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The Honorable Leonard A. Fasano
Senate Minority Leader
Legislative Office Building
Suite 3400
Hartford, CT 06106

Dear Senator Fasano:

You have asked for a formal legal opinion concerning the legal effect of the constitutional and statutory spending caps set forth, respectively, in the Connecticut constitution, article third, § 18, and Conn. Gen. Stat. § 2-33a. Specifically, you ask:

> (1) Do we have an enforceable constitutional spending cap, or did voter approval of the spending cap create only the promise of a future enforceable right that is contingent upon the legislature fulfilling its obligation to adopt definitions for the enforcement of the spending cap by the requisite three fifths vote; and
>
> (2) Is the super majority vote requirement contained in the statutory spending cap binding on current and future legislatures, or absent an enforceable constitutional spending cap, could the general assembly exceed the cap with a simple majority vote.

We conclude that unless and until the General Assembly adopts the definitions that the constitutional spending cap requires by the necessary three-fifths vote of the members of each house, the constitutional spending cap has no legal effect.

We further conclude that a court would likely hold that the General Assembly could exceed the statutory spending cap by a simple majority vote. We

base this conclusion on the well-established principles that one legislature cannot control the exercise of power by a subsequent legislature, and that when two laws conflict, the later enacted one prevails. Although it would not bind a court, this opinion represents our considered judgment as to how a court would likely approach and resolve your questions in light of statutory construction principles and binding Connecticut precedent.

I. History of the Constitutional and Statutory Spending Caps

In answering your questions, it is important to understand the history of the constitutional and statutory spending caps, and their relationship to each other. You have set forth some of this history in your letter.

On August 21, 1991, the General Assembly passed House Joint Resolution 205, which proposed amending article third of the state constitution to add a constitutional spending cap. The proposed amendment prohibited the General Assembly from authorizing an increase in general budget expenditures that exceeded the percentage increase in personal income or inflation, whichever was higher, in the absence of a declaration by the Governor that there exists an emergency or extraordinary circumstances and a vote by at least three-fifths of each house of the General Assembly to exceed such limit. It further expressly required that the General Assembly define by law the terms "increase in personal income," "increase in inflation," and "general budget expenditures" by a vote of three-fifths of the members of each house. See H.J.R. 205 (June 1991 Special Session).

During floor debate on the proposed amendment, legislators discussed the requirement that the General Assembly define the amendment's key terms and recognized that these definitions were essential prerequisites to the amendment taking effect. See 34 Conn. S. Proc., pt. 13, 1991 Sess. 205 (Aug. 21, 1991); 34 Conn. H. R. Proc., pt. 34, 1991 Sess. 799-805 (July 1, 1991). In the House, when asked whether "the definitions that are spoken of here would need to be adopted and if so, how would that occur," Representative McNally explained that "the Resolution states that enactment or amendment of such definitions shall require a three-fifths vote of the members of each House of the General Assembly. So at that time a three-fifths vote of both Chambers would be required to implement definitions as proposed in this Resolution." 34 Conn. H. R. Proc., pt. 34, 1991 Sess. 800-801 (July 1, 1991). When Representative Prelli followed up with a question as to whether "general budget expenditures" meant gross or net appropriation, Representative McNally responded that "general budget expenditures are left for future definition. That could include whatever . . . three-

fifths of both Chambers of the General Assembly define it as." Id. at 803-804. In the Senate, Senator Fleming questioned whether the cap would "be able to go into effect if we were unable to reach that 3/5's vote and enact these definitions to get it going?" 34 Conn. S. Proc., pt. 13, 1991 Sess. 205 (Aug. 21, 1991). Senator Herbst responded, "it is doubtful that it could go into effect without that." Id. As Representative McNally summed up, the proposed amendment "provides the potential for future spending control. It doesn't provide any guarantees." 34 Conn. H. R. Proc., pt. 34, 1991 Sess. 799 (July 1, 1991). After the General Assembly passed the proposed amendment, the electorate overwhelmingly approved it on November 3, 1992, and it became what is now article third, § 18(b), of the state constitution.[1]

On the same day that the General Assembly passed the proposed constitutional spending cap resolution, it also passed 1991 Conn. Pub. Acts No. 91-3 (June 1991 Special Session), which contained a statutory spending cap. The statutory spending cap mirrored the provisions of the constitutional spending cap except that, unlike the constitutional spending cap, it defined the terms "general budget expenditures," "increase in personal income," and "increase in inflation." The General Assembly passed the statutory spending cap, including its definitions, by a simple majority vote. Nielsen v. State, 236 Conn. 1, 5 n. 5 (1996). It also did so before the voters had actually approved the constitutional

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[1] As adopted, the constitutional spending cap states:

> The general assembly shall not authorize an increase in general budget expenditures for any fiscal year above the amount of general budget expenditures authorized for the previous fiscal year by a percentage which exceeds the greater of the percentage increase in personal income or the percentage increase in inflation, unless the governor declares an emergency or the existence of extraordinary circumstances and at least three-fifths of the members of each house of the general assembly vote to exceed such limit for the purposes of such emergency or extraordinary circumstances. The general assembly shall by law define 'increase in personal income', 'increase in inflation' and 'general budget expenditures' for the purposes of this section and may amend such definitions, from time to time, provided general budget expenditures shall not include expenditures for the payment of bonds, notes or other evidences of indebtedness. The enactment or amendment of such definitions shall require the vote of three-fifths of the members of each house of the general assembly.

Conn. const. art. III, § 18(b).

spending cap. It is clear, therefore, that the legislature did not intend to, and did not, in fact, adopt definitions for the constitutional spending cap when it passed the statutory spending cap.

Rather, the General Assembly intended the statutory spending cap to be a temporary measure while it worked towards the more difficult goal of adopting definitions for the constitutional spending cap by the necessary three-fifths vote. See 34 Conn. H.R. Proc., pt. 34, 1991 Sess. 804 and 805 (July 1, 1991) (remarks of Representative McNally). During floor debate, legislators recognized that the definitions in the statutory spending cap would not automatically become the definitions required by the constitutional spending cap. Thus, when Senator Freedman asked whether, once the constitutional amendment was adopted by the public, "the Legislature [would] then have to revote the current statutory language," Senator Herbst responded "[y]es, we will have to revote and we will probably have to redefine whatever takes place at that time." 34 Conn. S. Proc., pt. 13, 1991 Sess. 209 (Aug. 21, 1991).

After passage, the statutory spending cap was codified at Conn. Gen. Stat. § 2-33a and has never been amended. It provides, in pertinent part, that:

> The General Assembly shall not authorize an increase in general budget expenditures for any fiscal year above the amount of general budget expenditures authorized for the previous fiscal year by a percentage which exceeds the greater of the percentage increase in personal income or the percentage increase in inflation, unless the Governor declares an emergency or the existence of extraordinary circumstances and at least three-fifths of the members of each house of the General Assembly vote to exceed such limit for the purposes of such emergency or extraordinary circumstances.

Conn. Gen. Stat. § 2-33a. The statute goes on to define its key terms.[2] As noted, the General Assembly adopted § 2-33a, including the definitions, by a simple

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[2] Specifically, Conn. Gen. Stat. § 2-33a states that:

> As used in this section, 'increase in personal income' means the average of the annual increase in personal income in the state for each of the preceding five years, according to United States Bureau of Economic Analysis data; 'increase in inflation' means the increase in the consumer price index for urban consumers

majority vote prior to the time the constitutional spending cap was approved by the voters. Nielsen v. State, 236 Conn. 1, 5 n. 5 (1996).

In 1993, when the General Assembly had failed, despite repeated attempts, to adopt the definitions required to implement the constitutional spending cap, a group of taxpayers sued the General Assembly, seeking to compel it to enact the necessary definitions. Nielsen v. State, 236 Conn. 1 (1996). The Connecticut Supreme Court affirmed the dismissal of the suit, holding that it presented "a political question not amenable to judicial resolution." Id. at 9. According to the Court, the plaintiffs sought relief that the court could not provide "without an impermissible intrusion upon the prerogatives and functions of the coordinate branches of government." Id.

The Nielsen Court explained that it could not order the relief sought because, among other reasons, "[a] necessary predicate for a right to injunctive relief is the determination that a constitutional right exists and has been violated." Id. at 11. But the constitutional spending cap contained no such right. According to the Court, "the adoption of article third, § 18, establishe[d] only a future right to a spending cap, a right that will mature into an actionable right only *after* its predicate terms have been defined by the General Assembly." Id. at 11 (italics in original, citing State v. Sanabria, 192 Conn. 671, 687-691 (1984)). "In the absence of defined terms, there [was] no basis for enjoining presently permissible conduct by a coordinate branch of government." Id. at 12. Although the plaintiffs asked the Court to define the amendment's terms itself, the Court specifically

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during the preceding twelve-month period, according to United States Bureau of Labor Statistics data; and 'general budget expenditures' means expenditures from appropriated funds authorized by public or special act of the General Assembly, provided (1) general budget expenditures shall not include expenditures for payment of the principal of and interest on bonds, notes or other evidences of indebtedness, expenditures pursuant to section 4-30a, or current or increased expenditures for statutory grants to distressed municipalities, provided such grants are in effect on July 1, 1991, and (2) expenditures for the implementation of federal mandates or court orders shall not be considered general budget expenditures for the first fiscal year in which such expenditures are authorized, but shall be considered general budget expenditures for such year for the purposes of determining general budget expenditures for the ensuing fiscal year. As used in this section, 'federal mandates' means those programs or services in which the state must participate, or in which the state participated on July 1, 1991, and in which the state must meet federal entitlement and eligibility criteria in order to receive federal reimbursement, provided expenditures for program or service components which are optional under federal law or regulation shall be considered general budget expenditures.

rejected that request, explaining that the text of article third, § 18, expressly committed sole responsibility for that task to the General Assembly and the terms had no inherent meaning that were reliably discernable though judicial processes. Accordingly, the Court held that it could neither order the legislature to act, nor act itself, to define the terms necessary to implement the constitutional spending cap. Any available relief, it stated, would be through the political process, not the courts.

In so holding, the Nielsen Court made clear that the constitutional spending cap in article third, § 18, had no current effect, and would continue to have no effect, until the General Assembly enacted the necessary definitions by a three-fifths vote of each house. Furthermore, the Court ruled, in response to the plaintiffs' specific claim for relief, that the definitions set forth in Conn. Gen. Stat. § 2-33a, the statutory spending cap, could not be "substitute[d]" to satisfy the requirements of article third, § 18, because they had been adopted by a simple majority vote, rather than by the three-fifths vote required by the constitution. Nielsen, 236 Conn. at 13 n. 8; Roger Sherman Liberty Center, Inc. v. Williams, 52 Conn. Supp. 118, 130 n. 4 (2011). This situation has not changed since Nielsen was decided.[3]

II. Analysis

In your first question you ask whether the constitutional spending cap has any current legal effect. The answer to this question is apparent from the preceding discussion. As the legislative history of the constitutional spending cap and the Connecticut Supreme Court's analysis in Nielsen make clear, the constitutional spending cap set forth in article third, § 18(b) has no current legal effect, and will continue to have no legal effect until the General Assembly adopts the necessary definitions by a three-fifths vote of the members of each house. Members of the General Assembly recognized when they proposed the constitutional spending cap that the future passage of definitions would be essential to give it effect. See 34 Conn. S. Proc., pt. 13, 1991 Sess. 205 (Aug. 21, 1991); 34 Conn. H. R. Proc., pt. 34, 1991 Sess. 799-805 (July 1, 1991). The Nielsen Court confirmed this conclusion, holding that "the adoption of article third, § 18, establishe[d] only a future right to a spending cap, a right that will mature into an actionable right only *after* its predicate terms have been defined by

[3] We note that one justice only concurred in the Court's judgment, and stated his view that the matter would in fact become justiciable "[i]f the legislature fails to perform its duty within a reasonable time period . . . ." Nielsen, 236 Conn. at 17 (Berdon, J., concurring).

the General Assembly." Nielsen, 236 Conn. at 11 (italics in original, citing State v. Sanabria, 192 Conn. 671, 687-691 (1984)). Thus, we conclude in answer to your first question, that in the absence of properly adopted definitions, the constitutional spending cap has no present legal effect.

In your second question you ask whether the General Assembly could exceed the statutory spending cap in Conn. Gen. Stat. § 2-33a by a simple majority vote. As discussed, the statutory cap purports to prohibit the General Assembly from authorizing an increase in general budget expenditures that exceeds the percentage increase in personal income or inflation, whichever is higher, "unless the Governor declares an emergency or the existence of extraordinary circumstances *and at least three-fifths of the members of each house of the General Assembly vote to exceed such limit* for the purposes of such emergency or extraordinary circumstances." Conn. Gen. Stat. § 2-33a (emphasis added). Notwithstanding this language, a court would likely conclude that the General Assembly may lawfully exceed the statutory spending cap – or indeed could amend the definitions in the statutory cap – by a simple majority vote.

Three well established legal principles guide our analysis. First, under our state constitution and democratic system of government, absent a specific constitutional provision to the contrary, the power to pass legislation is exercised by a simple majority vote. Second, as you note in your letter, the Connecticut Supreme Court has long held that "[o]ne [l]egislature cannot control the exercise of the powers of a succeeding [l]egislature." Patterson v. Dempsey, 152 Conn. 431, 439 (1965); Preveslin v. Derby & Ansonia Developing Co., 112 Conn. 129, 140 (1930); see also State v. Staub, 61 Conn. 553, 564-565 (1892). Third, it is well settled that "[w]hen two statutes conflict . . . the latest expression of the legislature prevails over a conflicting prior enactment." Wisniowski v. Planning Commission of Town of Berlin, 37 Conn. App. 303, 313-314, cert. denied, 233 Conn. 909 (1995); accord Tomlinson v. Tomlinson, 305 Conn. 539, 553 (2012).

Applying these related principles, the Court in Patterson v. Dempsey, 152 Conn. 431 (1965), held that a state statute prohibiting the General Assembly from including general legislation in an appropriations bill did not preclude the later passage of an appropriations bill that included general legislation. The Court emphasized that, as a fundamental principle of the exercise of the legislative power, an earlier legislative enactment cannot bind a subsequent legislature. Id. at 439. The General Assembly's inclusion of the non-appropriation matters in the appropriations bill "was the equivalent of an affirmative enactment suspending, to the extent that the action violated [the prior statute], the prohibitory part of [that

prior statute]." Id. "The effect is really that of repeal by implication. 'When expressions of the legislative will are irreconcilable, the latest [in time] prevails.'" Id. (quoting Moran v. Bens, 144 Conn. 27, 30 (1956)). To hold otherwise would violate fundamental principles of majoritarian democracy and legislative sovereignty by allowing one General Assembly to "effectively control the enactment of legislation by a subsequent General Assembly." Id.; see also Newton v. Mahoning County Commissioners, 100 U.S. 548, 559 (1879) ("[e]very succeeding legislature possesses the same jurisdiction and power . . . as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality."); AFSCME v. City of West Haven, 43 Conn. Supp. 470, 489 (1994) ("[N]o legislature can impose its will on all future lawmakers by enacting legislation that cannot be altered."), aff'd, 234 Conn. 217 (1995) (per curiam).[4]

The same principles apply to the present question and lead to the same conclusion. Although § 2-33a, as enacted by a prior legislature, purports to establish certain spending restrictions applicable unless the Governor declares emergent or extraordinary circumstances, and at least three-fifths of the members of each house vote in favor, those restrictions are ineffective to bind subsequent legislatures or alter the manner in which they exercise their constitutional power to pass laws. Thus, if the current General Assembly were to pass a state budget act or other statute that failed to comply substantively or procedurally with the statutory spending cap, the more recent legislation would control and be presumed to have suspended the conflicting portions of the earlier enacted statutory spending cap. No other conclusion is consistent with the fundamental constitutional principles identified above. Those important principles serve to protect legislative prerogatives from gradual erosion and, indeed, to safeguard voters' ability to elect representatives vested with authority undiminished by the acts and judgments of past legislatures.[5]

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[4] One exception to these rules, not present here, is "where vested rights, protected by the constitution, have accrued under the earlier act." Patterson, 152 Conn. at 439.

[5] We note that an earlier opinion of this office advised that the statutory spending cap could be amended only by a three-fifths majority. See 1993 Conn. Op. Atty Gen. 93-006, 1993 WL 378479 at *2 (April 14, 1993). That opinion did not have the benefit of the Supreme Court's decision in Nielsen, which concluded that the constitutional amendment established "only a future right to a spending cap." Neither the statutory cap, nor the yet to be defined constitutional cap, presently restricts the legislature's ability to amend the existing statutory cap by majority vote.

Separation of powers principles strongly suggest that a court would leave undisturbed a legislative enactment that deviated in some fashion from the statutory spending cap. "The power to legislate, which our [state] constitution has committed solely to the General Assembly, necessarily includes the power to appropriate funds to finance the operation of the state and its programs." City of Bridgeport v. Agostinelli, 163 Conn. 537, 544 (1972). Because "[t]he legislature is in a far better position than the courts to balance the myriad of factors necessary to formulate policy on matters that so intimately concern the state budget," DaimlerChrysler Services North America, LLC v. Commissioner of Revenue Services, 274 Conn. 196, 210 (2005), judicial deference to the legislature on such issues is often warranted and appropriate. See, e.g., Roger Sherman Liberty Center, Inc. v. Williams, 52 Conn. Supp. 118 (2011)(dismissing challenge to state budget bill in part because it presented a nonjusticiable political question committed to the legislative branch).

For all of the foregoing reasons, we conclude that a court, if faced with the question, would likely hold that the legislature can lawfully exceed the statutory spending cap with a simple majority vote.[6]

Very truly yours,

GEORGE JEPSEN
ATTORNEY GENERAL

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[6] We are not the first Attorney General's Office to have been asked this very question. The Montana Attorney General reached the same conclusion in a formal opinion to the Montana legislature about the enforceability of a statutory spending cap. In reaching that conclusion, the Montana Attorney General cited some of the same Connecticut Supreme Court precedents upon which we have relied in this opinion. See 51 Mont. Op. Atty. Gen. No. 4, 2005 WL 1631092 at *5 (July 5, 2005) (Montana's statutory spending cap "placed no enforceable limits on the spending power of a subsequent legislature").