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

OPENING BRIEF ON THE MERITS OF INTERVENERS DARRELL STEINBERG AND JOHN A. PÉREZ

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MISCELLANEOUS:

STATEMENT OF ISSUES FOR REVIEW

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

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

INTRODUCTION

The California Constitution leaves to the legislative branch "the exclusive power of deciding how, when, and for what purposes the public funds shall be applied." (*Humbert v. Dunn* (1890) 84 Cal. 57, 59.) "'Enactment of a state budget is a legislative function . . . [I]t is, and indeed must be, the responsibility of the legislative body to weigh [ ] needs and set priorities for the utilization of the limited revenues available.'" (*Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 302, quoting *Anderson v. Superior Ct.* (1998) 68 Cal.App.4th 1240, 1249.)

The Governor has a role in this process, but it is a limited one. He may veto the budget act in its entirety or "reduce or eliminate one or more items of appropriation while approving other portions of a bill." (Cal. Const., art. IV, § 10(e).) The latter power, known as the line-item veto, "may be exercised 'only when clearly authorized by the constitution, and the language conferring it is to be strictly construed.'" (*Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1088, citation omitted.)

The most important restraint on the line-item veto is its confinement to "items of appropriation." That phrase has a well-understood meaning, consistent throughout the Constitution and the case law. It means a legislative provision that grants authority to spend public funds, setting aside those funds for authorized expenditures. (*White v. Davis* (2003) 30 Cal.4th 528, 538.) The decision whether to grant spending authority is a core function of the Legislature. The Governor's line-item veto allows him to reduce or eliminate only a grant of spending authority. It does not allow him to act legislatively by otherwise modifying the provisions of a bill sent to him for signature. (*Harbor*, *supra*, 43 Cal.3d at 1086.)

Here, however, the Governor did exactly that. In 2009, the Legislature undertook its constitutional responsibility to find immediate and much-needed solutions to an urgent fiscal crisis. After extensive hearings and deliberations, in July 2009 the Legislature passed A.B. 1,[1] a bill that, among other things, ordered reductions to certain appropriations made in the Budget Act of 2009, previously enacted in February that year. Those provisions did not grant spending authority; rather they took such authority away. The Governor nonetheless purported to exercise his line-item veto to increase the size of those reductions.

The Court of Appeal upheld that exercise of the line-item veto, holding that "[w]hether spending authority is increased or decreased, it is still spending authority." (Slip Opn. at 17.) This statement turns on its

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[1] A.B. 1 was passed in the 2009-10 Fourth Extraordinary Session and therefore the Court of Appeal referred to it as AB 4X 1. For ease of reference, it will be referred to here simply as A.B. 1.

head the well-established meaning of an appropriation as a legislative grant of permission to spend public funds. Here, the grant of spending authority had already occurred when the Legislature passed the Budget Act in February 2009. The Legislature's passage of A.B. 1 some months later *took away* spending authority that already existed. Contrary to the statement of the Court of Appeal, the two acts are not the same, and the difference between them is profound.

The Court of Appeal's interpretation turns the line-item veto from a limited check on a grant of spending authority to an affirmative grant of legislative power to the Governor, allowing him to modify the provisions of a bill sent to him for signature. Rather than confining the Governor to his limited role in the legislative process, the Court of Appeal's opinion extends that role to an area in which it has never before been allowed.

The Court of Appeal's approach has other far-reaching consequences that affect the balance of powers between the Legislature and Governor. It would mean that bills making spending reductions are subject to the two-thirds vote requirement which, until now, has applied only to bills that grant spending authority. It would mean that even the most minor of changes to a bill that made an appropriation, even a non-substantive change, would newly authorize the appropriation, subjecting it again to the Governor's line-item veto. It would mean that to make mid-year corrections to a Budget Act, the Legislature must pass dozens or even hundreds of bills, each separately setting forth the changes to only one item of appropriation. None of these consequences would result if an appropriation subject to the line-item veto is limited to the same meaning it

has always had – i.e., a bill provision that grants authority to spend public funds, setting aside those funds for a specified purpose.

The Governor could have vetoed A.B. 1 in its entirety, rejecting the Legislature's spending reduction plan and forcing the issue of budget reductions back into the hands of the Legislature. This is what he did in late June 2009 when he vetoed a series of budget-related bills. Alternatively, he could have accepted the Legislature's reasoned, collective judgment of how far to reduce State expenditures mid-year, without causing irreparable harm. What he could not do, however, is substitute his judgment for that of the Legislature to make affirmative changes to bill provisions that contained no grant of spending authority. Nothing in the Constitution allows the Governor to play that role.

STATEMENT OF FACTS AND OF THE CASE

In February 2009, the Legislature passed the Budget Act of 2009 (Chapter 1 of the 2009-10 Third Extraordinary Session), making appropriations for the support of State government for fiscal year 2009-10 (the "2009 Budget Act"). (Interveners' RJN in the Court of Appeal ["Interveners' RJN"], Exh. A.) On February 20, 2009, the Governor signed the 2009 Budget Act into law. Early passage of the 2009 Budget Act was deemed essential to cure a $36 billion deficit that then existed for the 2008-09 and 2009-10 fiscal years. (Declaration of Darrell Steinberg ["Steinberg Decl."] filed with Interveners' Pet. for Writ of Mandate, ¶ 3.)

The State's economy continued to worsen, however, and by mid-March, the Legislative Analyst's Office estimated that the State's deficit through 2009-10 would be $9.5 billion. (Steinberg Decl., ¶ 5.) By the time of the May budget revision, the Governor and Director of Finance

estimated the State's deficit at $19.3 billion, and by the end of July that estimate increased to $23.3 billion – or 27 percent of the total General Fund expenditures for 2009-10. (*Id.*)

In March 2009, the Senate Budget committees began extensive public hearings on how best to balance the State's budget and address its cash flow problems. (Steinberg Decl., ¶ 6.) In May of 2009, the Legislature formed a Budget Conference Committee consisting of 10 members of each house charged with hearing public testimony and forging an agreement between the two houses of the Legislature for revisions to the 2009 Budget Act. (*Id.*, ¶ 7.) The Conference Committee heard public testimony for over two weeks, with concerned citizens and locally-elected representatives testifying about the possible effects of further cuts in spending. (*Id.*)

The Committee then began deliberating. Beginning on June 28, 2009, in the absence of a two-thirds consensus on how to move forward, the Legislature put forth a package of majority vote measures in the Third Extraordinary Session intended to provide a level of savings and additional revenues that would assist the State from falling into a fiscal abyss. The Governor vetoed those bills. (Steinberg Decl., ¶ 9.)

On July 20, 2009, after further difficult negotiations and working in a special session called to address the fiscal emergency, the legislative leadership and the Governor announced an agreement on revisions to the 2009 Budget Act that had been passed and signed into law in February. (Steinberg Decl., ¶ 10.) The final budget revision package passed by the Senate contained $24.2 billion in budget solutions, including $15.6 billion in cuts, $3.9 billion in additional revenues, $2.1 billion in borrowing, $1.5 billion in fund shifts, and $1.2 billion in deferrals and other

adjustments. (*Id.*) The precise amounts and mix of cuts and other solutions were carefully thought out, as explained by Senate President pro Tempore Darrell Steinberg:

> Despite deep and painful cuts in almost every area of the State, the budget agreement avoided suspension of Proposition 98, the funding source for both K-12 education and community colleges, and guaranteed repayment in the future years of $11.2 billion in Proposition 98 "Maintenance Factor." Equally important to me and many of my colleagues in the Legislature, the budget agreement protected the human services safety net for the State's neediest residents. It protected CalWORKS from elimination and from extreme cut proposals. It maintained the IHSS program largely intact. It protected Healthy Families from elimination or from a reduction in the program eligibility threshold, although there were significant cuts to the program. The preservation of the safety net was a critical part of the budget negotiations with the Governor, and both the Speaker of the Assembly and I made it absolutely clear to the Governor that we would not agree to any more cuts in these programs than were established by A.B. 1 as passed by the Legislature.
>
> (Steinberg Decl., ¶ 11.)

On July 23, 2009, the Senate and Assembly by two-thirds vote[2] passed Assembly Bill 1 of the Fourth Extraordinary Session, which

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[2] Because a bill passed in a special session takes effect the 91st day following the adjournment of the special session (Cal. Const., art. IV, § 8(c)(1)), such a bill – depending on when it is enacted – can take effect mid-year without necessarily requiring the two-thirds vote that applies to a bill containing an urgency clause. (*Id.* at § 8(d).) The statute at issue here required and received a two-thirds vote, because it contained an urgency clause and because some of its provisions constituted new appropriations.

amended the 2009 Budget Act to make additional appropriations and most of the budget cuts agreed upon in negotiations ("A.B. 1")[3]. (Steinberg Decl., ¶ 12.) On July 28, 2009, the Governor signed into law A.B. 1, subject to the purported use of his line-item veto authority.[4] The Governor sought to veto 27 different provisions of A.B. 1, cutting an additional $489 million from the General Fund by further decreasing programs that assist the State's neediest citizens, including the poor, the sick and the very old. (*Id.*, ¶ 13.)

For example, A.B. 1 enacted the following reduction to the Department of Aging:

> SEC. 568. Section 17.50 is added to the Budget Act of 2009, to read: [¶] Sec. 17.50. The amount appropriated in Item 4170-101-0001 of Section 2.00 is hereby reduced by $15,643,000.
>
> (Interveners' RJN, Exh. B at 540.)

The Governor's veto reads:

> SEC. 17.50. I am reducing the item of General Fund appropriation in this section by $6,160,000 as opposed to approving the item as presented without reduction. *Thus, I am increasing the General Fund reduction from $9,483,000 to $15,643,000.*
>
> * * *

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[3] A copy of relevant excerpts of the version of A.B. 1 that was passed by the Senate and Assembly is Exhibit B to Interveners' RJN.

[4] A copy of the Governor's Message to the Assembly enumerating and explaining his line-item vetoes of A.B. 1 is Exhibit C to Interveners' RJN.

"Sec. 17.50. The amount appropriated in Item 4170-101-0001 of Section 2.00 is hereby reduced by ~~$9,483,000~~ $15,643,000."

(Interveners' RJN, Exh. C at 8, § 17.50, emphasis added.)

Through these purported line-item vetoes, the Governor made significant reductions to social service programs beyond those made by the Legislature when it passed A.B. 1. Among those further reductions were:

- An additional $50 million reduction in funding for Regional Center services for young children with developmental disabilities;
- An additional $50 million reduction in funding for the Healthy Families program;
- Elimination of state funding for the Linkages Program and the Community-Based Services Program, which serve low-income seniors;
- An additional $37,555,000 reduction in funding for In-Home Support Services;
- Elimination of remaining state funding for the Domestic Violence Shelter program;
- An additional $12 million reduction in Child and Adolescent Health programs;
- Elimination of remaining state funding for Community Clinic programs;
- An additional $60 million cut to state funding for county administration of the Medi-Cal program; and
- An additional $52.1 million cut to programs run by the Office of AIDS Prevention and Treatment.

(Interveners' RJN, Exh. C.)

These additional cuts made by the Governor were directly contrary to the level and type of mid-year cuts that the Legislature had agreed to make. As Senator Steinberg explained,

> Members of the Legislature and the legislative budget committees heard firsthand from constituents and advocacy groups about the impact of the cuts we were forced to make. The declarations submitted by the petitioners in this case echo what we heard. They represent the human face of the suffering that we know must inevitably follow from the cuts we were forced to make. In drafting and passing A.B. 1, we did our best to alleviate that suffering by weighing the availability of other sources of funding, either private or public, or of other programs that might fill in for those that were cut. We cut as far as we thought necessary but no further, because we knew that cutting further would have profound human consequences. We carefully weighed all these options in passing A.B. 1, [and] we made a careful judgment call about the minimum level of funding the social safety net programs could receive and still provide adequate services to the State's neediest. . . .
>
> (Steinberg Decl., ¶ 14.)

In his veto message, the Governor explained that his increases to the legislatively-enacted spending reductions were intended "to increase the reserve and to reduce the state's structural deficit." (Interveners' RJN, Exh. C at 8-12.) Although ordinarily the Constitution requires transfers from the General Fund to a budget stabilization reserve account each year, in May 2009, acting pursuant to his authority under article XVI, section 20(e) of the Constitution, the Governor issued an executive order suspending such transfers for the 2009-10 fiscal year. (Exec. Order S-07-

09 (May 29, 2009).)[5] There thus was no constitutional requirement "to increase the reserve" in 2009-10.

On August 12, 2009, petitioner St. John's Well Child and Family Center filed an original petition for writ of mandate in the First District Court of Appeal, challenging the Governor's line-item vetoes insofar as they purported to make additional funding reductions in sections 568 and 570-575 of A.B. 1, which added to the 2009 Budget Act sections 17.50, 18.00, 18.10, 18.20, 18.30, 18.40 and 18.50.[6] On September 14, 2009, the Court of Appeal granted the motion of Senator Steinberg and then-Assembly Speaker Bass to intervene in the *St. John's* suit.[7] After briefing and oral argument, on March 2, 2010 the Court of Appeal issued its opinion denying the petitions for writ of mandate and upholding the challenged vetoes.

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[5] This Court may take judicial notice of the Governor's Executive Order pursuant to Evidence Code sections 452(c) and 459. It is available online at http://www.gov.ca.gov/executive-order/12402/.

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

[7] Assemblywoman Bass has stepped down as Assembly Speaker, and the Court has allowed current Speaker John Pérez to substitute for her in this action.

In an opinion certified for publication, the Court of Appeal stated that the "dispositive issue . . . is whether the seven sections of Assembly Bill 4X 1 that the Governor further reduced here, were 'items of appropriation' (Cal. Const., art. IV, § 10(e)), upon which the Governor could exercise his line-item veto power." (Slip Opn. at 11.)[8] In determining that they were, the court reviewed the case law that uniformly holds that an appropriation involves the setting aside of a sum of money for a specific purpose and a grant of authority to spend it. (*Id.* at 11-16.) Nonetheless, the court concluded that the case law does not require "that *only* items that add amounts to funds already provided constitute 'items of appropriation.'" (*Id.* at 17.) Instead, the Court of Appeal held that "[w]hether spending authority is increased or decreased, it is still spending authority." (*Id.*) As such, the court concluded, it constitutes an item of appropriation that is subject to line-item veto.

ARGUMENT

I.

A REDUCTION OF SPENDING AUTHORITY IS NOT AN ITEM OF APPROPRIATION SUBJECT TO THE LINE-ITEM VETO

A. The Governor's Power Is Limited By The Plain Language Of Article IV, Section 10 To Reducing Or Eliminating Items Of Appropriation

With respect to the Governor's veto authority, the Constitution is quite specific. Once the Legislature passes a bill, the Governor may sign all of that bill into law, or he may veto it in its entirety.

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[8] The Court of Appeal's opinion is an attachment to Interveners' Petition for Review.

(Cal. Const., art. IV, § 10(a).) Those are his only two options. He "may not veto parts" of the bill, nor may he "modify or change the effect of a proposed law 'or . . . do anything concerning it except to approve or disapprove it as a whole.'" (*Harbor*, *supra*, 43 Cal.3d at 1087, 1088, quoting *Lukens v. Nye* (1909) 156 Cal. 498, 501-503.)

The Governor's veto authority yields its all-or-nothing quality in one context only: when the Legislature presents the Governor with a bill that contains one or more items of appropriation. The key question at issue here involves the term "items of appropriation" as it appears in article IV, section 10(e), which reads:

> The Governor may reduce or eliminate one or more items of appropriation while approving other portions of a bill. . . .
>
> (Cal. Const., art. IV, § 10(e).)

The first step in constitutional interpretation is ascertaining whether the words themselves are plain and unambiguous. "When interpreting the Constitution, we must choose the plain meaning of the provision if the language is clear and unambiguous." (*Cal. School Boards Assn. v. State* (2009) 171 Cal.App.4th 1183, 1206.)

> "Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the [L]egislature (or framers of a constitution) should be intended to mean what they have plainly expressed, and consequently, no room is left for construction. Possible or even probable meanings, when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere."
>
> (*Ross v. City of Long Beach* (1944) 24 Cal.2d 258, 261, quoting *City and County of S.F. v. McGovern* (1915)

28 Cal.App. 491, 499 and *State v. McGough* (Ala. 1898) 24 So. 395, 397.)

In construing the language of the Constitution, terms are presumed to have their ordinary, common sense meaning. (*Fields v. Eu* (1976) 18 Cal.3d 322, 327.) In ordinary parlance, the term "appropriation" has always been understood to mean a grant of authority to spend public funds, setting aside the funds to be spent for a specified purpose. A bill makes an appropriation if its legal effect is to grant that spending authority.

Thus the word "appropriation" is commonly defined as "money set aside by formal action for a specific use." (Merriam-Webster Online Dictionary at <http://www.merriam-webster.com/dictionary/appropriation> [as of June 27, 2010].)[9] For example, if a newspaper reports that the Legislature made an appropriation to fund a neighborhood battered women's shelter, its readers would understand that the Legislature set aside funds to be provided to that battered women's shelter. More to the point, they would *not* believe that by providing an appropriation, the Legislature took money away from the shelter. After all, an appropriation provides public funds; it does not take them away.

The word "appropriation" or the verb form "appropriate" appears elsewhere in the Constitution, and in each such appearance, its plain meaning is a grant of authority to spend public funds.[10] Nowhere in the Constitution is the term used to refer to a bill that contains no such grant

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[9] *See also* Black's Law Dict. (Abridged 7th ed. 2000) p. 78 (defining "appropriation" to mean "A legislative body's act of setting aside a sum of money for a public purpose.").

[10] The only exceptions are the references to appropriations of water in articles X and X A of the Constitution.

of authority or, as in this case, that makes reductions in existing spending authority. For example, section 12 of article IV contains the following language:

> (c)(4) Until the budget bill has been enacted, the Legislature shall not send to the Governor for consideration any bill appropriating funds for expenditure during the fiscal year for which the budget bill is to be enacted, except emergency bills recommended by the Governor or appropriations for the salaries and expenses of the Legislature.
>
> (d) 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(c) & (d).)

Substituting the phrase "reduction in spending authority" for "appropriation" renders nonsensical subdivision (c)(4) of section 12. In subdivision (d), such a substitution would mean that any legislation that decreases prior authorized spending must command a two-thirds vote. Such a supermajority has never been required for spending cuts.[11]

The word "appropriation" also is used in the constitutional provision commonly known as the "Gann Limit," which defines "[a]ppropriations subject to limitation" as "any authorization to expend

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[11] The implications of the Court of Appeal's ruling for the legislative vote requirement on bills that reduce spending are discussed *infra*.

during a fiscal year . . . ." (Cal. Const., art. XIII B, § 8(a) & (b).) To take just one example, the provision in A.B. 1 which states that Budget Act item 4265-001-0001 "is hereby *reduced* by $6,981,000" is not, in the words of the Gann Limit, an "authorization to expend" but a command that $6,981,000 *not* be spent. (Interveners' RJN, Exh. C at 10.) The purpose of the Gann Limit – to rein in state spending – surely would not be served if it were construed to encompass a limitation on "*reductions to* appropriations."

So too, article XIX B relating to motor vehicle sales taxes discusses how moneys that are placed into the Transportation Investment Fund "shall be allocated, upon appropriation by the Legislature . . ." (Cal. Const., art. XIX B, § 1(b)(1) and (c).) Article XVI exempts from the state debt limit certain short term cash anticipation loans "not exceeding the amounts of existing appropriations to which the resulting proceeds are to be applied." (*Id.*, art. XVI, § 1.3.) That same article provides that counties and cities that provide for the support of orphans, the blind, or other needy persons "shall be entitled to receive the same pro rata appropriations as may be granted to such institutions under church, or other control." (*Id.*, art. XVI, § 3(6).) Article XXXV, which provides funding for stem cell research to the California Institute for Regenerative Medicine, states that such funds "shall be continuously appropriated without regard to fiscal year . . . and shall not be subject to appropriation or transfer by the Legislature or the Governor for any other purpose." (*Id.*, art. XXXV, § 4.)

In each of these uses of the word "appropriation" or "appropriate," the intended meaning is the granting of authority to spend public funds that are thereby set aside for a specified purpose. These provisions are all in pari material and must be construed the same way.

(*Lester v. Lennane* (2000) 84 Cal.App.4th 536, 559, citation omitted ["Because sections 11 and 14 of article VI are in pari materia, we construe 'cause' to mean the same thing in both provisions."].) Thus, a provision of a bill that reduces spending authority does not satisfy the meaning of the term "appropriation," but instead has a legal effect opposite to that of an appropriation.

As this Court has stated, "no definition of that term" – 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*, *supra*, 43 Cal.3d at 1092.) This should be enough to invalidate the Governor's vetoes, because none of the provisions at issue here set aside a sum of money to be paid from the public treasury. That act had already occurred in February; the only thing that happened to those provisions in July was a reduction of the amount already set aside. To construe the July reductions as items of appropriation ignores the plain meaning of that term. (*See Cal. School Boards Assn.*, 171 Cal.App.4th at 1207-1210 [rejecting attempt to introduce ambiguity in constitutional language when plain meaning is apparent].)

> Though the judiciary, like other departments of the Government, is bound to use its powers so as best to promote the public good and fulfill the will of the people, still we can know nothing of that will, except as it has found expression in the Constitution; nor can we, under pretext of promoting the public welfare, usurp powers with which the people have never invested us.
>
> The great object, with reference to which all the rules and maxims that govern the interpretation of statutes, Constitutions, and other written instruments have been framed, is to discern the

> true intent of their authors, and when that intent has been ascertained, it becomes the duty of the Court to give effect to it, whatever may be the convictions of the Judges as to its wisdom, expediency or policy.
>
> (*Bourland v. Hildreth* (1864) 26 Cal. 161, 180.)

(*See also County of Orange v. Heim* (1973) 30 Cal.App.3d 694, 727 [discussing "the obligation of courts not to read constitutional provisions in or out of the Constitution under the guise of interpretation, no matter how desirable or expedient such action might appear to be at the moment."]; *Cal. Attorneys et al. v. Schwarzenegger* (2009) 174 Cal.App.4th 424, 436 ["[O]ur role is not to distort the plain meaning of the Constitution to advance public policy."].)

B. The History Of The Line-Item Veto Demonstrates That It Was Not Intended For The Use At Issue Here

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

budget to the Legislature and, at the same time, he was given the authority to limit appropriations if insufficient funds were available.

> Under the budget system, every state department would submit in advance its estimated requirements and these estimates would be correlated by trained economists under the direction of the Governor. The extravagant and wasteful practice of having the legislature appropriate specific amounts for definite purposes without consideration of available funds to meet these costs would be done away with, and the taxpayers would know fairly accurately just what the state will spend in any year and where the funds will go.
>
> (Interveners' RJN, Exh. E [Ballot Pamp., Gen. Elec. (Nov. 7, 1922), argument in favor of Prop. 12, p. 78].)

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

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

> modified appropriation to meet the condition of the treasury.
>
> (*Id.*, pp. 78-79.)

Thus, the ability to reduce an appropriation as well as veto it was tied to the introduction of a formal budget process, by which revenues and expenditures would be compared and a formal spending plan (the Budget Act) enacted. The line-item veto would allow the Governor to constrain attempts by the Legislature to authorize new spending, for example in the event that "sufficient funds are not available." Certainly nothing in the ballot pamphlet indicates that through this amendment, the people intended a meaning of the term "appropriation" that would allow the Governor to increase a reduction to an *existing* appropriation.

Both the wording of article IV, section 10(e) and the history of the line-item veto are consistent with defining the term "appropriation" as an act that grants the authority to spend funds set aside for a specified purpose, and for limiting the Governor's power to reducing or eliminating provisions that grant such spending authority. As demonstrated below, that interpretation also is consistent with this Court's prior decisions regarding the scope of the Governor's line-item veto power.

C. The Case Law Construing "Items of Appropriation" Does Not Extend That Term To Items That Reduce Appropriations

The case law interpreting the term "items of appropriation" for purposes of article IV, section 10 of the California Constitution consistently focuses on an appropriation as the grant of authority to spend public funds, which is how that term always has been used in the Constitution. (*See Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1089.) As this Court said long ago, "The appropriation. . . constitutes . . . the

authority of the Controller to draw his warrants, and of the Treasurer, when in funds, to pay the same, and *that is all.*" (*People ex rel. McCauley v. Brooks* (1860) 16 Cal. 11, 24, emphasis added.)[12] The term "appropriation" does not extend to legislative action that, conversely, reduces an existing appropriation.

A more specific definition emerged as subsequent cases worked their way through the courts. Just one year after the constitutional amendment adding the gubernatorial power to reduce or eliminate an item of appropriation, this Court defined an "appropriation" to be "a specific setting aside of an amount, not exceeding a definite sum, for the payment of certain particular claims or demands." (*Wood v. Riley* (1923) 192 Cal. 293, 303.) At issue in *Wood v. Riley* was a statutory directive from the Legislature that a percentage of funds appropriated for teachers' colleges be allocated instead to the Director of Education for the administrative expenses of his department. This Court held that the allocation triggered the Governor's line-item veto power, because it was "a specific setting aside of an amount, not exceeding a definite fixed sum, for the payment of certain particular claims or demands," thus granting the authority to expend that amount for the identified purpose. (*Id.* at 303, 306.) The Governor's line-item veto of that allocation had the effect of "control[ling] the expenditures of the state" by reducing the sum that the Legislature had set aside for expenditure. (*Id.* at 305.) It thus fell squarely within his constitutionally prescribed role.

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[12] Overruled in part by *Stratton v. Green* (1872) 45 Cal.3d 149, 151.

This Court and the courts of appeal have continued to hold that an essential element of an appropriation is the legislative decision to grant the authority to expend an identified amount of funding thereby set aside for a particular claim or demand. (*See, e.g., White v. Davis, supra,* 30 Cal.4th at 538, internal quotations and citation omitted ["[A]n appropriation is a legislative act setting aside a certain sum of money for a specified object in such manner that the executive officers are authorized to use that money and no more for such specified purpose."]; *Cal. Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264, 1282 [same]; *Planned Parenthood Affiliates of Cal. v. Swoap* (1985) 173 Cal.App.3d 1187, 1198 ["A legislative 'appropriation' has been judicially defined as one '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.' [Citations.]"]; *Ryan v. Riley* (1924) 65 Cal.App. 181, 187 ["There must be a setting apart from the public revenues of a certain sum of money for a specified object . . . ."].)

Consistent with this meaning, it is also clear that appropriations can involve the legislative decision to *add* additional funds to prior appropriations. For example, in *Wood v. Riley, supra,* this Court examined the statutory language at issue and concluded that "one cannot escape the conviction that it worked an appropriation. *It added a specific amount to the allowance already made* for the use of the state board of education . . ." (192 Cal. at 305, emphasis added.)

In *Harbor v. Deukmejian, supra,* this Court relied on that definition in analyzing a bill provision that amended substantive law to alter the payment date for certain benefits so that recipients could begin receiving payments earlier. (43 Cal.3d at 1089.) The provision did not

designate a particular sum of money to be used for paying claims, but the Court observed that it would nevertheless "require the expenditure of funds from the treasury," given that some recipients would begin receiving benefits earlier than under previous law. (*Id.* at 1083, 1089-1090.) However, this substantive purpose was payable within the scope of the broad AFDC appropriation that had been approved by the Governor as part of the Budget Act. (*Id.* at 1090.) The Court thus concluded that the bill provision in question was not an "item of appropriation" because "[i]t does not set aside money for the payment of any claim and makes no appropriation from the public treasury, nor does it add any additional amount to funds already provided for." (*Id.* at 1089.)

To summarize, a bill does not make an appropriation simply because it relates to state finances, or addresses a matter within the scope of a previously enacted appropriation. Rather, legislation that sets aside public funds to authorize their expenditure for a specified public purpose, or that amends an existing appropriation to authorize the expenditure of additional amounts, is a positive act that results in a grant of spending authority that did not yet exist in law, and on that basis makes an appropriation.

Applying these principles to the reductions at issue here, it is readily apparent that they did not "set aside money for the payment of any claim" or otherwise grant the authority to spend public funds. Provisions in the 2009 Budget Act accomplished that task. Nor do the vetoed items "add any additional amounts to funds already provided for." To the contrary, the effect of the vetoed items was to revoke, in part, existing spending authority that had been provided in a different bill altogether – the 2009 Budget Act.

Here, however, the Court of Appeal nonetheless concluded that the reductions made in A.B. 1 are appropriations, because they "specified definite amounts by which the original appropriations would be reduced. [¶] Whether spending authority is increased or decreased, it is still spending authority." (Slip Opn. at 17.) This statement by the Court of Appeal requires particular attention, because it appears to be the principal basis for its ruling that the line-item veto power was properly exercised. Put simply, a provision authorizing money to be spent is not equivalent to a provision that withdraws that spending authority – the legal effect of the two is diametrically opposed.

The flaws in the Court of Appeal's construction become even more apparent when it is applied in the context of the constitutional constraint on the power to make appropriations. As discussed later in this brief, section 12(d) of article IV requires a two-thirds vote by each house of the Legislature to authorize most appropriations from the General Fund. The two-thirds vote constrains the Legislature's ability to grant new authority to spend public moneys, thereby protecting the public fisc. Requiring a two-thirds vote for bills that revoke spending authority, which the Court of Appeal's approach would do, does not further that purpose of protecting the public fisc, but instead makes it harder for the Legislature to do so.

The Court of Appeal also concluded that "[t]here is no substantive difference between gubernatorial reduction of an item of appropriation in the original 2009 Budget Act . . . and gubernatorial reduction of such item in a subsequent amendment to the 2009 Budget Act, i.e., Assembly Bill 4X 1." (Slip Opn. at 17.) In fact there is a substantive difference. The Constitution expressly allows the line-item veto to be

exercised only when the Legislature grants spending authority by enacting an item or items of appropriation, as it does when it passes the Budget Act. The Constitution does not allow the line-item veto to be exercised when the Legislature reduces or withdraws a previously enacted grant of spending authority in a subsequent bill, or even when it passes a bill that provides spending direction within the scope of a previously enacted appropriation so as to "require the expenditure of funds from the treasury" because that fact alone "does not transform a substantive measure to an item of appropriation." (*Harbor*, *supra*, 43 Cal.3d at 1090.) An appropriation is one thing and one thing only – an affirmative grant of authority to spend public funds set aside for a designated purpose. The key phrase from *Harbor* is worth repeating: "no definition of that term ["item of appropriation"] . . . can reasonably embrace a provision . . . which does not set aside a sum of money to be paid from the public treasury." (*Id.* at 1092.)

Moreover, the Court of Appeal itself noted a substantive difference between the two concepts, although it reached the wrong conclusion about the significance of that difference. The court wrote:

> If spending reductions are not items of appropriation, a simple legislative majority could not only overturn a two-thirds vote on the annual budget act, but insulate its new determinations from gubernatorial oversight. This cannot be.
>
> (Slip Opn. at 18.)

In fact, a simple legislative majority *can* reduce spending, and it is difficult to imagine that the voters would have wanted it any other way. Since 1933, the Constitution has required that bills making appropriations

be passed by a two-thirds vote of the Legislature.[13] (Cal. Const., art. IV, § 12(d).) Given the purpose of this requirement to protect the public fisc, no such supermajority vote requirement is currently attached to bills that *reduce* appropriations.[14] A legislative majority can always decrease State spending, unless that spending is required by the Constitution or an initiative measure; a supermajority vote is required only when the Legislature seeks to initiate or increase State spending.

The line-item veto is a check on State spending. It is not a check on State thrift. As discussed *infra*, requiring a two-thirds vote for bills that decrease State spending would undermine, rather than further, the purposes of the line-item veto and of the special fiscal emergency provisions enacted by Proposition 58.

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[13] The Constitution exempts from this two-thirds vote requirement "appropriations for the public schools. . . ." (Cal. Const., art. IV, § 12(d).)

[14] When Proposition 22 was passed by the voters, granting the Governor authority to reduce or eliminate an item of appropriation, there was no two-thirds vote requirement in the Constitution for measures making appropriations; that was not added until 1933, when the Constitution was amended to require a two-thirds vote for any budget act that exceeded prior year expenditures by more than five percent. (Prop. 1, Spec. Elec. (1933).) In that context, the Commonwealth Club of California, which was the primary sponsor of the 1922 line-item veto amendment, noted that it "did not interfere with the right of the legislature to amend any item in the budget by majority vote . . . ." (Walcott, *The Executive Budget Wins in Cal.* (1924) 13 Nat.Mun.Rev. 134, 135.) There thus is nothing in the legislative history of Proposition 22 to support the Court of Appeal's view that the voters cannot possibly have intended to allow the Legislature to make spending cuts by a majority vote.

D. The Legislature Intended These Provisions As Cuts That Do Not Make Appropriations

California courts have consistently looked to the Legislature's intent to determine whether a provision constitutes an appropriation. (*Cal. Assn. for Safety Education*, 30 Cal.App.4th at 1282, quoting *Riley v. Johnson* (1933) 219 Cal. 513, 519 ["legislative intent determines whether a statute contains an appropriation."]; *see also City and County of S.F. v. Kuchel* (1948) 32 Cal.2d 364, 366; *Proll v. Dunn* (1889) 80 Cal. 220, 227 ["All that is required is a clear expression of the legislative will on the subject."].) The Court of Appeal seized on the wording of the Legislative Counsel's Digest of A.B. 1, and the fact that it was considered to be a bill containing an appropriation, as supporting the view that the Legislature intended by passage of the bill to make an appropriation. (Slip Opn. at 19-20.)

No one disputes that, as reflected in its title, some of the revisions to the 2009 Budget Act made by A.B. 1 are items of appropriation because they granted new spending authority.[15] Yet the only items at issue

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[15] This fact does not mean the bill at issue here was not properly passed pursuant to the Legislature's constitutional authority to combine multiple appropriations in a single budget bill, as the Court of Appeal suggests would be the case. (Slip Opn. at 20.) The Legislature has construed the constitutional provision added by Proposition 58 to mean that a bill amending a budget bill, particularly one passed under the fiscal emergency procedures of article IV, section 10(f), is a budget bill within the meaning of article IV, section 12(d)'s requirement that only the budget bill may contain more than one item of appropriation. That legislative construction is entitled to deference. (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180.)

(continued . . .)

in this action *reduce* amounts that were authorized by existing law to be paid for a specified purpose. (*See, e.g.*, Interveners' RJN, Exh. B, p. 540, emphasis added [the amount previously appropriated in Budget Act item 4170-101-0001 "is hereby *reduced* by $9,483,000"].)

The Legislative Counsel's Digest for A.B. 1 recites that the legislation was enacted to respond to the Governor's July 1, 2009 "proclamation declaring a fiscal emergency." (Interveners' RJN, Exh. C at 12.) The Digest further states:

> The Budget Act of 2009 (Chapter 1 of the 2009-10 Third Extraordinary Session) made appropriations for the support of state government for the 2009-10 fiscal year.
>
> This bill would make revisions in those appropriations for the 2009-10 fiscal year. The bill would make specified reductions in certain appropriations.

(*Id.*)

Thus, the Legislature viewed the 2009 Budget Act as a vehicle for its appropriations, while it viewed A.B. 1 primarily as a vehicle for cutting state spending. (*See Brown v. Superior Court* (1982) 33 Cal.3d 242, 250-251 [relying in part on information in Legislative

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(. . . continued)

Here, A.B. 1 was a comprehensive revision of the earlier enacted budget bill, adding to some appropriations and reducing others. There is no indication that when the voters added the fiscal emergency provisions of article IV, section 10(f) in 2004, they meant for the Legislature to pass multiple bills if it wanted to decrease existing appropriations in the Budget Act at the same time it was increasing others. Indeed, such a requirement is entirely inconsistent with the principle of expediency that underlies section 10(f).

Counsel's Digest to conclude that proviso at issue did not constitute an appropriation].)

The Legislative Counsel Bureau, which wrote the digest on which the Court of Appeal relies, does not consider the items at issue in this case to be items of appropriation. In an opinion dated August 5, 2009, Legislative Counsel concluded that "the items and sections of A.B. 1 that proposed only to make reductions in existing, previously enacted appropriations . . . do not constitute items of appropriation that are subject to the Governor's line-item veto power." (Interveners' RJN, Exh. D at 3.)

Thus, legislative intent, judicial decisions, and the Legislature's own nonpartisan counsel confirm what the plain language and expressed intent of article IV, section 10 dictate: an appropriation is a provision that sets aside money for a public purpose and grants authority to spend that money for that purpose.[16] A provision that reduces that funding amount or otherwise restricts the scope of the spending authority is not an appropriation. As to provisions of a bill that grant new spending authority, the Governor can line-item veto the money that is thereby set aside for that spending purpose. He cannot, however, line-item veto a bill provision that contains no grant of spending authority, but would only reduce the scope of existing authority.

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[16] The Court of Appeal also considered the petitioners' prayer for relief as somehow constituting an admission that the items at issue here are appropriations even though they reduce State spending. (Slip Opn. at 22 and fn. 20.) Not so. The relief requested simply was to provide the funding appropriated in the 2009 Budget Act, as reduced by A.B. 1, without regard to any further reductions made by the Governor in his line-item vetoes of A.B. 1. Were the provisions of A.B. 1 themselves appropriations, there would be no need to refer to the 2009 Budget Act in the prayer for relief.

E. The Re-Enactment Rule Does Not Turn A Reduction Of Spending Authority Into An Appropriation

The Court of Appeal agreed with the Governor's argument that the reductions in A.B. 1 are really "items of appropriation," because under article IV, section 9 of the Constitution, the Legislature has "re-enacted" each section of the 2009 Budget Act that it amends by decreasing the spending authority previously granted. (Slip Opn. at 23-27.) The provision of the Constitution that sets forth the re-enactment rule reads in relevant part:

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

An item of appropriation, however, is not a "section of a statute." Section 2.00 of the 2009 Budget Act, for example, set forth more than two thousand items of appropriation.

Furthermore, application of the re-enactment rule to the Budget Act would undermine, rather than further, the purpose of the rule. (*See American Lung Assn. v. Wilson* (1996) 51 Cal.App.4th 743, 749, citation omitted ["The underlying purpose of the re-enactment rule is to make sure legislators are not operating in the blind when they amend legislation, and to make sure the public can become apprised of changes in the law."].) If the re-enactment rule applied here in the manner suggested by the Court of Appeal, the Legislature would have been required to include in A.B. 1 each of the thousands of items of appropriation included in section 2.00 of the 2009 Budget Act, even if they were not subject to any change. That would not have achieved the display purposes of the re-

enactment rule, because the reductions would have been hidden among the hundreds of items that remained unchanged.

More importantly, although the display of the items that were subject to reduction satisfies the purpose of the re-enactment rule, it does not have the effect of re-authorizing appropriations made by the Budget Act. When the Legislature enacted the 2009 Budget Act in February, it set aside particular sums of money and authorized various state agencies to draw upon those funds in support of various programs. A.B. 1 did not change the authority of state agencies to draw funds from the state treasury in support of their programs; that authority has existed continuously from the date the 2009 Budget Act was enacted. The display of previously enacted appropriations for the purpose of amendment by a subsequent bill does not result in enactment of a *new* appropriation of those same amounts. Article IV, section 9 of the Constitution has never been so construed.

The Legislature and the courts have recognized that a provision of a law that is re-enacted merely because it is part of a statute that is the subject of an amendment is deemed to have existed from the date it was originally adopted. (*See* Gov. Code, § 9605; *In re Lance W.* (1985) 37 Cal.3d 873, 895; *see also In re White* (2008) 163 Cal.App.4th 1576, 1581-1582.) For example, if the Legislature were to amend a law by majority vote to reduce a tax, the re-enactment of the amended statute would itself impose neither the tax, nor the taxpayers' liability for paying the tax – that liability would have existed from the date the tax was first enacted. Instead, the Legislature's action would merely reduce the amount owed by the taxpayer. Yet under the Court of Appeal's view, that amendment to reduce the tax would constitute a new authorization of the

original tax, having the absurd result of imposing a two-thirds vote requirement upon the passage of a bill to reduce taxes.

In short, neither the plain language of article IV, section 10, nor the legislative history or judicial interpretations of the term "appropriation," nor the Legislature's intent in passing A.B. 1 nor the intent underlying the re-enactment rule, supports the Court of Appeal's holding that the term can be stretched to include the inverse of an appropriation, namely, a reduction in spending. Moreover, to support such a reading requires giving a liberal construction to the Governor's line-item veto power, which as discussed below, is something that this Court consistently has declined to do.

II.

THE GOVERNOR'S EXPANSION OF HIS LINE-ITEM VETO AUTHORITY VIOLATES THE FUNDAMENTAL PRINCIPLE OF SEPARATION OF POWERS

Separation of powers principles counsel against expanding the definition of "item of appropriation," because doing so would expand the Governor's encroachment on a core legislative area.

A. Exercising The Budgeting Power Is A Core Legislative Function

The California Constitution requires a separation of the powers of government among the legislative, executive, and judicial branches. "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.) The entirety of the legislative power resides in the Legislature, unless the Constitution explicitly provides otherwise. (*Marine Forests Society v. Cal. Coastal Com.* (2005) 36 Cal.4th 1, 31.)

Under this separation of powers, the legislative branch controls the public purse. The Constitution leaves to the legislative branch "the exclusive power of deciding how, when, and for what purposes the public funds shall be applied." (*Humbert v. Dunn* (1890) 84 Cal. 57, 59.)

> [T]he Legislature is the branch of government that must, on a yearly basis, fit the needs of the state into the funds available. "Enactment of a state budget is a legislative function, involving 'interdependent political, social and economic judgments which cannot be left to individual officers acting in isolation; rather, it is, and indeed must be, the responsibility of the legislative body to weigh those needs and set priorities for the utilization of the limited revenues available.'" (*Anderson v. Superior Court* (1998) 68 Cal.App.4th 1240, 1249 . . . .) In determining what funds to expend in a given year, the Legislature must consider many legitimate and pressing calls on the state's resources . . . . (See *California Teachers Assn. v. Ingwerson* (1996) 46 Cal.App.4th 860 . . . .)
>
> (*Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 302.)

Exercising the power of the purse – levying taxes and making appropriations – is among the "core functions of the legislative branch . . . ." (*Id.*) Public funds may not be spent except by appropriations duly passed by the Legislature and signed into law by the Governor. (Cal. Const., art. XVI, § 7.) "Legislative determinations relating to expenditures in other respects are binding upon the executive: 'The executive branch, in expending public funds, may not disregard legislatively prescribed directives and limits pertaining to the use of such funds.'" (*Carmel Valley*

Fire Protection Dist., *supra*, 25 Cal.4th at 299, quoting *Superior Ct. v. County of Mendocino* (1996) 13 Cal.4th 45, 53.)

The Governor's authority to "reduce or eliminate one or more items of appropriation while approving other portions of a bill" (Cal. Const., art. IV, § 10(e)) is an exception to that core legislative authority. In exercising his veto power, "the Governor acts as a 'legislative instrumentality,' and as a special agent with limited powers, and . . . he may therefore act only as the Constitution allows." (*Harbor*, *supra*, 43 Cal.3d at 1087, quoting *Lukens v. Nye*, *supra*, 156 Cal. at 501-503.) The Governor's line-item veto thus may "be exercised 'only when clearly authorized by the constitution, and the language conferring it is to be strictly construed.'" (*Id.* at 1088, citation omitted; *see also Lukens v. Nye*, 156 Cal. at 501 ["As an executive officer, [the Governor] is forbidden to exercise any legislative power or function except as in the Constitution expressly provided."].)

The Constitution explicitly defines the role of the Governor with respect to the annual budgeting process. The Governor must submit to the Legislature a budget by January 10 of each year, setting forth his estimated revenues and "recommended" expenditures for the following fiscal year. (Cal. Const., art. IV, § 12(a).) The Legislature then is tasked with passing a budget bill by two-thirds vote. (*Id.*, § 12(d).) When the Legislature passes a budget bill, the Governor may sign it; he may veto it in its entirety; or he may "reduce or eliminate one or more items of appropriation" in the bill. (*Id.*, § 10(a) & (e).) That veto, whether of the entire bill or only certain appropriations within it, must be exercised within twelve days. If it is not, the budget bill becomes law as passed and remains law unless and until the Legislature enacts changes. (*Id.*, § 10(b)(3).) In

other words, the Governor's authority with respect to a budget bill ends when the twelve-day veto period ends. He can veto new or additional appropriations that are passed by the Legislature, but all he can do with those previously enacted appropriations is enforce them as enacted. (*Lukens v. Nye*, *supra*, 156 Cal. at 501-502.)

The passage of Proposition 58 in 2004 added additional procedures that may be used to address budget shortfalls that occur *during* the fiscal year. As amended, the Constitution now provides that if revenues decline or expenditures increase mid-year, the Governor may declare a fiscal emergency and call the Legislature into special session. (Cal. Const., art. IV, § 10(f)(1).)

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

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

> 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).)

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

> As California faced unprecedented budget deficits for the last 3 years, the problem was ignored, spending exceeded revenues, and there was no process in place to address the fiscal crisis. Proposition 58 will allow the Governor to call a Special Session of the Legislature to deal with future fiscal crises. If the Legislature fails to act within 45 days, then they will not be able to recess and they will not be able to pass any other legislation. This will force the Governor and the Legislature to work together to find a solution to the problem BEFORE IT IS TOO LATE.
>
> (Supp. Ballot Pamp., Primary Elec. (Mar. 2, 2004), argument in favor of Prop. 58, p. 14.)[17]

A declaration of fiscal emergency is beyond the ordinary actions taken by the Legislature and Governor to address mid-year corrections. It is not at all unusual for budgets passed at the beginning of a

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

fiscal year to require ongoing corrections during that year, as revenues and expenditures are updated. Thus, as part of his January submission of the proposed budget for the next fiscal year, the Governor provides updated revenue and expenditure figures for the past, current and succeeding fiscal years. (Gov. Code, § 13337.) In addition, by May 14 each year, the Director of Finance provides a second round of updated estimates on revenues and proposes any necessary expenditure increases or cuts for the current and ensuing fiscal years. (Gov. Code, § 13308(d).) This ongoing process frequently results in legislative changes to current-year appropriations and expenditures. (*See, e.g.*, Stats. 2003, ch. 4, §§ 7, 18-68 [postponing certain school appropriations and reverting others to the General Fund in the face of dwindling State revenues and a decrease in the Proposition 98 minimum school funding guarantee as re-calculated mid-way through the 2002-03 budget year].) To our knowledge, no Governor has attempted to apply the line-item veto to spending reductions made during such ordinary budget adjustments.

Nothing in section 10(f) of article IV suggests any intent on the part of the voters to expand the Governor's line-item veto power when used to review legislation passed in a fiscal emergency. Instead, the Governor's only additional power in that circumstance is to call the special session because once he does, the Legislature has 45 days to send the Governor a bill addressing the fiscal crisis; if it does not, it may not send the Governor any other bills until it has sent one addressing the fiscal crisis. (Cal. Const., art. IV, § 10(f)(3).) The Constitution does not prescribe the content of the legislation that is responsive to the fiscal crisis. It does not require that the state budget be brought back into balance mid-year. It does not require that the Legislature reduce spending, or detail the items of

reduction. All of that is left to the judgment of the Legislature. The Constitution simply requires that the Legislature take some timely action responsive to the fiscal emergency before it proceeds to any other business of the State.

The language of the Constitution provides no extraordinary authority for the Governor in this process once he has proclaimed the fiscal emergency and called the special session. All it allows him to do is what he does with any other piece of legislation sent to him during the year – sign it, veto it, or eliminate or reduce one or more items of appropriation. Proposition 58 added no language to the Constitution allowing the Governor to increase or decrease the size of the spending cuts made by the Legislature in response to a declaration of fiscal emergency. Indeed, twice in recent years the voters have rejected proposals that would have allowed the executive branch to do precisely that.[18] (Interveners' RJN, Exh. F at 22 [Proposition 76]; Exh. H at 10 [Proposition 1A].)

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[18] The language of Proposition 76, rejected by the voters in 2005, is instructive. It would have amended the Constitution to increase the Governor's authority with respect to spending cuts by adding the following language:

> (2) Notwithstanding any other provisions of this Constitution, if a bill or bills have not been enacted to remedy the fiscal emergency by the 45th day following the issuance of the proclamation, or the 30th day if appropriation authority is currently provided pursuant to subdivision (g) of Section 12 of Article IV, the Governor shall reduce items of appropriation as necessary to remedy the fiscal emergency. The Governor may reduce items of appropriation on

(continued . . .)

Moreover, as discussed above, the result of the Court of Appeal's reasoning would mean that a bill containing a spending reduction requires a two-thirds vote of each house of the Legislature for passage. (Slip Opn. at 18.) The entire purpose of Proposition 58, however, is to provide a speedy and effective way for the Legislature and the Governor to work together to find a comprehensive solution to a mid-year budget crisis. Developing the consensus necessary to pass remedial legislation in the midst of a fiscal emergency is sufficiently challenging even under the status quo. However, imposing a two-thirds vote requirement upon the passage of a spending reduction bill means that concerns of a minority party or other legislative voting bloc must be met for any such bill to pass, making the task much more difficult. The timely enactment of legislation that makes spending reductions is clearly a primary purpose of a fiscal emergency special session called under article IV, section 10(f), as is the ability of the Legislature in a special session to pass legislation by majority vote that will go into effect on an expedited basis. (Cal. Const., art. IV, § 8(c)(1).) The interpretation that such legislation requires an extraordinary vote in each house for passage thus directly undermines the operation of this constitutional provision as well.

(. . . continued)

> an equally proportionate basis, or disproportionately, at his or her discretion.
>
> (Interveners', Exh. F at 61.)

In other words, Proposition 76 acknowledged that the current language of the Constitution does not allow the Governor to unilaterally make mid-year spending reductions, and it added language that would have explicitly allowed him to do so.

B. The Veto Power Is A Negative Check On The Legislature And Not An Affirmative Grant Of Legislative Power

The only legislative authority that the Constitution provides for the Governor is his power to veto. That power cannot be expanded beyond the actual language of the Constitution without encroaching upon the power of the Legislature, in violation of article III, section 3 of the Constitution.

> [A]rticle III, section 3 provides that one branch of government may not exercise the powers granted to another "except as permitted by this Constitution." Case law, commentators, and historians have long recognized that in exercising the veto the Governor acts in a legislative capacity. [Citations.] It is not coincidental that from the first Constitution of this state in 1849, and in the United States Constitution as well, the executive's power to veto legislation has appeared in the legislative article.
>
> It follows that in exercising the power of the veto the Governor may act only as permitted by the Constitution. That authority is to veto a "bill" (art. IV, § 10, subd. (a)) or to "reduce or eliminate one or more items of appropriation" (id., subd. (b)).
>
> (*Harbor*, *supra*, 43 Cal.3d at 1088-1089, fn. omitted.)

The power to veto, or to reduce or eliminate, is not the power to create or increase. The former is negative; the latter affirmative. The distinction is critical. "The word 'veto' means 'I forbid' in Latin. . . . [T]he effect of the veto [is] negative, frustrating an act without substituting anything in its place." (*Id.*)

In this case, the Governor sought to use his power to *increase* what the Legislature had done. The Legislature had made a policy determination regarding how much state spending had to be cut in response to the fiscal crisis and where those spending cuts were to be made. The Governor, however, disagreed with the Legislature's policy determinations. He wanted to make *more* cuts in order to keep a larger budget reserve, and in so doing, expanded A.B. 1 to reach beyond the limits of what the Legislature had passed. The Governor's attempted use of the veto to expand and increase the Legislature's cuts in spending authority flies in the face of the common understanding of the veto power and, in particular, its use in the context of the budget process.

Thus in *Harbor* this Court, mindful of the limited role of the Governor with respect to the budgeting process and of the historical evolution of the veto power in California, rejected the "claim that the veto power should be liberally construed."[19] (*Id.* at 1088, fn. 9.) This limitation takes on added importance in the context of the line-item veto. The Governor's veto power ordinarily extends only to vetoing a bill in its entirety; "he may not select portions of a bill for his disapproval." (*Id.* at 1086.)

> The limitation is firmly rooted in our constitutional system. If the rule were otherwise, the sensitive balance between the powers granted the legislative and executive

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[19] The Court cited with approval the ruling of the Colorado Supreme Court that the veto power may be "exercised 'only when clearly authorized by the constitution, and the language conferring it is to be strictly construed.'" (*Harbor*, *supra*, 43 Cal.3d at 1088, quoting *Colorado Gen. Assem. v. Lamm* (Colo. 1985) 704 P.2d 1371, 1385-1386.)

> branches of government in the Constitution would be placed in jeopardy. Were the executive permitted to pick and choose among various provisions of a substantive measure, vetoing some but not all parts of a bill, he would be invading the authority of the legislative branch since the effect of such a power would be to permit him to affirmatively legislate. As a much-quoted early case commented, "the executive, in every republican form of government, has only a qualified and destructive legislative function, and never creative legislative power."
>
> (*Id.* at 1086, quoting *State v. Holder* (Miss. 1898) 23 So. 643, 645.)

The Governor's ability to reduce or eliminate an item of appropriation is an exception to this all-or-nothing concept of the veto. As such, it has been construed to extend only so far as the plain language of the Constitution allows, and no further. (*Id.* at 1087-1088.) This is true even when a literal and narrow construction allows the Legislature to avoid the reach of the line-item veto. (*Id.* at 1092 [rejecting argument "that the Governor may veto part of a general bill – a power denied him by the Constitution – in order to foil an alleged legislative attempt to evade the veto."].)

Thus in *Reardon v. Riley* (1938) 10 Cal.2d 531, the Legislature had added to the appropriation for the Department of Industrial Relations a directive that $328,000 be used for safety inspectors with $20,000 set aside for agents' salaries. (*Id.* at 533.) The Governor vetoed the provision setting aside funds for safety inspectors and agents, and the question was whether this had the effect of reducing the overall appropriation for the Department by the $328,000. (*Id.* at 534.) This Court held it did not have that effect. (*Id.* at 535-537.) The Court's decision is

consistent with a narrow construction of the line-item veto, even when its use would rein in State spending.

The Governor is not powerless, of course. The constitutional system of checks and balances allows one branch to "check," or halt, the exercise of core power by another branch. The Governor could have "checked" the Legislature's plan by vetoing A.B. 1 in its entirety, as he did with the Legislature's mid-year spending revisions passed just one month prior to A.B. 1. (Steinberg Decl., ¶ 9.)

The vetoes at issue here, however, did not halt the Legislature's actions – it expanded them. They did not reduce or eliminate "items of appropriation" because the legal effect of the provisions that were vetoed was to reduce, rather than grant, spending authority. The Constitution explicitly allows the Governor to reduce or eliminate an item of appropriation, as a check on legislation that would make a grant of spending authority, but nowhere in the Constitution is the Governor granted the power to modify a provision of a bill that does not make an appropriation. Reducing or eliminating an appropriation is consistent with the notion of a veto as calling a halt to, or narrowing, legislative action. Increasing a *cut* in spending authority does the opposite, taking a legislative action and enlarging it. This turns the veto power from a negative check on the Legislature's actions into a usurpation of affirmative legislative power, in violation of the separation of powers. (*See Thirteenth Guam Leg. v. Bordallo* (D.C. Guam 1977) 430 F.Supp. 405, 409 ["[T]he veto is only a negative power. Were it capable of creative as well as destructive use, there would be no question that the executive would be able to usurp the legislative function and irreparably undermine rather than preserve the integrity of the separation of powers."].)

C. The Unintended Consequences Of The Court Of Appeal's Ruling Would Severely Hamper The Legislature's Ability To Respond To A Fiscal Crisis

The Court of Appeal's determination that spending reductions are "items of appropriation" also affects the interpretation of the term "appropriation" used elsewhere in article IV of the Constitution, particularly with respect to the vote required in each house of the Legislature to pass a bill that makes an appropriation. Article IV, section 12(d) of the Constitution states: "Appropriations from the General Fund of the State, except appropriations for the public schools, are void unless passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring." As discussed above, the Court of Appeal's conclusion that a bill provision that reduces state spending is an "appropriation" would mean, therefore, that a bill containing such a provision requires the affirmative vote of two-thirds of the membership of each house in order to pass. (Slip Opn. at 18.)

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

The effect is particularly troublesome on special sessions called by the Governor for State fiscal emergencies pursuant to article IV, section 10(f) of the Constitution. As discussed earlier, the voters approved Proposition 58 in 2004 to establish a process to encourage the Governor and Legislature to act quickly in reducing State expenditures mid-year in

times of fiscal crisis.[20] Imposing a two-thirds vote requirement upon the passage of every bill that reduces spending makes the task much more difficult. Further, the failure to reach a timely consensus would preclude the Legislature from turning its attention to other legislative matters. (Cal. Const., art. IV, § 10(f)(2).) Because the enactment of legislation that makes spending reductions and the passage of majority vote bills that take effect on an expedited basis, are the primary purposes of a fiscal emergency special session called under article IV, section 10(f), the interpretation that such legislation requires an extraordinary vote in each house for passage directly undermines the operation of this constitutional provision and takes away an important weapon in the Legislature's arsenal for combating a fiscal crisis.

The holding of the Court of Appeal creates additional confusion. The court wrote:

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

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[20] As noted above, the legislation that is in dispute in the instant case was enacted pursuant to a special session called by the Governor under this authority.

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

Putting aside the faulty logic of these pronouncements, their implications are far-reaching. If even technical changes to a previously enacted appropriation allow the Governor to blue-pencil that appropriation a second time, then the Legislature will be reluctant to make even the most salutary of such changes. Moreover, if a bill passed to reduce State spending results in a re-enactment of the entirety of section 2.00 of the annual Budget Act simply because it makes reductions to one or more of the thousands of items of appropriation contained in that section, then the Governor may argue he can take a second bite at each of those thousands of items in the re-enacted section 2.00, not just those as to which the Legislature has made a reduction.

Further, the Court of Appeal mistakenly concluded that the A.B. 1 provisions in question, if part of a budget bill, would violate the single subject rule in article IV, section 9 of the Constitution because, in the court's view, a budget bill may not address "more than the single subject of appropriations." (Slip Opn. at 23.) For purposes of the single subject rule, the courts of this State have held that the subject of the Budget Act is the appropriation of funds for government operations, meaning that it cannot constitutionally be employed to expand a state agency's authority, or to "substantively amend [ ] and chang[e] [e]xisting statute law." (*Planned Parenthood Affiliates of Cal. v. Swoap* (1985) 173 Cal.App.3d 1187, 1199, quoting *Assn. for Retarded Citizens v. Dept. of Developmental Services*

(1985) 38 Cal.3d 384, 394, internal quotations omitted.) Thus, the subject of the Budget Act for purposes of the single subject rule is the enactment of "fiscal policy." (*Cal. Lab. Federation, AFL-CIO v. Occupational Safety & Health Stds. Bd.* (1992) 5 Cal.App.4th 985, 995, fn. 9.) This does not mean that the Budget Act is confined solely to items of appropriation. To the contrary, the annual Budget Act invariably includes a wide range of control sections and other provisions that authorize transfers to and from the General Fund, impose reporting requirements, place limitations upon expenditures authorized elsewhere, and otherwise relate to the appropriation of funds but do not themselves make an appropriation. (*See, e.g.*, Stats. 2008, ch. 268, §§ 4.90, 4.95, 5.45, 6.00, 8.50, 8.51, 8.53, 9.30, 9.45, 11.10, 11.11, 12.00, 12.32.) Thus, for single subject purposes, a provision that reduces the amount of a separately enacted appropriation surely falls within the "appropriations" or "fiscal policy" subject of the annual Budget Act. No judicial precedent in this State holds otherwise.

The anomalies that would flow from accepting the Court of Appeal's views here are incompatible with the California Constitution. For example, if the Legislature were to pass a bill that makes only technical, nonsubstantive changes to a previously enacted appropriation, without changing the amount of the appropriation, then under the Court of Appeal's reasoning the original appropriation is not only "re-enacted" but thereby reauthorized, and the Governor is allowed to step in anew and slash the funding amount. Moreover, the technical amendment, now construed as an "item of appropriation" under this logic, would be subject to the two-thirds vote requirement. Most importantly, the Governor could "eliminate" a

reduction to a previously enacted appropriation, thereby allowing *more* spending than the Legislature authorized.[21]

These are not merely theoretical possibilities. They have already occurred and, if permitted to stand, would turn on its head the very purpose of the line-item veto. For example, one of the vetoes not challenged by petitioners here is Item 9840-001-0001, the Augmentation for Contingencies or Emergencies. It was amended by A.B. 1 to fix minor typographical errors, but the amount of the appropriation that had been made in the 2009 Budget Act – $44,100,000 – was not changed. Nonetheless, through his veto message, the Governor purported to reduce this item to $20,100,000. (Interveners' RJN, Exh. C at 8.) In another veto not placed at issue here, the Governor purported to veto provision 5 of Item 5225-301-0660, which would have prohibited the Department of Corrections from making any further encumbrances or expenditures of funding appropriated in the Budget Act of 2009 for the Condemned Inmate Complex at San Quentin State Prison until certain specified conditions were met. The Governor's veto thus permits the very encumbrances and expenditures that the Legislature sought to prohibit. (Interveners' RJN, Exh. C at 5-6.)

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[21] *Rios v. Symington* (Ariz. 1992) 833 P.2d 20, decided under the Arizona constitution, is not to the contrary. It upheld the line-item veto of reductions to appropriations, but under a constitutional analysis that sought to expand the role of the Governor, not limit it. (*Id.* at 27-29.) Moreover, after *Rios*, the Governor of Arizona began to use his line-item veto power to "actually increase the size of initial legislative appropriations." (Strouse, *The Item Veto Case, Bennett v. Napolitano: What About the Merits?* (2005) 37 Ariz. St. L.J. 165, 171-72, footnotes omitted.)

Of course, a veto of the entirety of A.B. 1 also would have allowed more spending than the Legislature desired, at least on a temporary basis until the Legislature passed another spending reduction plan. But by vetoing the entire bill – which the Governor explicitly is allowed to do under the Constitution – the Governor would have sent matters back to the Legislature to create in the first instance the broad architecture of a reduced spending plan. That creative power belongs to the Legislature alone. The Governor's power is to say no to what the Legislature creates, and send matters back to the Legislature. The Governor also has a specific, limited power to check the Legislature's action by narrowing it – reducing or eliminating grants of spending authority in a budget bill, or any other bill, by line-item vetoing particular provisions of the bill that make appropriations. What he can not do is expand the Legislature's action beyond the four corners of what was initially passed, as he did here, or otherwise undertake to modify a particular provision of a bill.

Nor does it matter that the Legislature may override the unlawful veto by a two-thirds vote. The possibility of an override cannot cure the unconstitutionality of the underlying act. (*Cf. County of Sonoma v. Superior Ct.* (2009) 173 Cal.App.4th 322, 354-355 [unlawful delegation is not cured by subsequent vote of governing body].)

The Court of Appeal's opinion creates considerable uncertainty regarding the constitutional guidelines that direct the legislative process and changes the interaction between the Legislature and Governor in ways never contemplated by the voters. Rather than discourage attempts to do an end-run around the Governor's veto power, the court's focus on the form of a provision of a bill rather than its legal effect surely will increase those attempts. The Court of Appeal's approach invites disputes

between the Legislature and Governor over exactly what provisions are re-enacted through a particular series of cuts, whether they are properly packaged to avoid single-subject issues, whether they open the entirety of the budget bill to a second round of cuts by the Governor, and whether they are cuts that require a two-thirds vote to enact.[22] Legislators who know that the Governor may make deeper cuts may be even more disinclined to make any funding reductions to a currently funded program.

None of this uncertainty – much less the wholesale revision of constitutional ground rules that have guided interaction between the Governor and the Legislature for decades – was warranted. These outcomes may be avoided by a construction of the Governor's power to

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

> Not only would we be violating the plain words of the Constitution if we were to adopt the unwarranted definition proposed by respondents, but we would place an intolerable burden on the relations between the executive and legislative branches of government. If, as respondents suggest, the Governor has the power to exercise his veto as to any portion of a substantive bill which in his view constitutes a "subject," the result would be a continual conflict between the Governor and the Legislature over whether the scope of the veto power was exceeded because the Governor failed to confine his disapproval to a single subject encompassed in a bill.
>
> (*Harbor*, 43 Cal.3d at 1093.)

"reduce or eliminate . . . items of appropriation" that applies that power only to bill provisions whose effect in law is to grant authority to spend State funds. That is the construction that the Legislature always has applied, and one that is indicated by previous decisions of this Court.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeal should be reversed.

Dated: June 30, 2010

Respectfully submitted,

LEGISLATIVE COUNSEL BUREAU

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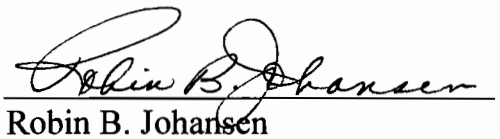
By: 
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Pursuant to Rule 8.204(c) of the California Rules of Court, I certify that this brief is proportionately spaced, has a typeface of 13 points or more and contains 13,831 words as counted by the Microsoft Word 2003 word processing program used to generate the brief.

Dated: June 30, 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.

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Michael Narciso

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