



ARIZONA SUPREME COURT ORAL ARGUMENT CASE SUMMARY



The Forty-Seventh Legislature of Arizona; The Arizona State Senate; The Arizona House of Representatives; Ken Bennett, individually and as President, Arizona State Senate; and James P. Weiers, Individually and as Speaker, Arizona House of Representatives, v. Janet Napolitano, Governor of Arizona; Arizona Department of Administration and William Bell, Director; and Arizona State Personnel Board and Jeff Grant, Chair **CV-06-0079-SA**

PARTIES AND COUNSEL:

Petitioners: The Forty-Seventh Legislature of Arizona; The Arizona State Senate and House of Representatives; Ken Bennett, individually, and as Arizona State Senate President; and James Weiers, individually, and as Arizona House of Representatives Speaker ("The Legislature") are represented by Gary Lassen and Thomas Crouch, Meagher & Geer.

Respondent: Governor Napolitano is represented by Tim Nelson and Nicole Davis, General Counsel Office of the Governor, and by Paul Eckstein, Joel Nomkin, Charles Blanchard, and Lee Stein of Perkins Coie Brown & Bain. The Arizona Department of Administration and Director William Bell and the Arizona State Personnel Board and Chair Jeff Grant are represented by Mary O'Grady, Arizona Solicitor General. Ms. O'Grady filed a motion informing the Court that those State agency respondents join in the Governor's response to the petition for special action.

Amicus Curiae: Amicus Curiae National Conference of State Legislatures is represented by N. Warner Lee and John Fry of Ryley, Carlock, & Applewhite.

FACTS AND PROCEDURAL HISTORY:

The item-veto in issue concerns one item in House Bill 2661 ("the "Bill"), which passed as an emergency measure with bipartisan support. The Bill was comprised of nine sections and included a section making appropriations of monies for pay raises of \$51,738,300 for fiscal year 2005-06, and \$169,079,000 for fiscal year 2006-07. The Bill included sections amending existing statutes governing performance pay. Section 5 of the Bill also amended A.R.S. §41-771 which identifies employment positions that are exempt from personnel rules commonly referred to as the State merit system. Section 5, lines 14-18 of page 4 of the Bill, amended the list of exempt employees to include "state officers and employees [other than peace officers, correctional officers, and juvenile correctional officers] who are appointed or employed after December 31, 2006 and who are at a pay grade of twenty-four or above." As of March 11, 2006, the annual salary range for pay grade twenty-four was \$49,408 to \$84,596.

Employees who are covered by the State merit system (“covered employees”) accrue annual leave according to different schedules than the schedule for those who are not covered employees (“exempt employees”). Under the Arizona Department of Administration personnel rules, covered employees accrue annual leave based on their years of service according to a schedule as set forth in administrative regulations which also provide that covered employees may carry forward from year to year up to 240 hours of accrued annual leave. Exempt employees accrue annual leave at a flat rate of 6.47 hours/bi-weekly regardless of their length of service to the State and they may carry forward from year to year up to 320 hours of accrued annual leave.

The Governor approved the Bill but exercised a line-item veto as to the provision in Section 5 of the Bill amending A.R.S. §41-771. The line-item veto left two portions of the Bill unaffected: (1) An immediate pay increase averaging 6.3% for State government employees; and (2) Provisions concerning State employees’ “performance pay.” The Governor signed the Bill into law. Because the Bill had an emergency clause and passed the Legislature with more than two-thirds of each house’s members approving, the pay raise and performance components of the Bill have now taken effect.

The line-item veto concerned the clause in the Bill that would have increased payments to departing State employees for annual leave. State employees at or above a pay grade of 24 and with less than 15 years of service, by becoming exempt, would have earned and been able to carry forward more hours of annual leave than they would have as covered employees as explained above. Arizona law states that employees shall be paid for accrued and unused leave upon separation from their employment where, as in the State compensation system, the employer has a practice or policy of making such payments. A.R.S. §23-350(5) (“Wages include . . . vacation pay . . . when the employer has a policy or a practice of making such payments.”)

The Governor explained her reasons for vetoing the provision in her letter to the Legislature concerning the item veto. She noted that because of the differences in the way exempt and non-exempt employees would accrue annual leave, the proposed change would have posed additional costs to the State unrelated to state employee salaries. The Governor stated: “Such costs are unwarranted. The current merit system has served Arizona well and I see no reason to exempt future employees at or above grade 24.”

Three days after the Governor returned the Bill, the Arizona House and the Arizona Senate, without attempting to override or to pass the vetoed item as a separate bill, resolved to challenge the line-item veto in court. The Resolution stated:

Whereas, the House [and Senate] decline to entertain an attempt to override the Governor’s purported line-item veto of House Bill 2661 because [they] believe that this veto is wholly outside the Governor’s constitutional line-item veto power.

Whereas, the House [and Senate] do not wish to convey the impression to the Court, by attempting an override, that it believes that this dispute, as to the scope of the

Governor's power, is a political question appropriate for political resolution. The political question of the wisdom or advisability of the provision of House Bill 2661 that was vetoed is different from the legal question of the constitutional scope of the Governor's power. Moreover, the House [and Senate] believe it would be appropriate to request judicial relief subsequent to a veto override attempt."

Pursuant to the Resolution, seven weeks after the Governor issued her line-item veto, the Legislature filed this special action asking this Court: (1) to accept review and to declare the Governor's item-veto invalid as exceeding her constitutional authority because the Arizona Constitution does not grant a Governor authority to strike a substantive, non-appropriation item while approving the rest of the Bill, and (2) to order the Governor and affected state officers to implement the Bill without regard to the unlawful partial veto.

The National Conference of State Legislatures filed an *amicus curiae* brief (a "friend of the Court brief") with permission of the Court. That brief asserts that legislative bodies should be accorded standing to challenge the constitutionality of item-vetoes and that the large number of recently litigated cases indicates that even after decades of experience many critical issues of the interpretation of the item-veto remain unresolved.

ISSUE PRESENTED BY THE LEGISLATURE

"Under the Constitution, if a bill "contains several items of appropriations of money," the Governor may veto "one or more of such items." This Court has defined "appropriation" to mean setting aside a certain sum of money for a specific object, with authorization to spend it. The Governor item-vetoed four lines of text from a Bill. The vetoed text added a category of employees who are exempt from the State Merit System. Does part of a Bill that adds to the list of positions exempt from the merit system constitute an "item of appropriation of money"?

ISSUES PRESENTED BY THE GOVERNOR

"1. Should this Court exercise discretionary special action jurisdiction to again consider the scope of the Governor's constitutional item-veto authority? Or, do principles of standing and judicial restraint dictate that the Court decline such jurisdiction given that (i) none of the votes on HB 2661 were nullified (all votes were counted, and the Bill was transmitted to the Governor in the normal course), and (ii) Petitioners have refused to seek a veto override, or to otherwise avail themselves of their legislative remedies to challenge the subject item-veto, because Petitioners by express resolution, seek to force this Court to rule on the scope of the Governor's veto authority.

2. Issue presented only if the Court decides to exercise special action jurisdiction:

“Whether the Governor properly exercised her item-veto authority when she item-vetoed an amendment to A.R.S. §41-771 that, if enacted, would have exempted State employees at a pay grade of 24 or above from the State Merit System, thereby requiring increased State payments to departing employees for accrued annual leave.”

This Summary was prepared by the Arizona Supreme Court Staff Attorney's Office solely for educational purposes. It should not be considered official commentary by the court or any member thereof or part of any brief, memorandum or other pleading filed in this case.