Case No. S181760

IN THE SUPREME COURT 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 A DECISION BY THE COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION TWO
CASE NO. A125750

OPENING BRIEF ON THE MERITS

NEIGHBORHOOD LEGAL SERVICES
OF LOS ANGELES COUNTY
ABBY MCCLELLAND (#226432)
KATHERINE E. MEISS (#069185)
DAVID PALLACK (#90083)
BARBARA SIEGEL (#169209)
NU USAHA (#190094)
13327 VAN NUYS BLVD.
PACOIMA, CALIFORNIA 91331
TELEPHONE: (818) 834-7572

Attorneys for Petitioners
Rosa Navarro and Lionso Guzman

KIRKLAND & ELLIS LLP
R. ALEXANDER PILMER (#166196)
DEREK MILOSAVLJEVIC (#255134)
333 SOUTH HOPE ST., 29TH FL.
LOS ANGELES, CA 90071
TELEPHONE: (213) 680-8400

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

DISABILITY RIGHTS ADVOCATES
SIDNEY WOLINSKY (#33716)
KATRINA K. CORBIT (#237931)
ANNA LEVINE (#227881)
2001 CENTER ST., 4TH FL.
BERKELEY, CA 94701
TELEPHONE: (510) 665-8644

Attorneys for Petitioners
Californians for Disability Rights;
California Foundation for
Independent Living Centers;
Nevada-Sierra Regional In-Home
Supportive Services Public
Authority; Liane Yasumoto; and
Judith Smith

WESTERN CENTER ON
LAW & POVERTY
RICHARD A. ROTHSCHILD (#67356)
3701 WILSHIRE BLVD., SUITE 208
LOS ANGELES, CA 90010
TELEPHONE: (213) 235-2629

Attorneys for Petitioners

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TELEPHONE: (818) 834-7572

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R. ALEXANDER PILMER (#166196)
DEREK MILOSAVLJEVIC (#255134)
333 SOUTH HOPE ST., 29TH FL.
LOS ANGELES, CA 90071
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LAW & POVERTY
RICHARD A. ROTHSCHILD (#67356)
3701 WILSHIRE BLVD., SUITE 208
LOS ANGELES, CA 90010
TELEPHONE: (213) 235-2629

Attorneys for Petitioners

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ISSUES PRESENTED

1. Does the Governor's Article IV, § 10(e) line-item veto power extend to legislative reductions to previously-enacted items of appropriation?

2. If legislative reductions to prior appropriations are properly subject to the line-item veto, did the Governor violate the California Constitution's Article III, § 3 separation of powers mandate by increasing such reductions, instead of eliminating or reducing them?

INTRODUCTORY STATEMENT

This Court has granted review of two separate but related issues that have far-reaching implications not only for the balance of power between California's legislative and executive branches, but for access to the political process for those who are already among those with the least representation.

First, this Court will decide whether the definition of an item of appropriation upon which the Governor may constitutionally use his line-item veto includes legislative reductions to existing, lawfully-enacted amounts. The answer to this question—based on the holdings of this Court in the long line of cases defining an item of appropriation, on the common sense understanding of the term, and on the policy underlying the line-item veto's limited grant of legislative power—is an unqualified "no."

The power to legislate, including the "power of the purse," is vested in the Legislature. However, when using the veto, the

Governor acts in a legislative capacity. While the Constitution[1] grants the Governor this limited legislative power, it must be strictly construed. In the case of the line-item veto, the Governor may reduce or eliminate only "items of appropriation" contained in a bill. The Governor does not have the power to reduce or eliminate items of appropriation which have become law. This much is clear because twice in recent years ballot initiatives which would have given him the power to unilaterally cut legislatively-enacting appropriations were introduced—and defeated.

In a long line of cases dating back to 1872, this Court has provided guidance as to what constitutes an item of appropriation upon which the Governor may validly use his line-item veto. Under each of these cases, and under all prior Court of Appeal opinions applying their holdings, only legislative ***spending*** proposals have been deemed items of appropriation. Never before had a California court held that the Governor's line-item veto power extends to legislation which would reduce or limit spending authorized in existing duly-enacted legislation.

Because of the importance of how and where the people's money is to be spent, the Constitution includes safeguards with respect to legislative spending proposals, including both the requirement that such a bill must receive a two-thirds vote in each house, and the Governor's power to reduce or eliminate the amount of spending proposals after passage. Because the

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[1] Unless otherwise noted, all references herein to "the Constitution" pertain to the California Constitution.

underlying policy concerns which warrant such safeguards for proposed spending legislation are not present in the context of budget reductions, the legislative supermajority requirement does not apply, and nor should the line-item veto power.

The second question before this Court is whether—if a reduction to a prior-enacted appropriation is itself an item of appropriation—the Governor may use the line-item veto to increase the amount of that reduction. Consideration of both the clear language of the Constitution conferring the line-item veto power—which must be strictly construed—as well as the historical understanding of and policy behind the veto requires that the answer to this question too, must be "no."

The veto power, in California as in all republican forms of government, is a negative power. This grant permits the executive to reject or frustrate an act without substituting anything in its place, but never to creatively legislate. This concept applies with equal force to the line-item veto. In the case of an item of appropriation, the Constitution's grant of power to "reduce or eliminate" permits the Governor to reject or frustrate all or part of a spending proposal or proposals.

Since all prior valid exercises of the line-item veto in California had been on proposals for new spending or increases to prior appropriations, the effect of those vetoes has always been to reduce the amounts passed by the Legislature. If, however, this Court holds that a reduction to an existing appropriation itself constitutes an item of appropriation, the effect of the line-item veto could only be to reinstate all or part of the previously-

enacted appropriation. Whether in relation to a spending reduction or an increase, the Constitution's veto power permits the governor only to reject—in part or in whole—an item of appropriation, and the rejection of a spending cut logically results in the maintenance of the status quo. This conclusion is consistent with the effect of a veto *in toto* of a bill containing one or more such reductions—all spending would revert to its prior-enacted level.

Reversing the Court of Appeal's decision would not, as the Governor has suggested, narrow the role of the executive in the budget process—it will reaffirm his Constitutionally-prescribed role. In this and future fiscal crises, the Governor has and will have significant tools available to him to ensure that the treasury is able to meet the needs of the people. It was the Governor who pursuant to Article IV, § 10(f) called the Legislature into special session and proposed legislation, which culminated in the passage by the Legislature of billions of dollars in cuts to the 2009-2010 Budget. Thereafter, instead of working within the constitutional framework, he chose to substitute his own policy judgments for those of the Legislature.

If allowed to stand, the Court of Appeal's decision will likely lead to even greater disruptions to our system of checks and balances. Future Legislatures, aware of the fallout that can result from deep cuts being made to programs which are important to its constituents, will have the political incentive to make only the barest minimum reductions, and require the Governor to do the rest and absorb the blame. This, the

Constitution does not permit. The power to legislate is vested in the Legislature, and that power is mandatory, not permissive.

Just as likely, in future financial crises, when cooperation and decisive action are most needed, political battles and gridlock within the Legislature will result. In the present case, after difficult negotiations, the Legislature was able to reach a compromise to address the dire condition of the state treasury. If the Court of Appeal's holding stands, future compromises are less likely as legislators may dig in their heels and refuse to accept a mid-year cut of even one dime from a program of particular importance to their constituents for fear that once the bill reaches the Governor's desk, the entire program may be eliminated. Such a result cannot be what the voters envisioned when they adopted Article IV, 10(f).

Petitioners urge this Court to reverse the judgment of the Court of Appeal and hold that the Governor's purported vetoes are invalid because reductions to previously-enacted appropriations are not themselves items of appropriation subject to the Governor's line-item veto power. Alternatively, the Court should hold that the Governor's purported vetoes are invalid because the Governor may only use the line-item veto to reject—in whole or in part—the reductions themselves, not increase those reductions. In doing so, this Court will reaffirm the principles that the legislative power of the state remains vested in the Legislature, and that the limited legislative power of the veto is a purely negative one which must be strictly construed.

STATEMENT OF THE CASE

On February 20, 2009, Governor Schwarzenegger approved the Budget Act of 2009: "An act making appropriations for the support of the government of the State of California and for several public purposes in accordance with the provisions of Section 12 of Article IV of the Constitution of the State of California, and declaring the urgency thereof, to take effect immediately." (S.B. 1, 2009 Cal. Legis. Serv. 3rd Ex. Sess. Ch. 1 (West) (hereinafter the "Budget Act").)

As the global recession took hold, California's economy worsened, it became apparent that the predicted state revenues on which the Budget Act was based, would not come to fruition. (Typed opn. at 5.) On July 1, 2009, the Governor declared a fiscal emergency, and pursuant to section 10, subdivision (f) of Article IV of the Constitution of the State of California, convened the Legislature to meet in an extraordinary session to consider and act upon legislation to address the fiscal emergency. (*Id.*)

After weeks of negotiation and debate, on July 24, 2009, the Legislature passed Assembly Bill No. 1 of the 2009-10 Fourth Extraordinary Session ("A.B. 1"), which revised, amended and supplemented the Budget Act. (*Id.*) Among the cuts made in A.B. 1, the Legislature greatly reduced funding to critical medical, disability, and domestic violence service programs provided by and to Petitioners. (*Id.*)

On July 28, 2009, Governor Schwarzenegger signed A.B. 1 after purporting to make vetoes which had the effect of further reducing the amounts appropriated in the Budget Act by more

than $488 million beyond the cuts passed by the Legislature. These vetoes, piggybacking on the Legislature's brokered compromise which itself resulted in more than $15 billion in spending reductions, have disproportionately impacted many of the state's most powerless and vulnerable communities, including the elderly, the disabled, victims of domestic violence, and those suffering from HIV and AIDS. (*Id.* at 7-8.)

St. John's Well Child and Family Center, Rosa Navarro, Lionso Guzman, California Foundation For Independent Living Centers, Nevada-Sierra Regional IHSS Public Authority, Californians For Disability Rights, Liane Yasumoto, and Judith Smith (collectively, "Petitioners") filed their Petition for a Writ of Mandate in the California Court of Appeal, First Appellate District on August 9, 2009, seeking to enjoin State Controller John Chiang from enforcing or attempting to enforce the Governor's use of the veto on seven sections of A.B. 1 which had the effect of increasing cuts to the vital services provided by and used by Petitioners by more than $287 million. (Petition for Writ of Mandate ("Pet.") at 1, 16-17; Typed opn. at 5-6.)

Petitioners sought relief on the ground that Governor Schwarzenegger's purported vetoes exceeded his power under Article IV, § 10(e), and were thus null and void. The writ would have directed state officials to ensure the continued disbursement of funds appropriated in the Budget Act of 2009 as amended and supplemented in A.B. 1 and to desist from any act enforcing the Governor's challenged vetoes of A.B. 1. (Pet. at 18-19; Typed opn. at 3.)

On September 14, 2009, the Court of Appeal granted a motion to intervene on behalf of Petitioners filed by State Senator Darrel Steinberg, President pro Tem of the California State Senate and Assembly Member Karen Bass, Speaker of the California State Assembly. Following multiple rounds of briefing and oral argument heard on December 15, 2009, the case was submitted.

On March 2, 2010, the Court of Appeal issued its decision denying the Petition and holding that the reductions to the Budget Act contained in A.B. 1 were "items of appropriation" subject to the line-item veto, and that the Governor's line item power allowed him to increase those reductions. (Typed opn. at 33.)

LEGAL DISCUSSION

I. LEGISLATIVE REDUCTIONS TO PRIOR-ENACTED APPROPRIATIONS ARE NOT ITEMS OF APPROPRIATION SUBJECT TO THE LINE-ITEM VETO.

The opinion below correctly noted that although the question of whether the California Constitution's limited grant of legislative power to the Governor through the use of the line-item veto extends to a mid-year budget reduction was a matter of first impression, this Court has not failed to offer guidance on the issue. (Typed opn. at 8.) The appellate court's error was in interpreting that guidance.

A. The Governor's line-item veto power must be strictly construed.

Article III, Section 3 of the California Constitution defines the powers of the government and mandates the separation of

those powers. "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.) Bills are passed by the Legislature and become law if signed by the Governor, or if the Governor fails to act within a constitutionally-specified amount of time. (Cal. Const., art. IV, §§ 10(a), (b).)

One limited exception to the exclusive nature of the Legislature's lawmaking power is that "in exercising the veto the Governor acts in a legislative capacity." (*Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1089.) The Governor may veto a bill by "returning it with any objections to the house of origin," and thereafter it will only become law if "each house then passes the bill by rollcall vote entered in the journal, [with] two-thirds of the membership concurring. . . ." (Cal. Const, art. IV, § 10(a).) Because of the veto's quasi-legislative nature, "the veto power [may] be exercised 'only when clearly authorized by the constitution, and the language conferring it is to be strictly construed.'" (*Harbor* at 1088 (internal citation omitted).)

In addition to the power to veto a bill *in toto*, the line-item, or partial veto permits the Governor to "reduce or eliminate one or more items of appropriation while approving other portions" of a bill. (Cal. Const., art. IV, § 10(e).) But when the Governor attempts to selectively veto non-appropriation items within in a bill, he exceeds his authority under the Constitution, infringes upon the province of the Legislature, and violates the separation

of powers. Accordingly, any such veto is null and void. (*Lukens v. Nye* (1909) 156 Cal. 498, 503.)

The Court of Appeal acknowledged that the Governor's line-item veto power extends only to provisions which constitute "items of appropriation." (Typed opn. at 1.) Thus, the first question before that Court was whether strictly construed, the terms of art. IV, § 10(e), subject a legislative reduction to a previously-enacted budget to the partial veto as an "item of appropriation." Until the Court of Appeal so held, no California authority existed which supported an affirmative answer to the question.

B. This Court's prior holdings compel the conclusion that legislative reductions to an enacted budget do not constitute items of appropriation.

In a long line of cases, this Court has narrowly construed what constitutes an item of appropriation. In *Stratton v. Green* (1872) 45 Cal. 149, 151, the Court defined an appropriation as 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." In *Wood v Riley* (1923) 192 Cal. 293, 303, an appropriation was held to be a "specific setting aside of an amount, not exceeding a definite fixed sum, for the payment of certain particular claims or demands," which includes "add[ing] an additional amount to the funds already provided." In *Harbor*, the Court approved its prior holdings, refusing to find an item of appropriation where the section at issue failed to set aside money for the payment of a claim, make an appropriation from the treasury, or add an additional amount to funds already provided

for. (43 Cal. 3d at 1089-90.) None of the reductions to prior appropriations made in A.B. 1 set aside money for the payment of a claim, made an appropriation from the treasury, nor added any additional amount to funds already provided for. Accordingly, the Governor may not use the line-item veto on these provisions.

In *Wood*, the Court heard a challenge to the Governor's attempted line-item veto of a provision included within the Budget Bill which would have instructed the controller, at the request of the state director of education, to transfer a sum of money from another department's appropriation to the director of education. (*See Wood*, 192 Cal. at 296.) The petitioner, the Superintendent of Public Instruction, argued that the transfer was not an appropriation, as it took no money from the treasury. The Court rejected the Superintendent's argument and defined "appropriation" as "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 . . . . which balance cannot be thereafter ***increased***[2] except by further legislative appropriation." (*Id.* at 303.) The transfer in *Wood* was an appropriation, wrote the Court, "because it ***added*** a specific amount to the allowance already made for the

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[2] Unless otherwise noted, all emphasis in the brief is supplied by Petitioners.

use of the state board of education and the state superintendent of schools." [3] (*Id.* at 305.)

The *Wood* opinion did not say that an appropriation "cannot be thereafter ***decreased*** except by further legislative appropriation." As such, *Wood* does not support the conclusion that in passing A.B. 1, the Legislature was required to make an appropriation to ***decrease*** the sums which had already been set apart by the enactment of the Budget Act. A.B. 1's legislative budget reductions did not fit *Wood*'s facts, as they did not ***add*** any amount to allowances already made. Instead, the Legislature merely ***reduced*** the amounts already appropriated, which appropriations remain otherwise in force in the enacted Budget Act. Unlike an increase, such a reduction does not require "further legislative appropriation" under the Court's holding, and indeed, no such legislative appropriation was passed.

This Court's holding in *Harbor* demonstrates that reductions to previously-appropriated amounts do not themselves constitute appropriations merely because they relate to the appropriations in the Budget Act. In *Harbor*, the Governor argued that his line-item veto of a provision which concerned the ***timing*** of AFDC payments was in reality a component of an item

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[3] Significantly, though it was held to be an item of appropriation by the Court, the rejection of this proviso in its entirety by the Governor did not result in the elimination of all funding for the Department of Education. Only the additional amount appropriated in the proviso was affected, and the baseline appropriation for the Department contained elsewhere in the bill remained intact.

of appropriation which, he argued, consists of two parts: the amount appropriated, and its purpose. (*Harbor*, 43 Cal. 3d at 1090.) In rejecting the Governor's argument, the Court explained that it was "aware of no authority which even remotely supports the attempted exercise of the veto in this manner." (*Id.*) No definition of appropriation, this Court explained, "can reasonably embrace a provision . . . which does not set aside a sum of money to be paid from the public treasury," (*Id.* at 1092.) Likewise, Governor Schwarzenegger may not use his veto power on the provisions at issue solely because they relate to previous appropriations by way of reduction.

Although none of this Court's prior definitions of an appropriation include the scenario here, where the challenged items are a ***decrease*** to an already-enacted budget item, the Court of Appeal concluded that this distinction is irrelevant. (*See* Typed opn. at 16-17.) The Court ruled that the Supreme Court's decision in *Wood* "does not require, as petitioners and interveners suggest, that ***only*** items that add amounts to funds already provided constitute 'items of appropriation.'" Petitioners suggest no such thing, and fully recognize this Court's definition of an appropriation as an act "by which a named sum of money has been set apart in the treasury and devoted to a particular claim or demand." (*Stratton v. Green* (1872) 45 Cal. 149, 151.) It is clear, however, that an increase to a previously-enacted appropriation adheres to this definition, while a reduction does not. The sums of money the Governor purports to veto were "set

apart in the treasury" in the Budget Act signed by the Governor in February 2009, not by A.B. 1 in July.

Lacking any precedential support for its holding that a mid-year reduction falls within the parameters of this Court's prior definitions of an appropriation, the Court of Appeal instead flatly declared: "Whether spending authority is increased or decreased, it is still spending authority." (Typed opn. at 17.) This statement, of course, merely begs the question. In fact, an increase is properly the subject of the line-item veto because it necessarily grants ***new*** or additional ***spending*** authority, and thus acts in essence as a new appropriation, while a decrease limits only the amount authorized, which authority otherwise continues to exist. Further, in seeming recognition of this Court's clear directive that no definition of item of appropriation "can reasonably embrace a provision . . . which does not set aside a sum of money to be paid from the public treasury," (*Harbor*, 43 Cal.3d at 1092) the Appellate Court concluded that the reductions at issue in A.B. 1, "nevertheless direct the 'specific setting aside of an amount. . . .'" (Typed opn. at 17 (quoting *Wood*, 192 Cal. at 303-04).)

But such determinations fly in the face not only of this Court's prior holdings and the facts of this case, but also of common sense. The "setting aside" of money, as this Court has explained is required to appropriate, is not done through a spending ***reduction***. Instead the "setting aside" of money for these vital services provided to the disabled, sick, battered, and otherwise vulnerable Californians, was done months earlier,

upon passage of the Budget Act, signed into law by the Governor. Since the grant of authority to spend was given, and the amounts were designated not in A.B. 1, but in the February 2009 Budget Act, A.B. 1's funding cuts do not constitute items of appropriation.

This conclusion is consistent with the ordinary understanding of what it means to "set aside" money. A small child understands that when she places 75 cents into her piggy-bank, she has ***set that money aside*** for later use. When she withdraws a quarter to buy a piece of candy, she did not then ***set aside*** 50 cents; that money was set aside beforehand. Likewise, if instead of removing a quarter, she adds one, she hasn't just set aside a dollar; the initial 75 cents continues to be set aside, and she has now set aside 25 cents more.

C. The policy underlying the Governor's power to line-item veto a spending proposal does not apply to proposals for legislative budget reductions.

As discussed above, Article III, Section 3 mandates the separation of powers, and prohibits the Governor from acting in a legislative capacity "except as permitted by this Constitution." (Cal. Const., art. III, § 3.)

Because of the importance of how and where the people's money is to be spent, in 1922, the people increased the Governor's power to act legislatively, adding the ability to reduce as well as eliminate and item of appropriation to his Article IV, § 10(e) powers. As the Governor himself states, "the people gave the Governor the power of the line-item veto in order to control spending." (Answer to Petition for Review at 2.)

That the people have granted the Governor such a unique power with respect to spending proposals is unsurprising. The people have likewise imposed a significant obstacle to spending upon the Legislature itself. While most bills require only a majority vote in each house to become a statute (Cal. Const., art. IV, § 8), a spending proposal, including the Budget Bill, requires two-thirds passage in each house. (*Id.* art. IV, § 12(d).)

But the people have not shown the inclination to place obstacles in the way of legislative intention ***not*** to spend. To ***block*** a Budget Bill or any other bill containing an appropriation, a mere one-third plus one vote in ***either house*** is sufficient. To repeal any appropriation—or even the entire Budget Act—requires only a simple majority vote in the Legislature.

As an initial matter, if the Legislature may eliminate ***all*** spending with a simple majority vote, then it must follow that it can reduce ***some*** spending in the same manner. As such, the Court of Appeal's holding that the Legislature's reductions were themselves items of appropriation cannot be, since Article IV, § 12 requires that appropriations be passed by a two-thirds vote.

Just as importantly, the fact that the people have not seen it necessary to impose the supermajority requirement upon the Legislature when it wishes ***not*** to spend demonstrates that the additional grant of legislative power given the Governor with respect to spending proposals is neither necessary nor permissible. In light of the mandates of Article III, § 3, and this Court's history of strictly construing the veto power, the Governor

should not be permitted to expand the reach of his legislative intrusion here.

II. THE GOVERNOR MAY NOT USE THE VETO TO AFFIRMATIVELY LEGISLATE.

Whether or not the Court of Appeal was correct that a mid-year budget reduction constitutes an item of appropriation (and Petitioners argue it was not), the appellate court clearly erred in holding that the Governor's use of the line-item veto to ***increase*** those reductions was within his constitutional power. If allowed to stand, the Court of Appeal's decision would represent an unprecedented departure from the principle recognized by this Court in *Harbor*, that "the executive, in every republican form of government, has only a qualified and destructive legislative function, and never creative legislative power." (*Harbor*, 43 Cal.3d at 1086 (quoting *State v. Holder* (1898) 76 Miss. 158).)

A. The Governor's veto has always been a negative power.

The understanding of the veto as a negative power is beyond dispute. This Court recognized in *Harbor* 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." (*Id.* at 1085.) California's original 1849 Constitution granted the Governor the power to veto, or reject, only a whole

bill.[4] The 1879 Constitution added the line-item, or "partial" veto power to wholly reject one or more items of appropriation, while accepting the remainder of the bill.[5] But the partial veto power does not grant the Governor any creative legislative power; it only provides him a less absolute form of the negative power. The effect of the 1879 veto was thus still negative, now frustrating only *part of* an act, but still without substituting anything in its place. (*See e.g., State ex rel. Sego v. Kirkpatrick* (N.M. 1974) 524 P.2d 975, 981 ("The power of partial veto is the power to disapprove. This is a negative power, or a power to delete or destroy an item, and is not a positive power to alter, enlarge or increase the effect of the remaining parts or items.").)

Likewise, when the Constitution was amended in 1922 to permit the Governor to reduce, as well as to object or eliminate entire items of appropriation, the grant of power remained a negative one. That is, the Governor still may only reject the Legislature's ***spending*** proposals, but he may now reject some of the amount appropriated, while approving the remainder. It is, essentially, a "partial" partial veto power. This Court's

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[4] Cal. Const. of 1849, art. IV, § 17 ("Every bill which may have passed the legislature, shall before it becomes a law, be presented to the Governor. If he approve it, he shall sign it; but if not, he shall return it, with his objections, to the house in which it originated, which shall enter the same upon the journal and proceed to reconsider it.")

[5] Cal. Const. of 1879, art. IV, § 16 ("If any bill presented to the Governor contains several items of appropriation of money he may object to one or more items, while approving other portions of the bill.")

observation that "the effect of the veto [is] negative, frustrating an act without substituting anything in its place," (*Harbor* at 1085) continues to apply under section 10(e). The Governor may reject all or part of a spending proposal, but he may never use the veto to ***increase*** the amount proposed. It follows that even if a reduction to a prior-enacted appropriation is itself an item of appropriation, that reduction (and only the reduction) may be rejected by the Governor in whole or in part, but it may not be increased.

B. The Court of appeal's holding would turn the veto power on its head.

The appellate court dismissed the long-standing view of the veto as a destructive power as "little more than wordplay." (Typed opn. at 30.) In its view, "treating the veto as an increase in the reduction rather than a decrease in the appropriation is as arbitrary as describing a glass of water as half full rather than half empty." (*Id.*) One need only consider the result which would have occurred had the Governor vetoed A.B. 1 *in toto* to realize that the distinction is in no way arbitrary, and instead comports with the historical understanding of the veto as a negative power.

The Court of Appeal recognized the irrefutable fact that had the Governor vetoed A.B. 1 in its entirety, the result would have been that the appropriations contained within the Budget Act of 2009 would remain at their enacted levels. (Typed opn. at 32 n.23.) Thus, exercising the full form of the veto as it has existed since the 1849 Constitution would result not in elimination of all funding for all programs, but in preservation of the funding status quo—in this case the appropriations as passed

in the Budget Act. Likewise, the exercise of the partial veto as it existed from 1879 until 1922 would have eliminated the vetoed reductions, also resulting in the continued force of the affected appropriations at their Budget Act levels.

Yet, inexplicably, the Court of Appeal concluded that the line-item veto as it exists today permits the Governor to ***increase*** the Legislature's reductions and bring the level of funding to below that which was passed into law under the Budget Act. This simply does not comport with the veto's grant of power to forbid or reject. If the elimination of a proposed reduction in whole leaves—as it must—an appropriation at its enacted level, then to reduce, or to veto that reduction in part, necessarily results in a smaller cut to funding, not a greater one. Such a conclusion is hardly derived from wordplay; it is wholly consistent with this Court's direction in *Harbor* that a veto's effect is "negative, frustrating an act without substituting anything in its place." (*Harbor* at 1085.) The Governor's purported vetoes would do just that, substituting his greater reductions rather than rejecting, in whole or in part, those passed by the Legislature.

C. Persuasive authority has held that the line-item veto of legislative budget reductions can only result in reversion to the previously-enacted amounts.

The effect of a line-item veto upon a legislative reduction to previously-enacted appropriations was explored in the only other case in which Petitioners are aware of a court upholding such a veto. In that case, *Rios v. Symington* (1992) 172 Ariz. 3, the Arizona Supreme Court ruled in accordance with the historical understanding of the veto as a purely negative power, and held that such a veto of a reduction to a previously-enacted appropriation leaves that original level of funding intact. (*Id.* at 11.)

The Court of Appeal's opinion asserted that "significant differences between the Arizona and California constitutional schemes regarding the line-item veto" prevented the Court from finding *Rios* particularly persuasive (Typed opn. at 18 n.12). But the only notable difference between the states' line-item provisions is that Arizona does not allow the Governor to reduce, as well as eliminate an item of appropriation.[6] Indeed, the Arizona provision is nearly identical to that contained in the

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[6] *See* Ariz. Const., art 5, § 7 ("If any bill presented to the Governor contains several items of appropriations of money, he may object to one or more of such items, while approving other portions of the bill. In such case he shall append to the bill at the time of signing it, a statement of the item or items which he declines to approve, together with his reasons therefor, and such item or items shall not take effect unless passed over the Governor's objections as in this section provided.").

California Constitution between 1879 and 1922, discussed above. In fact, in his Opposition to the Petition below, the Governor reminded the Court of Appeal that "[b]ecause of its similarity to California's line-item veto provisions, the California Supreme Court has recognized that cases from Arizona are persuasive authority on the 'veto power of the Governor.'" (Opp'n to Pet. at 12 n.6 (quoting *Wood*, 192 Cal. at 301-02).)

In *Rios*, the Arizona Governor called the Legislature into session to balance the state budget and address overcrowding in the prison system. (*Rios* at 4.) The Legislature responded by passing two bills which "in part creat[ed] new appropriations and in part direct[ed] various increases and decreases in previous appropriations." (*Id.* at 5.) The Court considered whether the Governor's vetoes to certain of those increases and decreases to prior appropriations were permitted under the Arizona Constitution.

The Court first concluded that it was "clear that the veto power extends to an ***increase*** to an earlier appropriation, because it is, in essence, a new appropriation." (*Id.* at 10.) Thus, the Legislature's increase to $1,240,100 from its original appropriation of $936,400 for the penitentiary land fund was properly vetoed by the Governor. However, the Governor's veto did not effect an elimination of the amount ***originally appropriated***. Instead, the veto was permissible only upon the increase itself, not the entire appropriation, which reverted to the $936,400 enacted in the budget act. This is consistent with the historical understanding of the veto as a negative power upon

new legislative actions. An increase to an earlier appropriation grants new authority to spend, and thus, the new amount may be vetoed. Such an increase does ***not*** permit the Governor to reach back and veto those appropriations which have already become law.

In considering ***reductions*** to original appropriations passed by the Legislature, the *Rios* Court first noted that transfers of funds from a previous appropriation into the general fund "are not clearly 'items of appropriation' because the transfers themselves do not constitute a legislative grant of spending authority, much less state a specified sum of money to be devoted to a specified purpose." (*Id.* at 9.) In spite of these correct observations, the Court ultimately decided that a reduction to a previously-passed appropriation should be subject to the line-item veto. But it authoritatively held that the effect of such veto "is to reinstate the amount ***originally appropriated by the Legislature.***" (*Id.* at 11 (emphasis in opinion).)

Thus, should this Court find persuasive the reasoning and conclusion of *Rios*, which the Governor himself argued in his papers before the Court of Appeal "are compelling and should apply equally to the facts presented here," (Opp'n to Pet. at 14) the Governor—even if permitted to use his line-item veto power on reductions to prior appropriations—may not do anything other than eliminate or reduce those ***reductions***. In this case, however, as the Governor has not purported to veto only the reductions, but instead contends that the entire original appropriations were subject to his blue pencil, his improper

attempt to exercise powers not granted are "wholly ineffectual and void for any and every purpose." (*Lukens v. Nye* (1909) 156 Cal. 498, 502.)

Of further note, in *Rios*, the Court rejected an argument raised by the Arizona Senate President similar to that made by Governor Schwarzenegger and accepted by the Court of Appeal, that in passing the equivalent of A.B. 1, the Arizona legislature "struck the original appropriated number" and replaced it with the lower amount. (*Rios*, 172 Ariz. at 11.) Thus, he argued, for those agencies that were affected by the vetoes, "there [we]re no legislatively-enacted numbers anywhere for the fiscal year 1991-1992 budget." (*Id.*) The Court flatly disagreed. "The line item veto of an amended appropriation renders the amendment void, and the amount appropriated in the original appropriations bill stands." (*Id.*)

As mentioned, the only significant difference between the Arizona line-item veto and the California version is that the California Governor is permitted to reduce as well as eliminate an item of appropriation. (*See* Ariz. Const., art 5, § 7.) This minor difference cannot account for the Court of Appeal's holding that in California the entire original appropriation becomes subject to the veto while in *Rios*, only the reduction itself was in play.

The Court of Appeal acknowledged that in *Rios*, "the net effect of the line-item vetoes resulted in a reinstatement of the original appropriation." (Typed opn. at 18 n.12.) If using the line-item veto to completely eliminate a reduction results in the

restoration of the full amount originally appropriated in the Budget Act, then it does not follow that using the line-item veto to ***partially*** eliminate that reduction could result in the amount appropriated being ***less*** than that provided for in the Budget Act. To so hold would grant the Governor authority over spending which is the province of the Legislature. In effect, the Governor could substitute his judgment for the Legislature's and reset spending levels up or down, depending on whether he characterizes his veto as a reduction or an elimination. Such a result is in direct conflict with this Court's statement that a veto's effect is "negative, frustrating an act without substituting anything in its place." (*Harbor*, 43 Cal.3d at 1085.)

D. The Court of Appeal's holding would have the unintended consequence of frustrating the Governor's true veto power.

Should this Court hold that a budget cut is an item of appropriation which subjects the new amount to reduction or elimination, it will necessarily mean that the Governor may not veto a spending reduction by rejecting the cut and retaining the previously-enacted amount. Although in this instance, the Governor might be amenable to having his veto power altered in such a way, it may not always be so. In a future response to a similar financial crisis, the Legislature may—along with passing some number of cuts to programs proposed by the Governor—reduce all or nearly all of the funding for the Governor's "pet" project or projects. This funding may have come as a result of protracted negotiation over the original Budget Act. If the Court of Appeal's holding is permitted to stand, the Governor's only

avenue to continued funding of his favored project would be to veto the Legislature's bill *in toto*, leaving the financial crisis unaddressed. This and other unintended consequences may be avoided if this Court reaffirms the essential nature of the veto as a negative power.

Whether or not this Court holds that a reduction to a prior appropriation itself constitutes an item of appropriation, the Constitution permits the Governor only to "reduce or eliminate one or more items of appropriation while approving other portions" of a bill. (Cal. Const., art. IV, § 10(e).) No provision of the Constitution, and no prior decision of this Court permits the Governor to "***increase*** the reductions made by A.B. 1" as he expressly admits his purported vetoes have the effect of doing. (Return Br. at 7, ¶ 8.)

III. THE COURT OF APPEAL BASED ITS HOLDING ON IRRELEVANT AND MISAPPLIED STATUTORY PROVISIONS.

In tacit acknowledgment that this Court's prior decisions and definitions lend no support for the holding that a mid-year reduction to a duly-enacted appropriation itself constitutes an item of appropriation, the Court of Appeal attempted to support its holding through an "[e]xamination of the structure and content" of A.B. 1. (Typed opn. at 18.) In so doing, the appellate court confused the issues, and expounded on questions neither before the court, nor directly relevant to those that were. This, despite the Court's explicit recognition that such constitutional questions, "whenever possible, [it is] obliged to avoid." (Typed opn. at 28.)

A. Whether A.B. 1 is classified as a budget bill is of no significance to the questions before the Court.

In its opinion, the Court of Appeal first set out to demonstrate that A.B. 1 is in fact a budget bill because some of the amendments contained therein increased funding beyond the amounts enacted by the passage of the 2009 Budget Act, and neither Petitioners nor Interveners dispute that such increases constitute items of appropriation. But the question of whether A.B. 1 should be classified as a budget bill was not before the Court. No party sought invalidation of A.B. 1, nor did any party even assert that the constitutional requirements for passage of a budget bill were not met. The Constitution states: "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(d).)

While these requirements were indeed met in passing A.B. 1, classification of the bill as a "budget bill" serves no purpose other than to set up the Court of Appeal's classic logical fallacy. The appellate court erroneously concluded that the Legislature's reductions "must be [items of appropriation] 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. . . .'" (Typed opn. at 20.) (citing Cal. Const.,

art. IV, § 12(d).) But the cited constitutional provision in no way establishes that because only a budget bill may contain more than one item of appropriation, it must consist ***only*** of one or more items of appropriation. Indeed, every Budget Act, including the 2009 Act, contains provisions which are undeniably not items of appropriation.[7] Such provisions are not subject to the Governor's line-item power simply because they relate to true items of appropriation. (*Harbor*, 43 Cal. 3d at 1090-91.) Nor should the reductions at issue here be.

B. The Court of Appeal improperly considered whether A.B. 1 might violate the single-subject rule.

Next, despite the requirement that the appellate court avoid constitutional questions whenever possible (*see Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1357), and its later assertion that it had done just that (Typed opn. at 32), the Court of Appeal considered whether the single-subject rule of Article IV, § 9 might be violated if the reductions at issue were held not to be items of appropriation. (Typed opn. at 27-28.) Since no party sought invalidation of A.B. 1 or parts thereof said to violate the rule, this question was not properly before the Court. Indeed, had the Governor raised such a challenge and succeeded, the proper remedy would be to reinstate the funding for the impacted

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[7] *See, e.g.* Section 8.51 ("Each state agency shall, by certification of the Controller, identify the account within the Federal Trust Fund when charges are made against any appropriation made herein from the Federal Trust Fund.")

programs at their Budget Act levels.[8] In any event, only the most strained interpretation of the purpose and requirements of the rule would have invalidated any part of A.B. 1 had such a challenge been made.

Classified as a "budget bill" or not, any single-subject rule concerns regarding A.B. 1 are without merit. The single-subject rule "was not enacted to provide means for the overthrow of legitimate legislation." (*Evans v. Superior Court* (1932) 215 Cal. 58, 62.) The rule "is to be construed liberally to uphold proper legislation, all parts of which are reasonably germane." (*Id.*) A bill complies with the rule "if its provisions are either functionally related to one another or are reasonably germane to one another or the objects of the enactment." (*Harbor*, 43 Cal.3d at 1100.)

In *League of Women Voters v. Eu* (1992) 7 Cal.App.4th 649, 653, the Court of Appeal considered whether a proposed ballot initiative violated the single subject rule when it combined reductions in welfare grants with provisions giving the Governor unilateral power to resolve budget crises. The appellate court rejected the single-subject rule challenge, and held that the initiative fell within the guidelines established by this Court in *Harbor*. (*League of Women Voters* at 666-67 ("overall theme and driving purpose" of the challenged initiative was obtaining a balanced budget).) Similarly, in A.B. 1 the theme and driving

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[8] *See* Cal. Const., art. IV, § 9 ("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.").

purpose was to address the fiscal emergency as declared by the Governor. Reductions and increases to prior-appropriated items in the Budget Act were merely avenues to doing so.

While in *Harbor* this Court held that a trailer bill to the annual budget act violated the single-subject rule,[9] as was the case in *League of Women Voters*, the facts here are distinguishable. In *Harbor*, the Court was considering a bill which "amend[ed], repeal[ed], or add[ed] approximately 150 sections contained in more than 20 codes and legislative acts." (*Harbor* at 1097.) This Court noted that the bill only vaguely addressed the subjects of "Fiscal affairs," and "statutory adjustments" to the budget. (*Id.* at 1100-01 (citing *Brosnahan v. Brown* (1982) 32 Cal.3d 236).) Accordingly, the Court held the bill "encompass[ed] matters of 'excessive generality.'" (*Id.*) No such excessive generality is present in A.B. 1, which was specifically intended to address the fiscal emergency. Unlike the provisions of A.B. 1, each of which was tailored to that goal, the "grab-bag of unrelated provisions" in *Harbor* "had no unifying, budget balancing theme and were not designed for that end." (*League of Women Voters,* 7 Cal.App.4th at 666.)

The adoption of Article IV, § 10(f) into the California Constitution in 2004, subsequent to the Court of Appeal's 1992 holding in *League of Women Voters*, helps to render even more

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[9] Though *Harbor* concerned a bill passed by the Legislature and *League of Women Voters* concerned a ballot initiative, "the same principles apply to the single subject rule relating to initiatives as to legislative enactments." (*Harbor*, 43 Cal.3d at 1098.)

confusing the Court of Appeal's lack of certainty that A.B. 1 "has a comparable unifying theme" as did the bill in *League of Women Voters*. (Typed Opn at 28.) For unlike the measures at issue in that case and in *Harbor*, A.B. 1 was specifically passed pursuant to Article IV, § 10(f)'s mandate of a "bill to address the fiscal emergency."

Constitutional provisions must be examined in view of other provisions in the Constitution which bear on the subject, not in isolation. (*Fields v. Eu* (1976) 18 Cal.3d 322, 328.) "The goal, of course, is to harmonize all related provisions if it is reasonably possible to do so without distorting their apparent meaning, and in so doing to give effect to the scheme as a whole." (*Id.*) "Strained interpretation, or construction leading to unreasonable or impractical results, is to be avoided." (*Id.*) Invalidation of legislation mandated by the Constitution because it violates the single-subject rule would be just such an unreasonable and impractical result.

Most importantly, the Court of Appeal's consideration of this issue bears little or no relevance to the question which was ***actually*** before the court: whether the ***unchallenged*** legislative reductions constitute items of appropriation. This Court has previously declined to hold that any relationship exists between the single-subject rule and the extent of the veto power. "[T]he primary purpose of the one subject rule is the regulation of legislative procedures: the avoidance of logrolling by legislators in the enactment of laws. The veto power, on the other hand, provides the executive with a defense against the power of the

Legislature. There is no evidence that the framers of our Constitution recognized a relationship between the two provisions." (*Harbor*, 43 Cal.3d at 1094.) Since no party raised a challenge to A.B. 1 as violative of the single-subject rule, the Court of Appeal's extended consideration of that provision was wholly inappropriate.

C. The Court of Appeal incorrectly applied and relied upon the re-enactment rule of Article IV, section 9.

The Court of Appeal further clouded the issues before the it by accepting the Governor's misguided contention that in passing A.B. 1, the Legislature effectively repealed the appropriations duly enacted in the Budget Act, and replaced those appropriations with entirely new appropriations reflecting the mid-year budget reductions. (*See* Typed opn. at 25-26.) The appellate court stated it found support for this conclusion in Article IV, section 9, which states that "[a] section of a statute may not be amended unless the section is re-enacted as amended." But this section simply does not stand for the proposition that a reduction to a prior appropriation effects a repeal and re-enactment of that previously-enacted appropriation and subjects the entire amount to the line-item veto. This is apparent both from the purpose and intent of Article IV, section 9, and the clear terms of Government Code Section 9605.

This Court has previously announced that the re-enactment rule of Article IV, section 9 "should be reasonably construed and limited in its application to the specific evil which it was designed to remedy." (*Brosnahan v. Brown*, 32 Cal.3d at

256.) There can be no doubt that this specific evil, relating only to the form of a legislative bill, has no relevance to the issue before this Court, and that the Court of Appeal's reliance on the provision to support the Governor's use of the line-item veto was misguided.

As explained by this Court in *Brosnahan*, the adoption of Article IV, section 9's re-enactment rule was a response to "mischief inherent" in the legislative process when legislatures "amended an act or a section of it . . . without setting out the entire context of the section as amended. [Citations.] The objection to this method of amendment was the uncertainty and difficulty of correctly reading the original section as later changed." (*Id.* at 255-56 (quoting *People v. Western Fruit Growers* (1943) 22 Cal.2d 494, 500-501).) Specifically, the re-enactment rule's purpose "is to prevent the title of a subsequent act from being made a cloak or artifice to distract attention from the substance of the act and to protect legislators and the public from being entrapped by misleading titles . . . ." (*In re Henry's Estate* (1944) 64 Cal.App.2d 76, 82.)

The context in which A.B. 1 was passed was a far cry from one in which a legislature passes a bill amending a statute under a cloud of secrecy or confusion. The intense atmosphere and media scrutiny surrounding the California Legislature's passage of A.B. 1 in response to the Governor's direction was ably recounted in the Amicus Curiae Brief of Children Now, et al.:

> The Governor's actions received wide coverage in both national and local press. Under Article IV § 10(f)(2), the

> Legislature had forty-five days to pass legislation "address[ing] the fiscal emergency" declared by the Governor. The consequences of failing to pass such legislation within that timeframe were significant; . . .
>
> On July 2, 2009, A.B. 1 was introduced into the Assembly. On July 2, 2009 and July 6, 2009, the Assembly and Senate, respectively, convened a special session to review the State's budget. Over the next three weeks, the Legislature deliberated over the extensive reductions that would be necessary to close the $24+ billion budget shortfall. These deliberations received extensive coverage from the media.

(Children Now Amicus Br. at 25-27 (internal citations omitted).) In such an environment of transparency, and under explicit constitutional mandate, it simply cannot be said that the purpose of the re-enactment rule was not achieved in passing A.B. 1.

D. A.B. 1 did not repeal and reauthorize the appropriations contained in the Budget Act.

As clear as it is that the budget reductions contained in A.B. 1 do not relate to the "specific evil" which Article IV, section 9's re-enactment rule was designed to remedy, so is it clear that that provision does not effect a repeal of the appropriations duly enacted in the Budget Act, and replace them with new appropriations, as the Court of Appeal effectively held. Instead, A.B. 1 left intact the Budget Act's authorization to spend for the programs at issue, but merely reduced the ***amounts*** appropriated. That Article IV, section 9 neither mandates nor

effects a reauthorization of those appropriations is apparent from the clear terms of Government Code section 9605.

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 re-enacted 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 . . . ." As the Court of Appeal acknowledged, the "effect of Government Code section 9605 'is to avoid an implied repeal and reenactment of unchanged portions of an amended statute, ensuring that the unchanged portion operates without interruption.'" (Typed opn. at 26 (quoting *In re Lance W.* (1985) 37 Cal.3d 873, 895).) As such, it simply cannot be then, that the authorization to expend funds is somehow "new." Instead, under section 9605, that authorization must be considered as having been the law since the time the Budget Act was enacted in February, 2009. And as courts in this state have held that an item of appropriation requires both an amount to be set aside, and authorization to spend that amount for a particular purpose, the reductions in A.B. 1 cannot constitute a new item of appropriation subject to the line-item veto. (*See Ryan v. Riley* (1924) 65 Cal.App. 181, 187 (requiring the "setting apart from the public revenues of a certain sum of money" such "that the executive officers are authorized to use that money ***and no more***"); *California Ass'n for Safety Educ. v. Brown* (1994) 30 Cal. App. 4th 1264, 1282 (quoting same).)

The Court of Appeal rejected this argument, holding that "the 'setting aside' and the 'amount' thereof are fundamentally indivisible." (Typed opn. at 27.) While this may be true, the appellate court confused Petitioners' and Interveners' argument. Petitioners do not suggest a divide between the "setting aside" and the amount, but rather ask the Court to recognize the distinction between the setting aside of an amount, and the authorization to spend that amount, "and no more." (*Ryan* at 187; *California Ass'n for Safety Educ.* at 1282.) When the Legislature passes a reduction to a prior-enacted budget item, it has not sought to extend the authorization beyond the amount originally appropriated; indeed, it has, by reducing the amount set aside, stayed well within that original authorization. This is markedly different from a situation where the Legislature seeks to ***increase*** funding for a particular program. In that circumstance, the Legislature exceeds the previously-enacted authorization to spend the original amount "and no more." This is consistent with this Court's holding that an appropriation, once enacted, "cannot be thereafter increased" except by another appropriation. (*Wood*, 192 Cal. at 303.)[10] Such an increase sets aside an ***additional*** amount, and must further authorize the spending of that additional amount "and no more."

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[10] Petitioners are aware of no decisions in which such an increase to an existing appropriation was held to place that existing appropriation before the Governor subject to the line-item veto. As a new appropriation, only the increase itself would be subject to the veto.

If the Court of Appeal's interpretation and application of the re-enactment rule were correct, it would reduce to mere surplusage this Court's holding in *Wood* and its statement in *Harbor*, 43 Cal.3d at 1089-90, that an item of appropriation includes an act which "add[s] any additional amount to funds already provided for." For if any amendment to the amount of an original appropriation repeals and re-enacts such appropriation anew, an increase would simply fit within the common understanding of an appropriation, and such a holding would have been unnecessary. But the re-enactment rule does not create a repeal and replacement, and the reason for this Court's distinction between an increase and an original appropriation is clear. An increase creates a new appropriation—setting aside and authorizing the spending of an additional amount—thus subjecting that additional amount to the partial veto, but not the original appropriation and authorization therefor, which remain good law.

E. Neither Article XVI, section 7, nor Government Code section 12440 support the Court of Appeal's holding.

Consideration of Government Code section 9605 also disposes of the Court of Appeal's erroneous conclusion that because Petitioners seek a writ directing the Controller to pay funds in accordance with the Budget Act as amended by A.B. 1, "petitioners and interveners implicitly acknowledge that the provisions of [A.B. 1] are items of appropriation." (Typed opn. at 22.) In support of this conclusion, the Court of Appeal cited Cal. Const., art. XVI, § 7, and Government Code § 12440, which

prevent the Controller from drawing a warrant or making payments in the absent of a Controller's warrant and a duly enacted appropriation. (Typed opn. at 22.)

But such duly enacted appropriations clearly exist in the form of the Budget Act itself, signed into law by the Governor's pen in February 2009. As discussed above, pursuant to Government Code section 9605, those previously-enacted appropriations remain intact, subject only to a reduction in their amounts. "The portions [of a statute] which are not altered are to be considered as having been the law from the time when they were enacted; the new provisions are to be considered as having been enacted at the time of the amendment . . . ." (Gov't Code § 9605.)

IV. THE PEOPLE OF CALIFORNIA HAVE DECLINED TO GRANT THE GOVERNOR THE POWER WHICH THE COURT OF APPEAL HAS NOW BESTOWED.

Nowhere in the Constitution, nor, as discussed, in the prior holdings of this State's courts, has the Governor been given the power to increase a reduction to an existing appropriation. Likewise, the voters have never shown the inclination to grant such a power. Instead, they have repeatedly shown a disinclination to do so.

In its opinion, the Court of Appeal cites to ballot materials including the arguments in favor of the 1922 amendment to the Constitution. (Typed opn. at 10 n.10.) The Court emphasizes in a footnote that the materials state the measure would "enable the Governor to reduce an appropriation to meet the financial condition of the treasury . . . ." (*Id.*) But the purpose of the veto is to give "the Governor power to control ***expenditures*** of the

state." *Wood*, 192 Cal. at 305; (*see also* Respondents' Opp'n at 3) (purpose is to "ensure that the Legislature's ***spending*** proposals were within the means of the state"). And as with an appropriation, no definition of state spending can reasonably include legislation "which does not set aside a sum of money to be paid from the public treasury." (*Harbor*, 43 Cal.3d at 1092.) The Court of Appeal and the Governor conflate "spending" with declining to spend, just as they conflate an appropriation with a reduction thereto. A mid-year budget cut is not a spending proposal, and no amount of conclusory assertions to the contrary can make it so.

Moreover, the 1922 amendment gave the Governor the power to reduce spending ***proposals***, not funding which has already been enacted, though twice in recent years ballot initiatives would have done just that. In November of 2005, by a margin of 62.4 percent to 37.6 percent, voters rejected Proposition 76, which would have given the Governor the power to unilaterally cut spending if the Legislature failed to address a fiscal emergency. (*See* Interveners' Motion to Intervene ("Steinberg Mot."), RJN, Ex. F at 25.) More recently, in May 2009, voters defeated Proposition 1A by a margin of 65.4 percent to 34.6 percent, which would have likewise allowed the Governor to make certain mid-year reductions without legislative approval. (*See* Steinberg Mot. RJN, Ex. H at 13; RJN, Ex. I at 10.) While the voters have given the Governor the power to reduce or eliminate ***spending proposals*** made by the Legislature, it is

clear that they wish to have any cuts to existing appropriations made by the Legislature.

V. THE GOVERNOR HAS CONSTITUTIONALLY-PERMISSIBLE METHODS AVAILABLE TO ENSURE THE VIABLE CONDITION OF THE TREASURY.

Although the people of California have not granted the Governor the power to use the line-item veto to unilaterally reduce prior-enacted appropriations, they have not left him powerless to see to the condition of the treasury. Indeed, he availed himself of one his most effective tools in this case. A.B. 1's passage was mandated by, and enacted pursuant to, Article IV, § 10(f) of the California Constitution, which states that "following the enactment of the budget bill" the Governor may, in the case of a financial shortfall, "issue a proclamation declaring a fiscal emergency" and call the Legislature into special session. (Cal. Const. art. IV, § 10(f)(1).) The Governor must identify the nature of the emergency in his proclamation and submit it to the Legislature, "accompanied by proposed legislation to address the fiscal emergency." (*Id.*) Thereafter, strict requirements are imposed on the Legislature:

> (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.

(Cal. Const., art. IV, § 10(f)(2)-(3).)

The Governor indeed issued a proclamation "following the enactment of the budget bill" for the 2009-10 fiscal year, declaring a fiscal emergency pursuant to art. IV, § 10(f)(1). (*See* Opp'n to Pet. at 4.) As required, the Governor accompanied that proclamation with proposed legislation to address the fiscal emergency, and in fulfillment of its Constitutional responsibility, the Legislature passed A.B. 1 — "a bill addressing the fiscal emergency."

The bill presented to the Governor in response to his actions contained over $15 billion in cuts to the 2009-2010 Budget. (Typed opn. at 5.) In this context, it is difficult to take seriously the Governor's claim that without the power to further cut he will be unable to exercise sufficient control over the expenditures of the state. But even if he were unsatisfied with the steps taken by the Legislature, he was not without Constitutionally-permissible options. First, he could have vetoed A.B. 1 *in toto*, and sent the Legislature back to the drawing board. But if his desire was to get the process moving immediately, he needed only sign the bill presented to him, immediately implementing the billions of dollars in cuts passed by the Legislature, and then exercise his art. IV, § 10(f) powers once again to call the Legislature back into session to cut further.

In addition to being impermissible, the Governor's attempt to expand executive power through the use of the line-item veto is short-sighted. If the vetoes of A.B. 1 are permitted to stand, the unique legislative process under which that bill's successful compromise could only have been achieved is unlikely to ever be

repeated. While A.B. 1 was passed as a bipartisan effort with the understanding that failure to act was not an option under the terms of § 10(f)(2), the Governor's penny-wise, pound-foolish use of the veto is likely to instead promote gridlock. With the knowledge that any agreement between legislators on amounts of reductions amount to mere "suggestions" to the Governor, legislators—particularly those from the party not represented in the Governor's office—are unlikely to accept even the smallest of mid-year cuts to their favored program. After all, what value is there in reaching a compromise with one's fellow lawmakers, when any so-called agreement is subject to the whims of the executive?

An equally disturbing possibility is that future lawmakers, always cognizant of future elections and aware of the fallout resultant from deep cuts being made to programs which are important to their constituents, will have the political incentive to make only the barest minimum reductions, and require the Governor to do the rest and absorb the blame. This type of "hot potato" legislating is not permitted by Article III, § 3 of the Constitution. The Legislature is simply not permitted to relinquish its power and responsibility to the executive in the manner that the Court of Appeal's holding would allow. The power to legislate is vested in the Legislature, and that power is mandatory, not permissive.

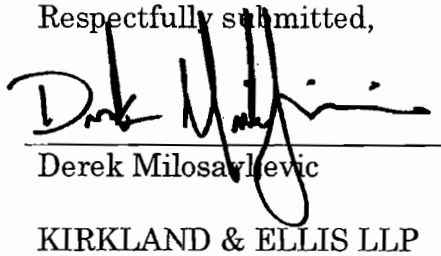
CONCLUSION

Petitioners respectfully ask this Court to reject the Court of Appeal's strained interpretation of an item of appropriation, and its disregard for this Court's mandate that the Governor's veto power be narrowly construed. Should this Court affirm the appellate court's decision, the result would be an unprecedented intrusion of the Governor into the province of the Legislature, which the voters of California have twice rejected. Worse, the Governor's first exercise of his newly claimed power will be at the expense of his state's most vulnerable citizens.

For all the above reasons, Petitioners respectfully request that this Court reverse the decision of the Court of Appeal.

Dated: June 30, 2010

Respectfully submitted,



Derek Milosavljevic

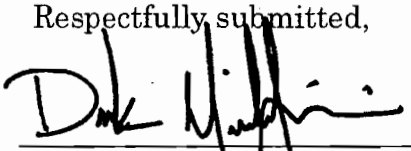
KIRKLAND & ELLIS LLP
Attorneys for Petitioner
St. John's Well Child and Family Center

CERTIFICATE OF WORD COUNT

The text of this brief consists of 10,409 words as counted by the Microsoft Word program used to generate the Brief.

Dated: June 30, 2010

Respectfully submitted,



Derek Milosavljevic

KIRKLAND & ELLIS LLP
Attorneys for Petitioner
St. John's Well Child and Family Center

PROOF OF SERVICE

I, Sarah Farley, declare:

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 California Street, San Francisco, California 94104. On June 30, 2010, I served a copy of the within document(s):

OPENING BRIEF ON THE MERITS

X **By Overnight Mail**
By causing the document(s) listed above to be delivered to the addressee(s) set forth below on the following business morning by Federal Express Corporation or Express Mail.

Service List

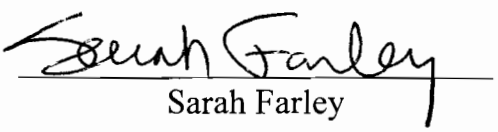
Ross Charles Moody Office Of The Attorney General 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94105	Attorney for Respondents Governor Schwarzenegger and State Controller John Chiang
Nu Usaha Abby Jean McClelland Neighborhood Legal Services of Los Angeles County 13327 Van Nuys Blvd Pacoima, CA 91331-3099	Attorney for Petitioners Rosa Navarro and Lionso Guzman
Richard A. Rothschild Western Center On Law And Poverty 3701 Wilshire Blvd., Ste. 208 Los Angeles, CA 90010	Attorney for Petitioners California Foundation for Independent Living Centers

Sidney Wolinsky Disability Rights Advocates 2001 Center St. 4th Floor Los Angeles, CA 94701	Attorney for Petitioners California Foundation for Independent Living Centers
Robin Bradle Johansen Remcho, Johansen & Purcell 201 Dolores Avenue San Leandro, CA 94577	Attorney for Interveners Darrell Steinberg, John Perez
Robert Craig Welsh O'Melveny & Myers LLP 1999 Avenue Of The Stars, 7th Floor Los Angeles, CA 90067	Attorney for Valley Community Clinic (North Hollywood, California); Eisner Pediatric & Family Medical Center (Los Angeles, CA); The Saban Free Clinic (Los Angeles and Hollywood, CA); YWCA Monterey County (Monterey, California); Westside Family Health Center (Santa Monica, California); Community Clinic Association of LA County (Los Angeles, CA); The Legal Aid Association of California (statewide); Children Now (Oakland, California), Amicus Curiae for Petitioners
Scott A. Kronland Altshuler, Burzon LLP 177 Post St. Suite 300 San Francisco, CA 94108	Attorney for SEIU California State Council; California United Homecare Workers, Amicus Curiae for Petitioners
Anthony Segall Rothner, Segall, Greenstone & Leheny, 510 S. Marengo Avenue Pasadena, CA 91101	Attorney for United Domestic Workers of America Amicus Curiae for Petitioners

Eve Mary Coddon Paul, Hastings, Janofsky 515 S. Flower #2300 Los Angeles, CA 90071	Attorney for Aids Project Los Angeles, Amicus Curiae for Petitioners
Laurence Scott Zakson Reich Adell & Cvitan 3550 Wilshire Blvd #2000 Los Angeles, CA 90010-2421	Attorney for Los Angeles County Democratic Central Committee, Amicus Curiae for Petitioners
Juniper Lesnik Santa Clara County Counsel 70 West Hedding Street San Jose, CA 95110	Attorney for County of Santa Clara, Amicus Curiae for Petitioners
Greta Suzanne Hansen Office of the County Counsel 70 West Hedding Street Ninth Floor, East Wing, San Jose, CA 95110-1770	Attorney for County of Santa Clara, Amicus Curiae for Petitioners
Richard Dowe Martland Nielsen Merksamer et al LP 1415 L St #1200 Sacramento, CA 95814	Attorney for George Deukmejian; Pete Wilson; Gray Davis; California Chamber of Commerce; California Taxpayers Association California Business Roundtable, Amicus curiae for Respondents
California Court of Appeal 1st Appellate District 350 McAllister Street San Francisco, California 94102-3600	

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 30, 2010, at San Francisco, California.



Sarah Farley