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

PETITION FOR REVIEW

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STATEMENT OF ISSUES PRESENTED

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

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

WHY REVIEW SHOULD BE GRANTED

In holding that the Governor may use his Article IV, § 10(e) partial veto power upon legislative reductions to duly-enacted appropriations, the Court of Appeal departed from this Court's long line of decisions defining items of appropriation for the purposes of the line-item veto. By further holding that the Governor may increase, rather than reduce or eliminate a budget cut, the appellate court has not only disregarded the California Constitution, but veered from the understanding of the executive veto as a negative check on legislative power — as it has always been — and instead bestowed upon it a creative power. Perhaps worst of all, the Court of Appeal's decision, which would inflict severe and irreparable harm on sick children, disabled adults, battered women, and others of the most vulnerable Californians, would judicially-establish a power which the people of California have twice in recent years rejected at the ballot box.

The separation of powers represents a delicate balance, and the upsetting of that balance is likely to impair the processes by which this and future financial crises affecting California are addressed. As California strains to fit the needs of its people with the constraints of its treasury, mid-year downward adjustment of amounts originally allocated in the Budget Act may become increasingly necessary. Absent this Court's review, when such occasions arise, future Legislatures may refuse to pass a mid-year cut of even one dime from a program of particular importance to their constituents for fear that once the bill reaches the Governor's desk, the entire program may be eliminated. As such, at a time when cooperation and decisive action are most needed, political battles and gridlock are likely to result.

No less troubling is the potential that the Legislature, aware of the potential political backlash that can result from deep cuts being made to programs which are important to their constituents, will make only the barest minimum reductions, and require the Governor to do the rest and absorb the fallout. The Constitution simply doesn't permit the Legislature to punt its power and responsibility to the executive in this manner. Article IV, § 1 vests the power to legislate in the Legislature, and Article III, § 3 makes that power mandatory, not permissive. This Court should grant review to confirm this tenet.

Supreme Court review is necessary to ensure the continued validity of its prior decisions and to re-affirm that the fundamental principle of separation of powers enshrined in Article III, § 3 of the California Constitution retains as much force in times of crisis as it does in times of prosperity. Without this Court's review, the appellate court's holding will stand as a singular and confusing incongruity from the long-standing tenet that the veto is a negative, not creative power.

STATEMENT OF THE CASE

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

On July 1, 2009, the Governor declared a fiscal emergency, and pursuant to section 10, subdivision (f) of Article IV of the Constitution of the State of California, convened the Legislature to meet in an extraordinary session to consider and act upon legislation to address the fiscal emergency.

On July 24, 2009, the Legislature passed Assembly Bill No. 1 of the 2009-10 Fourth Extraordinary Session ("A.B. 1"), which revised, amended

and supplemented the Budget Act. Among the cuts made in A.B. 1, the Legislature greatly reduced funding to critical medical, disability, and domestic violence service programs provided by and to Petitioners.

On July 28, 2009, Governor Schwarzenegger signed A.B. 1 after purporting to make vetoes which have the effect of further reducing the amounts appropriated in the Budget Act by more than $488 million beyond the cuts passed by the Legislature, and harming Petitioners and other similarly-situated Californians.

Petitioners' Petition for Writ of Mandate was filed in the Court of Appeal, First Appellate District on August 12, 2009. Petitioners sought a determination that Governor Schwarzenegger's purported vetoes exceeded his power under Article IV, § 10(e), and were thus null and void. The Petition sought relief which would direct state officials to ensure the continued disbursement of funds appropriated in the Budget Act of 2009 as amended and supplemented in A.B. 1 and to desist from any act enforcing the Governor's purported vetoes of A.B. 1.

On September 14, 2009, the Court of Appeal, First Appellate District, Division Two filed an Order granting the motion to intervene on behalf of Petitioners filed by State Senator Darrel Steinberg, President pro Tem of the California State Senate and Assembly Member Karen Bass, Speaker of the California State Assembly.

On September 21, 2009, the Court of Appeal issued an order for Respondents to show cause why the relief requested should not be granted. Following briefing and oral argument heard on December 15, 2009, the case was submitted.

On March 2, 2010, the Court of Appeal issued its decision, certified for publication, which denied the Petition and held that the Governor's vetoes which increased the budget reductions contained in A.B. 1 did not violate the California Constitution. The Court of Appeal's decision became final on April 1, 2010.

LEGAL DISCUSSION

I. THE COURT OF APPEAL HAS MISAPPLIED THIS COURT'S PRIOR ARTICULATIONS OF ITEMS PROPERLY SUBJECT TO THE LINE-ITEM VETO

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

A. The Governor's Limited Line-Item Veto Power Must Be Strictly Construed.

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

The Governor may veto a bill by "returning it with any objections to the house of origin," and thereafter it will only become law if "each house then passes the bill by rollcall vote entered in the journal, [with] two-thirds of the membership concurring. . . ." Cal. Const, art. IV, § 10(a). "Case law, commentators, and historians have long recognized that in exercising the veto the Governor acts in a legislative capacity." *Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1089. "Therefore, the veto power [may] be exercised 'only when clearly authorized by the constitution, and the language conferring it is to be strictly construed.'" *Id.* at 1088 (internal citation omitted). In addition to the power to veto a bill *in toto*, the line-item, or partial veto permits the Governor to "reduce or eliminate one or more items of appropriation while approving other portions" of a bill. Cal. Const., art. IV, § 10(e).

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

B. The Court of Appeal's Holding That Legislative Reductions to an Enacted Budget Constitute Items of Appropriation Conflicts With This Court's Prior Decisions.

On multiple occasions, California courts have offered guidance as to what constitutes an "item of appropriation." Never before the Court of Appeal's ruling, however, had one held that a reduction to a previously-enacted appropriation constitutes a new appropriation. In *Ryan v. Riley* (1924) 65 Cal.App. 181, 187, the Court of Appeal defined an appropriation as the designation of "a certain sum of money for a specified object in such manner that the executive officers are authorized to use that money and no more for such specified purpose." In *Wood v. Riley* (1923) 192 Cal. 293, 305, this Court concluded that "add[ing] a specific amount to [an] allowance already made" meets the requirements, and in *Harbor v. Deukmejian*, this 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 a ***decrease*** to an already-enacted budget item. Yet, the Court of Appeal concluded that this distinction is irrelevant. (*See* Opn. at 16-17.) The Court ruled that the Supreme Court's decision in *Wood* "does not require, as petitioners and interveners suggest, that ***only*** items that add amounts to funds already provided constitute 'items of appropriation.'" (emphasis in opinion). Petitioners suggest no such thing, and fully recognize this Court's definition of an appropriation as an act "by which a named sum of money has been set apart in the treasury and devoted to a particular claim or demand." *Stratton v. Green* (1872) 45 Cal. 149, 151. It is clear, however, that an increase to a previously-enacted appropriation adheres to this definition, while a reduction does not.

Lacking any precedential support for its holding that a mid-year reduction falls within the parameters of this Court's prior definitions of an appropriation, the Court of Appeal instead flatly declared: "Whether spending authority is increased or decreased, it is still spending authority." (Opn. at 17.) This statement, of course, merely begs the question. In fact,

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

an increase is properly the subject of the line-item veto because it necessarily grants ***new*** or additional spending authority, and thus acts in essence as a new appropriation, while a decrease limits only the amount authorized, which authority otherwise continues to exist. Further, in seeming recognition of this Court's clear directive that no definition of item of appropriation "can reasonably embrace a provision . . . which does not set aside a sum of money to be paid from the public treasury," *Harbor*, 43 Cal.3d at 1092, the Appellate Court concluded that the reductions at issue in A.B. 1, "nevertheless direct the 'specific setting aside of an amount....'" (Opn. at 17) (quoting *Wood*, 192 Cal. at 303-04).

But such determinations fly in the face not only of this Court's prior holdings and the facts of this case, but also of common sense. The "setting aside" of money as this Court has explained is required to appropriate, is not done through a spending ***reduction***. Instead the "setting aside" of money for these vital services provided to the disabled, sick, battered, and otherwise vulnerable Californians, was done months earlier, upon passage of the Budget Act, signed into law by the Governor. Since the grant of authority to spend was given, and the amounts were designated not in A.B. 1, but in the February 2009 Budget Act, A.B. 1's funding cuts do not constitute items of appropriation.

This conclusion is consistent with the ordinary understanding of what it means to "set aside" money. A small child understands that when

she places 75 cents into her piggy-bank, she has *set that money aside* for later use. When she withdraws a quarter to buy a piece of candy, she did not then ***set aside*** 50 cents; that money was set aside beforehand. Likewise, if instead of removing a quarter, she adds one, she hasn't just set aside a dollar; the initial 75 cents continues to be set aside, and she has now set aside 25 cents more.

C. The Court of Appeal Based Its Holding on Irrelevant and Misapplied Statutory Provisions.

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

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

The Court of Appeal first sets out in its opinion to demonstrate that A.B. 1 is in fact a budget bill because some of the amendments contained therein increased funding beyond the amounts enacted by the passage of the 2009 Budget Act, and neither Petitioners nor Interveners dispute that such

increases constitute items of appropriation. But the question of whether A.B. 1 should be classified as a budget bill was not before the Court. No party sought invalidation of A.B. 1, nor did any party even assert that the constitutional requirements for passage of a budget bill were not met. The Constitution states: "No bill except the budget bill may contain more than one item of appropriation, and that for one certain, expressed purpose. Appropriations from the General Fund of the State, except appropriations for the public schools, are void unless passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring." (Cal. Const., Art IV, § 12(d).)

While these requirements were indeed met in passing A.B. 1, classification of the bill as a "budget bill" serves no purpose other than to set up the Court of Appeal's classic logical fallacy. The appellate court erroneously concluded that the Legislature's reductions "must be [items of appropriation] under Article IV, section 12, subdivision (d) of the California Constitution, which provides in part: 'No bill except the budget bill may contain more than one item of appropriation, and that for one certain, expressed purpose. . . .'" (Opn. at 20.) (citing Cal. Const., art. IV, § 12(d).) But the cited constitutional provision in no way establishes that because only a budget bill may contain more than one item of appropriation, it must consist ***only*** of one or more items of appropriation. Indeed, every Budget Act, including the 2009 Act, contains provisions

which are undeniably not items of appropriation.[2] Such provisions are not subject to the Governor's line-item power simply because they relate to true items of appropriation, and nor should the reductions at issue be.

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

Next, despite the requirement that the appellate court avoid constitutional questions whenever possible (*see Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1357), and its later assertion that it had done just that (Opn. at 32), the Court of Appeal considered whether the single-subject rule of Article IV, § 9 might be violated if the reductions at issue were held not to be items of appropriation. (Opn. at 27-28.) Since no party sought invalidation of A.B. 1 or parts thereof said to violate the rule, this question was not properly before the Court. Indeed, had the Governor raised such a challenge and succeeded, the proper remedy would be to reinstate the funding for the impacted programs at their Budget Act levels.[3] In any event, only the most strained interpretation of the purpose and

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

[3] *See* Cal. Const., art. IV, § 9 ("A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void.").

requirements of the rule would have invalidated any part of A.B. 1 had such a challenge been made.

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

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

While in *Harbor* this Court held that a trailer bill to the annual budget act violated the single-subject rule,[4] as was the case in *League of Women Voters*, the facts here are distinguishable. In *Harbor*, the Court was considering a bill which "amend[ed], repeal[ed], or add[ed] approximately 150 sections contained in more than 20 codes and legislative acts." *Id.* at 1097. This Court noted that the bill only vaguely addressed the subjects of "Fiscal affairs," and "statutory adjustments" to the budget. *Id.* at 1100-01 (citing *Brosnahan v. Brown* (1982) 32 Cal.3d 236). Accordingly, the Court held the bill "encompass[ed] matters of 'excessive generality.'" *Harbor* at 1101. No such excessive generality is present in A.B. 1, which was specifically intended to address the fiscal emergency. Unlike the provisions of A.B. 1, each of which was tailored to that goal, the "grab-bag of unrelated provisions" in *Harbor* "had no unifying, budget balancing theme and were not designed for that end." *League of Women Voters,* 7 Cal.App.4th at 666.

The adoption of Article IV, § 10(f) into the California Constitution in 2004, subsequent to the Court of Appeal's 1992 holding in *League of Women Voters*, helps to render even more confusing the Court of Appeal's lack of certainty that A.B. 1 "has a comparable unifying theme" as did the

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

bill in *League of Women Voters*. (Opn at 28.) For unlike the measures at issue in that case and in *Harbor*, A.B. 1 was specifically passed pursuant to Article IV, § 10(f)'s mandate of a "bill to address the fiscal emergency."

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

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

between the two provisions." *Harbor*, 43 Cal.3d at 1094. Since no party raised a challenge to A.B. 1 as violative of the single-subject rule, the Court of Appeal's extended consideration of that provision was wholly inappropriate.

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

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

This Court has previously announced that the re-enactment rule of Article IV, section 9 "should be reasonably construed and limited in its application to the specific evil which it was designed to remedy."

Brosnahan v. Brown, 32 Cal.3d at 256. There can be no doubt that this specific evil, relating only to the form of a legislative bill, has no relevance to the issue before this Court, and that the Court of Appeal's reliance on the provision to support the Governor's use of the line-item veto was misguided.

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

The context in which A.B. 1 was passed was the complete opposite of one in which a legislature passes a bill amending a statute under a cloud of secrecy or confusion. The intense atmosphere and media scrutiny surrounding the California Legislature's passage of A.B. 1 in response to

the Governor's direction was ably recounted in the Amicus Curiae Brief of Children Now, et al.:

> The Governor's actions received wide coverage in both national and local press. Under Article IV § 10(f)(2), the Legislature had forty-five days to pass legislation "address[ing] the fiscal emergency" declared by the Governor. The consequences of failing to pass such legislation within that timeframe were significant; . . .
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> On July 2, 2009, A.B. 1 was introduced into the Assembly. On July 2, 2009 and July 6, 2009, the Assembly and Senate, respectively, convened a special session to review the State's budget. Over the next three weeks, the Legislature deliberated over the extensive reductions that would be necessary to close the $24+ billion budget shortfall. These deliberations received extensive coverage from the media.

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

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

As clear as it is that the budget reductions contained in A.B. 1 do not relate to the "specific evil" which Article IV, section 9's re-enactment rule was designed to remedy, so is it clear that that provision does not effect a repeal of the appropriations duly enacted in the Budget Act, and replace

them with new appropriations, as the Court of Appeal effectively held. Instead, A.B. 1 left intact the Budget Act's authorization to spend for the programs at issue, but merely reduced the ***amounts*** appropriated. That Article IV, section 9 neither mandates nor effects a reauthorization of those appropriations is apparent from the clear terms of Government Code section 9605.

Government Code section 9605 states: "Where a section or part of a statute is amended, it is not to be considered as having been repealed and re-enacted in the amended form. The portions which are not altered are to be considered as having been the law from the time they were enacted; the new provisions are to be considered as having been enacted at the time of the amendment . . . ." As the Court of Appeal acknowledged, the "effect of Government Code section 9605 'is to avoid an implied repeal and reenactment of unchanged portions of an amended statute, ensuring that the unchanged portion operates without interruption.'" (Opn. at 26) (quoting *In re Lance W.* (1985) 37 Cal.3d 873, 895.) As such, it simply cannot be then, that the authorization to expend funds is somehow "new." Instead, under section 9605, that authorization must be considered as having been the law since the time the Budget Act was enacted in February, 2009. And as courts in this state have held that an item of appropriation requires both an amount to be set aside, and authorization to spend that amount for a particular purpose, the reductions in A.B. 1 cannot constitute a new item of

appropriation subject to the line-item veto. *See Ryan v. Riley,* 65 Cal.App. at 187 (requiring the "setting apart from the public revenues of a certain sum of money" such "that the executive officers are authorized to use that money ***and no more***"); *California Ass'n for Safety Educ. v. Brown* (1994) 30 Cal. App. 4th 1264, 1282 (quoting same).

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

another appropriation. *Wood*, 192 Cal. at 303.[5] Such an increase sets aside an ***additional*** amount, and must further authorize the spending of that additional amount "and no more."

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

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

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

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

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

II. THIS COURT SHOULD GRANT REVIEW TO RE-AFFIRM THAT THE GOVERNOR MAY NOT USE THE VETO TO AFFIRMATIVELY LEGISLATE

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

A. The Governor's Veto Has Always Been a Negative Power.

The understanding of the veto as a negative power is beyond dispute. This Court recognized in *Harbor* that "[t]he word 'veto' means 'I forbid' in Latin. Then, as now, the effect of the veto was negative, frustrating an act without substituting anything in its place." *Id.* at 1085. California's original 1849 Constitution granted the Governor the power to veto, or reject, only a

whole bill.[6] 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.[7] But the partial veto power does not grant the Governor any creative legislative power; it only provides him a less absolute form of the negative power. The effect of the 1879 veto was thus still negative, now frustrating only *part of* an act, but still without substituting anything in its place. *See e.g., State ex rel. Sego v. Kirkpatrick* (N.M. 1974) 524 P.2d 975, 981 ("The power of partial veto is the power to disapprove. This is a negative power, or a power to delete or destroy an item, and is not a positive power to alter, enlarge or increase the effect of the remaining parts or items.").

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

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6 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.")

7 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.")

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.

B. The Court of Appeal's Holding Would Turn the Veto Power on Its Head.

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

The Court of Appeal recognized the irrefutable fact that had the Governor vetoed A.B. 1 in its entirety, the result would have been that the appropriations contained within the Budget Act of 2009 would remain at

their enacted levels. (Opn. at 32 n.23.) Thus, exercising the full form of the veto as it has existed since the 1849 Constitution would result not in elimination of all funding for all programs, but in preservation of the funding status quo -- in this case the appropriations as passed in the Budget Act. Likewise, the exercise of the partial veto as it existed from 1879 until 1922 would have eliminated the vetoed reductions, also resulting in the continued force of the affected appropriations at their Budget Act levels.

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

The effect of a line-item veto upon a legislative reduction to previously-enacted appropriations was explored in the only other case in

which Petitioners are aware of a court holding that such reductions are subject to the partial veto. In that case, *Rios v. Symington* (1992) 172 Ariz. 3, the Arizona Supreme Court ruled in accordance with the historical understanding of the veto as a purely negative power, and held that such a veto of a reduction to a previously-enacted appropriation leaves that original level of funding intact. *Id.* at 11.

The Court of Appeal's opinion asserted that "significant differences between the Arizona and California constitutional schemes regarding the line-item veto" prevented the Court from finding *Rios* particularly persuasive (Opn. at 18 n.12). But the only significant 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.[8] Indeed, the Arizona provision is nearly identical to that contained in the California Constitution between 1879 and 1922, discussed above. As such, the only additional analysis required of this Court would be to determine whether the California Constitution permits the Governor to reject only part of a

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8 *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.").

legislative reduction, where the Arizona Constitution requires him to reject such reduction in full.

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

The Court first concluded that it was "clear that the veto power extends to an ***increase*** to an earlier appropriation, because it is, in essence, a new appropriation." *Id.* at 10. Thus, the Legislature's increase to $1,240,100 from its original appropriation of $936,400 for the penitentiary land fund was properly vetoed by the Governor. However, the Governor's veto did not effect an elimination of the amount ***originally appropriated.*** Instead, the veto was permissible only upon the increase itself, not the entire appropriation, which reverted to the $936,400 enacted in the budget act. This is consistent with the historical understanding of the veto as a negative power upon ***new*** legislative actions. An increase to an earlier appropriation grants new authority to spend, and thus, the new amount may be vetoed. Such an increase does ***not*** permit the Governor to reach back and veto those appropriations which have already become law.

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

Thus, should this Court find persuasive the reasoning and conclusion of *Rios*, which the Governor himself argued in his papers before the Court of Appeal "are compelling and should apply equally to the facts presented here," (Respondents' Opp'n at 14) the Governor -- even if permitted to use his line-item veto power on reductions to prior appropriations -- may not do anything other than eliminate or reduce those ***reductions***. In this case, however, as the Governor has not purported to veto only the reductions, but instead contends that the entire original appropriations were subject to his blue pencil, his improper attempt to exercise powers not granted are "wholly ineffectual and void for any and every purpose." *Lukens v. Nye* (1909) 156 Cal. 498, 502.

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

It simply cannot be that because the California Constitution permits the Governor to reduce or eliminate an item of appropriation, the original Budget Act appropriation becomes subject to the veto while in *Rios*, only the reduction itself was in play. The Court of Appeal acknowledges that in *Rios*, "the net effect of the line-item vetoes resulted in a reinstatement of the original appropriation." (Opn. at 18 n.12.) If using the line-item veto to completely eliminate a reduction results in the restoration of the 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.

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

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

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

In its opinion, the Court of Appeal cites to ballot materials including the arguments in favor of the 1922 amendment to the Constitution. (Opn.

at 10 n.10.) The Court emphasizes in a footnote that the materials state the measure would "enable the Governor to reduce an appropriation to meet the financial condition of the treasury . . . ." (*Id.*) But the purpose of the veto is to give "the Governor power to control ***expenditures*** of the state." *Wood*, 192 Cal. at 305; (*see also* Respondents' Opp'n at 3) (purpose is to "ensure that the Legislature's ***spending*** proposals were within the means of the state"). And as with an appropriation, no definition of state spending can reasonably include legislation "which does not set aside a sum of money to be paid from the public treasury." *Harbor*, 43 Cal.3d at 1092. The appellate Court and the Governor conflate "spending" with declining to spend just as they conflate an appropriation with a reduction thereto. A mid-year budget cut is not a spending proposal, and no amount of conclusory assertions to the contrary can make it so.

Moreover, the 1922 amendment gave the Governor the power to reduce spending ***proposals***, not funding which has already been enacted, though twice in recent years ballot initiatives would have done just that. In November of 2005, by a margin of 62.4 percent to 37.6 percent, voters rejected Proposition 76, which would have given the Governor the power to unilaterally cut spending if the Legislature failed to address a fiscal emergency. (*See* Interveners' Motion to Intervene ("Steinberg Mot."), RJN, Ex. F at 25.) More recently, in May 2009, voters defeated Proposition 1A by a margin of 65.4 percent to 34.6 percent, which would have likewise

allowed the Governor to make certain mid-year reductions without legislative approval. (*See* Steinberg Mot. RJN, Ex. H at 13; RJN, Ex. I at 10.) While the voters have given the Governor the power to reduce or eliminate ***spending proposals*** made by the Legislature, it is clear that they wish to have any cuts to existing appropriations made by the Legislature.

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 by the Constitution. Petitioners ask this Court to grant review of the Court of Appeal's strained interpretation of an item of appropriation, and its disregard for this Court's direction that the Governor's veto power must be narrowly construed. Should this Court decline to review the appellate court's decision, the result would be an unprecedented intrusion of the executive into the province of the Legislature, which the voters of California have twice rejected. Worse, the Governor's first exercise of his newly usurped power would be to injure this State's most vulnerable citizens.

The Court of Appeal's observation that the Legislature may override the Governor's purported vetoes (Opn. at 32) is of no significance to the legal analysis, nor to Petitioners, who bear the brunt of the Governor's extra-constitutional actions, and are among those Californians with the least ability to influence political maneuvering. Any purported use of the partial

veto by the Governor may be overridden, no matter if the provision vetoed is clearly substantive or otherwise not constitutionally subject to the veto. This political "remedy" cannot and should not impact a court's decision on the constitutionality of the underlying act.

Petitioners note that if the Governor was unsatisfied with the extent of the budget cuts passed by the Legislature, he possessed an alternative which would neither violate Article III, § 3's separation of powers mandate, nor would it impermissibly expand the Governor's Article IV, § 10(e) veto power. The Governor had every right under the Constitution to approve the cuts made by the Legislature by signing A.B. 1 into law, and if he remained unsatisfied with the extent of the cuts, to once again invoke his Article IV, § 10(f) power to call the Legislature back into special session to cut further.

In approving the Governor's use of the veto to originate mid-year cuts following a brokered compromise, which itself produced significant spending reductions, the Court of Appeal has dramatically expanded the power of the executive. As a result, without this Court's review, any such future compromises are unlikely to occur. Instead, in times of future economic turmoil, California faces the prospect of legislative decisions made behind the closed doors of the Governor's office which will disparately impact California's most vulnerable and politically powerless children, women and men. In fact, this is exactly what has already occurred.

To Petitioners, the Court of Appeal's decision represents something far more personal and insidious than the uprooting of the separation of powers doctrine and abandonment of the historical understanding of the veto power. Absent review, the appellate court's holding will prevent thousands of Californians from receiving the basic health care, shelter, medicine, and safety from violence and abuse which were to be provided for them under the Budget Act passed by the Legislature and signed by the Governor. Though all citizens suffer when the Constitution and our fundamental system of government are violated, for Petitioners in this case the suffering is both personal and literal.

For all the above reasons, Petitioners respectfully request that this Court grant review of the Court of Appeal's decision.

Dated: April 12, 2009

Respectfully submitted,

Derek Milosavljevic

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St. John's Well Child and Family Center

CERTIFICATE OF WORD COUNT

The text of this petition consists of 8,329 words as counted by the Microsoft Word program used to generate the Petition.

Dated: April 12, 2009

Respectfully submitted,

Derek Milosavljevic

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

Exhibit

Filed 3/2/10

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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.	A125750

INTRODUCTION

The current economic downturn affects all Californians, but those suffer most who receive essential health and welfare assistance from agencies dependent upon state tax revenues. The needs of such vulnerable citizens so exceed the state's diminished ability to pay for them that "Sophie's choices" are presented. Government must choose between and among equally needy groups, knowing those not favored will be devastated. The responsible decision makers are the Legislature and the Governor. In the context of the constitutionally prescribed budget process, the power of the purse—i.e., the power to appropriate public funds—belongs only to the Legislature. With respect to a bill containing appropriations, the Governor can only sign or veto the measure in its entirety or "reduce or eliminate one or more items of appropriation." (Cal. Const., art IV, § 10,

subd. (e).) The question in this case is whether the Governor exceeded these limited powers.

In this original writ proceeding, we consider constitutional challenges to the Governor's use of the line-item veto authority provided in article IV, section 10, subdivision (e) of the California Constitution to increase the amount of midyear reductions (further reducing the reductions) made by the Legislature to the Budget Act of 2009. (Stats. 2009, 3d Ex. Sess., ch. 1, approved by Governor Feb. 20, 2009 (hereafter "2009 Budget Act").) We shall conclude the Governor's exercise of the challenged veto power does not exceed his constitutional authority.

Petitioners include St. John's Well Child and Family Center, a nonprofit network of five community health centers and six school-based clinics in medically underserved areas of Los Angeles County, and other entities and individuals throughout the state whose programs and lives will be drastically affected by the further reductions at issue here.[1]

Respondents are Arnold Schwarzenegger, the Governor of the State of California, and John Chiang, who, as the Controller of the State of California, is responsible for administration of the state's finances, including disbursement of funds appropriated by law.[2] The Controller does not take a position on the merits of this litigation.

Interveners are Darrell Steinberg, in his official capacity as President pro Tempore of the California State Senate, and in his personal capacity as a resident and taxpayer of

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[1] Other petitioners are Rosa Navarro and Lionso Guzman, individual residents of Los Angeles County who have received medical treatment from St. John's Well Child and Family Center; California Foundation for Independent Living Centers (the Foundation), a statewide, nonprofit organization made up of 25 Independent Living Centers providing services and advocacy by and for people with all types of disabilities; Nevada Sierra Regional IHSS (In Home Supportive Services) Public Authority, a public agency whose purpose is to make the IHSS component of the foundation work better for consumers; Californians for Disability Rights, California's oldest and largest membership organization of persons with disabilities; and Liane Yasumoto and Judith Smith, who each receive IHSS to assist with daily living tasks.

[2] The Governor and Controller are sued in their official capacities only.

Sacramento County, and Karen Bass, in her official capacity as Speaker of the California Assembly, and in her personal capacity as a resident and taxpayer of Los Angeles County.

Several amici curiae have filed briefs supporting the various parties.[3]

Petitioners and interveners contend that the Governor's action exceeded constitutional limits because the individual budget cuts he further reduced were not "items of appropriation" (Cal. Const., art. IV, § 10, subd. (e)) that could be individually vetoed or reduced. They further contend that the Governor attempted to exercise authority belonging solely to the Legislature in violation of article III, section 3 of the California Constitution.

Petitioners and interveners seek original relief in this court pursuant to article VI, section 10 of the California Constitution, Code of Civil Procedure sections 387 and 1085, and California Rules of Court, rule 8.485 et seq. They seek to enjoin the Controller from enforcing or taking any steps to enforce the Governor's vetoes of certain provisions of Assembly Bill No. 1 (hereafter "Assembly Bill 4X 1"), as embodied in the Budget Act of 2009—Revisions (Stats. 2009, 4th Ex. Sess. 2009-2010, ch. 1, hereafter "Revised 2009 Budget Act"). (See Assem. Bill 4X 1, as amended by Sen., July 23, 2009 and approved by Governor July 28, 2009 [with certain deletions, revisions and reductions (hereafter "Governor's Veto Message")].) Although we customarily decline to exercise such

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[3] Amicus curiae briefs on behalf of petitioners have been filed by the following amici curiae: Santa Clara County; SEIU California State Council, United Domestic Workers, and California United Homecare Workers; Children Now, Valley Community Clinic, Eisner Pediatric & Family Medical Center, the Saban Free Clinic, YWCA Monterey County, Westside Family Health Center, Community Clinic Association of Los Angeles County, and The Legal Aid Association of California; Aids Project Los Angeles; and the Los Angeles County Democratic Central Party and the Riverside County Democratic Central Committee.

An amicus brief in support of respondents Governor Schwarzenegger and Controller Chiang has been filed by amici curiae George Deukmejian, Pete Wilson, Gray Davis, the California Chamber of Commerce, the California Taxpayers' Association and the California Business Roundtable (collectively, "amici curiae former California governors").

jurisdiction, preferring initial disposition by the superior court, this case involves issues of sufficient public importance and urgency to justify departing from the usual course. The significance of the issues and need for prompt resolution warrant exercise of our original jurisdiction. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 500; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 340; see also *Planned Parenthood Affiliates v. Van de Kamp* (1986) 181 Cal.App.3d 245, 262-265.) Therefore, on September 21, 2009, we issued an order to show cause why the relief sought should not be granted and thereafter held oral argument.[4]

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[4] At oral argument, we expressed our intention to take judicial notice (Evid. Code, §§ 451, 452) upon interveners' request of various materials relating to the passage of the 2009 Budget Act, Assembly Bill 4X 1 and the Revised 2009 Budget Act. Interveners' request for judicial notice was unopposed. Accordingly, we take judicial notice of the following materials:

a. Senate Bill No. 1 (2009-2010 3d Ex. Sess.) approved by the Governor on February 20, 2009;

b. Assembly Bill 4X 1 (2009-2010 4th Ex. Sess.) as amended by the Senate on July 23, 2009;

c. Assembly Bill 4X 1 (2009-2010 4th Ex. Sess.) as approved by the Governor on July 28, 2009 (containing the Governor's Veto Message);

d. Legislative Counsel Opinion No. 0920928 (Aug. 5, 2009) Governor's Line-Item Veto Authority: Reductions to Existing Appropriations;

e. Ballot Pamphlet, General Election, November 7, 1922, text and arguments in favor of Proposition 12 ("State Budget Amendment"), which enacted a constitutional amendment expanding the scope of the line-item veto;

f. Voter Information Guide, General Election, November 8, 2005, text and analysis of voter initiative Proposition 76 ("State Spending and School Funding Limits");

g. Secretary of State's "Statement of Vote" on Proposition 76;

h. Voter Information Guide, Special Election, May 19, 2009, text and analysis of Proposition 1A ("State Budget Changes. California Budget Process. Limits State Spending. Increases 'Rainy Day' Budget Stabilization Fund");

i. Secretary of State's "Statement of Vote" on Proposition 1A.

We also take judicial notice (Evid. Code, §§ 459, 452) at the Governor's request, of the following ballot materials presented to the voters when they were considering two measures: (1) Proposition 58: Voter Information Guide, Supplemental, Primary Election, March 2, 2004, text and analysis of Proposition 58 ("The California Balanced Budget Act"), adding article IV, section 20, subdivision (f) to the California Constitution; (2) Proposition 12: Ballot Pamphlet, General Election, November 7, 1922, text and arguments in favor of Proposition 12 (same material as (e), *ante*, in different format).

BACKGROUND

On February 20, 2009, the Governor signed into law the 2009 Budget Act, which set forth various appropriations of state funds for the 2009-2010 fiscal year. California's economy worsened, the revenue assumptions on which the 2009 Budget Act was based proved to be far too optimistic, and the state's overall cash flow positions continued to worsen. The Governor proclaimed a fiscal crisis pursuant to the California Constitution, article IV, section 10, subdivision (f),[5] and the Legislature assembled in a special session to address the fiscal emergency. After months of negotiations, the Legislature passed Assembly Bill 4X 1 on July 23, 2009. The final budget package enacted as Assembly Bill 4X 1 contained $24.2 billion in budget solutions, including $15.6 billion in cuts, $3.9 billion in additional revenues, $2.1 billion in borrowing, $1.5 billion in fund shifts, and $1.2 billion in deferrals and other adjustments.

On July 28, 2009, the Governor exercised his line-item veto to reduce or eliminate several items contained in Assembly Bill 4X 1, and then signed the measure into law. (Rev. 2009 Budget Act.) The Governor vetoed 27 different line items of sections of Assembly Bill 4X 1. The effect of these vetoes was to further reduce the total amount appropriated in the 2009 Budget Act by more than $488 million. Many of the items

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[5] California Constitution, article IV, section 10, subdivision (f), provides: "(1) If, following the enactment of the budget bill for the 2004-05 fiscal year or any subsequent fiscal year, the Governor determines that, for that fiscal year, General Fund revenues will decline substantially below the estimate of General Fund revenues upon which the budget bill for that fiscal year, as enacted, was based, or General Fund expenditures will increase substantially above that estimate of General Fund revenues, or both, the Governor may issue a proclamation declaring a fiscal emergency and shall thereupon cause the Legislature to assemble in special session for this purpose. The proclamation shall identify the nature of the fiscal emergency and shall be submitted by the Governor to the Legislature, accompanied by proposed legislation to address the fiscal emergency.

"(2) If the Legislature fails to pass and send to the Governor a bill or bills to address the fiscal emergency by the 45th day following the issuance of the proclamation, the Legislature may not act on any other bill, nor may the Legislature adjourn for a joint recess, until that bill or those bills have been passed and sent to the Governor.

"(3) A bill addressing the fiscal emergency declared pursuant to this section shall contain a statement to that effect."

reduced by the Governor had already been reduced by the Legislature from the amounts appropriated in the 2009 Budget Act. The Governor's signing message explained that his cuts and eliminations to the spending bill were for the most part designed "to increase the reserve and to reduce the state's structural deficit." (Rev. 2009 Budget Act, Governor's Veto Message for §§ 18.00, 18.10, 18.20, 18.40; see also *id.*, §§ 17.50, 18.50.)

This original mandamus action by petitioners and interveners followed,[6] in which they challenge the Governor's use of the line-item veto on seven sections of Assembly Bill 4X 1, specifically, sections 568 and 570 through 575.[7] These vetoes impact the seven sections of Assembly Bill 4X 1 as follows:

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[6] On August 10, 2009, intervener Steinberg filed a complaint in the San Francisco Superior Court, seeking a writ of mandate addressing the same issue presented herein and challenging the Governor's use of the line-item veto on items in Assembly Bill 4X 1. On August 17, 2009, Steinberg informed this court that his petition was pending in the superior court and explained that it challenged not only the items challenged here by petitioners, but an additional 14 uses of the line-item veto. Following our August 17, 2009 request to respondents to address all issues raised by the petitioners' writ petition, Steinberg and Assembly Speaker Bass sought to intervene and urged this court to issue the original writ as sought by petitioners. On September 14, 2009, we granted their motion to intervene and accepted their writ petition for filing.

[7] As enacted by the Legislature, and submitted to the Governor, the relevant provisions of Assembly Bill 4X 1 provide in pertinent part:

"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." (Assem. Bill 4X 1, § 568 [Dept. of Aging].)

"SEC. 570. Section 18.00 is added to the Budget Act of 2009, to read: [¶] Sec. 18.00 (a) The amount appropriated in Item 4260-101-0001 of Section 2.00 is hereby reduced by $2,789,402,000. [¶] . . . [¶] (e) The amount appropriated in Item 4260-111-0001 of Section 2.00 is hereby reduced by $4,303,000." (Assem. Bill 4X 1, § 570 [Dept. of Health Care Services].)

"SEC. 571. Section 18.10 is added to the Budget Act of 2009, to read: [¶] Sec. 18.10 [¶] . . . [¶] (c) The amount appropriated in Item 4265-111-0001 of Section 2.00 is hereby reduced by $62,967,000." (Assem. Bill 4X 1, § 571 [Dept. of Public Health].)

"SEC. 572. Section 18.20 is added to the Budget Act of 2009, to read: [¶] Sec. 18.20. (a) The amount appropriated in Item 4280-101-0001 of Section 2.00 is hereby reduced by $125,581,000." (Assem. Bill 4X 1, § 572 [for local assistance Managed Risk Medical Insurance Board, for Healthy Families Program].)

- Section 17.50, further reducing the general fund reduction for the Department of Aging by $6,160,000;
- Section 18.00, subdivision (a), further reducing general fund funding for local assistance of the Medi-Cal program by $60,569,000; and section 18.00, subdivision (e), eliminating funding for Community Clinic Programs;
- Section 18.10, further reducing the funding for various programs administered by the Office of AIDS by $52,133,000, further reducing funding for the Domestic Violence Program by $16,337,000,[8] further reducing funding for the Adolescent Family Life Program by $9,000,000, and further reducing funding for the Black Infant Health Program by $3,003,000;
- Section 18.20, further reducing the Healthy Families Program by $50,000,000;
- Section 18.30, further reducing Regional Center Purchase of Services for children up to age five by $50,000,000;

"SEC. 573. Section 18.30 is added to the Budget Act of 2009, to read: [¶] Sec. 18.30. (a) The amount appropriated in Item 4300-101-0001 of Section 2.00 is hereby reduced by $214,828,000." (Assem. Bill 4X 1, § 573 [Dept. of Developmental Services, for Regional Centers].)

"SEC. 574. Section 18.40 is added to the Budget Act of 2009, to read: [¶] Sec. 18.40. [¶] . . . [¶] (e) The amount appropriated in Item 4440-111-0001 of Section 2.00 is hereby reduced by $3,547,000." (Assem. Bill 4X 1, § 574 [Dept. of Mental Health, for caregiver resource centers serving families of adults with acquired brain injuries].)

"SEC. 575. Section 18.50 is added to the Budget Act of 2009, to read: [¶] Sec. 18.50. [¶] . . . [¶] (d) The amount appropriated in Item 5180-111-0001 of Section 2.00 is hereby reduced by $643,248,000." (Assem. Bill 4X 1, § 575 [for local assistance, Dept. of Social Services].)

[8] At the Governor's request, and over the objection of interveners, we take judicial notice of Senate Bill No. 13, passed by the Legislature after the Governor's veto, and signed by the Governor. (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 29, approved by Governor Oct. 21, 2009.) That bill transferred $16.3 million from the Alternative and Renewable Fuel and Vehicle Technology Fund to the general fund as a loan to appropriate those funds to the California Emergency Management Agency to support domestic violence shelters for the 2009-2010 fiscal year.

- Section 18.40, further reducing funding of the Caregiver Resource Centers by $4,082,000; and
- Section 18.50, further reducing general fund funding to the In-Home Supportive Services Program by $37,555,000.

I. Constitutional Framework of the Veto Power

The question presented as a matter of first impression is whether the Governor's line-item veto power encompasses the ability to further reduce mid-year reductions made by the Legislature to appropriations originally made in the 2009 Budget Act. Although the particular issue may be novel, we are not without guidance, as the California Supreme Court, in *Harbor v. Deukmejian* (1987) 43 Cal.3d 1078 (*Harbor*), extensively described the constitutional framework within which the Governor exercises the line-item veto.

"The California Constitution declares that the legislative power of the state is vested in the Legislature (art. IV, § 1) and the executive power in the Governor (art. [V], § 1). Unless permitted by the Constitution, the Governor may not exercise legislative powers. (Art. III, § 3.) He may veto a bill 'by returning it with any objections to the house of origin,' and it will become law only if 'each house then passes the bill by rollcall vote . . . two thirds of the membership concurring. . . .' [(Art. IV, § 10, subd. (a).)] If the Governor fails to act within a certain period of time, the measure becomes law without his signature. (Art. IV, § 10, subd. [(b)].) The Governor's veto power is more extensive with regard to appropriations. *He may 'reduce or eliminate one or more items of appropriation while approving other portions of a bill.'* Such items may be passed over his veto in the same manner as vetoed bills. (Art. IV, § 10, subd. [(e)].)" (*Harbor, supra,* 43 Cal.3d at p. 1084, italics added.)[9]

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[9] Article IV, section 10 of the California Constitution provides in part: "(a) Each bill passed by the Legislature shall be presented to the Governor. It becomes a statute if it is signed by the Governor. The Governor may veto it by returning it with any objections to the house of origin, which shall enter the objections in the journal and proceed to reconsider it. If each house then passes the bill by rollcall vote entered in the journal, two-thirds of the membership concurring, it becomes a statute.

[¶] . . .[¶]

The *Harbor* court agreed with the petitioners there that "in vetoing legislation, the Governor acts in a legislative capacity, and that in order to preserve the system of checks and balances upon which our government is founded, he may exercise legislative power only in the manner expressly authorized by the Constitution. Since that document only authorizes the Governor to veto a 'bill' or to reduce or eliminate 'items of appropriation' the Governor may not veto part of a bill which is not an 'item of appropriation.' " (*Harbor, supra*, 43 Cal.3d. at p. 1084.)

Tracking the historical development of the veto power from its origins in Rome, where the tribune of plebeians had the power to disapprove measures recommended by the senate, *Harbor* explained 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." (*Harbor, supra,* 43 Cal.3d at p. 1085, citing Zinn, The Veto Power of the President (1951) 12 F.R.D. 209.) Evolving in the United States as "an integral part of the system of checks and balances" (*Harbor*, at p. 1085), the veto power at the federal level is circumscribed by the limitation that the President may approve or reject a bill in its entirety, but may not select portions of a bill for disapproval. "As a much-quoted early case commented, 'the executive, in every republican form of government, has only a qualified and destructive legislative function, and never creative legislative power.' (*State v. Holder* (1898) 76 Miss. 158 [23 So. 643, 645].) [¶] While the rule prohibiting selective exercise of the veto is unyielding in the federal system, most states have provided an exception for items of appropriation." (*Harbor*, at p. 1086; see *Thirteenth Guam Legislature v. Bordallo* (D. Guam 1977) 430 F.Supp. 405, 410.)

"In California, the constitution of 1849 included a gubernatorial veto provision similar to that contained in the United States Constitution. (Cal. Const. of 1849, art. IV,

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"(e) The Governor may reduce or eliminate one or more items of appropriation while approving other portions of a bill. The Governor shall append to the bill a statement of the items reduced or eliminated with the reasons for the action. The Governor shall transmit to the house originating the bill a copy of the statement and reasons. Items reduced or eliminated shall be separately reconsidered and may be passed over the Governor's veto in the same manner as vetoed bills."

§ 17 . . . .) The Constitution of 1879 added the item veto power, allowing the Governor to 'object to one or more items' of appropriation in a bill which contained several 'items of appropriation.' (Cal. Const. of 1879, art IV, § 16.) By constitutional initiative in 1922, the Governor was empowered *not only to eliminate 'items of appropriation' but to reduce them,* while approving other portions of a bill. (Art. IV, § 10, subd. ([e]).) The 1922 amendment also directed the Governor to submit a budget to the Legislature containing his recommendation for state expenditures. (Art. IV, § 12, subd. (a).)" (*Harbor, supra,* 43 Cal.3d at p. 1086, italics added.)[10]

The item veto and the line-item veto allowing the Governor to eliminate or reduce items of appropriation do not confer the power to selectively veto *general* legislation. (*Harbor, supra,* 43 Cal.3d at p. 1087; *Lukens v. Nye* (1909) 156 Cal. 498, 501-503.) The Governor may not veto part of a bill that is not an "item of appropriation." (*Harbor,* at pp. 1084-1085, 1088-1089.)

"[A]rticle III, section 3 provides that one branch of government may not exercise the powers granted to another 'except as permitted by this Constitution.' Case law, commentators, and historians have long recognized that in exercising the veto the Governor acts in a legislative capacity. [Citations.] . . . [¶] It follows that in exercising the power of the veto the Governor may act only as permitted by the Constitution. That authority is to veto a 'bill' (art. IV, § 10, subd. (a)) or to 'reduce or eliminate one or more

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[10] The ballot argument in favor of the 1922 constitutional initiative that empowered the Governor to exercise the line-item veto to reduce an item of appropriation stated in relevant part: "The budget system will save the taxpayer money, because all state appropriations will be handled in a business way, duplications prevented and extravagance avoided. *The proposed measure will also enable the Governor to reduce an appropriation to meet the financial condition of the treasury, which under our present system he cannot do. Frequently a worthy measure is vetoed because the legislature passes a bill carrying an appropriation for which sufficient funds are not available. Under present conditions the Governor is compelled to veto the act, no matter how meritorious, because of the excessive appropriation, whereas, if he had the power given by the proposed constitutional amendment, he could approve the bill with a modified appropriation to meet the condition of the treasury.*" (Ballot Pamp., Gen. Elec. (Nov. 7, 1922), argument in favor of Prop. 12, pp. 78-79, italics added.)

items of appropriation' (*id.*, subd. ([e]).)" (*Harbor, supra,* 43 Cal.3d at p. 1089, fn. omitted.)

The dispositive issue, then, is whether the seven sections of Assembly Bill 4X 1 that the Governor further reduced here, were "items of appropriation" (Cal. Const., art. IV, § 10, subd. (e)), upon which the Governor could exercise his line-item veto power. We are convinced that they are.

II. "Item of Appropriation"

Petitioners and interveners contend that, because the challenged items in Assembly Bill 4X 1 reduced the amounts previously appropriated in the 2009 Budget Act, these items were not "appropriations." They maintain that a "reduction" cannot be an "appropriation," and point out that there are no instances in which a California governor has ever before exercised the line-item veto in this manner.

Since the passage of the 1922 constitutional amendment empowering the Governor to exercise the line-item veto, our Supreme Court has addressed the question of what constitutes an "item of appropriation" subject to the Governor's line-item veto power in two important cases, *Harbor, supra,* 43 Cal.3d 1078, and *Wood v. Riley* (1923) 192 Cal. 293, and we turn to them for guidance.

A. *Judicial definitions of "item of appropriation"*

Wood v. Riley, supra, 192 Cal. 293, was decided in 1923, shortly after the Constitution was amended to allow the Governor to use the line-item veto to reduce as well as eliminate "items of appropriation." In that case, the Legislature added to a budget bill a proviso requiring the Controller to transfer one percent of the appropriations set aside for salaries and support of several teachers' colleges and special schools to the state department of education as the administrative allotment of the department. (*Id.* at pp. 294-296.) The Governor vetoed the proviso. (*Id.* at p. 296.) The director of education sought to enforce the proviso, notwithstanding the Governor's disapproval, arguing that the Governor was attempting to veto part of a sentence in an appropriation bill that did not appropriate money, but simply provided for a transfer, as a matter of bookkeeping, of a percentage of funds already appropriated. (*Id.* at p. 297; see *Harbor,*

supra, 43 Cal.3d at p. 1091, fn. 13.) The Supreme Court upheld the veto, holding that *although it took no new money from the state treasury*, the proviso "was a specific setting aside of an amount, not exceeding a definite fixed sum, for the payment of certain particular claims or demands . . . . It appears in no other light than as amounting to an item of appropriation in that it adds an additional amount to the funds already provided for the administration of the office of the director of education through the sums appropriated for the use of the state board of education and the superintendent of public instruction. This court has held that 'by a specific appropriation' was understood '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 . . . The Fund upon which a warrant must be drawn must be one the amount of which is designated by law, and therefore capable of definitive exhaustion—a Fund in which an ascertained sum of money was originally placed, and a portion of that sum being drawn an unexhausted balance remains, which balance cannot be thereafter increased except by further legislative appropriation.' (*Stratton v. Green* [(1872)] 45 Cal. 149, 151. [Citations.]) . . . The proviso, therefore, appears to fill all the requirements of a distinct item of appropriation of so much of a definite sum of money as may be required for a designated purpose connected with the state government." (*Wood v. Riley,* at pp. 303-304.)

The Supreme Court was also persuaded that the Legislature intended to insulate its appropriation for the general administrative office of the department from the Governor's veto, which it could not do if it directly appropriated funds for that office. (*Wood v. Riley, supra,* 192 Cal. at pp. 304-305.) "It is very clear that the situation presented is that no appropriation having been recommended by the Governor, or included in the proposed budget bill, for the payment of the 'salaries and support of the general administrative office of the division of normal and special schools,' other than the general provisions for the support of the state board of education and the state superintendent of schools, the legislature attempted, by the inclusion of the proviso in the bill, to make such additional appropriation for such purpose under the guise of an administrative allotment. Therefore, looked at in the light of what it was intended to accomplish, and what it would have

accomplished if allowed to stand, one cannot escape the conviction that it worked an appropriation. It added a specific amount to the allowance already made for the use of the state board of education and the state superintendent of schools." (*Ibid.*) The court concluded the Legislature could not "by indirection, defeat the purpose of the constitutional amendment giving the Governor power to control the expenditures of the state, when it could not accomplish that purpose directly or by an express provision in appropriation bills." (*Id.* at p. 305.)

In *Harbor, supra,* 43 Cal.3d 1078, the Legislature enacted a budget for the 1984-1985 fiscal year. One item in the budget was an appropriation for aid to families with dependent children (AFDC) for over $1.5 billion. Ten days later, the Legislature passed a trailer bill containing 71 sections enacting, amending and repealing numerous provisions in numerous codes. (Sen. Bill No. 1379 (1983-1984 Reg. Sess.).) The trailer bill was not to become operative unless the 1984-1985 Budget Act was also passed. Among the trailer bill's provisions was section 45.5 (Sen. Bill No. 1379, Stats. 1984, ch. 268, § 45.5, p. 1383 (hereafter "section 45.5")), amending the Welfare and Institutions Code to allow AFDC benefits to be paid under certain circumstances from the time a benefits application was made, rather than from the date the application was processed. (*Harbor*, at pp. 1082-1083.) In approving the 1984-1985 Budget Act, the Governor reduced the item containing the AFDC allotment by more than $9 million. Two days later, he approved the trailer bill, but purported to veto section 45.5 relating to the timing of the benefits payments. (*Harbor,* at pp. 1082-1083.)

The Supreme Court held that the Governor's purported veto of section 45.5 of the trailer bill relating to timing of the benefits was not justified as the provision was not an "item of appropriation." (*Harbor, supra,* 43 Cal.3d at pp. 1090-1091.) However, the court also held that the trailer bill violated the single-subject rule of article IV, section 9 of the California Constitution. (*Id.* at p. 1094.) Therefore, the court gave its determination as to both rulings prospective effect only, as the Governor would have had the power to veto section 45.5 had it been passed by the Legislature as a separate bill.

The net effect was that the veto was not invalidated, but only that section of the bill would be rendered inoperative. (*Id.* at pp. 1101-1102.)

In reaching its determination that section 45.5 was *not* an "item of appropriation" and, therefore, that the Governor could not selectively veto the item without vetoing the entire bill, *Harbor* recognized that "[t]he 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.' In *Bengzon* [*v. Secretary of Justice* (1937) 299 U.S. 410] 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.) 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 specified purpose']; *Commonwealth v. Dodson* (1940) 176 Va. 281 [11 S.E.2d 120, 127] ['an indivisible sum of money dedicated to a stated purpose']])." (*Harbor, supra,* 43 Cal.3d at p. 1089.)

Harbor concluded that the provision at issue did not qualify "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. Its effect is substantive. Like thousands of other statutes, it directs that a department of government act in a particular manner with regard to certain matters. Although as is common with countless other measures, the direction contained therein will require the expenditure of funds from the treasury, this does not transform a substantive measure to an item of appropriation. We agree with petitioners that section 45.5 only expresses the Legislature's intention that the AFDC appropriation, whatever its amount, must be used to provide benefits to recipients from the date of application under certain circumstances." (*Harbor, supra,* 43 Cal.3d at pp. 1089-1090.)

The *Harbor* court was not persuaded by the Governor that the Legislature had attempted to separate the appropriation and its purpose into separate measures in order to evade a veto of the entire indivisible measure. (*Harbor, supra,* 43 Cal.3d at pp. 1090-1091.) According to the court, "[b]oth were specified in the [1984-1985] Budget Act, that is, over $1.5 billion was appropriated for the purpose of funding AFDC. The Governor is bound by this 'purpose' as set forth in the budget. If the Legislature chooses to budget by a lump sum appropriation, he may eliminate or reduce the amount available for the purpose as set forth therein. Here, the Governor not only reduced the 'item of appropriation' as set forth in the budget, but he divided it into its supposed component parts, assigned a purpose and amount to the part he disapproved, reduced the total by that amount, and attempted to veto a portion of a substantive bill which he claims contains the 'subject of the appropriation.' We are aware of no authority that even remotely supports the attempted exercise of the veto in this manner." (*Id.* at pp.1090-1091.)

The court concluded that even the Legislature's attempt to avoid the Governor's veto was not sufficient justification to allow the term to be interpreted to embrace a substantive measure like section 45.5 where no definition of the term "item of appropriation" as used in the Constitution—including that used in *Wood v. Riley, supra,* 192 Cal. 293—could "reasonably embrace a provision like section 45.5, which does not set aside a sum of money to be paid from the public treasury." (*Harbor, supra,* 43 Cal.3d at p. 1092.) "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 . . . 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.* at p. 1092, fn. omitted.)

Following *Harbor, supra,* 43 Cal.3d 1078, the Court of Appeal in *California Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264 (*Safety Education*) described an appropriation similarly, as "a legislative act setting aside 'a certain sum of money for a specified object in such a manner that the executive officers are authorized to use that

money and no more for such specified purpose.' (*Ryan v. Riley* (1924) 65 Cal.App. 181, 187.)" (*Safety Education*, at p. 1282.)[11]

B. *Judicial definitions applied*

As in *Wood v. Riley, supra,* 192 Cal. 293, and unlike in *Harbor, supra,* 43 Cal.3d 1078, the challenged items presented to the Governor in Assembly Bill 4X 1, each "appear[] to fill all the requirements of a distinct item of appropriation of so much of a *definite sum of money* as may be required *for a designated purpose* connected with the state government." (*Wood v. Riley*, at p. 304, italics added.) Assembly Bill 4X 1 "set aside a sum of money to be paid from the public treasury" (*Harbor,* at p. 1092), albeit a smaller sum than that initially appropriated in the 2009 Budget Act.

Contending that only an *increase* in spending authority amounts to an appropriation, petitioners, interveners, and their amici curiae emphasize that none of the definitions of "item of appropriation" contained in the cases refer to a *decrease* in the spending authorized by a previously enacted budget, and maintain that such a reduction may not be deemed an item of appropriation. They further argue that because the 2009 Budget Act had *already* set aside sums of money to be paid by the treasury for specific purposes, those items and sections of Assembly Bill 4X 1 that proposed only reductions to existing, previously enacted appropriations did not satisfy the requirement of money set aside for a particular purpose. The argument, in other words, is that a reduction in a set-aside cannot itself be considered a set-aside. We disagree.

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[11] The issue in *Safety Education, supra,* 30 Cal.App.4th 1264, was whether the statutory scheme at issue reflected "a continuing appropriation by the Legislature or whether the availability of driver training funding is subject to legislative discretion." (*Id.* at p. 1282.) The court found the statutory language clear that the funds that may be used to pay for driver training were limited to amounts appropriated in the annual budget act, so that the statutory scheme did not establish a continuing appropriation. (*Id.* at p. 1283.) The asserted continuing appropriation provisions in *Safety Education* had no dollar amount listed, and expressly deferred the amount of appropriation to "the annual Budget Act" item that addressed driver's education. (*Id.* at p. 1272.) The case does not stand for the proposition asserted by petitioners that a limitation upon or reduction of an appropriation does not constitute an appropriation.

The cases do not require, as petitioners and interveners suggest, that *only* items that add amounts to funds already provided constitute "items of appropriation." Governor Deukmejian's claim failed in *Harbor,* because section 45.5 of the trailer bill did not qualify "as an item of appropriation under *any* of [the] definitions" reviewed by the court. (*Harbor, supra*, 43 Cal.3d at p. 1089.) "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. Its effect is *substantive*." (*Ibid.,* italics added.) Furthermore, unlike section 45.5 in *Harbor,* which referred to no sum of money, much less a definite or ascertainable sum, the Assembly Bill 4X 1 items here specified definite amounts by which the original appropriations would be reduced.

Whether spending authority is increased or decreased, it is still spending authority. Although described as reductions in specified items and sections, the amounts set aside in Assembly Bill 4X 1, nevertheless direct the "specific setting aside of an amount, not exceeding a definite fixed sum, for the payment of certain particular claims or demands . . . ." (*Wood v. Riley, supra,* 192 Cal. at pp. 303-304; see *Harbor, supra,* 43 Cal.3d at p. 1092.) The items in Assembly Bill 4X 1 eliminated or further reduced by the Governor's veto *capped* the spending authority at a lesser amount than had the 2009 Budget Act. The Controller could not thereafter disburse, nor could the recipients of the funds thereafter draw upon, a larger amount than that set aside by the Legislature for the specified purposes. Once enacted, an appropriation " 'cannot be thereafter increased except by further legislative appropriation.' [Citations.]" (*Wood v. Riley,* at p. 303, citing, among others, *Stratton v.* Green (1872) 45 Cal. 149, 151.)

There is no substantive difference between gubernatorial reduction of an item of appropriation in the original 2009 Budget Act, to which interveners and petitioners do not object, and gubernatorial reduction of such item in a subsequent amendment to the 2009 Budget Act, i.e., Assembly Bill 4X 1. Both involve changes in spending authority.[12]

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[12] Although the precise question whether reductions in appropriations are items of appropriation subject to the Governor's line-item veto is, as we have said, a question of first impression in this state, the Arizona Supreme Court answered the question

Adoption of the view of petitioners, interveners and their amici curiae that the challenged vetoes were not of "items of appropriation" would permit the Legislature, in a single bill, to selectively make multiple reductions in previous appropriations, leaving the Governor only the power to veto the entire bill—a limitation the 1922 amendment to article IV of the California Constitution was specifically designed to eliminate. (See, *ante*, p. 10, fn. 10.) If spending reductions are not items of appropriation, a simple legislative majority could not only overturn a two-thirds vote on the annual budget act, but insulate its new determinations from gubernatorial oversight. This cannot be.

C. *Examination of the structure and content of Assembly Bill 4X 1 itself shows that the challenged vetoes were of items of appropriation*

Our determination that the challenged vetoes were vetoes of "items of appropriation" is also supported by the structure and content of Assembly Bill 4X 1 itself.

Assembly Bill 4X 1 is an amendment to the 2009 Budget Act. (See *Planned Parenthood Affiliates v. Swoap* (1985) 173 Cal.App.3d 1187, 1199 [an amendment is a

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affirmatively in *Rios v. Symington* (1992) 172 Ariz. 3, 833 P.2d 20 (*Rios*), a case relied upon by the Governor. The *Rios* court rejected the claim that the governor's line-item veto power did not extend to legislative measures decreasing prior appropriations: "When the Legislature transfers monies from a previously-made appropriation, the obvious effect is to reduce the amount of the previous appropriation. The Constitution does not permit such reductions free of gubernatorial oversight. To hold otherwise would permit the Legislature to do indirectly that which it may not do directly, and would seriously limit the Executive's constitutional role in the appropriation process. [¶] . . . [¶] In our view, if the Governor's constitutional power to line item veto an appropriation is to mean anything, the Governor must be constitutionally empowered to line item veto a subsequent reduction or elimination of that appropriation." (*Id.* at p. 26.)

Although the analysis in *Rios, supra,* 833 P.2d 20, supports our conclusion, we are aware that the constitutional framework for exercise of the veto power in Arizona described in *Rios* is different in some critical respects from California's. Unlike ours, Arizona's constitution does not empower its governor to "reduce" an item of appropriation. In addition, because of the terms of the line-item veto in Arizona, the net effect of the governor's veto in *Rios* was to reinstate the original appropriation. We cannot tell how much weight the court placed upon this factor. Consequently, although *Rios* addresses issues similar to those presented here, significant differences between the Arizona and California constitutional schemes regarding the line-item veto prevent us from finding it particularly persuasive.

legislative act *changing* prior or existing law by adding or taking from it some particular provision].) This multi-itemed budget bill[13] contains numerous appropriations. The parties recognize that Assembly Bill 4X 1 contains at least *some* items of appropriation, concededly subject to the Governor's line-item veto, as a few of the provisions *increased* spending over that appropriated in the 2009 Budget Act.[14]

Assembly Bill 4X 1 is titled "Budget Act of 2009—Revisions" and describes itself in chapter 1 as, "[a]n act to amend and supplement the Budget Act of 2009 . . . by amending Items . . . , by adding Items . . . , and by repealing Items . . . , and by amending Sections . . . , by adding Sections . . . [including those at issue here], and by repealing Section 4.65 of, that act, *relating to the State Budget, making an appropriation therefore*, and declaring the urgency thereof, to take effect immediately." (Assem. Bill 4X 1, italics added.)[15] Hence, both by title and express statement Assembly Bill 4X 1 declares that it amends the 2009 Budget Act by making appropriations. The last section of Assembly Bill 4X 1 recites that the "act is an urgency statute" that "*makes revisions in appropriations* for the support of the government of the State of California and for

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[13] Petitioners dispute that Assembly Bill 4X 1 was a "budget bill." (See, *post*, pp. 28-29.)

[14] The Governor maintains, and petitioners and interveners do not dispute, that section 10 of Assembly Bill 4X 1 increased funding for Item 0250-101-0932, for support of the judicial branch; section 61 increased funding for Item 0690-001-0001, for support of the California Emergency Management Agency; section 149 increased funding for Item 2670-001-0290, for support of the Board of Pilot Commissioners; and section 318 increased Item 4265-001-0890, for support of the Department of Public Health. (Assem. Bill 4X 1, §§ 10, 61, 149, 318.)

[15] Assembly Bill 4X 1 is titled "Budget Act of 2009—Revisions" and states it is "[a]n act to amend and supplement the Budget Act of 2009 . . . by amending Items [there follows a list of more than 350 items by number], by adding Items [there follows a list of more than 100 items by number], and by repealing Items [there follows a list of more than 40 items by number], and by amending Sections [there follows a list of 10 sections], and by adding Sections [there follows a list of 21 sections, including those sections 17.50, 18.00 through 18.50 at issue here], and by repealing Section 24.65 of, that act, relating to the State Budget, *making an appropriation* therefore, and declaring the urgency thereof, to take effect immediately." (Assem. Bill 4X 1, italics added.)

several public purposes for the 2009-10 fiscal year."[16] (Assem. Bill 4X 1, § 583, italics added.)

Finally, the Legislative Counsel's Digest for Assembly Bill 4X 1 includes the legend "*Appropriation: yes.*" (Legis. Counsel's Digest, Assem. Bill 4X 1, Stats. 2009, 4th Ex. Sess. 2009, ch. 1, italics added.)[17]

A reasonable reading of Assembly Bill 4X 1 and the Legislative Counsel's Digest leads to the conclusion that the multiple budget items identified in the measure are items of appropriation, as they must be under article IV, section 12, subdivision (d) of the California Constitution, which provides in part: "No bill except the budget bill may contain more than one item of appropriation, and that for one certain, expressed purpose. . . ." (Cal. Const., art. IV, § 12, subd. (d).)[18]

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[16] "This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are: [¶] This act makes revisions in appropriations for the support of the government of the State of California and for several public purposes for the 2009-10 fiscal year. It is imperative that these revisions be made effective as soon as possible. It is therefore necessary that this act go into immediate effect." (Assem. Bill 4X 1, § 583.)

[17] The Legislative Counsel's Digest states: "The Budget Act of 2009 (Chapter 1 of the 2009-10 Third Extraordinary Session) made appropriations for the support of state government for the 2009-10 fiscal year.

"This bill would make revisions in those appropriations for the 2009-10 fiscal year. The bill would make specified reductions in certain appropriations.

"The California Constitution authorizes the Governor to declare a fiscal emergency and to call the Legislature into special session for that purpose. The Governor issued a proclamation declaring a fiscal emergency, and calling a special session for this purpose, on July 1, 2009.

"This bill would state that it addresses the fiscal emergency declared by the Governor by proclamation issued on July 1, 2009, pursuant to the California Constitution.

"This bill would declare that it is to take effect immediately as an urgency statute.

"Appropriation: yes." (Legis. Counsel's Dig., Assem. Bill 4X 1.)

[18] "No bill except the budget bill may contain more than one item of appropriation, and that for one certain, expressed purpose. Appropriations from the General Fund of the State, except appropriations for the public schools, are void unless passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring." (Cal. Const., art IV, § 12, subd. (d).)

After the Governor exercised his line-item veto, the Legislative Counsel issued an opinion, cited by interveners, concluding that "an item or section of a bill that proposes only to make a reduction in an existing item of appropriation previously enacted in the Budget Act of 2009 is not itself an item of appropriation" and therefore, "in vetoing items of sections of [Assembly Bill 4X 1] that proposed only reductions to existing appropriations enacted by the Budget Act of 2009, the Governor exceeded his 'line-item' veto authority." (Ops. Cal. Legis. Counsel, No. 0920928 (Aug. 5, 2009) Governor's Line-Item Veto Authority: Reductions to Existing Appropriations, pp. 1, 4.)[19] We are not persuaded.

"While an opinion of the Legislative Counsel is entitled to respect, its weight depends on the reasons given in its support." (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 238.) Because the conclusions of Legislative Counsel seem to us little more than a series of ipse dixits, we accord them "little weight." (*Ibid.*) Moreover, opinions of the Legislative Counsel are persuasive because they are ordinarily "prepared to assist the Legislature in its consideration of pending legislation" (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17) and therefore often shed light on the legislative purpose. The opinion before us, however, was not prepared to assist in the consideration of *pending* legislation. As it opines on the constitutionality of the Governor's veto of Assembly Bill 4X 1, it is no more persuasive than the views of the parties. Legislative intent—i.e., whether the

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[19] Like petitioners and interveners, the Legislative Counsel's opinion concludes that "[t]he legal effect of an item or section of a bill that solely makes a reduction of a previously appropriated amount is not to grant authority to a state officer to expend a specified sum, but to lessen that authority. Unlike an appropriation, the reduction of an existing appropriation does not set aside moneys for payment of a claim or make a new appropriation of moneys from the public treasury, nor does it add additional amounts to funds already provided for by an existing appropriation or identify a new purpose for which moneys may be expended. A state officer is not granted new expenditure authority, nor is a state officer's expenditure authority extended in any way by an item or section of a bill that solely makes a reduction of an existing appropriation." (Ops. Cal. Legis. Counsel, No. 0920928, *supra*, Governor's Line-Item Veto Authority: Reductions to Existing Appropriations, at p. 4, fn. omitted.)

Legislature intended that the items at issue be subject to the Governor's veto power—is irrelevant to our inquiry.

Our conclusion that the items at issue were appropriations is further buttressed by the nature of the relief sought by petitioners and interveners. Petitioners and interveners both contend the provisions of Assembly Bill 4X 1 did not "set aside money for the payment of any claim" because the funds for these programs already had been set aside and spending authority previously had been provided in the 2009 Budget Act. At the same time, however, they ask this court *to direct the Controller to pay state funds, in the amounts specified in Assembly Bill 4X 1, for the programs specified therein*, based upon the passage of that budget bill.[20] The relief sought is not permitted under the California Constitution, unless appropriations directing it are in place. (Cal. Const., art. XVI, § 7.) Article XVI, section 7 provides: "Money may be drawn from the Treasury *only through an appropriation* made by law and upon a Controller's duly drawn warrant." (Italics added.) The constitutional requirement is further elaborated by Government Code section 12440, which provides: "The Controller shall draw warrants on the Treasurer for the payment of money directed by law to be paid out of the State Treasury; but a warrant shall not be drawn unless authorized by law, and unless . . . *unexhausted specific appropriations* provided by law are available to meet it." (Italics added.) In seeking payments from the Controller from state funds in the amounts set aside in Assembly Bill 4X 1, for the programs identified therein, and according to the terms of that bill, petitioners and interveners implicitly acknowledge that the provisions of that budget measure are items of appropriation.

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[20] Petitioners request, among other things, that this court issue a writ of mandate directing respondents "[t]o take all actions necessary to ensure that the moneys appropriated in the Budget Act of 2009, as amended and supplemented by [Assembly Bill 4X 1], and excluding the Governor's purported vetoes thereto, be disbursed and continue to be disbursed as directed in accordance with the laws of California." Interveners seek a writ of mandate "requiring respondents to provide for the full amount of appropriations made by the Legislature under the Budget Act of 2009, as reduced and revised by [Assembly Bill 4X 1], without regard to the reductions purported to be made by respondent [Governor] . . . ."

The content and structure of Assembly Bill 4X 1 thus supports our conclusion that the provisions at issue are items of appropriation subject to reduction or elimination by the Governor's use of the line-item veto power.

Identification of the Assembly Bill 4X 1 legislative reductions as items of appropriation is consistent with the reenactment and single-subject rules of the California Constitution, article IV, section 9,[21] and the mandate of article IV, section 12, subdivision (d), that "[n]o bill except a budget bill may contain more than one item of appropriation . . . ." Petitioners' and interveners' claims to the contrary are not persuasive.

First, if, as interveners claim, Assembly Bill 4X 1 amendments to the 2009 Budget Act do not reenact the items of appropriation they purport to change, the measure would violate the directive of article IV, section 9 of the California Constitution, that "[a] section of a statute may not be amended unless the section is re-enacted as amended." Second, if the reduced Assembly Bill 4X 1 items at issue are not items of appropriation, Assembly Bill 4X 1 would seemingly violate the single-subject requirement of article IV, section 9, as a budget bill dealing with more than the single subject of appropriations. Finally, if Assembly Bill 4X 1 is not a "budget bill," as petitioners claim, it violates the provisions of article VI, section 12, subdivision (d), that only a budget bill may contain more than one item of appropriation.

Petitioners and interveners deal with the foregoing problems in very different—and often contradictory—ways.

Petitioners try to shield the items in question from reduction by the Governor by claiming that, as to the seven sections of Assembly Bill 4X 1 at issue, the Legislature neither repealed nor *reenacted* the appropriations signed by the Governor in the 2009 Budget Act. As earlier pointed out, the California Constitution provides that "[a] section

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[21] Article IV, section 9 of the California Constitution provides in its entirety: "A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void. A statute may not be amended by reference to its title. A section of a statute may not be amended unless the section is re-enacted as amended."

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

Petitioners argue that the *language* used by the Legislature in effecting reductions differentiates those sections of Assembly Bill 4X 1 that "amend," and therefore reenact, sections of the 2009 Budget Act, from other sections that merely "added" sections to the 2009 Budget Act containing items (those at issue here) that petitioners and interveners contend are not appropriations. (Interveners do not endorse this argument. They contend that *none* of the Assembly Bill 4X 1 reductions, no matter how phrased, is an "item of appropriation.") Petitioners posit two sections of Assembly Bill 4X 1 as illustrative:

"Section 399 of [Assembly Bill 4X 1], as passed by the Legislature amended the Budget Act as follows:

" 'SEC. 399. Item 6110-001-0001 of Section 2:00 of the Budget Act of 2009 is *amended* to read:

" '6110-001-0001—For support of Department of Education . . . . 38,210,000.' [(Assem. Bill 4X 1, § 399, italics added.)]" [Petitioners note the amount previously appropriated in the 2009 Budget Act was $43,139,000, so in effect Assembly Bill 4X 1 reduced the amount for this item by $4,929,000. (2009 Budget Act, Item 6110-001-0001, No. 1 West's Cal. Legis. Service, p. 494.)][22]

Petitioners "note that this amendment makes no mention of the reduction from the previously appropriated amount; it simply proposes to replace the original text with a new sum. *Thus, it may be argued, it represents an entirely new appropriation upon which the Governor may justly use his veto power.*"

Petitioners contrast section 399 (a section not at issue in this litigation) with "the amendment proposed in Section 572 of [Assembly Bill 4X 1], which will reduce funding for the Healthy Families Program:

" 'SEC. 572. Section 18.20 is *added* to the Budget Act of 2009, to read:

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[22] Bracketed insertions are ours, not petitioners'.

" 'Sec. 18.20. (a) *The amount appropriated* in Item 4280-101-0001 of Section 2.00 *is hereby reduced by* $125,581,000.' [(Assem. Bill 4X 1, § 572, italics added.)]" [The amount previously appropriated in the 2009 Budget Act was $377,487,000, so the effect is that a sum of $251,906,000 is set aside for this program. (2009 Budget Act, Item 4280-101-0001, No. 1 West's Cal. Legis. Service, p. 428.)]

The specific sums set aside for the particular programs are easily ascertained from Assembly Bill 4X 1, by simply subtracting the dollar amount of the reductions from the original amounts appropriated in the 2009 Budget Act.

Petitioners argue that although the two amendments have similar effect—reducing the amount originally set aside under the 2009 Budget Act—"the direct amendment and reenactment of previously passed items of appropriation in the manner of proposed Section 399 arguably exposes them to the [G]overnor's line-item power . . . ; no such authority exists . . . with respect to the reductions made in the manner of Section 572."

In essence, Petitioners argue that the Legislature may do by indirection that which it cannot do directly, that is, it may insulate certain items of appropriation from the Governor's line-item veto power by the language used, where other items having the identical effect of reducing the sums appropriated in the 2009 Budget Act would be subject to that power. This, the Legislature may not do. (See *Wood v. Riley, supra,* 192 Cal. at pp. 304-305.) As amici curiae former Governors observe: "If by simple wordsmithing the legislative branch can create an omnibus spending bill limiting the Governor's oversight only to veto of the entire bill, then the budgetary process is reduced to a game of 'chicken' daring a [G]overnor to bring state government to a halt through a veto."

Whether identified in Assembly Bill 4X 1 as amendments of, revisions to, or additions to the 2009 Budget Act, it is clear that every provision of Assembly Bill 4X 1 changed a section of the 2009 Budget Act. In *Planned Parenthood Affiliates v. Swoap, supra,* 173 Cal.App.3d 1187, 1199, we recognized that "[a]n amendment has been described as ' "a legislative act designed to change some prior or existing law by adding

or taking from it some particular provision." ' [Citations.]" Consequently, the sections that were "added" like those that expressly "amended" the 2009 Budget Act, reenacted those provisions and were subject to the line-item veto or reduction by the Governor. (See also *People v. Western Fruit Growers* (1943) 22 Cal.2d 494, 501.)

Interveners approach the problem from a different perspective. The key question, as they see it, is not whether the reenactment rule applies, but the effect of its application. Interveners agree that Assembly Bill 4X 1 fulfills the purpose of the reenactment rule of avoiding confusion on the part of the Legislature and the public that often results when amendments direct the insertion, omission or substitution of certain words or additions of provisions without setting out the entire context of the section to be amended. (*White v. State of California* (2001) 88 Cal.App.4th 298, 313-314.) Interveners contend, however, that when viewed in tandem with Government Code section 9605, the effect of the article IV, section 9 reenactment rule of the California Constitution was that the only provisions of the 2009 Budget Act that were reenacted by adoption of the reductions in Assembly Bill 4X 1 were those that were changed, that is, the *amount* of each reduction.

Government Code section 9605 states: "Where a section or part of a statute is amended, it is not to be considered as having been repealed and reenacted 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; and the omitted portions are to be considered as having been repealed at the time of the amendment." The effect of Government Code section 9605 is "to avoid an implied repeal and reenactment of unchanged portions of an amended statue, ensuring that the unchanged portion operates without interruption." (*In re Lance W.* (1985) 37 Cal.3d 873, 895.) Scaffolding their arguments on this structure, petitioners and interveners assert that by changing only the *amount* of the appropriation in the provisions of Assembly Bill 4X 1 at issue, the Legislature did not reenact the corresponding items of appropriation of the 2009 Budget Act but merely reduced the "amount."

This argument would have us parse a putative "item of appropriation" into three separate parts: the "*setting aside*," the "*amount*" thereof, and the "*particular purpose*" to which that amount may be put. So divided, petitioners and interveners maintain that Assembly Bill 4X 1 changed only the "amount" of the items in Assembly Bill 4X 1 at issue, and none of the changes fit the tripartite definition of "item of appropriation." The flaw in this imaginative argument is that the "setting aside" and the "amount" thereof are fundamentally indivisible. The act of setting aside is meaningful only with respect to the designated amount. 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.

If petitioners and interveners are correct that the many reductions at issue here did not constitute items of appropriation, and so cannot be selectively vetoed or further reduced by the Governor, then, because each item involves a different statutory program, the entire bill might be invalid as a violation of the single-subject rule. (See *Planned Parenthood Affiliates v. Swoap, supra,* 173 Cal.App.3d at pp. 1198-1199.) "In California, legislators and state agencies have repeatedly been reminded by the Attorney General that '[a]nnual budget acts, like all other enactments of the Legislature, are subject to the provisions of section [9], Article IV, of the California Constitution,' which sets forth the single-subject rule. [Citations.] . . . [O]ur Supreme Court recently agreed that ' " 'the budget bill may deal only with the one subject of 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.' " ' [Citations.]" (*Planned Parenthood Affiliates v. Swoap,* at pp. 1198-1199.)

In *Harbor, supra,* 43 Cal.3d 1078, the court held the trailer bill containing multiple statutory amendments intended to implement the appropriations previously set forth in the annual budget act violated the single-subject rule, as the number and scope of topics contained therein covered numerous unrelated subjects. The court rejected the

claim that the provisions of the trailer bill were "reasonably germane" to the objects of the measure, which were asserted to be to " 'fiscal affairs' " and " 'statutory adjustments.' " (*Id.* at pp. 1100-1101.) According to the court, in such case, the bill "encompass[ed] matters of 'excessive generality' " (*id.* at p. 1100), as "[t]he number and scope of topics germane to 'fiscal affairs' in this sense is virtually unlimited." (*Id.* at pp. 1100-1101.)

Relying on *League of Women Voters v. Eu* (1992) 7 Cal.App.4th 649, petitioners are confident that Assembly Bill 4X 1 would pass muster under the single-subject rule if the items in the measure vetoed by the Governor are not "items of appropriation." *League of Women Voters v. Eu*, which distinguished *Harbor, supra,* 43 Cal.3d at page 1098, rejected a single-subject rule challenge to a proposed ballot initiative combining reductions to welfare benefits with other provisions that would increase the power of the Governor in fiscal crises. Reasoning that the object of the initiative was not simply "fiscal affairs" or "statutory adjustments," as in *Harbor*, the court concluded that the "overall theme and driving purpose" of the initiative was to obtain a balanced budget, and budget balancing was a sufficiently narrow single subject for purposes of the single-subject rule. (*League of Women Voters v. Eu,* at p. 666.) We do not share petitioners' certainty that Assembly Bill 4X 1 has a comparable unifying theme apart from the fact that its substantive provisions appropriate money from the public treasury for specified purposes. We need not decide the question, however. It is for our purposes sufficient that petitioners' interpretation would present a substantial constitutional question, which, whenever possible, we are obliged to avoid. (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 65; *Kollander Construction, Inc. v. Superior Court* (2002) 98 Cal.App.4th 304, 314, disapproved on other grounds in *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1107, fn. 5 ["We are constrained to avoid constitutional questions where other grounds are available and dispositive"]; see *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1357.)

Somewhat inexplicably, petitioners maintain in their traverse that the legislative process undertaken pursuant to the Governor's proclamation of a fiscal emergency that

culminated in Assembly Bill 4X 1 did not create a "budget bill" containing "items of appropriation" and could not violate the single-subject rule. They argue that "the claim that Assembly Bill [4X] 1 is *a* budget bill, . . . conflicts with the text of [the California Constitution,] [a]rticle IV, [section] 10[, subdivision] (f)(1), referencing the passage of '*the* budget bill' and [section] 10[, subdivision] (f)(3), contemplating a separate bill 'addressing the fiscal emergency' to be passed following passage of the budget bill." We fail to see any conflict. That the 2009 Budget Act was indisputably a "budget bill" does not make Assembly Bill 4X 1 any less a "budget bill." Were it otherwise, Assembly Bill 4X 1, which contains multiple items of appropriation—at least four that petitioners and interveners concede are appropriations—for diverse purposes, would be in direct conflict with the mandate of article IV, section 12, subdivision (d), that only a budget bill may contain more than one item of appropriation, as well as potentially running afoul of the single-subject rule of article IV, section 9.

Contrary to petitioners, interveners acknowledge that "[a] bill amending a budget bill, particularly one passed under the fiscal emergency procedures of article IV, section 10(f), *is a budget bill* within the meaning of article IV, section 12(d)'s requirement that only the budget bill may contain more than one item of appropriation." (Italics added.) Interveners suggest, however, that the reenactment rule of article IV, section 9 (providing in part that "[a] section of a statute may not be amended unless the section is re-enacted as amended") does not apply to the budget, arguing that an item of appropriation is not a "section of a statue." This suggestion flies in the face of article IV, section 10, subdivision (a) [a "bill passed by the Legislature. . . becomes a statute if it is signed by the Governor"] and the recognition by Assembly Bill 4X 1 that "[t]his act is an urgency *statute* . . . ." (Assem. Bill 4X 1, § 583, italics added; see also Leg. Counsel's Dig., Assem. Bill 4X 1 ["This bill would declare that it is to take effect immediately as an urgency statute"].)

III. Separation of Powers

Interveners' contention that the amounts designated by the items of Assembly Bill 4X 1 at issue should not be reducible by the Governor is based in part on a separation of powers theory, also advanced by amici curiae SEIU California State Council et al. This claim is built upon (1) the absence in our California Constitution of explicit gubernatorial authority to increase or decrease the size of spending cuts made by the Legislature in response to a declaration of fiscal emergency, and (2) the language in *Harbor, supra*, 43 Cal.3d 1078, emphasizing that, as interveners put it, "the power to veto, reduce or eliminate is not the power to create or increase," such as, for example, the Supreme Court's observations that "[t]he word 'veto' means 'I forbid' in Latin. . . . [T]he effect of the veto [is] negative, frustrating an act without substituting anything in its place." (*Id.* at p. 1085.)

As interveners see it, in making the challenged line-item vetoes, "the Governor sought to use his power to *increase* what the Legislature had done. The Legislature had made a policy determination regarding how much state spending had to be cut in response to the fiscal crisis and where those spending cuts were to be made. The Governor, however, disagreed with the Legislature's policy determinations. He wanted to make *more* cuts in order to keep a larger budget reserve." According to interveners, the Governor's preference for a larger budget reserve is a policy determination belonging to the legislative, not the executive, branch. Facially intriguing, this argument amounts to little more than wordplay.

Whether the items in Assembly Bill 4X 1 at issue are appropriations cannot be determined by seeing the Governor's use of the veto power only as increasing the Legislature's reductions and characterizing that as an impermissibly affirmative or "creative" act. For one thing, treating the veto as an increase in the reduction rather than as a decrease in the appropriation is as arbitrary as describing a glass of water as half full rather than half empty. By increasing the Legislature's reduction, the Governor decreases the size of the appropriation. What matters is not whether the Governor's act is seen as affirmative or negative, but its purpose and practical effect.

The difference of opinion between the Legislature and the Governor was not whether the amount of particular items of appropriation enacted in the 2009 Budget Act needed to be reduced, but the *magnitude* of the reductions. What mattered in the end were the amounts set aside for particular purposes; the Legislature wanted higher amounts than did the Governor. While the Governor's line-item vetoes may be said to have "increased" the reductions made by the Legislature as to the items at issue, the most significant effect of the vetoes, and their purpose, was to further reduce the amounts set aside by the Legislature. The Governor's wielding of the line-item veto was therefore quintessentially negative, as it lowered the cap on the spending authority for specified purposes, providing precisely the type of check on the Legislature intended by the constitutional initiative that adopted the line-item veto, empowering the Governor "to reduce an appropriation to meet the financial condition of the treasury." (Ballot Pamp., Gen. Elec. (Nov. 7, 1922), argument in favor of Prop. 12, pp. 78-79.)

Interveners' separation of powers argument thus begs the question. To be sure, the Governor's challenged acts were legislative in nature and, "[a]s an executive officer, [the Governor] is forbidden to exercise any legislative power or function except as the constitution expressly provide[s]." (*Lukens v. Nye, supra,* 156 Cal. at p. 501.) The question is not whether the gubernatorial act at issue is legislative, but whether it is constitutionally authorized. As earlier explained, we find it authorized by the statement in article IV, section 10, subdivision (e) of our California Constitution, that "[t]he Governor may reduce or eliminate one or more *items of appropriation* while approving other portions of a bill."

Nor are we impressed by the "anomalies" interveners contend would flow from finding the Governor's use of the line-item veto here is within constitutional bounds. Interveners contend, for example, that our reliance on article IV, section 9 of the California Constitution, for the conclusion that Assembly Bill 4X 1 reenacted those portions of the 2009 Budget Act that it amended, would allow the Governor to reduce the amount of funding authorized by a bill making only non-substantive technical changes to a previously enacted and unchanged appropriation, and also subject the measure to the

two-thirds vote requirement. Interveners also posit that it would also permit the Governor to "eliminate" a reduction to a previously enacted appropriation, thereby allowing *more* spending than the Legislature authorized which, they maintain, is not the use of the veto as a "negative" check on the Legislature, but the opposite.[23]

We need not address these issues as they are not before us. However, we do think it appropriate to point out that the Governor's veto power does not give him the last word. The Legislature retains the ability to override the Governor's veto of items of appropriation in the same manner as other bills, by separately reconsidering and passing them by a two-thirds majority of each house. (Cal. Const., art. IV, § 10, subds. (a), (e).) Nor do we here address the validity of the Governor's attempted allocation or splitting of his further reductions among various programs or portions of programs where Assembly Bill 4X 1 simply contained a lump sum reduction in a single item of appropriation. (But see *Harbor, supra,* 43 Cal.3d at pp. 1090-1091.)[24]

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[23] This would also have occurred if the Governor had vetoed Assembly Bill 4X 1 in its entirety. However, interveners do not argue the entire bill was not subject to veto or that exercise of such veto would be an impermissibly creative act rather than one that is permissibly negative.

[24] Interveners and petitioners point to the defeat of Proposition 76 at the November 2005 General Election and the defeat of Proposition 1A in May 2009, as evidence that the voters did not give the Governor the line-item veto power he exercised here. Proposition 76 would have allowed the Governor unilaterally to make spending reductions if the Legislature failed to enact legislation to deal with a fiscal emergency. (Ballot Pamp., Special Statewide Elec. (Nov. 8, 2005) Prop. 76 ("State Spending and School Funding Limit. Initiative Constitutional Amendment.").) Proposition 1A would have allowed the Governor to make certain midyear reductions without legislative approval. (Ballot Pamp., Special Elec. (May 19, 2009) Prop. 1A ("State Budget. Changes California Budget Process. Limits State Spending. Increases 'Rainy Day' Budget Stabilization Fund.").) These two propositions, which would have expanded executive powers and permitted *unilateral* spending cuts by the Governor, are irrelevant to the issues presented here. (See *American Civil Rights Foundation v. Berkeley Unified School Dist.* (2009) 172 Cal.App.4th 207, 219, fn. 9 [denying a request for judicial notice of ballot arguments regarding a later, failed initiative on the same general topic as Prop. 209, and instead choosing to "focus our attention on the voters' intent in 1996, when they adopted Proposition 209"].)

CONCLUSION

In article IV, section 10, subdivision (e), the California Constitution grants the Governor the limited legislative power to exercise the line-item veto to eliminate or reduce "items of appropriation." For the reasons set forth in this opinion, we conclude that the particular Assembly Bill 4X 1 budget reductions at issue here were "items of appropriation" within the meaning of article IV, section 10, subdivision (e), and that the Governor's line-item vetoes reducing them, while approving other portions of Assembly Bill 4X 1, was therefore constitutionally authorized.

DISPOSITION

The petition for writ of mandate is denied.

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Kline, P.J.

We concur:

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Lambden, J.

_____
Richman, J.

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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 April 12, 2010, I served a copy of the within document(s):

PETITION FOR REVIEW

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 April 12, 2010, at San Francisco, California.

Sarah Farley

Sarah Farley