No. S181760

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

REPLY IN SUPPORT OF PETITION FOR REVIEW

Robin B. Johansen, State Bar No. 79084
Karen Getman, State Bar No. 136285
James C. Harrison, State Bar No. 161958
Thomas A. Willis, State Bar No. 160989
REMCHO, JOHANSEN & PURCELL, LLP
201 Dolores Avenue
San Leandro, CA 94577
Phone: (510) 346-6200
Fax: (510) 346-6201
Email: rjohansen@rjp.com

Diane F. Boyer-Vine, State Bar No. 124182
Legislative Counsel
Jeffrey A. DeLand, State Bar No. 105103
Chief Deputy Legislative Counsel
LEGISLATIVE COUNSEL BUREAU
925 "L" Street, Suite 900
Sacramento, CA 95814
Phone: (916) 341-8000
Fax: (916) 341-8395

Attorneys for Interveners Darrell Steinberg, President pro Tem of the Senate and John A. Pérez, Speaker of the Assembly

No. S181760

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

REPLY IN SUPPORT OF PETITION FOR REVIEW

Robin B. Johansen, State Bar No. 79084
Karen Getman, State Bar No. 136285
James C. Harrison, State Bar No. 161958
Thomas A. Willis, State Bar No. 160989
REMCHO, JOHANSEN & PURCELL, LLP
201 Dolores Avenue
San Leandro, CA 94577
Phone: (510) 346-6200
Fax: (510) 346-6201
Email: rjohansen@rjp.com

Diane F. Boyer-Vine, State Bar No. 124182
Legislative Counsel
Jeffrey A. DeLand, State Bar No. 105103
Chief Deputy Legislative Counsel
LEGISLATIVE COUNSEL BUREAU
925 "L" Street, Suite 900
Sacramento, CA 95814
Phone: (916) 341-8000
Fax: (916) 341-8395

Attorneys for Interveners Darrell Steinberg, President pro Tem of the Senate and John A. Pérez, Speaker of the Assembly

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

CALIFORNIA CONSTITUTION:

MISCELLANEOUS:

INTRODUCTION

The Governor's Answer to the petitions for review treats this case as much ado about nothing. The Court of Appeal's decision, the Answer states, "neither created a conflict with other decisions nor misapplied existing precedent." (Answer of the Governor to the Petitions for Review ["Answer"] at 4.) If the Court of Appeal's decision does not conflict with other decisions, it is because no court in this State has ever before been confronted with a challenge to a gubernatorial veto of a spending *cut*. As for misapplying existing precedent, the decision not only does that, but it turns that precedent on its head.

This case is indeed much ado – about something far bigger than the Governor will admit. Perhaps that is why his Answer ignores virtually all the reasons petitioners and interveners point to for granting review, focusing instead on a relatively tangential point – the framing of the request for relief – that has little if any bearing on the reasons this Court should grant the petitions for review.

The Court should grant review because this case will affect the relationship between the legislative and executive branches on fiscal matters for decades to come. By liberally construing the gubernatorial veto power, the Court of Appeal has tilted the balance of power between the legislative and executive branches on state budget matters distinctly in favor of the Governor. That construction is in direct contradiction of this Court's ruling in *Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, and its implications go far beyond the issue of whether the line-item veto can be applied to reductions in State spending. Add to this the Court of Appeal's pronouncements on the legislative vote needed to reduce spending, the reenactment rule, and the single subject rule, and the result is an opinion

that profoundly affects the relationships among the branches of government.

Whether or not the members of this Court agree with the outcome below, we respectfully suggest that an issue such as this, shifting the balance of power between the other two branches of government, deserves and demands this Court's attention and review.

ARGUMENT

I.

THE COURT OF APPEAL'S OPINION BREAKS WITH PRECEDENT BY BROADLY CONSTRUING THE GOVERNOR'S VETO POWER

The Governor has no real response to the argument that the plain language and intent behind article IV, section 10(e) of the Constitution give the Governor the authority to veto only "items of appropriation," which this Court consistently has held to mean a provision that sets aside money for expenditure, and not one that takes away money previously encumbered. (*See Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1089.) Nor does the Governor even mention the fact that this Court has rejected the argument that his line-item veto power should be liberally construed. (*Id.* at 1088, fn. 9.)

In fact, the Governor goes so far as to acknowledge that "*Harbor* noted that the United States Supreme Court has defined the term 'appropriation' as an act that 'adds an additional amount to the funds already provided,'" and that "the *Harbor* Court . . . articulated the minimum definition of 'item of appropriation' as including the 'set[ting] aside a sum of money to be paid from the public treasury.'" (Answer at 5-6, citations omitted.) Nevertheless, the Governor almost off-handedly

declares it "unremarkable" that the Court of Appeal opinion means that "[b]y re-opening the Budget Act and adjusting hundreds of appropriations, then presenting the bill to the Governor for signature, the Legislature undoubtedly engaged in the act of appropriating . . . ." (*Id.* at 7.)

The truth is that the Court of Appeal's ruling is quite remarkable in every respect. No California court has ever held that a reduction in an appropriation is itself an appropriation, making it subject to the Governor's line-item veto power. Nor has any court ever suggested that it takes a two-thirds majority of the Legislature to *reduce* an existing appropriation or that changes to a budget bill can only be made by reenacting the entire section in which the provision at issue appears.

The most remarkable thing about the Court of Appeal's holding is that it contradicts the very notion of what is an appropriation, which *Harbor* makes clear involves the act of setting aside an amount of money to be spent or encumbered for a specific purpose. The only appropriations at issue here were enacted in February, 2009 as part of the 2009-10 Budget Act, months before the Governor sought to increase the reductions to those appropriations. The Governor had the opportunity to use his line-item veto on the appropriations when they were enacted in February; he did not get a second chance when the Legislature reduced them in July.

Rather than address this or petitioners' other points, the Governor attacks petitioners' prayer for relief with a classic non sequitur. (Answer at 8-9.) The Governor argues that because petitioners asked the Court of Appeal to order the Controller to pay State funds in the amounts set out in AB 1, they have conceded that those amounts are items of appropriation, because the "California Constitution does not permit the

relief sought unless appropriations directing it are in place." (*Id.* at 9.) The argument begs the question of when the appropriation occurred. Petitioners and interveners are merely asking the Court to restore the eight provisions of AB 1 at issue here as they were passed in July, 2009, before the Governor sought to exercise his line-item veto. Those eight provisions ordered reductions in appropriations originally authorized in the February Budget Bill. There was no new appropriation authority in those eight provisions; nor was there any need for it.[1] These provisions of AB 1, as passed by the Legislature, were reductions to existing appropriations. The Controller's authority to pay the previously enacted appropriations, in those reduced amounts, is not in question. The Governor's authority to use his line-item veto on the AB 1 reductions in spending authority, however, as if these reductions were themselves "appropriations," is very much in question and merits this Court's review.

Finally, the Governor argues that "[p]etitioners cite no authority to support the contention that the Legislature is constitutionally permitted to make spending commitments of public money in a manner not subject to the line-item veto power of the Governor." (Answer at 6.) The first answer, of course, is the one articulated above: The Legislature did *not* make a spending commitment in July; it made that commitment in February, in a budget bill that was subject to the line-item veto power.

---

[1] AB 1 did contain some new or increased appropriations, which is why it was properly called an appropriations bill. The inclusion of such provisions, none of which is at issue here, does not transform other provisions that merely reduced existing appropriations into new items of appropriation.

The second answer is that it is the Governor, not the Legislature, who must justify enlarging his participation in the legislative process. The Governor's role in the legislative process represents a narrow exception to the separation of powers required under article III, section 3 of the Constitution. In *Harbor*, this Court firmly said, "We disagree with respondents' claim that the veto power should be liberally construed." (43 Cal.3d at 1088, fn. 9.) Instead, the Court concluded, "in exercising the power of the veto the Governor may act only as permitted by the Constitution." (*Id.* at 1089.)

The Governor's only retort is that "courts should not permit litigants to circumvent the Governor's veto power." (Answer at 6.) There is no circumvention, however, when the provision in question does not make an appropriation, and the power simply does not apply. It is in resolving that central issue – whether the veto power extends to bills that *reduce* spending authority – that the Court of Appeal expanded the Governor's role in the legislative process as no court has ever done before. At a minimum, no such significant change in the balance of power between the two branches should be permitted to occur absent careful review by this Court.[2]

---

[2] This Court has not hesitated to grant review or exercise its original jurisdiction with respect to cases involving separation of powers. In addition to *Harbor* and the other cases cited in Interveners' Petition for Review, *see, e.g.*, *Prof. Engineers in Cal. Gov. v. Kempton* (2007) 40 Cal.4th 1016 (initiative allowing State to contract with private entities does not shift legislative power to the executive); *Marine Forests Society v. Cal. Coastal Com.* (2005) 36 Cal.4th 1 (Coastal Act provision allowing legislative appointment of commission members does not violate separation of powers); *Raven v. Deukmejian* (1990) 52 Cal.3d 336 (invalidating initiative measure that infringed on fundamental judicial power to interpret

(continued . . .)

II.

THE GOVERNOR'S ANSWER IGNORES THE LEGISLATIVE CONSEQUENCES OF THE COURT OF APPEAL'S OPINION

The Governor does not even address, much less answer, the litany of problems caused by the opinion below that interveners discussed in their Petition for Review. (Petition for Review ["Pet."] at 20-27.) He appears remarkably unconcerned that if the opinion stands, future governors will have to muster a two-thirds vote in the Legislature before they can obtain any reductions to existing appropriations. Nor does he seem to care whether the bill he must send to the Legislature after calling a special session must reprint and reenact every section of the Budget Act that he wishes to amend, thereby opening up for revision every item contained in those sections.[3]

Indeed, the Governor does not even acknowledge that this case is the first to arise under the new constitutional provisions added by Proposition 58 to deal with fiscal emergencies. Those provisions were meant to streamline the process and, as the voters were told, they were

---

(. . . continued)
the California Constitution); *Methodist Hospital of Sac. v. Saylor* (1971) 5 Cal.3d 685 (restrictions and limitations on legislative power must be strictly construed and deference given to legislative interpretation of constitution); *Lukens v. Nye* (1909) 156 Cal. 498 (Governor's veto power is limited and can only be exercised in the specified mode).

[3] Art. IV, § 10(f)(1) (Governor's proclamation calling special session must be accompanied by proposed legislation to address fiscal emergency).

meant to "force the Governor and the Legislature to work together to find a solution to the problem BEFORE IT IS TOO LATE."[4]

The Governor's claim to be able to use the line-item veto on spending reductions can only frustrate the central purpose of Proposition 58. Far from encouraging the Legislature to work with the Governor to solve a fiscal emergency, the specter of further reductions unilaterally imposed through the line-item veto will hang over every discussion and threaten any agreement that the two branches are able to reach. Add to this the Court of Appeal's conclusion that such agreements not only require a two-thirds vote but potentially reopen every item of appropriation contained in the Budget Act, and legislative paralysis is virtually guaranteed. This cannot be what the voters intended when they enacted Proposition 58.

These are real problems that were created by the Governor's overreaching, and exacerbated by the opinion of the Court of Appeal. If left unaddressed, they promise to change the way fiscal decisions are made in this State for years to come. It does no good for the Governor to pretend the problems created by the Court of Appeal's opinion are not there. They are there, and they deserve this Court's review.

CONCLUSION

The Court of Appeal's opinion is anything but the "unremarkable" ruling that the Governor describes. It marks a drastic

---

[4] Supp. Ballot Pamp., Primary Elec. (Mar. 2, 2004), argument in favor of Prop. 58, p. 14, emphasis in original. The ballot pamphlet materials for Proposition 58 appeared as Exhibit A to Respondents' Request for Judicial Notice.

change in the constitutional meaning of the term "appropriation," it violates this Court's holding that the line-item veto power must be narrowly construed, and it significantly rewrites the roles of the executive and legislative branches in mid-year budgetary decisions. Such sweeping changes should not be permitted to occur absent review by this Court.

Dated: May 12, 2010

Respectfully submitted,

LEGISLATIVE COUNSEL BUREAU

REMCHO, JOHANSEN & PURCELL, LLP

By: Robin Johansen Leg
Robin B. Johansen

Attorneys for Interveners Darrell Steinberg, President pro Tem of the Senate and John A. Pérez, Speaker of the Assembly

(00111228.7)

BRIEF FORMAT CERTIFICATION PURSUANT TO
RULE 8.204(c) 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 2,028 words as counted by the Microsoft Word 2003 word processing program used to generate the brief.

Dated: May 12, 2010

Karen Getman

PROOF OF SERVICE

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

I am a citizen of the United States, over the age of 18, and not a party to the within cause or action. My business address is 201 Dolores Avenue, San Leandro, CA 94577.

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

Reply in Support of Petition for Review

on the following party(ies) in said action:

Abby Jean McClelland
Katherine E. Meiss
David Pallack
Barbara Siegel
Nu Usaha
Neighborhood Legal Services of
Los Angeles County
13327 Van Nuys Boulevard
Pacoima, CA 91331
Phone: (818) 834-7572
Email: amcclelland@nls-la.org
(By Email and Mail)

Attorneys for Petitioners
Rosa Navarro and Lionso Guzman

Robert Alexander Pilmer
Derek Milosavljevic
Kirkland & Ellis LLP
777 So. Figueroa Street, 37th Floor
Los Angeles, CA 90017
Phone: (213) 680-8400
Email: apilmer@kirkland.com
(By Email and Mail)

Attorneys for Petitioner
St. John's Well Child and
Family Center

Richard A. Rothschild Western Center on Law & Poverty 3701 Wilshire Boulevard, Suite 208 Los Angeles, CA 90010 Phone: (213) 235-2629 Email: rrothschild@wclp.org (By Email and Mail)	*Attorneys for All Petitioners*
Sidney Wolinsky Katrina K. Corbit Anna Levine Disability Rights Advocates 2001 Center Street, 4th Floor Berkeley, CA 94701 Phone: (510) 451-8644 Email: swolinsky@dralegal.org (By Email and Mail)	*Attorneys for Petitioners Californians for Disability Rights; California Foundation for Independent Living Centers; Nevada-Sierra Regional In-Home Supportive Services Public Authority; California Foundation for Independent Living Centers; Californians for Disability Rights; Liane Yasumoto; and Judith Smith*
Ross C. Moody Deputy Attorney General Office of the State Attorney General 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102 Phone: (415) 703-1376 Email: ross.moody@doj.ca.gov (By Email and Mail)	*Attorneys for All Respondents*
Anthony R. Segall Rothner, Segall, Greenstone & Leheny 510 S. Marengo Avenue Pasadena, CA 91101 Phone: (626) 796-7555 (By Mail)	*Attorneys for Amicus Curiae United Domestic Workers of America, AFSCME, Local 3930, AFL-CIO*
Scott A. Kronland Danielle E. Leonard Altshuler Berzon LLP 177 Post Street, Suite 300 San Francisco, CA 94108 Phone: (415) 421-7151 (By Mail)	*Attorneys for Amici Curiae SEIU California State Council and California United Homecare Workers*

Laurence S. Zakson
William Y. Sheh
Aaron G. Lawrence
Reich, Adell & Cvitan
3550 Wilshire Boulevard, Suite 2000
Los Angeles, CA 90010
Phone: (213) 386-3860
(By Mail)

Attorneys for Amicus Curiae Los Angeles County Democratic Central Committee

Eve M. Coddon
Cameron W. Fox
Amanda A. Bolliger
Paul, Hastings, Janofsky & Walker LLP
515 S. Flower Street,
Twenty-Fifth Floor, Suite 2300
Los Angeles, CA 90017
Phone: (213) 683-6000
(By Mail)

Attorneys for Amicus Curiae Aids Project Los Angeles

Robert M. Schwartz
Robert C. Welsh
David A. Lash
Sandeep N. Solanki
Jordan P. Raphael
Robert Silvers
O'Melveny & Myers LLP
1999 Avenue of the Stars, 7th Floor
Los Angeles, CA 90067
Phone: (310) 553-6700
(By Mail)

Attorneys for Amici Curiae 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

Miguel A. Márquez,
Acting County Counsel
Tamara A. Lange,
Lead Deputy County Counsel
Juniper Lesnik,
Deputy County Counsel
Greta S. Hansen,
Deputy County Counsel
Santa Clara County
Office of the County Counsel
70 West Hedding Street, Ninth Floor,
East Wing
San Jose, CA 95110
Phone: (408) 299-5900
(By Mail)

Attorneys for Amicus Curiae Santa Clara County

Steven A. Merksamer
Richard D. Martland
Kurt Oneto
Nielsen, Merksamer, Parrinello,
Mueller & Naylor, LLP
1415 "L" Street, Suite 1200
Sacramento, CA 95814
Phone: (916) 446-6752
(By Mail)

Attorneys for Amici Curiae George Deukmejian, Pete Wilson, Gray Davis, California Chamber of Commerce, California Taxpayers' Association, California Business Roundtable

Clerk of the Court
Court of Appeal, First Appellate District,
Division Two
350 McAllister Street
San Francisco, CA 94102
(By Mail)

☒ **BY UNITED STATES MAIL:** By enclosing the document(s) in a sealed envelope or package addressed to the person(s) at the address above and

☐ depositing the sealed envelope with the United States Postal Service, with the postage fully prepaid.

☒ placing the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the businesses' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, located in San Leandro, California, in a sealed envelope with postage fully prepaid.

☐ **BY OVERNIGHT DELIVERY:** By enclosing the document(s) in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☐ **BY MESSENGER SERVICE:** By placing the document(s) in an envelope or package addressed to the persons at the addresses listed and providing them to a professional messenger service for service.

☐ **BY FACSIMILE TRANSMISSION:** By faxing the document(s) to the persons at the fax numbers listed based on an agreement of the parties to accept service by fax transmission. No error was reported by the fax machine used. A copy of the fax transmission is maintained in our files.

☒ **BY EMAIL TRANSMISSION**: By emailing the document(s) to the persons at the email addresses listed based on a court order or an agreement of the parties to accept service by email. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

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

Michael Narciso