No. S181760

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

Petitioners,

v.

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

Respondents;

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

Interveners.

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

REPLY BRIEF OF INTERVENERS DARRELL STEINBERG AND JOHN A. PÉREZ

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INTRODUCTION

The Governor's view of his line-item veto authority extends far beyond the limited legislative role that this Court described in *Harbor v. Deukmejian* (1987) 43 Cal.3d 1078. As the Governor tells it, the Constitution sets him up as the sole guardian of the public fisc, a one-person decision maker authorized to decide how to cut public spending in a time of fiscal crisis.

In order to make that point, the Governor not only ignores this Court's teaching in *Harbor*, but he insists on each of the following propositions, not one of which is supportable as a matter of law:

- To constitute an item of appropriation, a provision of a bill need not actually make an appropriation. According to the Governor, any argument to the contrary is mere wordplay.
- Because any reduction to an existing appropriation is a new appropriation, the Governor may reduce or eliminate that reduction, thereby *increasing* state spending beyond what is proposed in the bill itself.
- The re-enactment rule of article IV, section 9 of the Constitution means that an amendment of an existing law has the substantive effect of repealing that law and enacting all of its remaining provisions ab initio.
- The single subject rule of article IV, section 9 of the Constitution requires that every provision of a budget bill be an item of appropriation.
- Because any reduction to an existing appropriation is a new appropriation, article IV, section 12(d) of the Constitution

requires a two-thirds vote of the Legislature in order to make the reduction.

The Governor asks this Court to endorse these propositions and others that appear throughout his brief, because they are critical to the validity of the line-item vetoes at issue in this case. To do so would require this Court to assume that legislative action reducing a grant of spending authority amounts to new authority to spend. That assumption in turn would mean that the Legislature will have to muster a two-thirds vote in order to make any reductions in spending, but the Governor would be free to eliminate or increase those reductions at will.

Such a construct makes no sense. Surely the voters who enacted the two-thirds vote requirement in article IV, section 12 would have balked at the idea that they were not only making it harder for the Legislature to increase spending but making it equally hard for it to *decrease* spending as well. Yet the Governor readily acknowledges that is the inevitable consequence of his argument that a reduction to an appropriation is an item of appropriation subject to his line-item veto.

The Governor also acknowledges that his interpretation of the line-item veto would actually allow him to *increase* spending beyond that which the Legislature intended to allow. Under the Governor's theory, a reduction to an item of appropriation can either be "reduced" – *i.e.*, made larger – or eliminated. If it is eliminated, the item reverts to the higher amount originally passed by the Legislature, thus thwarting any intent on the part of the voters that the line-item veto would be used to control state spending.

None of this comports with either the Constitution or common sense. Article IV, section 10 does not say that the Governor can

enlarge a legislative reduction of an appropriation. It says that he "may reduce or eliminate one or more items of appropriation," a phrase that manifestly applies only to a grant of spending authority. In keeping with the nature of the veto as a negative power, the Governor had the authority to reduce or eliminate each of the items of appropriation at issue here when they were first passed in February, 2009. He did not have the authority to enlarge the legislative reductions made in July, however. Those legislative reductions did not authorize spending; they did just the opposite. Because they were not "items of appropriation," the provisions of A.B. 1 at issue here were not subject to the Governor's line-item veto.

The Governor characterizes these distinctions as "sleight-of-hand," "wordplay" and "misdirection." At the same time, he argues that the term "appropriation" encompasses *reductions* in spending authority, an effect in law that is diametrically opposite to the effect of an appropriation. If there is wordplay afoot here, it is the Governor who is engaging in it, transforming one thing into another. In doing so, he reaches beyond the boundaries of his constitutional authority and invades that of the Legislature, which he cannot do.

ARGUMENT

I.

THE GOVERNOR'S LINE-ITEM VETO POWER DOES NOT EXTEND TO REDUCTIONS IN EXISTING APPROPRIATIONS

A. The Governor's Veto Authority Must Be Strictly Construed

Although he describes this Court's decision in *Harbor v. Deukmejian* as "seminal,"[1] the Governor has very little to say about it. In fact, he never even addresses this Court's holding that "in exercising the power of the veto the Governor may act only as permitted by the Constitution" and that the veto power is *not* to be liberally construed. (*Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1088-89, fn. 9 ["*Harbor*"].)

Ignoring the Court's holding entirely, the Governor repeatedly argues that his line-item veto authority must be stretched to include a reduction in an item of appropriation because there is nothing in the Constitution to prevent that. (*See* Ans. Br. at 2, 16.) The Governor has it backwards. The question is not whether there is anything in the Constitution that prevents him from using his veto authority in this unprecedented fashion, but whether there is anything that *permits* him to do so.

From the early beginnings of our democracy, the Governor's power to veto legislation has been a limited exception to the separation of powers decreed by article III, section 3 of our Constitution. Thus, in *Harbor,* this Court described its earlier ruling in *Lukens v. Nye* (1909) 156 Cal. 498:

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[1] Governor's Answering Brief on the Merits ("Ans. Br.") at 7.

> We held for plaintiffs, stating that in exercising the veto power the Governor acts as a "legislative instrumentality," and as a special agent with limited powers, and that he may therefore act only as the Constitution allows. Except for a bill containing several items of appropriation, he may not modify or change the effect of a proposed law "or . . . do anything concerning it except to approve or disapprove it as a whole."
>
> (43 Cal.3d at 1087-1088.)[2]

The Court went on: "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." (*Id.* at 1089.)

Thus, any inquiry into the meaning of the term "appropriation" for purposes of the line-item veto must be conducted with this Court's admonition in mind: Unless the Constitution expressly permits the Governor to reduce or eliminate a provision of a bill passed by the Legislature, he cannot do it. As demonstrated below, the broad meaning that the Governor would pour into the term "item of appropriation" cannot be squared with this Court's holding in *Harbor* and other cases that the Governor's right to participate in the legislative process is a limited one that must be strictly construed.

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[2] The *Harbor* Court expressly rejected the argument that *Lukens* was inapposite because the Governor did not try to exercise his veto in that case, saying that "the principles set forth there are clearly correct." (43 Cal.3d at 1088.)

B. An Item of Appropriation Must Include a Grant of Authority to Spend a Specified Amount of Public Funds For a Designated Purpose

Although there are very few things upon which the parties to this case all agree, there is universal consensus that the case turns on the meaning of the words "items of appropriation" within article IV, section 10(e). The Governor insists that the term "items of appropriation" is not limited to situations in which the Legislature is increasing spending, but that it includes reductions in spending as well. (Ans. Br. at 9-12.) He is wrong.

1. California case law defining an item of appropriation

First, the Governor mischaracterizes Interveners' and Petitioners' position as limiting the definition of an appropriation to one that "'adds an additional amount to the funds already provided,'"[3] although a bill that would amend an existing appropriation to that effect is certainly one example of an appropriation.

Second, the Governor is mistaken when he argues that in *Harbor,* "the Court considered the addition of funds as merely one of three possible tests for defining an item of appropriation, not an essential requirement." (Ans. Br. at 10.) Here is the paragraph in *Harbor* to which the Governor refers:

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

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[3] Ans. Br. at 10, quoting *Harbor*, 43 Cal.3d at 1089.

As is clear from the context, that paragraph followed the Court's review of various definitions of the term "item of appropriation" used in other cases:

> The term has been defined in various ways. *Wood v. Riley, supra,* 192 Cal. 293, 303, defines it as "a specific setting aside of an amount, not exceeding a definite sum, for the payment of certain particular claims or demands . . . not otherwise expressly provided for in the appropriation bill." It "adds an additional amount to the funds already provided."
>
> (*Id.*)

The Court went on to examine definitions from other jurisdictions:

> In *Bengzon* the term was described as a bill whose "primary and specific aim . . . is to make appropriations of money from the public treasury." (299 U.S. 410 at p. 413 [81 L.Ed. 312 at p. 314].) Other cases employ somewhat different definitions (e.g., *Jessen Associates, Inc. v. Bullock* (Tex. 1975) 531 S.W.2d 593, 599 ["setting aside or dedicating of funds for a specific purpose"]; *Commonwealth v. Dodson* (1940) 176 Va. 281 [11 S.E.2d 120, 127] ["an indivisible sum of money dedicated to a stated purpose"]).
>
> (*Id.*)

By examining these various definitions, the Court was not setting up three separate tests, any one of which would qualify a bill provision as an item of appropriation. If that were the case, the second definition – a legislative act that "make[s] appropriations of money from the public treasury"[4] – would be nothing more than a tautology. What the Court was looking for were the essential elements that go into that

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[4] 43 Cal.3d at 1089.

definition: the setting aside of a specific sum of money dedicated to the payment of a claim or other specified purpose. The Court made this clear later in its opinion when it stated that "no definition of that term – including the one employed in *Wood* [*v. Riley*] itself – can reasonably embrace a provision . . . which does not set aside a sum of money to be paid from the public treasury." (*Id.* at 1092.)

One essential element of an item of appropriation is therefore the act of setting aside a sum of money to be paid from the public treasury. This Court has also held that an item of appropriation must include the purpose for which the money may be spent. (*Stratton v. Green* (1872) 45 Cal. 149, 151.) Putting these concepts together, the fundamental constitutional meaning of the term is clear: a grant of the authority to spend a specified amount of public funds for a designated purpose. If a bill contains a provision that, if enacted, would have the legal effect of granting this spending authority, it thereby makes an appropriation; if there is no such provision, it makes no appropriation.

In amending a previously enacted appropriation, a subsequent bill may itself expand upon existing spending authority and thus make an appropriation pursuant to a provision that would, for example, "add any additional amount" to that appropriation, expand the purposes of the existing appropriation or extend its duration. The Court's definition in *Harbor* provides no support, however, for the Governor's claim that a provision of a subsequent bill that narrows the scope of existing spending authority by *reducing* the amount provided for constitutes an appropriation.

The other cases cited by the Governor are not to the contrary. The Governor places considerable emphasis on *Wood v. Riley* (1923) 192 Cal. 293. The case confirms the definition of an appropriation as "a

specific setting aside of an amount, not exceeding a definite fixed sum, for the payment of certain particular claims or demands . . . ." (*Id.* at 303.) The Governor acknowledges that definition, yet he contends that *Wood v. Riley* also teaches that the term must be read expansively in order to prevent the Legislature from circumventing the Governor's veto power. (Ans. Br. at 11-12.)

This Court expressly rejected the same argument in *Harbor*, where then-Governor Deukmejian insisted that the Legislature had done the same thing, citing *Wood v. Riley* and pointing to the same language that the present Governor relies on here. (*Harbor*, *supra*, 43 Cal.3d at 1090-1092.) It was in response to this argument, to which the Court devoted nearly three pages, that the Court held that no definition of the term "'item of appropriation' . . . can reasonably embrace a provision like section 45.5, which does not set aside a sum of money to be paid from the public treasury." (*Id.* at 1092.) The Court went on:

> The fact that in *Wood* the term "item of appropriation" was construed in such a way as to facilitate the Governor's power to veto a portion of the budget bill which could reasonably be encompassed within the meaning of that term does not provide authority for holding, as respondents suggest, that the Governor may veto part of a general bill – a power denied him by the Constitution – in order to foil an alleged legislative attempt to evade the veto.
>
> (*Id.*)[5]

---

[5] The Court's reference to "an even-handed respect for the executive and legislative branches of government," on which the Governor also relies, appeared in the Court's discussion of the appropriate remedy, not its discussion of the Governor's argument about legislative attempts to avoid the gubernatorial veto. (43 Cal.3d at 1102.)

Harbor not only rejected the Governor's argument that his line-item veto power should be liberally construed as a general matter,[6] but it also rejected his argument, based on *Wood v. Riley*, that the term "item of appropriation" must be defined expansively in order to prevent the Legislature from circumventing the gubernatorial veto power.[7]

2. The Arizona Supreme Court's decision in *Rios v. Symington*

Unlike Petitioners and the Governor, Interveners agree with the Court of Appeal that the Arizona Supreme Court's decision in *Rios v. Symington* adds little to the decision here, for two reasons.[8] First, and most importantly, the Arizona Supreme Court's decision is premised on a constitutional analysis that seeks to expand, rather than narrow, the Governor's role in the legislative process. Second, because the line-item veto in Arizona allows the Governor to eliminate, but not to reduce, an item of appropriation, the Arizona Supreme Court had no occasion to consider the consequences that would result if its approach were applied to California law.

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

[7] Nor did the Court confirm "the broad sweep of the Governor's line-item veto power" in *Board of Fish and Game Commissioners of California v. Riley* (1924) 194 Cal. 37, as the Governor also claims. (Ans. Br. at 13, fn. 7.) The Governor's line-item veto merely formed the predicate for the question before the Court, which involved the validity of a statute that allowed the Board of Control and the Governor to authorize payment of deficiency amounts from a continuously appropriated special fund. (*Board of Fish and Game Commissioners*, *supra*, at 48-49.)

[8] Slip Opn. at 17-18, fn. 12, citing *Rios v. Symington* (1992) 172 Ariz. 3 [833 P.2d 20] ("*Rios*").

According to the Governor, the court's analysis in *Rios* is persuasive here because of similarities between the line-item veto provisions in the constitutions of the two states. (Ans. Br. at 14, fn. 8.) But the Arizona Supreme Court itself has observed that there are "considerable difference[s]" among the various state courts over how to interpret very similar line-item veto provisions. (*Fairfield v. Foster* (1923) 25 Ariz. 146, 151 [214 P. 319, 321].) These cases thus turn on the governing perspective in each state concerning issues like legislative prerogatives and gubernatorial authority. (*Id.*; *see also* Fisher & Devins, *How Successfully Can the States' Item Veto Be Transferred to the President?* (1986) 75 Geo. L.J. 159, 167.) As to that essential issue – the proper balance of power between the legislature and the executive – Arizona could not be more different from California.

This Court has expressly held that California's separation of powers clause prevents an expansive reading of the Governor's use of legislative power through the line-item veto. (*See Harbor, supra,* 1087-1088; *Lukens v. Nye*, *supra*, 156 Cal. at 501-502.) As discussed above, that means that courts must necessarily hew closely to the definition of an appropriation when deciding whether a particular legislative enactment is subject to the line-item veto, so as not to broaden the range of enactments subject to the Governor's veto power.

The Arizona Supreme Court took precisely the opposite approach in *Rios*. It rejected the need to "construe the Governor's line item veto narrowly and strictly," opting instead to construe it robustly to protect the Governor's power in the appropriations process. (*Rios*, *supra*, 833 P.2d at 26.) Indeed, the Arizona Court's perceived need to protect the executive role in the legislative process pushes that Court's definition of

"appropriation" far beyond anything found in the case law of this State. The Arizona Supreme Court begins with a familiar definition of "appropriation" – the setting aside of a certain sum of money for a specified object (*id.* at 23) – but it expands that definition to embrace any item that amends an appropriation, regardless of whether the amendment itself appropriates. (*Id.*, at 25-26.) That directly contradicts the narrow construction appropriation embraced by this Court, which has rejected the notion that a general bill is converted into an appropriation bill merely because it "requires the expenditure of funds" within the scope of a previously enacted appropriation. (*Harbor*, *supra*, 43 Cal.3d at 1087, 1089-1090.)

Thus the *Rios* court found that legislative provisions that merely transferred money from various special funds to the general fund "are not clearly 'items of appropriation,'" because they did not grant spending authority or devote a specified sum of money to a specified purpose. (*Rios*, *supra*, 833 P.2d at 26.) Nevertheless, the court allowed the Governor's exercise of the line-item veto on the transfers because, in its view, allowing the transfers to escape the Governor's line-item veto authority would not "reflect[ ] the proper interplay between the legislative and executive branches." (*Id.*) It affirmed the Governor's vetoes of these items because "[t]o hold otherwise . . . would seriously limit the Executive's constitutional role in the appropriation process." (*Id.*)

The *Rios* court applied similar logic to approve the Arizona Governor's vetoes of decreases in previous appropriations. Without actually deciding that a cut to a prior appropriation itself constitutes an appropriation, the court declared that it was necessary to allow the Governor to veto this "amendment of an appropriation" to prevent the

Legislature from "circumvent[ing] the Governor's veto power and encroach[ing] upon the Executive's constitutional right to participate meaningfully in the appropriations process." (*Rios*, *supra*, 833 P.2d at 28.) As demonstrated above, that is precisely what this Court declined to do in *Harbor.*

Second, the line-item veto at issue in *Rios* allows the Governor to eliminate an item of appropriation, but does not allow him or her to reduce that item. The result of the Governor's veto in *Rios* was to undo the Legislature's cut and "to reinstate the amount *originally appropriated by the Legislature,*" *i.e.*, the amount that the Legislature had appropriated prior to the amendment that reduced that amount. (*Rios*, *supra*, 833 P.2d at 28, emphasis in original.) That is not, of course, what happened here. Here, the Governor *increased* a reduction made by the Legislature, which is a different thing entirely. The action of the Arizona Governor was true to the fundamental principle that "then, as now, the effect of the veto was negative, frustrating an act without substituting anything in its place." (*Harbor, supra,* 43 Cal.3d at 1085.) Here, the effect of the Governor's veto is to extend the legislative power further than it was intended to go by making deeper cuts than those made by the Legislature. Nothing in *Rios* or in California case law supports such a result.

3. The plain language of the Constitution

Next, the Governor insists that "the plain language of the Constitution refers only to 'items of appropriation,' and it is not limited to increases or decreases thereof." (Ans. Br. at 12.) For this proposition, he cites *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, and Black's Law Dictionary, which refer respectively to a legislative body's 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,'" or the "setting aside [of] a sum of money for a public purpose." (*Planned Parenthood Affiliates*, 173 Cal.App.3d at 1198, quoting *Stratton v. Green*, *supra*, 45 Cal. at 151; Black's Law Dict., 8th ed. 2004.)

The claim is puzzling, because the Governor makes no attempt to show how a reduction in an existing appropriation qualifies as a legislative act that "sets aside" money to be used for a particular purpose. That act occurs at the time the appropriation is made, not when it is reduced. The money has already been set aside in the public treasury. The act of reducing it is the antithesis of setting money aside, because it undoes part of the original act.

The Governor's citation to the definition in article XIII B of the California Constitution is equally puzzling. As Interveners noted in their opening brief, article XIII B is one of a number of constitutional provisions that uniformly refer to an appropriation as an authorization to *spend*, as opposed to the withdrawal or narrowing of that spending authority. Article XIII B, section 8 defines "[a]ppropriations subject to limitation" as "any authorization to expend during a fiscal year . . . ." (Cal. Const., art. XIII B, § 8(a).) Once again, the Governor offers no explanation as to why an act reducing a state agency's authority to spend can be equated to an "authorization to expend" when that authorization had occurred six months earlier pursuant to a separate enactment.

The Governor also points to the ballot materials for the 1922 amendment that allowed him not only to eliminate one or more items of appropriation but to reduce them as well. (Ans. Br. at 13.) The Governor argues, "To carry out the intent of the voters in authorizing the Governor to make deeper cuts than the Legislature when he deems it necessary, the

Governor's authority must include 'the right to object to the expenditure of money for a specified purpose and amount, without being under the necessity of at the same time refusing to agree to another expenditure which met his entire approval.'" (*Id.*, quoting *Wood v. Riley*, *supra*, 192 Cal. at 304.)

The Governor misses what the 1922 amendments were all about. For the first time in California history, those amendments imposed a yearly budget process to govern state spending. The amendments did not address the issue of mid-year budget cuts at all. Instead, they were designed to give the Governor authority to reduce or eliminate legislative proposals to grant *new* spending authority, either in the yearly budget or in appropriations made afterward. To argue, as the Governor does, that the amendments authorized him "to make deeper cuts than the Legislature when he deems it necessary" is simply not true. The amendments merely allowed the Governor to reduce, rather than eliminate, an item of new spending passed by the Legislature. They said nothing about allowing him to legislate affirmatively by making deeper cuts to a proposed reduction of existing spending authority whenever he "deems it necessary."

Thus, it was and is only new spending authority to which the line-item veto applies. This Court described what that means long ago in words that are still applicable today:

> Appropriations are made, and can only be made, by the legislature. The constitution has prescribed no set form of words in which it is to be done. All that is required is a clear expression of the legislative will on the subject. . . . "An appropriation of the money to a specific object would be an authority to the proper officers to pay the money."
>
> (*Proll v. Dunn* (1889) 89 Cal. 220, 226-227, quoting *Ristine v. State of Ind.* (1863) 20 Ind. 328.)

Accordingly, any bill containing a provision that has the legal effect of granting the authority to expend specified public funds for a designated purpose makes an appropriation, and such a provision falls within the scope of the Governor's line-item veto power. The question of whether a bill provision makes an appropriation is driven by this functional standard – *not*, as the Governor would have it, by the form of the wording granting the authority, or by whether the provision in question adds a new statute or amends an existing statute. For example, chapter 1645 of the Statutes of 1990 (A.B. 4325) added chapter 4.3 (commencing with section 1400) to division 2 of the Fish and Game Code, establishing the Inland Wetlands Conservation Program. As part of that chapter, sections 1430 and 1431 established the Inland Wetlands Conservation Fund to carry out the program and continuously appropriated the money in the fund for those purposes. That chapter has been subsequently amended by a bill that did not make an appropriation. (Stats. 1995, ch. 28 (AB 1247).) Thus, consistent with the purpose of section 10(e) of article IV as discussed above, it is the substantive question of whether a provision has the effect in law of granting new spending authority that triggers the application of the line-item veto power.

C. The Re-enactment Rule Does Not Turn a Reduction in Spending Authority Into an Item of Appropriation Subject to the Line-Item Veto

Unable to transform a reduction in spending authority into an authorization to spend, the Governor claims that by re-opening the Budget Act, the Legislature engaged in the act of appropriating. (Ans. Br. at 19.) He argues that the reductions contained in A.B. 1 are subject to the re-enactment rule contained in article IV, section 9, which provides that "[a]

section of a statute may not be amended unless the section is re-enacted as amended," and therefore he may use his line-item veto on the amended appropriations as if they were newly enacted. (Ans. Br. at 25-26.)

Interveners addressed this point in their opening brief, but the Governor makes no response. (*Compare* Interveners' Br. at 29-31 *with* Ans. Br. at 25-27.) Specifically, the Governor has not a word to say about the fact that an item of appropriation is not a "section of a statute" within the meaning of article IV, section 9 or that application of the re-enactment rule to A.B. 1 would gravely undermine the purpose of that provision by burying the Legislature's reductions among the thousands of items in section 2.00 of the Budget Act.

Thus, the Governor's view misses the point that the sole purpose of the re-enactment rule is to display the existing law and the amendments proposed thereto by a bill making an amendment, "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." (*American Lung Assn. v. Wilson* (1996) 51 Cal.App.4th 745, 749, citation omitted.) There is no suggestion in California case law that compliance with the re-enactment rule in section 9 of article IV constitutes a substantive repeal and replacement of the existing law being amended. To the contrary, California statutory law and judicial decision specify 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. (Gov. Code, § 9605; *In re Lance W.* (1985) 37

Cal.3d 873, 895.)[9] The California courts have held that even when a statute is actually repealed and re-enacted, if the re-enactment is simultaneous and in substantially the same terms, only the provisions omitted by re-enactment are deemed to be substantively "repealed," and the courts will construe the unchanged provisions as being continuously in force, such that "the new act should be construed as a continuation of the old with the modification contained in the new act." (*In re White* (2008) 163 Cal.App.4th 1576, 1581-1582, citing *Bear Lake & River Waterworks & Irrigation Co. v. Garland* (1896) 164 U.S. 1, 11-12; *see also Perkins Manufacturing Co. v. Clinton Construction Co. of Cal.* (1930) 211 Cal. 228, 237-238.)

These principles are directly applicable to the A.B. 1 provisions in question. The amendments made by A.B. 1 did not repeal the spending authority that was granted in the Budget Act of 2009, meaning that the provisions granting spending authority have been continuously in force from the effective date of the Budget Act of 2009. Thus, while appropriations made by the Budget Act of 2009 have been amended by A.B. 1, and it is the amended amounts against which the Controller may draw warrants to fund the purposes designated by the Budget Act of 2009,

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[9] The Governor seriously mischaracterizes this Court's language in *In re Lance W.*, when he claims that the Court "cautioned against applying section 9605 in a manner 'inconsistent with article IV, section 9'" or that the Court said that the "'only effect of section 9605 is to avoid an implied repeal and re-enactment of unchanged portions of an amended statute, ensuring that the unchanged portion operates without interruption.'" (Ans. Br. at 27, quoting *In re Lance W., supra,* 37 Cal.3d at 895.) In each case, the language quoted above was the Court's description of the position taken by an amicus, not the position of the Court itself.

it does not follow that spending authority has thereby been granted by A.B. 1. Rather, under the well-settled case law noted above, the only effect of A.B. 1 was to reduce the scope of that spending authority. As a matter of law, the spending authority, as so reduced, has existed since the enactment of the Budget Act of 2009.[10]

The Governor quotes a paragraph from the Court of Appeal's opinion rejecting the concept that the act of setting aside could be separated from the amount of the appropriation, saying that "'the "setting aside" and the "amount" thereof are fundamentally indivisible.'" (Ans. Br. at 26, quoting Slip Opn. at 26-27.) As the court put it, "The 'spending authority' granted by a proposed 'item of appropriation' is the *combination* of a setting aside of a designated sum *and no more,* for a particular purpose." (Slip Opn. at 27, emphasis in original.)

Interveners do not quarrel with the court's proposition. When an appropriation is made, the "setting aside" and the amount are indivisible. One cannot set aside money without knowing the amount. But what happens when the Legislature wants to *reduce* the amount previously set aside? Part of the amount set aside remains and part has been taken away. Nothing new has been set aside or authorized for expenditure and that is the fundamental flaw in the Governor's argument.

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[10] Likewise, pursuant to these principles, the effect in law of a technical, nonsubstantive amendment to an item of appropriation is not a new grant of that spending authority.

D. A.B. 1 Was Titled an Appropriations Bill Because It Contained Some Items That Authorized New Spending

The Governor points to the title of A.B. 1, its digest, its digest key and various of its provisions to support his argument that A.B. 1 in fact contains appropriations. Interveners do not disagree. A.B. 1 does contain provisions that make appropriations and those provisions are subject to the Governor's line-item veto power. That does not mean, however, that every provision in A.B. 1 must be an appropriation. One need only look at two of the provisions of the bill to understand the difference. A.B. 1's amendment of Item 4265-111-0231 for "local assistance, Department of Public Health" is a good example of a true item of appropriation, because it increased the amount of the item from $47,354,000 as originally enacted in February, 2009 to $54,154,000. The Governor exercised his line-item veto to reduce the item to its original amount, $47,354,000.[11] No one questions his authority to do this.

The reductions at issue here read quite differently, however. 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 $9,483,000.
>
> (Interveners' RJN, Exh. B at 540.)

Interveners have never disputed the fact that A.B. 1 contained some items of appropriation that were subject to the Governor's line-item veto. It does not follow, however, that simply because a substantive bill

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[11] Declaration of Jeffrey Ball in Support of Interveners' Request for Jud. Notice, Exh. A at 321, Exh. C at 200, Exh. B at 4 [veto message].

contains an appropriation and the digest reads "Appropriations: Yes," that every provision of that bill is an item of appropriation. (*See, e.g.,* Senate Bill No. 1133 (2005-2006 Reg. Sess.) [creating among other things the Quality Education Investment Act program and adding nine sections to the Education Code, only one of which contains appropriations].)[12] In order to be an appropriation, more is needed than that a provision appears in a bill that is keyed as an appropriation bill; the provision must meet the definition discussed at length above. If it does not, then the line-item veto is inapplicable.

The Governor also argues that A.B. 1 must be a budget bill, because if it were not, then it would violate the single subject rule and the rule that no bill, other than the budget bill, may contain more than one item of appropriation. (Ans. Br. at 20, citing Cal. Const., art. IV, §§ 9 & 12(d).) Once again, Interveners addressed this argument in their opening brief, but the Governor makes no attempt to respond to it. (*See* Interveners' Br. at 26-27, fn. 15.)

The Governor's argument depends on the assumption that if a provision is in a budget bill, it must be an item of appropriation. The Governor relies on *Planned Parenthood Affiliates v. Swoap*, *supra*, 173 Cal.App.3d at 1199, which cited the ruling of this Court in *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 394, quoting 64 Ops.Cal.Atty.Gen. 910, 917 (1981), for the principle that "'the budget bill may deal only with the one subject of

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[12] The digest key for this bill can be found at *www.leginfo.ca.gov* by choosing the 2005-2006 legislative session and entering the appropriate bill number.

appropriations to support the annual budget,'" and thus "'may not constitutionally be used to grant authority to a state agency that the agency does not otherwise possess'" or to "'substantively amend[ ] and chang[e] [e]xisting statute law.'" Both of these cases held that the single subject requirement precludes the Budget Act from amending substantive statutory law, but neither of them suggested that *every* provision of a budget bill must make an appropriation in order to satisfy the single subject requirement.

Third, as noted in Interveners' opening brief, the subject of the Budget Act for purposes of the single subject rule is the broader term "*fiscal* policy." (*Cal. Labor Federation, AFL-CIO v. Occupational Safety & Health Stds. Bd.* (1992) 5 Cal.App.4th 985, 995, fn. 9, rehg. den. & opn. mod. (May 21, 1992), emphasis in original.) Consistent with this view, each annual budget bill passed by the Legislature and approved by the Governor contains numerous provisions that authorize fund transfers, impose reporting requirements, limit expenditures that are authorized elsewhere and otherwise relate to the appropriation of funds without themselves making an appropriation. (Intervenors' Br. at 46.) *Bengzon v. Secretary of Justice of the Philippine Islands* (1937) 299 U.S. 410, on which the Governor relies, made the same point, applying the line-item veto power to an "item of an appropriation bill" which, according to the court, "obviously means an item which in itself is a specific appropriation of money, not some general provision of law which happens to be put into an appropriations bill." (*Id.* at 414-415.) Likewise, budget bills in this State, including A.B. 1, routinely have provisions that, although contained in a bill that makes appropriations, do not themselves make an appropriation of money and, therefore, are not subject to the line-item veto

power.[13] As noted above, courts have held that these provisions, which are generally known as "control language," may not amend substantive law, because to do so would violate the single subject rule. (*See, e.g., Planned Parenthood Affiliates v. Swoap, supra,* 173 Cal.App.3d at 1200-1201.) Even the Governor has not claimed that the reductions at issue in this case amended substantive law, however, and the single subject rule has no relevance here.

E. The Relief That Interveners Seek Is Not Inconsistent With Their Arguments That The Line-Item Vetoes Are Invalid

The Governor argues at length that the relief sought by Interveners and Petitioners demonstrates that the reductions at issue here were in fact items of appropriation subject to the line-item veto. (Ans. Br. at 21-23.) The Governor quotes Petitioners' prayer for relief, which asks that "'the moneys appropriated in the Budget Act of 2009, as amended and supplemented by A.B. 1, and excluding the Governor's purported vetoes thereto, be disbursed and continue to be disbursed as directed.'" (St. John's Petition for Writ of Mandate at 18, quoted in Ans. Br. at 22.) The Governor then argues that unless the provisions of A.B. 1 that Petitioners seek to enforce contain appropriations, the Controller cannot issue warrants based on those provisions. (Ans. Br. at 22.)

At the outset, Interveners' prayer for relief reads very differently from that of Petitioners. It asks:

> That this Court issue an alternative writ of mandate, or alternatively, issue a peremptory writ of mandate in the

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[13] As noted in Interveners' opening brief at p. 47, the Governor claimed the right to veto similar language in A.B. 1, without changing the amount that language addressed.

> first instance, prohibiting respondents from giving any force or effect to the line-item vetoes purportedly issued by respondent SCHWARZENEGGER on July 28, 2009 that purport to make additional funding cuts as set forth in paragraph 11 above . . . .
>
> (Interveners' Petn. for Writ of Mandate at 11.)

Second, the Governor is simply wrong when he asserts that "[i]n seeking payments from the Controller from state funds under the terms of AB 1, Petitioners and Interveners implicitly acknowledge that the provisions of AB 1 are items of appropriation." (Ans. Br. at 22.) Petitioners' prayer for relief did not seek payments "under the terms of A.B. 1;" it sought them under "the Budget Act of 2009, as amended and supplemented by A.B. 1, and excluding the Governor's purported vetoes thereto . . . ." (St. John's Pet. for Writ of Mandate at 18.) Without the February Budget Act, the spending authority would not exist, and for the same reasons discussed above with respect to the re-enactment rule, A.B. 1's amendments did not confer new spending authority. Thus, both prayers for relief are perfectly consistent with the argument that the reductions at issue here are not items of appropriation.

II.

THE GOVERNOR'S LINE-ITEM VETOES VIOLATE THE FUNDAMENTAL PRINCIPLE OF SEPARATION OF POWERS

Both sides view this case as one involving the separation of powers and only one side can be right. Either the Legislature controls the power of the purse, with the Governor playing an important but limited role, or the Governor controls the process, as he claims in his brief. The Governor describes himself as "the final authority on state spending" (Ans. Br. at 32) and insists that:

> In times when programs and services are being cut, the decisions about how much and where to cut are central to the appropriations process. The Governor's role is crucial during this process, and he must be allowed to utilize every tool provided him by the people through the Constitution.
>
> (*Id.* at 17.)

When they passed Proposition 58 in 2004, the people of California described in detail the tools they were willing to provide the Governor to deal with a fiscal crisis. Those tools included calling the Legislature into special session, a requirement to submit legislation for consideration and a deadline within which the Legislature had to act. (Cal. Const., art. IV, § 10 (f).) They did not include the power to make "decisions about how much and where to cut," as the Governor claims.

The decisions about how much and where to cut existing appropriations belong in the Legislature, which is the representative body equipped to conduct hearings and deliberate over the heart-wrenching choices that mid-year fiscal cuts inevitably entail. As the declaration of Senate President pro Tempore Darrell Steinberg makes clear, prior to passage of A.B. 1, legislative committees listened to hours of testimony from people like Petitioners about the effects of cuts on their lives and the lives of those they serve.[14] After hearing that testimony, the Members of the Legislature used the information they had received from the public to do two things: (1) evaluate the importance that particular programs play in the lives of California's citizens, and (2) evaluate how much those programs could and should be cut in response to the fiscal crisis.

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[14] Declaration of D. Steinberg in Support of Interveners' Pet. for Writ of Mandate, ¶ 7 ["Steinberg Decl."].

(Steinberg Decl., ¶ 8.) Ultimately they passed a bill that no one was happy with, but which two-thirds of the Legislature reluctantly agreed was the best they could do. (*Id.*, ¶ 12.)

The Governor's vetoes destroyed that carefully crafted consensus, substituting one person's preference for a higher budget reserve over the votes of 83 legislators.[15] This was a policy decision that belonged to the Legislature, not the Governor who acted outside of the limited authority conferred on him by article IV, section 10(e). Especially in times of fiscal crisis, "'it 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 of Cal.* (2001) 25 Cal.4th 287, 302, quoting *Anderson v. Superior Ct.* (1998) 68 Cal.App.4th 1240, 1249.)

It is no answer, as the Governor suggests, that the Legislature may override the Governor's vetoes. (*See* Ans. Br. at 3, fn. 3.) Article IV, section 10, subdivision (e) of the Constitution specifically requires that "[i]tems reduced or eliminated shall be separately reconsidered" and must be passed by a two-thirds vote to override the Governor's veto. It is one thing to obtain a super-majority for an urgency clause so that a package of cuts like those contained in A.B. 1 may go into effect right away. It is quite another to obtain a super-majority to approve each one in the face of a gubernatorial veto. When the cuts are contained as part of a package, an

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[15] The Governor acknowledges that his vetoes were intended to increase the state's reserve. (Ans. Br. at 6.) He makes no mention of the fact that earlier in the year, he had exercised his constitutional authority to suspend transfers to a budget stabilization reserve account under article XVI, section 20(e). (*See* Interveners' Br. at 9-10.)

individual legislator can defend a vote that may be unpopular in his or her district as necessary in order to achieve some other objective that was part of the same bill. The equation changes, however, when the legislator is asked to vote separately on the unpopular provision. The original consensus unravels and the two-thirds vote is unlikely to occur.

The result is a significant incursion on the legislative power. By purporting to use his line-item veto on a legislative reduction, the Governor claims he can require a two-thirds majority to override his veto, thus allowing a minority of the members of the Legislature to block the will of the majority. In *County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 344, the Court of Appeal explained the fundamental constitutional issue that arises from such a result. The issue involved a local initiative that would have required a unanimous vote of the Board of Supervisors to override an arbitration panel's compensation decision following a labor dispute. The Court of Appeal held that the initiative violated article XI, section 1, subdivision (b) of the Constitution, which provides that the county "governing body" shall provide for the compensation of county employees. "Governing body," the court held, "means a majority of the governing body." (*Id.* at 344-345.) Although the Constitution does not expressly state that the decision requires only a majority vote, the court said, "no other construction of section 1, subdivision (b) is reasonable, or indeed even permissible." (*Id.* at 344.) As the court explained,

> Permitting a minority of a governing body to set the compensation of county employees by making the arbitration panel's decision binding on the county would be inconsistent with both longstanding statutory rules of interpretation and established California case

> law, as well as deeply offensive to basic principles of representative democracy.
>
> (*Id.*)

The case law upon which the court relied included this Court's decision in *People v. Hecht* (1895) 105 Cal. 621:

> If a majority possesses all the authority of the whole, then such majority must be competent to its exercise. [¶] For all practical purposes the majority becomes the full board. It is the receptacle – the reservoir – of all the authority conferred upon the whole. . . .
>
> (*County of Sonoma v. Super. Ct., supra*, 173 Cal.App.4th at 345, quoting *People v. Hecht, supra*, 105 Cal. at 627, emphasis omitted.)

Thus, by claiming the right to exercise a line-item veto over what constitutionally requires only a majority vote – and by thereby necessitating a two-thirds majority to override him – the Governor seeks to enlarge his own power and invade the province of the Legislature. At the very least, this is the sort of expansive view of the line-item veto power that this Court declined to endorse in *Harbor*.

The Governor will disagree, however, because under his interpretation, a reduction in an appropriation requires the same two-thirds vote that is necessary to authorize new spending. The Governor concedes that this is the case, saying that "the issue raised by Interveners is based on the Constitution itself . . . ." (Ans. Br. at 31.) The issue is only based on the Constitution itself if the Governor succeeds in expanding the definition of "items of appropriation" to include *reductions* in items of

appropriation.[16] In other words, if the gubernatorial veto power is given a liberal construction so that it is allowed to reach beyond the definition of an item of appropriation as a grant of new spending authority, then that definition will necessarily require a two-thirds majority to make reductions in spending as well as to increase it. Only then will it be "based on the Constitution itself," as the Governor claims.

As discussed in Interveners' opening brief, such a result is antithetical to the purpose behind the two-thirds vote requirement to pass an appropriation. (Interveners' Br. at 43-44.) By definition, a two-thirds majority is harder to obtain than a simple majority. It follows, therefore, that the voters who enacted the requirement in article IV, section 12 of the Constitution of a two-thirds majority vote for an appropriation wanted to rein in legislative spending. The fact that they exempted "appropriations for the public schools"[17] from the two-thirds vote requirement demonstrates that they wanted to make it harder to enact spending increases for most things, with the exception of the public schools. The notion that those same voters would have wanted to make it harder for the Legislature to *reduce* spending makes no sense. Yet that necessarily follows from the Governor's expansive reading of the term "items of appropriation" in article IV, section 10. There is no principled way to differentiate between the meaning of the

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[16] As explained in Interveners' opening brief at page 6, footnote 2, A.B. 1 required a two-thirds vote to go into effect immediately and because some of its provisions were in fact new grants of spending authority. Had the Legislature decided to omit those new grants of spending authority and to wait for the bill to go into effect on the 91st day following its passage, it would not have required a super-majority vote.

[17] Cal. Const., art. IV, § 12(d).

term as it is used in section 10 and its meaning in section 12, as the Governor readily admits.

The Governor is equally unconcerned about the other anomalies that will result from his expansive interpretation of section 10, subdivision (e) of article IV. He does not even address the impact such an interpretation will have on future governors' abilities to negotiate with the Legislature when mid-year reductions are needed. As Interveners pointed out in their opening brief, if any change to an existing appropriation allows the Governor to blue-pencil that appropriation, legislators will be extremely reluctant to make even the most necessary of changes. (Interveners' Br. at 45.) They will also be extremely reluctant to reach any agreement with the Governor in a special session called pursuant to Proposition 58, because they know that the Governor can simply ignore that agreement at will. This is especially true if the Governor can eliminate some reductions while increasing others, thus altering the Legislature's plan altogether or even resulting in *more* spending than the Legislature intended.

The result is that the Governor's interpretation not only severely invades the province of the Legislature, but it may be self-defeating as well. Even under the Governor's interpretation, he can only reduce or eliminate an appropriation that the Legislature has amended. If, because of an expanded line-item veto power, the Legislature refuses to reopen appropriations in order to reduce them, the Governor is powerless to act. That kind of constitutional gridlock cannot be what the voters intended when they passed Proposition 58, which the voters were told would "force

the Governor and the Legislature to work together to find a solution" to a fiscal crisis before it is too late.[18]

None of these things needs to occur if the term "items of appropriation" is construed in its ordinary, common sense meaning as referring only to new grants of authority to spend, as opposed to reductions in existing grants of authority. Any broader meaning is precluded not only by the plain meaning of the Constitution and this Court's holding in *Harbor*, but by the fundamental principle of separation of powers.

CONCLUSION

The Governor and the Court of Appeal dismissed Interveners' arguments as "wordplay" and "sleight of hand." Words matter, however; they are both the tools and the substance of constitutional interpretation. In this case, the way three words are construed will have enormous implications for the separation of powers within our government. If the Governor is allowed to treat legislative action that withdraws the authority to spend as if it were a grant of spending authority, he will have succeeded in shifting significant control over the power of the purse from the legislative to the executive branch. That is not what the voters intended

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[18] Supp. Ballot Pamp., Primary Elec. (Mar. 2, 2004), argument in favor of Prop. 58, p. 14, included as Exhibit A to Respondents' Request for Jud. Notice.

when they enacted the line-item veto, nor is it consistent with the plain meaning of the Constitution.

The decision of the Court of Appeal should be reversed.

Dated: July 14, 2010

Respectfully submitted,

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BRIEF FORMAT CERTIFICATION PURSUANT TO
RULE 8.204(c) OF THE CALIFORNIA RULES OF COURT

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 8,069 words as counted by the Microsoft Word 2003 word processing program used to generate the brief.

Dated: July 14, 2010

Karen Getman

PROOF OF SERVICE

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

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

On July 14, 2010, I served a true copy of the following document(s):

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Michael Narciso

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