adds an additional amount to the funds already provided for the administration of the office of the director of education through the sums appropriated for the use of the state board of education and the superintendent of public instruction. This court has held that 'by a specific appropriation' was understood 'an Act by which a named sum of money has been set apart in the treasury and devoted to the payment of a particular claim or demand . . . The Fund upon which a warrant must be drawn must be one the amount of which is designated by law, and therefore capable of definitive exhaustion—a Fund in which an ascertained sum of money was originally placed, and a portion of that sum being drawn an unexhausted balance remains, which balance cannot be thereafter increased except by further legislative appropriation.' (*Stratton v. Green* [(1872)] 45 Cal. 149, 151. [Citations.]) . . . The proviso, therefore, appears to fill all the requirements of a distinct item of appropriation of so much of a definite sum of money as may be required for a designated purpose connected with the state government." (*Wood v. Riley,* at pp. 303-304.)

The Supreme Court was also persuaded that the Legislature intended to insulate its appropriation for the general administrative office of the department from the Governor's veto, which it could not do if it directly appropriated funds for that office. (*Wood v. Riley, supra,* 192 Cal. at pp. 304-305.) "It is very clear that the situation presented is that no appropriation having been recommended by the Governor, or included in the proposed budget bill, for the payment of the 'salaries and support of the general administrative office of the division of normal and special schools,' other than the general provisions for the support of the state board of education and the state superintendent of schools, the legislature attempted, by the inclusion of the proviso in the bill, to make such additional appropriation for such purpose under the guise of an administrative allotment. Therefore, looked at in the light of what it was intended to accomplish, and what it would have

accomplished if allowed to stand, one cannot escape the conviction that it worked an appropriation. It added a specific amount to the allowance already made for the use of the state board of education and the state superintendent of schools." (*Ibid.*) The court concluded the Legislature could not "by indirection, defeat the purpose of the constitutional amendment giving the Governor power to control the expenditures of the state, when it could not accomplish that purpose directly or by an express provision in appropriation bills." (*Id.* at p. 305.)

In *Harbor, supra,* 43 Cal.3d 1078, the Legislature enacted a budget for the 1984-1985 fiscal year. One item in the budget was an appropriation for aid to families with dependent children (AFDC) for over $1.5 billion. Ten days later, the Legislature passed a trailer bill containing 71 sections enacting, amending and repealing numerous provisions in numerous codes. (Sen. Bill No. 1379 (1983-1984 Reg. Sess.).) The trailer bill was not to become operative unless the 1984-1985 Budget Act was also passed. Among the trailer bill's provisions was section 45.5 (Sen. Bill No. 1379, Stats. 1984, ch. 268, § 45.5, p. 1383 (hereafter "section 45.5")), amending the Welfare and Institutions Code to allow AFDC benefits to be paid under certain circumstances from the time a benefits application was made, rather than from the date the application was processed. (*Harbor*, at pp. 1082-1083.) In approving the 1984-1985 Budget Act, the Governor reduced the item containing the AFDC allotment by more than $9 million. Two days later, he approved the trailer bill, but purported to veto section 45.5 relating to the timing of the benefits payments. (*Harbor,* at pp. 1082-1083.)

The Supreme Court held that the Governor's purported veto of section 45.5 of the trailer bill relating to timing of the benefits was not justified as the provision was not an "item of appropriation." (*Harbor, supra,* 43 Cal.3d at pp. 1090-1091.) However, the court also held that the trailer bill violated the single-subject rule of article IV, section 9 of the California Constitution. (*Id.* at p. 1094.) Therefore, the court gave its determination as to both rulings prospective effect only, as the Governor would have had the power to veto section 45.5 had it been passed by the Legislature as a separate bill.

The net effect was that the veto was not invalidated, but only that section of the bill would be rendered inoperative. (*Id.* at pp. 1101-1102.)

In reaching its determination that section 45.5 was *not* an "item of appropriation" and, therefore, that the Governor could not selectively veto the item without vetoing the entire bill, *Harbor* recognized that "[t]he term has been defined in various ways. *Wood v. Riley, supra,* 192 Cal. 293, 303, defines it as 'a specific setting aside of an amount, not exceeding a definite sum, for the payment of certain particular claims or demands . . . not otherwise expressly provided for in the appropriation bill.' It 'adds an additional amount to the funds already provided.' In *Bengzon* [*v. Secretary of Justice* (1937) 299 U.S. 410] the term was described as a bill whose 'primary and specific aim . . . is to make appropriations of money from the public treasury.' (299 U.S. 410 at p. 413.) Other cases employ somewhat different definitions (e.g., *Jessen Associates, Inc. v. Bullock* (Tex. 1975) 531 S.W.2d 593, 599 ['setting aside or dedicating of funds for a specified purpose']; *Commonwealth v. Dodson* (1940) 176 Va. 281 [11 S.E.2d 120, 127] ['an indivisible sum of money dedicated to a stated purpose']])." (*Harbor, supra,* 43 Cal.3d at p. 1089.)

Harbor concluded that the provision at issue did not qualify "as an item of appropriation under any of these definitions. It does not set aside money for the payment of any claim and makes no appropriation from the public treasury, nor does it add any additional amount to funds already provided for. Its effect is substantive. Like thousands of other statutes, it directs that a department of government act in a particular manner with regard to certain matters. Although as is common with countless other measures, the direction contained therein will require the expenditure of funds from the treasury, this does not transform a substantive measure to an item of appropriation. We agree with petitioners that section 45.5 only expresses the Legislature's intention that the AFDC appropriation, whatever its amount, must be used to provide benefits to recipients from the date of application under certain circumstances." (*Harbor, supra,* 43 Cal.3d at pp. 1089-1090.)

The *Harbor* court was not persuaded by the Governor that the Legislature had attempted to separate the appropriation and its purpose into separate measures in order to evade a veto of the entire indivisible measure. (*Harbor, supra,* 43 Cal.3d at pp. 1090-1091.) According to the court, "[b]oth were specified in the [1984-1985] Budget Act, that is, over $1.5 billion was appropriated for the purpose of funding AFDC. The Governor is bound by this 'purpose' as set forth in the budget. If the Legislature chooses to budget by a lump sum appropriation, he may eliminate or reduce the amount available for the purpose as set forth therein. Here, the Governor not only reduced the 'item of appropriation' as set forth in the budget, but he divided it into its supposed component parts, assigned a purpose and amount to the part he disapproved, reduced the total by that amount, and attempted to veto a portion of a substantive bill which he claims contains the 'subject of the appropriation.' We are aware of no authority that even remotely supports the attempted exercise of the veto in this manner." (*Id.* at pp.1090-1091.)

The court concluded that even the Legislature's attempt to avoid the Governor's veto was not sufficient justification to allow the term to be interpreted to embrace a substantive measure like section 45.5 where no definition of the term "item of appropriation" as used in the Constitution—including that used in *Wood v. Riley, supra,* 192 Cal. 293—could "reasonably embrace a provision like section 45.5, which does not set aside a sum of money to be paid from the public treasury." (*Harbor, supra,* 43 Cal.3d at p. 1092.) "The fact that in *Wood* the term 'item of appropriation' was construed in such a way as to facilitate the Governor's power to veto a portion of the budget bill which could reasonably be encompassed within the meaning of that term does not provide authority for holding . . . that the Governor may veto part of a general bill—a power denied him by the Constitution—in order to foil an alleged legislative attempt to evade the veto." (*Id.* at p. 1092, fn. omitted.)

Following *Harbor, supra,* 43 Cal.3d 1078, the Court of Appeal in *California Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264 (*Safety Education*) described an appropriation similarly, as "a legislative act setting aside 'a certain sum of money for a specified object in such a manner that the executive officers are authorized to use that

money and no more for such specified purpose.' (*Ryan v. Riley* (1924) 65 Cal.App. 181, 187.)" (*Safety Education*, at p. 1282.)[11]

B. *Judicial definitions applied*

As in *Wood v. Riley, supra,* 192 Cal. 293, and unlike in *Harbor, supra,* 43 Cal.3d 1078, the challenged items presented to the Governor in Assembly Bill 4X 1, each "appear[] to fill all the requirements of a distinct item of appropriation of so much of a *definite sum of money* as may be required *for a designated purpose* connected with the state government." (*Wood v. Riley*, at p. 304, italics added.) Assembly Bill 4X 1 "set aside a sum of money to be paid from the public treasury" (*Harbor,* at p. 1092), albeit a smaller sum than that initially appropriated in the 2009 Budget Act.

Contending that only an *increase* in spending authority amounts to an appropriation, petitioners, interveners, and their amici curiae emphasize that none of the definitions of "item of appropriation" contained in the cases refer to a *decrease* in the spending authorized by a previously enacted budget, and maintain that such a reduction may not be deemed an item of appropriation. They further argue that because the 2009 Budget Act had *already* set aside sums of money to be paid by the treasury for specific purposes, those items and sections of Assembly Bill 4X 1 that proposed only reductions to existing, previously enacted appropriations did not satisfy the requirement of money set aside for a particular purpose. The argument, in other words, is that a reduction in a set-aside cannot itself be considered a set-aside. We disagree.

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[11] The issue in *Safety Education, supra,* 30 Cal.App.4th 1264, was whether the statutory scheme at issue reflected "a continuing appropriation by the Legislature or whether the availability of driver training funding is subject to legislative discretion." (*Id.* at p. 1282.) The court found the statutory language clear that the funds that may be used to pay for driver training were limited to amounts appropriated in the annual budget act, so that the statutory scheme did not establish a continuing appropriation. (*Id.* at p. 1283.) The asserted continuing appropriation provisions in *Safety Education* had no dollar amount listed, and expressly deferred the amount of appropriation to "the annual Budget Act" item that addressed driver's education. (*Id.* at p. 1272.) The case does not stand for the proposition asserted by petitioners that a limitation upon or reduction of an appropriation does not constitute an appropriation.

The cases do not require, as petitioners and interveners suggest, that *only* items that add amounts to funds already provided constitute "items of appropriation." Governor Deukmejian's claim failed in *Harbor,* because section 45.5 of the trailer bill did not qualify "as an item of appropriation under *any* of [the] definitions" reviewed by the court. (*Harbor, supra*, 43 Cal.3d at p. 1089.) "It does not set aside money for the payment of any claim and makes no appropriation from the public treasury, nor does it add any additional amount to funds already provided for. Its effect is *substantive.*" (*Ibid.*, italics added.) Furthermore, unlike section 45.5 in *Harbor,* which referred to no sum of money, much less a definite or ascertainable sum, the Assembly Bill 4X 1 items here specified definite amounts by which the original appropriations would be reduced.

Whether spending authority is increased or decreased, it is still spending authority. Although described as reductions in specified items and sections, the amounts set aside in Assembly Bill 4X 1, nevertheless direct the "specific setting aside of an amount, not exceeding a definite fixed sum, for the payment of certain particular claims or demands . . . ." (*Wood v. Riley, supra,* 192 Cal. at pp. 303-304; see *Harbor, supra,* 43 Cal.3d at p. 1092.) The items in Assembly Bill 4X 1 eliminated or further reduced by the Governor's veto *capped* the spending authority at a lesser amount than had the 2009 Budget Act. The Controller could not thereafter disburse, nor could the recipients of the funds thereafter draw upon, a larger amount than that set aside by the Legislature for the specified purposes. Once enacted, an appropriation " 'cannot be thereafter increased except by further legislative appropriation.' [Citations.]" (*Wood v. Riley,* at p. 303, citing, among others, *Stratton v.* Green (1872) 45 Cal. 149, 151.)

There is no substantive difference between gubernatorial reduction of an item of appropriation in the original 2009 Budget Act, to which interveners and petitioners do not object, and gubernatorial reduction of such item in a subsequent amendment to the 2009 Budget Act, i.e., Assembly Bill 4X 1. Both involve changes in spending authority.[12]

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[12] Although the precise question whether reductions in appropriations are items of appropriation subject to the Governor's line-item veto is, as we have said, a question of first impression in this state, the Arizona Supreme Court answered the question

Adoption of the view of petitioners, interveners and their amici curiae that the challenged vetoes were not of "items of appropriation" would permit the Legislature, in a single bill, to selectively make multiple reductions in previous appropriations, leaving the Governor only the power to veto the entire bill—a limitation the 1922 amendment to article IV of the California Constitution was specifically designed to eliminate. (See, *ante*, p. 10, fn. 10.) If spending reductions are not items of appropriation, a simple legislative majority could not only overturn a two-thirds vote on the annual budget act, but insulate its new determinations from gubernatorial oversight. This cannot be.

C. *Examination of the structure and content of Assembly Bill 4X 1 itself shows that the challenged vetoes were of items of appropriation*

Our determination that the challenged vetoes were vetoes of "items of appropriation" is also supported by the structure and content of Assembly Bill 4X 1 itself.

Assembly Bill 4X 1 is an amendment to the 2009 Budget Act. (See *Planned Parenthood Affiliates v. Swoap* (1985) 173 Cal.App.3d 1187, 1199 [an amendment is a

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affirmatively in *Rios v. Symington* (1992) 172 Ariz. 3, 833 P.2d 20 (*Rios*), a case relied upon by the Governor. The *Rios* court rejected the claim that the governor's line-item veto power did not extend to legislative measures decreasing prior appropriations: "When the Legislature transfers monies from a previously-made appropriation, the obvious effect is to reduce the amount of the previous appropriation. The Constitution does not permit such reductions free of gubernatorial oversight. To hold otherwise would permit the Legislature to do indirectly that which it may not do directly, and would seriously limit the Executive's constitutional role in the appropriation process. [¶] . . . [¶] In our view, if the Governor's constitutional power to line item veto an appropriation is to mean anything, the Governor must be constitutionally empowered to line item veto a subsequent reduction or elimination of that appropriation." (*Id.* at p. 26.)

Although the analysis in *Rios, supra,* 833 P.2d 20, supports our conclusion, we are aware that the constitutional framework for exercise of the veto power in Arizona described in *Rios* is different in some critical respects from California's. Unlike ours, Arizona's constitution does not empower its governor to "reduce" an item of appropriation. In addition, because of the terms of the line-item veto in Arizona, the net effect of the governor's veto in *Rios* was to reinstate the original appropriation. We cannot tell how much weight the court placed upon this factor. Consequently, although *Rios* addresses issues similar to those presented here, significant differences between the Arizona and California constitutional schemes regarding the line-item veto prevent us from finding it particularly persuasive.

legislative act *changing* prior or existing law by adding or taking from it some particular provision].) This multi-itemed budget bill[13] contains numerous appropriations. The parties recognize that Assembly Bill 4X 1 contains at least *some* items of appropriation, concededly subject to the Governor's line-item veto, as a few of the provisions *increased* spending over that appropriated in the 2009 Budget Act.[14]

Assembly Bill 4X 1 is titled "Budget Act of 2009—Revisions" and describes itself in chapter 1 as, "[a]n act to amend and supplement the Budget Act of 2009 . . . by amending Items . . . , by adding Items . . . , and by repealing Items . . . , and by amending Sections . . . , by adding Sections . . . [including those at issue here], and by repealing Section 4.65 of, that act, *relating to the State Budget, making an appropriation therefore*, and declaring the urgency thereof, to take effect immediately." (Assem. Bill 4X 1, italics added.)[15] Hence, both by title and express statement Assembly Bill 4X 1 declares that it amends the 2009 Budget Act by making appropriations. The last section of Assembly Bill 4X 1 recites that the "act is an urgency statute" that "*makes revisions in appropriations* for the support of the government of the State of California and for

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[13] Petitioners dispute that Assembly Bill 4X 1 was a "budget bill." (See, *post*, pp. 28-29.)

[14] The Governor maintains, and petitioners and interveners do not dispute, that section 10 of Assembly Bill 4X 1 increased funding for Item 0250-101-0932, for support of the judicial branch; section 61 increased funding for Item 0690-001-0001, for support of the California Emergency Management Agency; section 149 increased funding for Item 2670-001-0290, for support of the Board of Pilot Commissioners; and section 318 increased Item 4265-001-0890, for support of the Department of Public Health. (Assem. Bill 4X 1, §§ 10, 61, 149, 318.)

[15] Assembly Bill 4X 1 is titled "Budget Act of 2009—Revisions" and states it is "[a]n act to amend and supplement the Budget Act of 2009 . . . by amending Items [there follows a list of more than 350 items by number], by adding Items [there follows a list of more than 100 items by number], and by repealing Items [there follows a list of more than 40 items by number], and by amending Sections [there follows a list of 10 sections], and by adding Sections [there follows a list of 21 sections, including those sections 17.50, 18.00 through 18.50 at issue here], and by repealing Section 24.65 of, that act, relating to the State Budget, *making an appropriation* therefore, and declaring the urgency thereof, to take effect immediately." (Assem. Bill 4X 1, italics added.)

several public purposes for the 2009-10 fiscal year."[16] (Assem. Bill 4X 1, § 583, italics added.)

Finally, the Legislative Counsel's Digest for Assembly Bill 4X 1 includes the legend "*Appropriation: yes.*" (Legis. Counsel's Digest, Assem. Bill 4X 1, Stats. 2009, 4th Ex. Sess. 2009, ch. 1, italics added.)[17]

A reasonable reading of Assembly Bill 4X 1 and the Legislative Counsel's Digest leads to the conclusion that the multiple budget items identified in the measure are items of appropriation, as they must be under article IV, section 12, subdivision (d) of the California Constitution, which provides in part: "No bill except the budget bill may contain more than one item of appropriation, and that for one certain, expressed purpose. . . ." (Cal. Const., art. IV, § 12, subd. (d).)[18]

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[16] "This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are: [¶] This act makes revisions in appropriations for the support of the government of the State of California and for several public purposes for the 2009-10 fiscal year. It is imperative that these revisions be made effective as soon as possible. It is therefore necessary that this act go into immediate effect." (Assem. Bill 4X 1, § 583.)

[17] The Legislative Counsel's Digest states: "The Budget Act of 2009 (Chapter 1 of the 2009-10 Third Extraordinary Session) made appropriations for the support of state government for the 2009-10 fiscal year.

"This bill would make revisions in those appropriations for the 2009-10 fiscal year. The bill would make specified reductions in certain appropriations.

"The California Constitution authorizes the Governor to declare a fiscal emergency and to call the Legislature into special session for that purpose. The Governor issued a proclamation declaring a fiscal emergency, and calling a special session for this purpose, on July 1, 2009.

"This bill would state that it addresses the fiscal emergency declared by the Governor by proclamation issued on July 1, 2009, pursuant to the California Constitution.

"This bill would declare that it is to take effect immediately as an urgency statute.

"Appropriation: yes." (Legis. Counsel's Dig., Assem. Bill 4X 1.)

[18] "No bill except the budget bill may contain more than one item of appropriation, and that for one certain, expressed purpose. Appropriations from the General Fund of the State, except appropriations for the public schools, are void unless passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring." (Cal. Const., art IV, § 12, subd. (d).)

After the Governor exercised his line-item veto, the Legislative Counsel issued an opinion, cited by interveners, concluding that "an item or section of a bill that proposes only to make a reduction in an existing item of appropriation previously enacted in the Budget Act of 2009 is not itself an item of appropriation" and therefore, "in vetoing items of sections of [Assembly Bill 4X 1] that proposed only reductions to existing appropriations enacted by the Budget Act of 2009, the Governor exceeded his 'line-item' veto authority." (Ops. Cal. Legis. Counsel, No. 0920928 (Aug. 5, 2009) Governor's Line-Item Veto Authority: Reductions to Existing Appropriations, pp. 1, 4.)[19] We are not persuaded.

"While an opinion of the Legislative Counsel is entitled to respect, its weight depends on the reasons given in its support." (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 238.) Because the conclusions of Legislative Counsel seem to us little more than a series of ipse dixits, we accord them "little weight." (*Ibid.*) Moreover, opinions of the Legislative Counsel are persuasive because they are ordinarily "prepared to assist the Legislature in its consideration of pending legislation" (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17) and therefore often shed light on the legislative purpose. The opinion before us, however, was not prepared to assist in the consideration of *pending* legislation. As it opines on the constitutionality of the Governor's veto of Assembly Bill 4X 1, it is no more persuasive than the views of the parties. Legislative intent—i.e., whether the

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[19] Like petitioners and interveners, the Legislative Counsel's opinion concludes that "[t]he legal effect of an item or section of a bill that solely makes a reduction of a previously appropriated amount is not to grant authority to a state officer to expend a specified sum, but to lessen that authority. Unlike an appropriation, the reduction of an existing appropriation does not set aside moneys for payment of a claim or make a new appropriation of moneys from the public treasury, nor does it add additional amounts to funds already provided for by an existing appropriation or identify a new purpose for which moneys may be expended. A state officer is not granted new expenditure authority, nor is a state officer's expenditure authority extended in any way by an item or section of a bill that solely makes a reduction of an existing appropriation." (Ops. Cal. Legis. Counsel, No. 0920928, *supra*, Governor's Line-Item Veto Authority: Reductions to Existing Appropriations, at p. 4, fn. omitted.)

Legislature intended that the items at issue be subject to the Governor's veto power—is irrelevant to our inquiry.

Our conclusion that the items at issue were appropriations is further buttressed by the nature of the relief sought by petitioners and interveners. Petitioners and interveners both contend the provisions of Assembly Bill 4X 1 did not "set aside money for the payment of any claim" because the funds for these programs already had been set aside and spending authority previously had been provided in the 2009 Budget Act. At the same time, however, they ask this court *to direct the Controller to pay state funds, in the amounts specified in Assembly Bill 4X 1, for the programs specified therein*, based upon the passage of that budget bill.[20] The relief sought is not permitted under the California Constitution, unless appropriations directing it are in place. (Cal. Const., art. XVI, § 7.) Article XVI, section 7 provides: "Money may be drawn from the Treasury *only through an appropriation* made by law and upon a Controller's duly drawn warrant." (Italics added.) The constitutional requirement is further elaborated by Government Code section 12440, which provides: "The Controller shall draw warrants on the Treasurer for the payment of money directed by law to be paid out of the State Treasury; but a warrant shall not be drawn unless authorized by law, and unless . . . *unexhausted specific appropriations* provided by law are available to meet it." (Italics added.) In seeking payments from the Controller from state funds in the amounts set aside in Assembly Bill 4X 1, for the programs identified therein, and according to the terms of that bill, petitioners and interveners implicitly acknowledge that the provisions of that budget measure are items of appropriation.

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[20] Petitioners request, among other things, that this court issue a writ of mandate directing respondents "[t]o take all actions necessary to ensure that the moneys appropriated in the Budget Act of 2009, as amended and supplemented by [Assembly Bill 4X 1], and excluding the Governor's purported vetoes thereto, be disbursed and continue to be disbursed as directed in accordance with the laws of California." Interveners seek a writ of mandate "requiring respondents to provide for the full amount of appropriations made by the Legislature under the Budget Act of 2009, as reduced and revised by [Assembly Bill 4X 1], without regard to the reductions purported to be made by respondent [Governor] . . . ."

The content and structure of Assembly Bill 4X 1 thus supports our conclusion that the provisions at issue are items of appropriation subject to reduction or elimination by the Governor's use of the line-item veto power.

Identification of the Assembly Bill 4X 1 legislative reductions as items of appropriation is consistent with the reenactment and single-subject rules of the California Constitution, article IV, section 9,[21] and the mandate of article IV, section 12, subdivision (d), that "[n]o bill except a budget bill may contain more than one item of appropriation . . . ." Petitioners' and interveners' claims to the contrary are not persuasive.

First, if, as interveners claim, Assembly Bill 4X 1 amendments to the 2009 Budget Act do not reenact the items of appropriation they purport to change, the measure would violate the directive of article IV, section 9 of the California Constitution, that "[a] section of a statute may not be amended unless the section is re-enacted as amended." Second, if the reduced Assembly Bill 4X 1 items at issue are not items of appropriation, Assembly Bill 4X 1 would seemingly violate the single-subject requirement of article IV, section 9, as a budget bill dealing with more than the single subject of appropriations. Finally, if Assembly Bill 4X 1 is not a "budget bill," as petitioners claim, it violates the provisions of article VI, section 12, subdivision (d), that only a budget bill may contain more than one item of appropriation.

Petitioners and interveners deal with the foregoing problems in very different—and often contradictory—ways.

Petitioners try to shield the items in question from reduction by the Governor by claiming that, as to the seven sections of Assembly Bill 4X 1 at issue, the Legislature neither repealed nor *reenacted* the appropriations signed by the Governor in the 2009 Budget Act. As earlier pointed out, the California Constitution provides that "[a] section

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[21] Article IV, section 9 of the California Constitution provides in its entirety: "A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void. A statute may not be amended by reference to its title. A section of a statute may not be amended unless the section is re-enacted as amended."

of a statute may not be amended unless the section is re-enacted as amended." (Cal. Const., art. IV, § 9.)

Petitioners argue that the *language* used by the Legislature in effecting reductions differentiates those sections of Assembly Bill 4X 1 that "amend," and therefore reenact, sections of the 2009 Budget Act, from other sections that merely "added" sections to the 2009 Budget Act containing items (those at issue here) that petitioners and interveners contend are not appropriations. (Interveners do not endorse this argument. They contend that *none* of the Assembly Bill 4X 1 reductions, no matter how phrased, is an "item of appropriation.") Petitioners posit two sections of Assembly Bill 4X 1 as illustrative:

"Section 399 of [Assembly Bill 4X 1], as passed by the Legislature amended the Budget Act as follows:

" 'SEC. 399. Item 6110-001-0001 of Section 2:00 of the Budget Act of 2009 is *amended* to read:

" '6110-001-0001—For support of Department of Education . . . . 38,210,000.' [(Assem. Bill 4X 1, § 399, italics added.)]" [Petitioners note the amount previously appropriated in the 2009 Budget Act was $43,139,000, so in effect Assembly Bill 4X 1 reduced the amount for this item by $4,929,000. (2009 Budget Act, Item 6110-001-0001, No. 1 West's Cal. Legis. Service, p. 494.)][22]

Petitioners "note that this amendment makes no mention of the reduction from the previously appropriated amount; it simply proposes to replace the original text with a new sum. *Thus, it may be argued, it represents an entirely new appropriation upon which the Governor may justly use his veto power.*"

Petitioners contrast section 399 (a section not at issue in this litigation) with "the amendment proposed in Section 572 of [Assembly Bill 4X 1], which will reduce funding for the Healthy Families Program:

" 'SEC. 572. Section 18.20 is *added* to the Budget Act of 2009, to read:

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[22] Bracketed insertions are ours, not petitioners'.

" 'Sec. 18.20. (a) *The amount appropriated* in Item 4280-101-0001 of Section 2.00 *is hereby reduced by* $125,581,000.' [(Assem. Bill 4X 1, § 572, italics added.)]" [The amount previously appropriated in the 2009 Budget Act was $377,487,000, so the effect is that a sum of $251,906,000 is set aside for this program. (2009 Budget Act, Item 4280-101-0001, No. 1 West's Cal. Legis. Service, p. 428.)]

The specific sums set aside for the particular programs are easily ascertained from Assembly Bill 4X 1, by simply subtracting the dollar amount of the reductions from the original amounts appropriated in the 2009 Budget Act.

Petitioners argue that although the two amendments have similar effect—reducing the amount originally set aside under the 2009 Budget Act—"the direct amendment and reenactment of previously passed items of appropriation in the manner of proposed Section 399 arguably exposes them to the [G]overnor's line-item power . . . ; no such authority exists . . . with respect to the reductions made in the manner of Section 572."

In essence, Petitioners argue that the Legislature may do by indirection that which it cannot do directly, that is, it may insulate certain items of appropriation from the Governor's line-item veto power by the language used, where other items having the identical effect of reducing the sums appropriated in the 2009 Budget Act would be subject to that power. This, the Legislature may not do. (See *Wood v. Riley, supra,* 192 Cal. at pp. 304-305.) As amici curiae former Governors observe: "If by simple wordsmithing the legislative branch can create an omnibus spending bill limiting the Governor's oversight only to veto of the entire bill, then the budgetary process is reduced to a game of 'chicken' daring a [G]overnor to bring state government to a halt through a veto."

Whether identified in Assembly Bill 4X 1 as amendments of, revisions to, or additions to the 2009 Budget Act, it is clear that every provision of Assembly Bill 4X 1 changed a section of the 2009 Budget Act. In *Planned Parenthood Affiliates v. Swoap, supra,* 173 Cal.App.3d 1187, 1199, we recognized that "[a]n amendment has been described as ' "a legislative act designed to change some prior or existing law by adding

or taking from it some particular provision." ' [Citations.]" Consequently, the sections that were "added" like those that expressly "amended" the 2009 Budget Act, reenacted those provisions and were subject to the line-item veto or reduction by the Governor. (See also *People v. Western Fruit Growers* (1943) 22 Cal.2d 494, 501.)

Interveners approach the problem from a different perspective. The key question, as they see it, is not whether the reenactment rule applies, but the effect of its application. Interveners agree that Assembly Bill 4X 1 fulfills the purpose of the reenactment rule of avoiding confusion on the part of the Legislature and the public that often results when amendments direct the insertion, omission or substitution of certain words or additions of provisions without setting out the entire context of the section to be amended. (*White v. State of California* (2001) 88 Cal.App.4th 298, 313-314.) Interveners contend, however, that when viewed in tandem with Government Code section 9605, the effect of the article IV, section 9 reenactment rule of the California Constitution was that the only provisions of the 2009 Budget Act that were reenacted by adoption of the reductions in Assembly Bill 4X 1 were those that were changed, that is, the *amount* of each reduction.

Government Code section 9605 states: "Where a section or part of a statute is amended, it is not to be considered as having been repealed and reenacted in the amended form. The portions which are not altered are to be considered as having been the law from the time they were enacted; the new provisions are to be considered as having been enacted at the time of the amendment; and the omitted portions are to be considered as having been repealed at the time of the amendment." The effect of Government Code section 9605 is "to avoid an implied repeal and reenactment of unchanged portions of an amended statue, ensuring that the unchanged portion operates without interruption." (*In re Lance W.* (1985) 37 Cal.3d 873, 895.) Scaffolding their arguments on this structure, petitioners and interveners assert that by changing only the *amount* of the appropriation in the provisions of Assembly Bill 4X 1 at issue, the Legislature did not reenact the corresponding items of appropriation of the 2009 Budget Act but merely reduced the "amount."

This argument would have us parse a putative "item of appropriation" into three separate parts: the "*setting aside*," the "*amount*" thereof, and the "*particular purpose*" to which that amount may be put. So divided, petitioners and interveners maintain that Assembly Bill 4X 1 changed only the "amount" of the items in Assembly Bill 4X 1 at issue, and none of the changes fit the tripartite definition of "item of appropriation." The flaw in this imaginative argument is that the "setting aside" and the "amount" thereof are fundamentally indivisible. The act of setting aside is meaningful only with respect to the designated amount. The "spending authority" granted by a proposed "item of appropriation" is the *combination* of a setting aside of a designated sum *and no more*, for a particular purpose.

If petitioners and interveners are correct that the many reductions at issue here did not constitute items of appropriation, and so cannot be selectively vetoed or further reduced by the Governor, then, because each item involves a different statutory program, the entire bill might be invalid as a violation of the single-subject rule. (See *Planned Parenthood Affiliates v. Swoap, supra,* 173 Cal.App.3d at pp. 1198-1199.) "In California, legislators and state agencies have repeatedly been reminded by the Attorney General that '[a]nnual budget acts, like all other enactments of the Legislature, are subject to the provisions of section [9], Article IV, of the California Constitution,' which sets forth the single-subject rule. [Citations.] . . . [O]ur Supreme Court recently agreed that ' " 'the budget bill may deal only with the one subject of appropriations to support the annual budget,' " and thus " 'may not constitutionally be used to grant authority to a state agency that the agency does not otherwise possess' " or to " 'substantively amend[] and chang[e] [e]xisting statute law.' " ' [Citations.]" (*Planned Parenthood Affiliates v. Swoap,* at pp. 1198-1199.)

In *Harbor, supra,* 43 Cal.3d 1078, the court held the trailer bill containing multiple statutory amendments intended to implement the appropriations previously set forth in the annual budget act violated the single-subject rule, as the number and scope of topics contained therein covered numerous unrelated subjects. The court rejected the

claim that the provisions of the trailer bill were "reasonably germane" to the objects of the measure, which were asserted to be to " 'fiscal affairs' " and " 'statutory adjustments.' " (*Id.* at pp. 1100-1101.) According to the court, in such case, the bill "encompass[ed] matters of 'excessive generality' " (*id.* at p. 1100), as "[t]he number and scope of topics germane to 'fiscal affairs' in this sense is virtually unlimited." (*Id.* at pp. 1100-1101.)

Relying on *League of Women Voters v. Eu* (1992) 7 Cal.App.4th 649, petitioners are confident that Assembly Bill 4X 1 would pass muster under the single-subject rule if the items in the measure vetoed by the Governor are not "items of appropriation." *League of Women Voters v. Eu*, which distinguished *Harbor, supra,* 43 Cal.3d at page 1098, rejected a single-subject rule challenge to a proposed ballot initiative combining reductions to welfare benefits with other provisions that would increase the power of the Governor in fiscal crises. Reasoning that the object of the initiative was not simply "fiscal affairs" or "statutory adjustments," as in *Harbor*, the court concluded that the "overall theme and driving purpose" of the initiative was to obtain a balanced budget, and budget balancing was a sufficiently narrow single subject for purposes of the single-subject rule. (*League of Women Voters v. Eu,* at p. 666.) We do not share petitioners' certainty that Assembly Bill 4X 1 has a comparable unifying theme apart from the fact that its substantive provisions appropriate money from the public treasury for specified purposes. We need not decide the question, however. It is for our purposes sufficient that petitioners' interpretation would present a substantial constitutional question, which, whenever possible, we are obliged to avoid. (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 65; *Kollander Construction, Inc. v. Superior Court* (2002) 98 Cal.App.4th 304, 314, disapproved on other grounds in *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1107, fn. 5 ["We are constrained to avoid constitutional questions where other grounds are available and dispositive"]; see *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1357.)

Somewhat inexplicably, petitioners maintain in their traverse that the legislative process undertaken pursuant to the Governor's proclamation of a fiscal emergency that

culminated in Assembly Bill 4X 1 did not create a "budget bill" containing "items of appropriation" and could not violate the single-subject rule. They argue that "the claim that Assembly Bill [4X] 1 is *a* budget bill, . . . conflicts with the text of [the California Constitution,] [a]rticle IV, [section] 10[, subdivision] (f)(1), referencing the passage of '*the* budget bill' and [section] 10[, subdivision] (f)(3), contemplating a separate bill 'addressing the fiscal emergency' to be passed following passage of the budget bill." We fail to see any conflict. That the 2009 Budget Act was indisputably a "budget bill" does not make Assembly Bill 4X 1 any less a "budget bill." Were it otherwise, Assembly Bill 4X 1, which contains multiple items of appropriation—at least four that petitioners and interveners concede are appropriations—for diverse purposes, would be in direct conflict with the mandate of article IV, section 12, subdivision (d), that only a budget bill may contain more than one item of appropriation, as well as potentially running afoul of the single-subject rule of article IV, section 9.

Contrary to petitioners, interveners acknowledge that "[a] bill amending a budget bill, particularly one passed under the fiscal emergency procedures of article IV, section 10(f), *is a budget bill* within the meaning of article IV, section 12(d)'s requirement that only the budget bill may contain more than one item of appropriation." (Italics added.) Interveners suggest, however, that the reenactment rule of article IV, section 9 (providing in part that "[a] section of a statute may not be amended unless the section is re-enacted as amended") does not apply to the budget, arguing that an item of appropriation is not a "section of a statue." This suggestion flies in the face of article IV, section 10, subdivision (a) [a "bill passed by the Legislature. . . becomes a statute if it is signed by the Governor"] and the recognition by Assembly Bill 4X 1 that "[t]his act is an urgency *statute* . . . ." (Assem. Bill 4X 1, § 583, italics added; see also Leg. Counsel's Dig., Assem. Bill 4X 1 ["This bill would declare that it is to take effect immediately as an urgency statute"].)

III. Separation of Powers

Interveners' contention that the amounts designated by the items of Assembly Bill 4X 1 at issue should not be reducible by the Governor is based in part on a separation of powers theory, also advanced by amici curiae SEIU California State Council et al. This claim is built upon (1) the absence in our California Constitution of explicit gubernatorial authority to increase or decrease the size of spending cuts made by the Legislature in response to a declaration of fiscal emergency, and (2) the language in *Harbor, supra*, 43 Cal.3d 1078, emphasizing that, as interveners put it, "the power to veto, reduce or eliminate is not the power to create or increase," such as, for example, the Supreme Court's observations that "[t]he word 'veto' means 'I forbid' in Latin. . . . [T]he effect of the veto [is] negative, frustrating an act without substituting anything in its place." (*Id.* at p. 1085.)

As interveners see it, in making the challenged line-item vetoes, "the Governor sought to use his power to *increase* what the Legislature had done. The Legislature had made a policy determination regarding how much state spending had to be cut in response to the fiscal crisis and where those spending cuts were to be made. The Governor, however, disagreed with the Legislature's policy determinations. He wanted to make *more* cuts in order to keep a larger budget reserve." According to interveners, the Governor's preference for a larger budget reserve is a policy determination belonging to the legislative, not the executive, branch. Facially intriguing, this argument amounts to little more than wordplay.

Whether the items in Assembly Bill 4X 1 at issue are appropriations cannot be determined by seeing the Governor's use of the veto power only as increasing the Legislature's reductions and characterizing that as an impermissibly affirmative or "creative" act. For one thing, treating the veto as an increase in the reduction rather than as a decrease in the appropriation is as arbitrary as describing a glass of water as half full rather than half empty. By increasing the Legislature's reduction, the Governor decreases the size of the appropriation. What matters is not whether the Governor's act is seen as affirmative or negative, but its purpose and practical effect.

The difference of opinion between the Legislature and the Governor was not whether the amount of particular items of appropriation enacted in the 2009 Budget Act needed to be reduced, but the *magnitude* of the reductions. What mattered in the end were the amounts set aside for particular purposes; the Legislature wanted higher amounts than did the Governor. While the Governor's line-item vetoes may be said to have "increased" the reductions made by the Legislature as to the items at issue, the most significant effect of the vetoes, and their purpose, was to further reduce the amounts set aside by the Legislature. The Governor's wielding of the line-item veto was therefore quintessentially negative, as it lowered the cap on the spending authority for specified purposes, providing precisely the type of check on the Legislature intended by the constitutional initiative that adopted the line-item veto, empowering the Governor "to reduce an appropriation to meet the financial condition of the treasury." (Ballot Pamp., Gen. Elec. (Nov. 7, 1922), argument in favor of Prop. 12, pp. 78-79.)

Interveners' separation of powers argument thus begs the question. To be sure, the Governor's challenged acts were legislative in nature and, "[a]s an executive officer, [the Governor] is forbidden to exercise any legislative power or function except as the constitution expressly provide[s]." (*Lukens v. Nye, supra,* 156 Cal. at p. 501.) The question is not whether the gubernatorial act at issue is legislative, but whether it is constitutionally authorized. As earlier explained, we find it authorized by the statement in article IV, section 10, subdivision (e) of our California Constitution, that "[t]he Governor may reduce or eliminate one or more *items of appropriation* while approving other portions of a bill."

Nor are we impressed by the "anomalies" interveners contend would flow from finding the Governor's use of the line-item veto here is within constitutional bounds. Interveners contend, for example, that our reliance on article IV, section 9 of the California Constitution, for the conclusion that Assembly Bill 4X 1 reenacted those portions of the 2009 Budget Act that it amended, would allow the Governor to reduce the amount of funding authorized by a bill making only non-substantive technical changes to a previously enacted and unchanged appropriation, and also subject the measure to the

two-thirds vote requirement. Interveners also posit that it would also permit the Governor to "eliminate" a reduction to a previously enacted appropriation, thereby allowing *more* spending than the Legislature authorized which, they maintain, is not the use of the veto as a "negative" check on the Legislature, but the opposite.[23]

We need not address these issues as they are not before us. However, we do think it appropriate to point out that the Governor's veto power does not give him the last word. The Legislature retains the ability to override the Governor's veto of items of appropriation in the same manner as other bills, by separately reconsidering and passing them by a two-thirds majority of each house. (Cal. Const., art. IV, § 10, subds. (a), (e).) Nor do we here address the validity of the Governor's attempted allocation or splitting of his further reductions among various programs or portions of programs where Assembly Bill 4X 1 simply contained a lump sum reduction in a single item of appropriation. (But see *Harbor, supra,* 43 Cal.3d at pp. 1090-1091.)[24]

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[23] This would also have occurred if the Governor had vetoed Assembly Bill 4X 1 in its entirety. However, interveners do not argue the entire bill was not subject to veto or that exercise of such veto would be an impermissibly creative act rather than one that is permissibly negative.

[24] Interveners and petitioners point to the defeat of Proposition 76 at the November 2005 General Election and the defeat of Proposition 1A in May 2009, as evidence that the voters did not give the Governor the line-item veto power he exercised here. Proposition 76 would have allowed the Governor unilaterally to make spending reductions if the Legislature failed to enact legislation to deal with a fiscal emergency. (Ballot Pamp., Special Statewide Elec. (Nov. 8, 2005) Prop. 76 ("State Spending and School Funding Limit. Initiative Constitutional Amendment.").) Proposition 1A would have allowed the Governor to make certain midyear reductions without legislative approval. (Ballot Pamp., Special Elec. (May 19, 2009) Prop. 1A ("State Budget. Changes California Budget Process. Limits State Spending. Increases 'Rainy Day' Budget Stabilization Fund.").) These two propositions, which would have expanded executive powers and permitted *unilateral* spending cuts by the Governor, are irrelevant to the issues presented here. (See *American Civil Rights Foundation v. Berkeley Unified School Dist.* (2009) 172 Cal.App.4th 207, 219, fn. 9 [denying a request for judicial notice of ballot arguments regarding a later, failed initiative on the same general topic as Prop. 209, and instead choosing to "focus our attention on the voters' intent in 1996, when they adopted Proposition 209"].)

CONCLUSION

In article IV, section 10, subdivision (e), the California Constitution grants the Governor the limited legislative power to exercise the line-item veto to eliminate or reduce "items of appropriation." For the reasons set forth in this opinion, we conclude that the particular Assembly Bill 4X 1 budget reductions at issue here were "items of appropriation" within the meaning of article IV, section 10, subdivision (e), and that the Governor's line-item vetoes reducing them, while approving other portions of Assembly Bill 4X 1, was therefore constitutionally authorized.

DISPOSITION

The petition for writ of mandate is denied.

Kline, P.J.

We concur:

Lambden, J.

Richman, J.

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I, the undersigned, declare under penalty of perjury that:

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On April 12, 2010, I served a true copy of the following document(s):

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I declare, under penalty of perjury, that the foregoing is true and correct. Executed on April 12, 2010, in San Leandro, California.

Michael Narciso

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