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

REPLY BRIEF ON THE MERITS

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INTRODUCTION

In his Answering Brief on the Merits ("ABOM"), the Governor does not dispute that in exercising the veto, he acts in a legislative capacity. He cannot dispute that the California Constitution and the decisions of this Court permit his exercise of legislative power only when specifically authorized by the Constitution, and that the limits of such power must be construed narrowly.

The Governor acknowledges—as he must—that the line item veto may only be used on one or more items of appropriation. He contends, however, that the limits of his power to use the line-item veto extend to legislative reductions to prior-enacted appropriations and that this power permits him to rewrite those duly-enacted appropriations as he sees fit.

The Governor can point to no constitutional provision, no legislative history, and no prior opinion of this Court which supports his expanded definition of an appropriation. Instead, he conclusively asserts that the Constitution makes him the final authority on state spending and the voters have granted him the authority to control spending through the use of the line-item veto. His power to limit spending notwithstanding, the Governor has twice failed to acquire the power to unilaterally reduce prior appropriations through ballot initiative, and now asks this Court to effectively hold that such power has always been his.

The Governor offers no logical explanation why the people would grant him the power to act as check on legislative directives ***not*** to spend. Because of the importance of how and

where the people's money is to be spent, the Constitution includes significant checks on legislative spending proposals, including both the requirement that such a bill must receive a two-thirds vote in each house, and the Governor's grant of power to reduce or eliminate the amount of spending proposals after passage. But the underlying policy concerns which warrant those checks on proposed spending legislation are not present in the context of budget reductions. Accordingly, the legislative supermajority requirement does not apply, and nor should the line-item veto power.

Even if this Court holds that a reduction to a prior-enacted appropriation is an item of appropriation subject to the line-item veto, only the reduction itself can be subject to reduction or elimination. By attempting to use the veto to increase a legislative reduction, the Governor acts in contravention of the clear terms of article IV, §10(e), the separation of powers doctrine, and the universal understanding of the veto as a negative power.

While dismissing Petitioners' separation of powers argument as based on wordplay and misdirection, the Governor asserts that he may "eliminate" a legislative reduction and reinstate the originally-enacted funding, or "reduce" the reduction by increasing the amount of the cut. In such a way, he asserts, he may reset funding upward or downward, depending on his preference.

Petitioners are unaware of any instance, in California or elsewhere, where the veto has been held to permit such an

expansive exercise of creative legislative power. Far from being narrowly construed, should this Court adopt the Governor's view of the line-item veto power, it would represent a significant departure from the understanding of the veto as it has always been in this country.

ARGUMENT

I. The Governor may not use the line-item veto on legislative reductions to prior-enacted appropriations.

The line-item 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).) In exercising the veto, "the Governor acts in a legislative capacity," and "may act only as permitted by the Constitution." (*Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1089.) It may be used "'only when clearly authorized by the constitution, and the language conferring it is to be strictly construed.'" (*Harbor*, 43 Cal.3d at 1088 (quoting *Colorado General Assembly v. Lamm* (Colo. 1985) 704 P.2d 1371, 1386).)

The first question before this Court is whether legislative reductions to a previously enacted budget constitute items of appropriation subject to the Governor's line-item veto. The Governor offers no California authority, nor any reasonable policy argument that supports an affirmative answer to this question.

A. The decisions of this Court do not support the Governor's definition of an appropriation.

Though this Court has offered guidance as to what constitutes an "item of appropriation," never has it held, as the Governor asserts, that a reduction to previously appropriated

spending equals a new 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, 305, the Court concluded that "add[ing] a specific amount to [an] allowance already made" meets the requirements, and in *Harbor v. Deukmejian*, the Court approved of its earlier definition as a "specific setting aside of an amount, not exceeding a definite sum, for the payment of particular claims or demands." (*Harbor*, 43 Cal.3d at 1089-90.) Notably, an appropriation, once enacted, "cannot be thereafter ***increased***"[1] except by another appropriation. (*Wood*, 192 Cal. at 303.) None of these definitions include the scenario here, where the challenged items are ***decreases*** to prior-enacted budget grants of funding for essential services to disabled adults, sick children, battered women, and other vulnerable Californians.

The Court's decision in *Wood* does not support the Governor's contention that a mid-year legislative ***reduction*** of previously-appropriated funds amounts to an "item of appropriation." *Wood* concerned the passage of the budget bill, which included a proviso that would have compelled the controller to transfer to the director of education, at his request, up to one percent of the budget allotted to another department. (*Wood*, 192 Cal. at 296.)

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[1] All emphasis in this brief is supplied by Petitioners, unless otherwise noted.

The Supreme Court held that this proviso, which "add[ed] an additional amount to the funds already provided" for the Department of Education elsewhere in the bill, constituted an item of appropriation.[2] (*Id.* at 303.) The Court concluded that the Legislature's proposed transfer would have mandated that the additional funds "should be set apart in the treasury and devoted to the payment" of salaries within the Department of Education. (*Id.* at 304.) Thus, the proposal met this Court's prior definition of an appropriation as "an Act by which a named sum of money has been set apart in the treasury . . . which balance cannot thereafter be increased except by further legislative appropriation." (*Id.* at 303.)

In contrast, the provisions vetoed in A.B. 1, pertain to ***reductions*** to existing appropriations, not increases. The sums of money the Governor purports to veto were "set apart in the treasury" in the Budget Bill passed and signed by the Governor, in February 2009, not by A.B. 1 in July.

Because the Governor provides no authority for the proposition that a legislative budget reduction meets any of the Court's prior definitions of an appropriation, he instead conclusively asserts that in A.B. 1, the Legislature has engaged in what he terms "setting aside," "setting apart," "earmarking,"

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[2] Significantly, the rejection of this proviso in its entirety by the Governor, though it was held to be an item of appropriation by the Court, 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.

and "spending commitments." (*See, e.g.*, ABOM at 10, 11, 32.) In doing so, the Governor recognizes this Court's clear direction 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.)

No manner of labeling can alter the fact that the "setting aside" of money as required by the Court, is not done through a spending reduction. Instead the "setting aside" of money for these services which are vital to the disabled, sick, battered, and otherwise vulnerable Californians, was done months earlier, in the Budget Bill, which was signed into law by the Governor. Even the out-of-state authority the Governor cites recognizes this fact. There, the Court noted that reductions to prior appropriations did "not constitute a legislative grant of spending authority, much less state a specified sum of money to be devoted to a specified purpose." (*Rios v. Symington* (Ariz. 1992) 172 Ariz. 3, 9.)

The Arizona Supreme Court's conclusion is consistent with the common sense understanding of what it means to set apart money and authorize spending. The definitional elements were met in the earlier legislation which created the appropriations at issue. (*Id.* at 7-8.) As the grant of authority to spend was given, and the amounts were designated not in A.B. 1 but in the February 2009 Budget Bill, A.B. 1's funding cuts do not constitute items of appropriation.

B. The policy underlying the Governor's power to line-item veto a spending proposal is inapplicable to proposals for legislative budget reductions.

In his Answering Brief, the Governor repeatedly asserts that the line-item veto is a grant of power to control spending. (*See* ABOM 1, 3, 4, 17, 30, 32.) Petitioners do not dispute that the line-item veto permits the Governor the power to act as a check on legislative proposals to expend public money. However, the question before the Court is whether the Constitution grants the Governor the power act as check on legislative proposals ***not*** to spend. Neither the ballot materials to the 1922 amendment to which the Governor cites (ABOM at 4), nor the policy behind the line-item veto suggests that such a check was granted or warranted.

Article III, section 3 of the California Constitution 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) line-item veto powers. As the Governor himself states, "the people gave the Governor the power of the line-item veto in order to control spending." (ABOM at 3-4.)

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.[3]

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

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[3] Because A.B. 1 was passed as an urgency statute, and contained at least four provisions which increased spending, it required passage by a two thirds vote in each house. (Cal. Const., art. IV, §§ 8(d), 12(d).) Just as a two thirds vote does not transform a non-appropriation bill into the budget bill, such a vote does not, as the Governor suggests, make every provision of A.B. 1 an item of appropriation.

Court's history of strictly construing the veto power, the Governor should not be permitted to expand the reach of his legislative power here.

C. The voters have never shown the inclination to give the Governor the power to decide when *not* to spend.

The Governor argues that Petitioners ignore "the plain language of the Constitution and the voters' intent." (ABOM at 1.) Not so. Nowhere in the Constitution or in this Court's holdings has the Governor been given the power to reduce a previously-enacted appropriation. Likewise, the voters have never shown the inclination to grant such a power. Instead, they have repeatedly shown a disinclination to do so.

To back his claim of voter support, the Governor submits ballot materials including the arguments in favor of the 1922 amendment to the Constitution. (ABOM at 4.) But, as discussed, the purpose of the veto is to give "the Governor power to control ***expenditures*** of the state." (*Wood*, 192 Cal. at 305; ABOM 1, 3, 4, 17, 30, 32.) And as with an appropriation, no definition of an expenditure 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.) As a mid-year budget cut does not set aside money, it cannot reasonably be considered a spending proposal. To the contrary, it is a proposal not to spend.

Although the 1922 amendment did not give the Governor the power to reduce or eliminate previously appropriated funds, twice in recent years ballot initiatives were defeated which 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* Steinberg Motion to Intervene, RJN, Ex. F at 25.) These reductions would not have been subject to legislative override. (*Id.*) 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 granted the Governor the limited legislative power to reduce or eliminate ***spending*** proposals made by the Legislature, it is clear that they wish the Governor to have no such power over decisions not to spend.

D. The Governor clouds the issues before the Court by citation to irrelevant statutory and Constitutional provisions.

As he did in his briefing to the Court of Appeal, the Governor tacitly acknowledges that this Court's prior decisions lend no support for the contention that a mid-year reduction to a duly-enacted appropriation itself constitutes an item of appropriation, and instead attempts to support his argument through the application of irrelevant statutory and Constitutional provisions. None of these provisions supports the Governor's novel and expansive view of the veto.

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

The Governor states that the evidence that A.B. 1 contained items of appropriation "is overwhelming." (ABOM at 18.) Indeed, Petitioners do not dispute that A.B. 1 contained at least four provisions which increase prior appropriations, and thus constitute items of appropriations under the prior holdings of this Court. (*See* Opening Brief on the Merits at 27.) This, because of the Constitutional directive that only the budget bill "may contain more than one item of appropriation," (Cal. Const., art IV, § 12(d)) the Governor reasons, A.B. 1 must be a budget bill. (ABOM at 20-21.) But the question of whether A.B. 1 should be classified as a budget bill was not before the Court, and no party sought invalidation of A.B. 1, nor asserted that the two-thirds requirement for passage of a budget bill was not met. 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.

2. The single-subject rule has not been violated.

The Governor's misguided attempt to prove that A.B. 1 is a budget bill seemingly stems from his misreading of case law, which he asserts supports the proposition that "when a budget bill contains provisions that do not constitute appropriations, the single-subject rule is violated and the provisions are invalid."

(ABOM at 21 (citing *Planned Parenthood Affils. v. Swoop* (1985) 173 Cal.App.3d 1187).)

The Governor misreads the Court of Appeal's holding in *Swoop*. In that case, the Court of Appeal invalidated a provision in the Budget Act which effectively amended provisions of the Family Act. (*Id.* at 1201.) Thus, the provision was not germane to the subject of the Budget Act. (*Id.*) That case did not hold, as the Governor suggests, that each and every provision in a budget bill must be an item of appropriation. The Court merely held that all such provisions be germane to the subject of the State Budget.

As such, 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 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.

Importantly, the Governor's confused discussion of this issue bears little or no relevance to the question which is 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 has raised a challenge to A.B. 1 as violative of the single-subject rule, this Court need not consider the issue.

3. Article IV, section 9 cannot transform legislative reductions into items of appropriation.

The Governor argues that in passing A.B. 1, the Legislature effectively "repealed and reauthorized" the appropriations enacted by the Budget Act. (ABOM at 25.) The Governor finds support for this conclusion in Article IV, section 9

of the Constitution, 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 reauthorization 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.) Specifically, the 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.)

As discussed more fully in Petitioners' Opening Brief on the Merits at pages 33-34, the process leading to A.B. 1's passage in response to the Governor's declaration of a fiscal emergency was widely covered by the national and local media. Accordingly, the "specific evil" which the re-enactment rule was adopted to prevent was not a factor, and this Court need not unduly consider the provision.

Moreover, even if applicable, it is clear that section 9 of Article IV does not effect a repeal of the appropriations duly enacted in the Budget Act, and a reauthorization, as the

Governor maintains and 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: "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 . . . ."

This Court has explained that the effect of 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." (*In re Lance W.* (1985) 37 Cal.3d 873, 895.) 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 from 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).)

Petitioners ask this Court to affirm 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.)[4] Such an increase sets aside an ***additional*** amount, and must further authorize the spending of that additional amount "and no more."

Under the interpretation and application of the re-enactment rule which the Governor advances, this Court's holding in *Wood* and its statement in *Harbor*, 43 Cal.3d at 1089-

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

90, that an item of appropriation includes an act which "add[s] any additional amount to funds already provided for" is reduced to mere surplusage. 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, which remain in effect.

4. Article XVI, section 7 and Government Code section 12440 are of no significance to the questions before the Court.

In his Answering Brief, the Governor advances the argument 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 AB 1 are items of appropriation." (ABOM at 22.) In support of this argument, the Governor cites 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. (*Id.* at 22-23.)

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.)

II. The Governor may not use the veto to affirmatively legislate.

In his Answering Brief, the Governor offers no meaningful response to Petitioners' argument that by using his veto to ***increase*** legislative reductions to previously-enacted appropriations he exceeds his power to "reduce or eliminate" an item of appropriation. Instead, seemingly emboldened by the Court of Appeal's decision, the Governor now asserts that he may "eliminate" a legislatively-passed reduction by reinstating the originally-enacted amount, or "reduce" it by ***increasing*** the amount cut by the Legislature. (ABOM at 15-16.) Such a power to rewrite the level of funding up or down as he sees fit is in conflict with any prior interpretation of the veto, and clearly violates the separation of powers.

A. The line-item veto, as are all forms of the veto, is a negative power.

This Court has previously recognized the Governor's veto as a negative power. In *Harbor*, it noted 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.[5] 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.[6] 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

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[5] 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.")

[6] 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.")

the amount appropriated, while approving the remainder. It is, essentially, a "partial" partial veto power. This Court's 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.

One need only consider the result which would have occurred had the Governor vetoed A.B. 1 *in toto* to realize that this distinction is in no way arbitrary, and instead comports with the historical understanding of the veto as a negative power.

It is undeniable 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. 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, the Governor argues that he may permissibly ***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.

B. The Arizona Supreme court's decision in *Rios* does not support the Governor's use of the line-item veto on A.B. 1.

The Governor asserts that the *Rios* case decided by the Arizona Supreme Court presented "a factual setting similar to this case," (ABOM at 13) and that "[b]ecause of [the Arizona Constitution's] similarity to California's line-item veto provisions," the case should serve as "persuasive authority on the 'veto power of the Governor.'" (ABOM at 14 n.8 (quoting *Wood*, 192 Cal. at 301-02).)

But in *Rios*, the Arizona Supreme Court held that the effect of the Governor's use of his line-item veto to "eliminate" a mid-year legislative spending reduction was to restore the funding to

the amounts originally appropriated in the Budget Act. (*Rios*, 172 Ariz. at 11.) Governor Schwarzenegger, though, now argues that "the net effect of the Governor's action in *Rios* was not a controlling factor in the court's opinion, but rather was a consequence of the terms of the line-item veto in Arizona."[7] (ABOM at 15.) "If the provisions of AB 1 at issue here are items of appropriations," the Governor argues, "they are subject to elimination ***or*** reduction by the Governor." (ABOM at 16 (emphasis in original).)

The Governor seemingly believes that he may ***eliminate*** a legislative reduction as the Governor did in *Rios* by reinstating the prior-enacted amount, or ***reduce*** the very same legislative reduction by increasing the amount of the cut. This creative interpretation of the line-item veto not only makes near antonyms of the words reduce and eliminate, but it ignores this Court's direction that the veto power must be narrowly construed, and turns that power on its head.

Of course, the Governor's interpretation cannot be correct. If using the line-item veto to completely eliminate a reduction

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[7] 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. (*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.").)

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.)

Even if this Court holds that a legislative spending reduction constitutes an item of appropriation, as discussed above, if the Governor is permitted to increase the legislative funding reduction, he must be precluded from reinstating an original amount, and vice versa. 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.

CONCLUSION

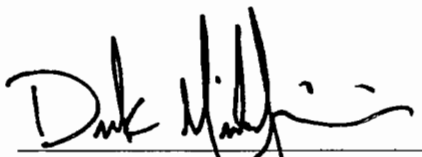
The legislative function of the state is vested in the Legislature; the Governor may wield no more legislative power than that which is explicitly granted to him by the Constitution. In asking this Court to accept his strained interpretation of an item of appropriation, the Governor asks the Court to reject its prior holdings that the veto power must be narrowly construed. In asking the Court to uphold the use of the veto to increase legislative budget reductions, the Governor seeks unprecedented power to affirmatively legislate.

Neither the terms of the veto provision, the prior holdings of this Court, nor the policy underlying the line-item veto warrant such a significant intrusion of the executive into the province of the Legislature. Worst of all, the Governor's first exercise of his newly usurped power would be to injure this 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: July 14, 2010

Respectfully submitted,



Derek Milosavljevic

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CERTIFICATE OF WORD COUNT

The text of this petition consists of 5,802 words as counted by the Microsoft Word program used to generate the Petition.

Dated: July 14, 2010

Respectfully submitted,

Derek Milosavljevic

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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 July 14, 2010, I served a copy of the within document(s):

REPLY 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.

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

Executed on July 14, 2010, at San Francisco, California.

Sarah Farley