Case No. A 125750

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

vs.

ARNOLD SCHWARZENEGGER et al., Respondents

APPLICATION AND STATEMENT OF INTEREST OF GEORGE DEUKMEJIAN, PETE WILSON, GRAY DAVIS, THE CALIFORNIA CHAMBER OF COMMERCE, THE CALIFORNIA TAXPAYERS' ASSOCIATION AND THE CALIFORNIA BUSINESS ROUNDTABLE TO FILE AN AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENTS ARNOLD SCHWARZENEGGER AND JOHN CHIANG; PROPOSED BRIEF OF AMICI CURIAE

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TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES, FIRST DISTRICT COURT OF APPEAL

Pursuant to California Rule of Court 8.200, subdivision (c), amici curiae George Deukmejian, Pete Wilson, Gray Davis, the California Chamber of Commerce, the California Taxpayers' Association and the California Business Roundtable respectfully request permission to file the accompanying brief amici curiae in support of Respondents. Amici George Deukmejian, Pete Wilson and Gray Davis are former Governors of California who each during their collective twenty-one years in office found it necessary to exercise their line-item veto authority under California Constitution Article IV, section 10(e).

The California Chamber of Commerce ("CalChamber") is a non-profit business association with over 15,000 members, both individual and corporate, representing virtually every economic interest in the State of California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the State's economic and jobs climate by representing business on a broad

range of legislative, regulatory and legal issues. CalChamber often advocates before the courts by filing amicus curiae briefs in cases involving issues of paramount concern to the business community.

The California Taxpayers' Association ("Cal-Tax") is a non-profit, non-partisan organization, founded in 1926, whose purpose is to protect California taxpayers from unnecessary taxes and to promote government efficiency. Cal-Tax serves its members - hundreds of small and large businesses that conduct business in California - through research and advocacy on significant California tax and spending issues in the legislative, executive, and judicial branches of government. Cal-Tax frequently appears as an amicus in this Court.

The California Business Roundtable is a non-partisan, non-profit organization composed of chief executive officers of California's leading corporations. Established in 1976, the Roundtable was created in the belief that business leaders should have an active role in the formulation and evaluation of public policy. Since its inception, the Roundtable has provided essential leadership on high-priority public policy issues.

Amici curiae's brief will address the adverse impact on the constitutional checks and balances between the legislative and

executive branches of petitioners' and intervenors' narrow interpretation of "an item of appropriation." Amici curiae's brief will also address the potential "one subject" implications of including allegedly multiple non-appropriation items in an appropriation bill.

Amici curiae view the narrow interpretation of Article IV, section 10(e) asserted by petitioners and intervenors as a fundamental and insidious intrusion on the constitutional power of the Governor to participate in the spending decisions of the legislative branch. 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 governor to bring state government to a halt through a veto.

The novel and legally unsupportable theory which petitioners and intervenors advance is not limited to the current fiscal crisis. If they prevail in their theory, absent a subsequent constitutional amendment, there will be no constraints on the Legislature to pass multi-item appropriations on a majority basis on the theory they are not appropriations subject to a two-thirds vote of the Legislature and, for the same reason, are outside a governor's line-item veto authority.

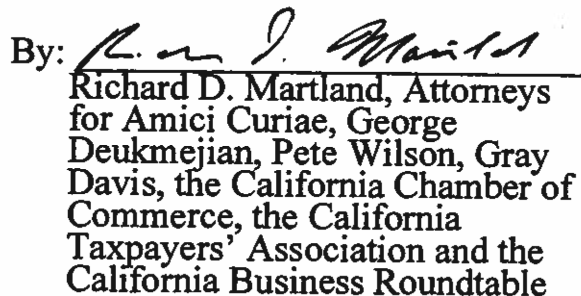
There can be no fiscal integrity without checks and balances. That is why amici curaie are requesting that the application for writ of mandate be denied.

For the foregoing reasons, Applicants respectfully request leave to file the attached brief *amici curiae*.

DATED: October 7, 2009

Respectfully submitted,

Nielsen, Merksamer, Parrinello, Mueller & Naylor, LLP



By: Richard D. Martland, Attorneys for Amici Curiae, George Deukmejian, Pete Wilson, Gray Davis, the California Chamber of Commerce, the California Taxpayers' Association and the California Business Roundtable

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PROPOSED BRIEF OF AMICI CURIAE GEORGE DEUKMEJIAN, PETE WILSON, GRAY DAVIS, THE CALIFORNIA CHAMBER OF COMMERCE, THE CALIFORNIA TAXPAYERS' ASSOCIATION AND THE CALIFORNIA BUSINESS ROUNDTABLE IN SUPPORT OF RESPONDENTS ARNOLD SCHWARZENEGGER AND JOHN CHIANG

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CERTIFICATION OF BRIEF LENGTH

I, Richard D. Martland, attorney for Amici Curiae, hereby certify that pursuant to Rule 14(c)(1) or 33(b)(1) of the California Rules of Court, the enclosed Brief is produced using at least 13 point Times New Roman type including footnotes and contains approximately 1,895 words, which is less than the total words permitted by the Rules of Court. Counsel relies on the word count of the computer program used to prepare this Brief.

DATED: October 7, 2009

Respectfully submitted,

Nielsen, Merksamer, Parrinello,
Mueller & Naylor, LLP.

By:

Richard D. Martland, Attorneys for
Amici Curiae

I. INTRODUCTION

The constitutional powers of the Governor with respect to the state budgetary process are fully and accurately set forth in the Governor's Opposition to this petition for writ of mandate. The Constitution sets forth distinct powers to the legislative and executive branches. Those powers are at the heart of the checks and balances system underlying the government of this state. The directive of the Constitution is to give a governor the ability to control spending by reducing or eliminating appropriations through the veto power. It is this power that the petitioners, intervenors, and amici are attempting to erode.

As more fully articulated below, reduced to their essentials, the arguments advanced by the petitioners, intervenors, and amici are that a governor loses control of the Budget Act upon approval, and that subsequent measures that reduce appropriations are beyond a governor's authority to selectively eliminate or reduce because they are not "items of appropriation." In short, what petitioners, intervenors and amici argue is, after the budget bill is enacted, the Legislature may, through a single bill, make selective and multiple reductions in the prior appropriations, leaving a governor only the power to veto the entire bill.

The mischief such a scheme could generate is manifest. It renders the original budget process irrelevant in that spending levels agreed to by two-thirds vote of the Legislature in the Budget Act could be overturned by

a majority vote of the Legislature in a single bill on the theory that spending reductions are not items of appropriation subject to two-thirds vote of the Legislature. Moreover, such a scheme flies in the face of Article IV, section 10(e) of the California Constitution, which empowers a governor as chief executive officer of the State to "reduce or eliminate one or more items of appropriations." For the reasons stated herein and in the Governor's Opposition, there is no legal support for such an illogical, novel and destructive theory.

A. An Item of Appropriation Includes Increases or Decreases In Spending Authority.

All parties to this litigation appear to be in agreement that the narrow issue to be resolved is whether a reduction in a Budget Act is, itself, an item of appropriation subject to a governor's power to reduce or eliminate items of appropriation. All parties to this litigation also appear in agreement that an "appropriation" confers spending authority on a particular entity of government. However, petitioners, intervenors and amici contend that only an *increase* in spending authority amounts to an "appropriation" and that a provision that reduces spending authority is not an appropriation. Apart from the lack of any case law to support that position, it is illogical. Whether spending authority is increased or decreased, it is still spending authority. No one can seriously disagree that when the Governor reduces spending authority in the budget bill that reduction is part of the

appropriation process. There can be no dispute that this multi-itemed bill is an amendment to the Budget Act, otherwise it could not contain multiple appropriations. California Constitution, Article IV, section 12(d) provides "No bill except the budget bill may contain more than one item of appropriation." There is no substantive difference between reducing an item of appropriation in the original Budget Act and in a subsequent amendment to the Budget Act. Both involve changes in spending authority.

Further, the Legislative Digest prepared by the Legislative Counsel for AB 1, expressly states that AB 1 is an amendment to the appropriations in the Budget Act of 2009. The Digest provides (Opp., Exh. A, AB 1, p.13):

> Legislative Counsel's Digest
>
> AB 1, Evans, Budget Act of 2009: revisions
>
> The Budget Act of 2009 (Chapter 1 of 2009-10 Third Extraordinary Session) made appropriations for the support of state government for the 2009-10 fiscal year.
>
> This bill would make revisions to those appropriations for the 2009-10 fiscal year. This bill would make specified reductions in certain appropriations.

Any reasonable person reading the Digest would assume the multiple budget items identified in AB 1 are, as they must be under Article IV, section 12(d), items of appropriation. However, in an opinion issued by Legislative Counsel after the Governor exercised his line item veto power, cited by intervenors in support of their

position, Counsel inexplicably concludes (See Intervenors' Pet., p. 20, RJN, Exh. D, p. 3):

> Thus the fact that provisions of A.B. 1 are related to existing appropriations previously authorized by the Budget Act of 2009 does not mean that those provisions are items of appropriation subject to the Governor's line-item veto.

Counsel's conclusion cannot be reconciled with Article IV, section 12(d) or the Legislative Counsel's Digest. Counsel's opinion would suggest that there was a deliberate attempt, not disclosed in the Digest, to place multiple non-appropriation items in a bill containing multiple items of appropriations that did, in fact, authorize increases[1] in spending in order to give the appearance of compliance with Article IV, section 12(d). Once the bill was passed and signed by the Governor, Counsel now contends these non-appropriation items cannot be vetoed, citing *Harbor v. Deukmejian* (1987) 43 Cal.3d 1078. This "gotcha" tactic must fail for lack of any credible legal support.

Outside the arcane area of state budgetary practices, no one can reasonably disagree that when a bank sets a limit on its customer's credit card, it has conferred spending authority up to that limit. When it reduces that credit limit, it still confers spending authority, but at a lower limit. The

---

[1] Sections 6 and 10 of AB 1 add a total of $64,682,000 and $ 16,973,000, respectively to judicial branch appropriations.

contention that the Governor is not engaged in the establishment of spending authority when he reduced the items of appropriation at issue in this matter flies in the face of common sense.

B. Application of *Harbor v. Deukmejian* Would Invalidate the Entire Bill.

Petitioners, intervenors, and amici argue, in effect, that because a reduction in an appropriation is not, itself, an appropriation, the Governor's constitutional authority only extends to vetoing the entire bill, citing *Harbor v. Deukmejian*. *Harbor* involved a trailer bill containing multiple statutory amendments intended to implement the appropriations set forth in the Budget Act. None of those amendments purported to decrease or increase the appropriations in the Budget Act. The court concluded that those amendments were not items of appropriation and could not be selectively vetoed by the Governor pursuant to his line-item veto authority under Article IV, section 10(e). Thus, *Harbor* never addressed the narrow issue before this court.

More relevant to this litigation, however, the Court in *Harbor* held the trailer bill was invalid on the basis that it violated the single subject prohibition in Article IV, section 9. If petitioners, intervenors and amici are correct that the multiple reductions at issue do not constitute an appropriation and for this reason cannot be selectively reduced by the Governor, then because each item involves a different statutory program,

like the trailer bill in *Harbor*, the entire bill would be invalid. It is a well recognized maxim that legislation should be construed, if reasonably possible, to preserve its constitutionality. (*Dept. of Corr. v. Workers' Comp. Appeals Bd.* (1979) 23 Cal.3d. 197, 207; *Carman v. Alvord* (1982) 31 Cal.3d 318, 333.)

C. The Legislature Is Attempting The Same Ploy That Failed in *Wood v. Riley*.

Legislative attempts to circumvent the Governor's veto authority are not new. In the early and frequently cited case of *Wood v. Riley* (1923) 192 Cal. 293, the Legislature sought to insulate an appropriation from the Governor's line-item veto by casting it as a "transfer." The court rejected the ploy, stating (Id. at 305): "To sustain the contention of the petitioner that the proviso in question did not amount to an item of appropriation and was therefore removed from the effect of the executive veto would be to hold that the Legislature might, 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."

That the Legislature is engaged in the same ploy attempted in *Wood* is evident from the manner in which it worded the language of items in dispute in this action. Rather than merely amending these items, as it did some others, to simply reflect the reduced amount, the Legislature *added* an

item that expressly stated it reduced the prior appropriation. For example, compare the following items (Pet. Memo P&A, pp. 32 and 33):

> 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
>
> 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.

Even Petitioner Saint John's Well Child and Family Center apparently concedes that the amendment language that makes no reference to a "reduction" would probably be subject to the Governor's line-item veto, but contends that the express reduction language should be treated as substantively different. (Pet. Memo P&A, pp. 31-32.) The distinction between the two forms is the classic distinction without a difference. What is revealing about the two formats, however, is that the Legislature was intentionally trying to insulate the items addressed in this litigation from the Governor's line-item veto authority.

D. The Governor's Vetoes Are Not Affected By The Defeat Of Proposition 76.

Intervenors attempt to characterize the Governor's vetoes as a mid-year budget correction, asserting that the voters denied the Governor such

authority when they rejected Proposition 76 on the November 2005 General Election ballot.

Intervenors assert: "Thus, the voters have made clear that the question of how to deal with a fiscal emergency should be decided by the Legislature." Proposition 76 would have allowed the Governor to unilaterally make reductions in spending if the Legislature failed to enact legislation to deal with a fiscal emergency. The failure of Proposition 76 did not deprive the Governor of his right to exercise the line-item veto.

II. CONCLUSION

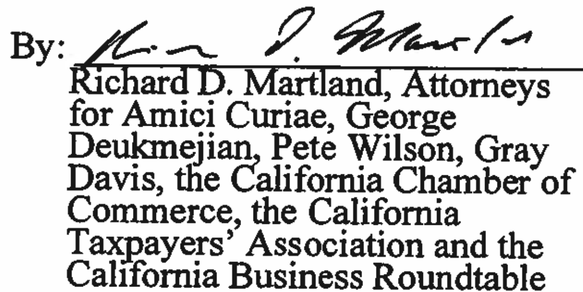
The supreme executive power of the state is vested in the Governor. (Cal. Const. art. V, sec. 1.) The Governor is responsible for the administration of state government for the benefit of its citizens. One of the most important functions of a governor is to control state spending. The line-item veto is an essential tool in carrying out that function. Under the guise of a fiscal crisis, petitioners, intervenors and amici have invented a theory out of whole cloth to deprive governors of the authority that has been conferred on them by the California Constitution since 1922. Neutering a governor during a fiscal crisis is irresponsible, particularly when such action is not supported by logic, reason or law. Checks and balances are what keep democratic governments functioning through the

good times and bad times. Petitioners, intervenors and amici, seek to upset that balance. We respectfully request this Court to reject their petition for writ of mandate.

DATED: October 7, 2009

Respectfully submitted,

Nielsen, Merksamer, Parrinello, Mueller & Naylor, LLP



By: Richard D. Martland, Attorneys for Amici Curiae, George Deukmejian, Pete Wilson, Gray Davis, the California Chamber of Commerce, the California Taxpayers' Association and the California Business Roundtable

DECLARATION OF SERVICE

CASE: *St. John's Well Child and Family Center et al. v. Schwarzenegger et al*

Court of Appeal Case No. **A 125750**

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is 1415 L Street, Suite1200, Sacramento, CA 95814.

On, October 7, 2009, I caused the foregoing document(s) described as **APPLICATION AND STATEMENT OF INTEREST OF GEORGE DEUKMEJIAN, PETE WILSON, GRAY DAVIS, THE CALIFORNIA CHAMBER OF COMMERCE, THE CALIFORNIA TAXPAYERS ASSOCIATION AND THE CALIFORNIA BUSINESS ROUNDTABLE TO FILE AN AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENTS ARNOLD SCHWARZENEGGER AND JOHN CHIANG; PROPOSED BRIEF OF AMICI CURIAE**

to be served on the individual(s) listed on the attached Service List as follows:

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✓ (BY OVERNIGHT MAIL) I caused such document(s) to be sent by overnight mail by using Federal Express Mail. Under that practice it would be deposited that same day in a Federal Express drop box for delivery the next business day.

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

Executed October 7, 2009, at Sacramento, California.

MARIE COOK

<u>SERVICE LIST</u>

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St. John's Well Child and Family Center et al. vs. Schwarzenegger et al.

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