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A06-840

State of Minnesota
In Court of Appeals

State of Minnesota ex rel. Speaker of House of Representatives
Hon. Steve Sviggum, et al.,

Appellants,

vs.

Peggy Ingison, in her official capacity as Commissioner of Finance,
Or her successor, et al.,

Respondents.

Brief of Appellants/Individual Legislators
And Appendix Vol. 1 of 2

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LEGAL ISSUES

1. Do individual legislators as members of the Minnesota State Legislature have standing to bring an action to the court to challenge the executive branch of government for misappropriation of state funds in violation of the Minnesota Constitution and/or Minnesota Statutes?

   The District Court concluded that, at a minimum, state legislators had standing as citizen taxpayers to assert claims of misappropriation of state funds.

Apposite Cases:

Coleman v. Miller, 307 U.S. 433 (1932)
Raines v Byrd, 521 U.S. 811 (1997)
Conant v Robins, Kaplan, Miller & Ciresi, LLP, 603 N.W.2d 143 (Minn. Ct. App. 1999)
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Silver v. Pataki, 96 N.Y.2d. 532, 755 N.E.2d 842, 730 N.Y.S.2d 482, 2001 Slip Op. 06138 (N.Y. July10, 2001).

2. Whether the writ of quo warranto is an appropriate procedure to require the Minnesota Commissioner of Finance to show by what authority that office could disburse funds without an appropriation by law?

   The District Court declined to issue a writ of quo warranto concluding it an improper procedure to contest past conduct of the Commissioner of Finance.

Apposite Cases:

Clayton v Kiffmeyer, 688 N.W.2d 117 (Minn. 2004)
Fletcher v Commonwealth of Kentucky, 163 S.W.3d 852 (Ky. May 19, 2005)
Jasper v. Comm'r of Pub. Safety, 642 N.W.2d 435 (Minn. 2002)
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State ex rel Danielson v. Village of Mound, 48 N W.2d 855 (1951)
Weinstein v. Bradford, 423 U.S. 147 (1975)

3. Did the Commissioner of Finance disburse state funds without an appropriation by law in contravention of Articles III, IV, and XI of the Minnesota Constitution?

   The District Court did not address this issue.

Apposite Cases:

Cinncinnati Soap Co v United States, 301 U.S. 308 (1937)
Office of Personnel Management v. Richmond, 496 U.S. 414 (1990)
In re Matter of Application of the Senate, 10 Minn.78 (Minn 1865)
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4. Are the Appellants entitled to attorney fees and costs in responding to the Commissioner's motion for sanctions?

   The District Court denied the motion for attorney fees and costs.

Apposite Cases:

Kirk Capital Corporation v Bailey, 16 F.3d 1485, 28 Fed. R. Serv.3d 88 (8th Cir. 1994)
Gibson v. Coldwell Banker Burnet, 659 N.W.2d 782 (Minn. Ct. App 2003)
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STATEMENT OF THE CASE

The Appellants filed a Petition for a Writ of Quo Warranto in Ramsey County District Court heard before the Honorable Chief Judge Gregg E. Johnson.[1] The Appellants sought a determination of Minnesota Constitution violations under Articles III, IV, and XI arising from the acts of the Commissioner of Finance to disburse state funds without a legislative appropriation of law and to issue an order to have the Commissioner cease and desist from any disbursement of state funds without an appropriation by law.

At the end of the 2005 budget biennium, not all appropriations to support governmental programs and agencies were passed by the legislature or otherwise signed into law by the governor. During this short political impasse, the Minnesota Attorney General sought judicial relief, later joined by the Governor, for a court order requiring the Commissioner of Finance to disburse funds from the state treasury without an appropriation by law. The actions of the Commissioner of Finance usurped the state legislature's prerogative to appropriate state funds in contravention of the separation of powers doctrine embodied within the Minnesota Constitution.

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[1] Appellants had first filed their Petition before the Minnesota Supreme Court pursuant to Minn. Stat. Sec. 480.04 (2004). In an order dated September 9, 2005, the Court dismissed the Writ without prejudice and instructed the Appellants to first file the Petition in District Court. App. pp. 271-274

STATEMENT OF FACTS

The Minnesota State Legislature has had a rich history of budgetary circumstances that have resulted in the failure to enact some necessary appropriation bills before the end of a regular legislative session.[2] The facts of this case stem from the additional acts of the Minnesota Attorney General and the Governor to engage the judicial branch of government in the political process involving appropriations after the end of the regular session.

The state legislature, as an elected body, appropriates money for the funding of state agencies and programs on a biennial basis. The fiscal biennium is July 1of the odd year to June 30th of the next consecutive odd year, e.g. July 1, 1999 to June 30, 2001.

In 2001, the Minnesota legislature failed to enact all necessary appropriations during the regular session that ended on May 21, 2001 for the complete functioning of the state's government. Governor Jesse Ventura subsequently convened the Minnesota legislature in special session on June 11, 2001. Ten days later, Attorney General Mike Hatch filed a petition and memorandum for an order to show cause with the Ramsey County District Court.[3] The matter was entitled "In Re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota," Court File No. C9-01-5725.[4] Governor Jesse Ventura filed an amicus curiae brief in support of Mike Hatch's

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[2] The Brief of Amicus Curiae of the 84th Minnesota Senate explains the political process, negotiation, compromise, and the not so unusual recent history of the Legislature's failures to enact all appropriations during the regular legislative session and the role of the Governor's veto regarding appropriation bills.
[3] App. pp. 1-8, 9-19
[4] App. p. 1.

petition.[5] A hearing on the matter was held on June 29, 2001 before Chief District Court Judge Lawrence D. Cohen who granted the petition.[6]

The District Court in 2001 court action ordered, among other things, that core functions of state government be performed, that each state agency, official, county and municipal entity, and school district determine those core functions and verify the performance of such for payment to the Commissioner of Finance and the State Treasurer, and appointed a Special Master.[7] The Special Master was to mediate, hear, and make recommendations to the Court with regard to any issues arising from the terms or compliance of the court's order.[8]

The 2001 Ramsey County Court proceedings ended on June 29, 2001 when the state legislature enacted the remaining additional appropriations.

Four years later, on May 23, 2005, the Minnesota legislature ended its regular session after passing ten bills for the appropriation by law of state funds to various state agencies and programs that Governor Tim Pawlenty signed into law except for one appropriation bill he vetoed. The next day Governor Tim Pawlenty convened the Minnesota legislature in special session.

As in 2001, Attorney General Mike Hatch on June 15, 2005 filed a petition and memorandum for an order to show cause with the Ramsey County District Court.[9] Governor Tim Pawlenty also joined in the litigation by filing a petition and motion.[10] The matter was entitled "In Re Temporary Funding of Core Functions of the Executive

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[5] App. pp. 20-25.
[6] App. pp. 26-35.
[7] App. pp. 34-35.
[8] App. p. 34.
[9] App. pp. 36-43, 44-62.
[10] App. pp. 86-95, 96-105.

Branch of the State of Minnesota," Court File No. C0-05-5928.[11] After a hearing on the matter held on June 29, 2005, Chief Judge Gregg E. Johnson granted the Attorney General's and Governor's petition.[12]

The District Court ordered as in 2001, among other things, that core functions of state government be performed, that each state agency, official, county and municipal entity, and school district determine those core functions and verify the performance of such to the Special Master.[13] The Special Master was to determine whether or not the Commissioner of Finance should pay for the performance of certain core functions.[14] The Special Master's responsibilities also included to mediate, hear, and make recommendations to the Court with regard to any issues arising from the terms or compliance of the court's order.[15]

From about June 30, 2005 to July 7, 2005, various agencies, programs, and individuals, including individual legislators, filed petitions with the court; such as the Minnesota Council of Airports,[16] the Department of Natural Resources,[17] Metro Transit,[18] the Ramsey County Board of Commissioners,[19] the Greater Twin Cities United Way,[20] the Minnesota Housing Partnership,[21] the Minnesota Council of Nonprofits,[22] the

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[11] App. p. 36.
[12] App. pp. 154-165.
[13] App. p. 165.
[14] App. p. 165.
[15] App. p. 165.
[16] App. pp. 227-228.
[17] App. pp. 189-190.
[18] App. pp. 179-180.
[19] App. pp. 219-220.
[20] App. pp. 199-200.
[21] App. pp. 225-226.
[22] App. pp. 175-176.

Minnesota Trucking Association and Minnesota Manufactures Homes Association,[23] Joe Pazandak,[24] and Senator W. Skoglund.[25] The Special Master made determinations in the form of recommendations to the Ramsey County Chief Judge, on what constituted core functions and therefore should be funded through the Commissioner of Finance.

Chief Judge Gregg Johnson affirmed the recommendations of the Special Master through orders issued on June 30, 2005 and July 7, 2005.[26] Then commencing on or about July 1, 2005 the Commissioner of Finance disbursed state funds totaling $569,623,962.00 pursuant to the court's orders.[27]

Meanwhile, while the legislature remained in special session Appellant State Senator Tom Neuville offered an amendment to pending legislation seeking to fund "core and essential" services of state government and employ the number of employees needed to carry out these functions, for a period of 30 days from the date of enactment and allow funds to be appropriated from the general fund to the Commissioner of Finance as long as the expenditures did not exceed Minnesota fiscal year 2005 levels.[28] The amendment, offered on June 30, 2005, was defeated by vote of the Senate.

The State Legislature was in special session at all times during the Ramsey County Court proceeding attempting to deal with the budget impasse

The political impasse which commenced at the end of the regular session was over by July 14, 2005 when the Minnesota legislature passed the last of the remaining seven bills for the appropriation by law of state funds. By the end of the following day,

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[23] App. pp. 205-206.
[24] App. pp. 181-182.
[25] App. pp. 222-223.
[26] App. pp. 193-195; 196-198; 215-218.
[27] App. pp. 275.
[28] App. p. 260.

the Governor signed all of the bills into law completing the biennial appropriations for the funding of all state agencies and programs.

On or about August 31, 2005 Petitioners filed a Petition for a Writ of Quo Warranto before the Minnesota Supreme Court against Peggy Ingison, in her official capacity as Commissioner of Finance. Without a hearing, the Minnesota Supreme Court issued an order on September 9, 2005 dismissing the Writ without prejudice and directed the Petitioners to file their petition for a Writ of Quo Warranto action with the District Court.[29]

Prior to the filing of the Petition for a Writ of Quo Warranto with the State Supreme Court, Petitioners' attorneys wrote to the Attorney General Mike Hatch. The Appellants requested on August 23, 2005 the appointment of their independently retained attorneys as "special counsel" pursuant to Minn. Stat. 8.06 regarding their action for a Writ of Quo Warranto.[30] The Attorney General immediately responded the very next day denying the Appellants request for the appointment of special counsel.[31]

The Appellants nevertheless engaged counsel to initiate and litigate the constitutional claims asserted in the instant action in a court of law, on behalf of themselves and the citizens of the State of Minnesota. On September 28, 2005 the Appellants filed their Petition for a Writ of Quo Warranto. During the briefing period, the Attorney General also served and simultaneously filed a Rule 11 motion against the Appellants counsel.

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[29] App. p. 271.
[30] App. p. 262.
[31] App. p. 253.

The hearing on the Appellants' Petition was held on December 13, 2005 before Chief Judge Gregg Johnson. Judge Johnson issued an order on March 3, 2005 from which this appeal is taken.

ARGUMENT

The individual legislative members sought from the District Court a Writ of Quo Warranto regarding the Commissioner of Finance's disbursement of state funds without an appropriation by law. The issues were legal questions regarding Minnesota's Constitution and statutes. Issues of standing, mootness, laches were also raised and addressed by the court. The determination of constitutional issues are legal questions as are issues of standing, mootness, and laches. As such, they are all subject to de novo review by the appellate court. *See, Frost –Benco Elec Ass'n v. Minnesota Publ Utils Comm'n, 358 N.W.2d 639, 642 (Minn. 1984); Joel v Wellman,* 551 N.W.2d 729, 730 (Minn. App. 1996), *review denied,* (Minn. Oct 29, 1996); *Isaacs v American Iron & Steel Co* , 690 N.W.2d 373, 376 (Minn. Ct. App. 2004). In short, the Appellants ask this Court to reverse the District Court for its errors in its application of the law. *See Art Goebel, Inc. v North Suburban Agencies, Inc.,* 567 N.W.2d 511, 515 (Minn. 1997).

I. Legislative Members Have Standing Based Upon Vote Nullification and Usurpation of Power When the Commissioner of Finance Disbursed State Funds Without an Appropriation by Law.

The decision of Chief Judge Gregg Johnson granted standing to the Minnesota legislators "at a minimum ... as citizen taxpayers."[32] However, the court failed to decide and recognize the important legal concept of standing granted to individual legislators. In this case, individual legislator standing is particularly important because the facts reflect the Attorney General's refused to represent the interests of the individual members of the State Legislature on separation of powers issues, including the refusal to appoint special counsel.

Minnesota courts have acknowledged that state legislators may bring claims for vote nullification and usurpation of legislative powers. *See Rukavina v Pawlenty*, 684 N.W.2d 525, 532 (Minn. Ct. App. 2004), *review denied* (Oct 19, 2004); *Conant v Robins, Kaplan, Miller & Ciresi*, L.L.P., 603 N.W.2d 143, 149-150 (Minn. Ct. App. 1999), *review denied* (Mar 14, 2000). For legislators to have standing, they must show that their claimed injury is "personal, particularized, concrete, and otherwise judicially cognizable." *Conant,* 603 N.W.2d at 150 (citing *Raines v. Byrd,* 521 U.S. 811, 820 (1997). But a lost political battle is insufficient cause to grant standing, however, either the nullification of votes and/or usurpation of legislative powers is sufficiently concrete to confer standing on a legislator. *Silver v. Pataki*, 96 N.Y.2d 532, 539, 755 N.E.2d 842,

[32] App. pp. 300; Order and Memorandum of March 3, 2005 at p. 5.

730 N.Y.S.2d 482, 2001 N.Y. Slip Op. 06138 (N.Y. July 10, 2001) (vote nullification).[33] In this case, individual legislators have suffered both vote nullification and usurpation of legislative powers. *Id.* at 539, *citing Coleman v Miller,* 307 U.S. 433 (1932) (vote nullification); *Dodak v. State Admin. Bd.*, 441 Mich. 547, 495 N.W.2d 539 (1993) (usurpation of power belonging to legislative body).

An individual legislator's standing is grounded in the Constitution. The constitutional powers and rights of individual state legislators are expressed in virtually all twenty-six sections of Article IV of the Minnesota Constitution. Significantly, Section 22 states:

> Section 22. Majority vote of all members required to pass a law. . No vote shall be passed unless voted for by a majority of **all the members** elected to each house of representatives, and the **vote entered in the journal of each house.**

(Emphasis added.) Taken with Section 23 of Article IV addressing "appropriations" wherein "[e]very bill passed in conformity to the rules of each house and the joint rules of the two houses shall be presented to the governor," each legislator has a right to vote on each appropriation and to have the appropriation recorded in the House or Senate Journal for accountability.

The U.S. Supreme Court first found in 1932 grounds for standing of individual legislators who claimed that their "no" votes were nullified by the legislative act being given effect anyway. In *Coleman v. Miller*, 307 U S. 433 (1932) the Court held that Kansas state legislators who had been locked in a tie vote that would have defeated the State's ratification of a proposed federal constitutional amendment, and who alleged that their votes were nullified when the Lieutenant Governor broke the tie by casting his vote

for ratification, had "a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id.* at 438. In 1997, the U.S. Supreme Court restated the *Coleman* holding and further explained that legislative standing existed when legislators' no votes were nullified by the legislative act being given effect anyway. *Raines v Byrd,* 521 U.S. 811, 822 (1997).

A number of state court decisions have followed the U.S Supreme Court's lead and continue to recognize that a single legislator has sufficient capacity and standing on a vote nullification to bring an action to vindicate his rights as a legislator. *Silver v Pataki,* 96 N.Y.2d 532, 755 N.E.2d 842, 730 N.Y S.2d 482, 2001 N.Y. Slip Op. 06138 (N.Y. July10, 2001). The Speaker of New York's General Assembly successfully challenged the Governor's use of a line item veto on non-appropriation bills:

> Nor is a controlling bloc of legislators (a number sufficient to enact or defeat legislation) a prerequisite to plaintiff's standing as a Member of the Assembly. The *Coleman* Court did not rely on the fact that all Senators casting votes against the amendment were plaintiffs in the action (*see, Kennedy v Sampson, supra,* 511 F.2d, at 435 ["In light of the purpose of the standing requirement * * * we think the better reasoned view * * * is that an individual legislator has standing to protect the effectiveness of his vote with or without the concurrence of other members of the majority"]). Moreover, plaintiff's injury in the nullification of his personal vote continues to exist whether or not other legislators who have suffered the same injury decide to join in the suit

Id. at 848-49.

Similarly, the Michigan Supreme Court held that a single member of the state house appropriations committee had standing to bring an action alleging that the state administrative board's transfer of appropriated funds from one program to another within a department of state government was unauthorized. *Dodak v State Admin. Bd.*, 441 Mich. 547, 495 N.W.2d 539 (1993).

Vote nullification exists under *Coleman* and its progeny because the Petitioners through their "no" votes and or legislative inaction did not enact appropriations by law Despite the lack of appropriations enacted by the state legislature, the Commissioner of Finance expended the state funds anyway. The Commissioner of Finance's actions -- admittedly pursuant to Ramsey County District Court orders[34] -- violated the Appellants exclusive legislative prerogative to appropriate state funds.

Furthermore, State legislators have standing because the Commissioner of Finance through the Ramsey County District Court usurped the exclusive legislative prerogative to appropriate state funds. Since the Ramsey County District Court orders were not an "appropriation by law" – not valid appropriations -- the Commissioner of Finance was required constitutionally not to expend the state funds. She did -- usurping a power allocated to the state legislature under Articles III, IV and XI of the Constitution.[35] Appellants, as legislators, were injured individually apart from the general public. *See, e.g*, *Rukavina,* 684 N.W.2d at 532; *Conant*, 603 N.W.2d at 149-150. The general citizenry do not vote to make appropriations by law; legislators do. As

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[34] However, the Commissioner of Finance should not have immediately followed the Court orders. She could have either intervened in the court proceedings and sought review of the constitutional issues raised herein or waited until state appropriations were enacted. For example, the Commissioner of Finance routinely waits to honor state court judgments against the state until the state legislature enacts appropriations to pay the judgment creditors. App. p. 258.

[35] The Commissioner of Finance and the Ramsey County District Court proceedings and orders unconstitutionally tipped the balance of powers in favor of the executive and judiciary branch at the expense of the legislative branch – at a critical juncture in budget negotiations. The legislature's power to appropriate funds is its paramount power and its leverage in budget negotiations. When the executive and judiciary branches usurped the power of appropriation, they unconstitutionally deprived the legislature of its power and leverage at the negotiating table while the state legislature was in session. See Amicus Curiae Brief of 84th Minnesota Senate.

contemplated in Article IV's sections 22 and 23, each appropriation must be passed by a majority of all members of the House and Senate and be entered into both the House and Senate journals. None of the petitions filed and heard before the District Court's Special Master was brought to a vote in the state legislature as required by the Constitution for an appropriation. None of the petitions or court orders were entered in the Senate or House journal. For each petition brought before the Special Master by an individual citizen or representative on behalf of an agency nullified an individual legislator's "yea" or "nay" vote guaranteed by Article IV. The action of the Court did no less than give "appropriations" power to individuals who in turn usurped the individual constitutional rights of individually elected legislators

The Appellants, as legislators, were individually harmed.

II. The Writ of Quo Warranto is an Appropriate Procedure to Require the Commissioner of Finance to Show by What Authority That Office Could Disburse Funds Without an Appropriation by Law.

The issuance of the writ for quo warranto was well within the jurisdiction of the District Court.[36] The District Court declined to grant the writ of quo warranto on the basis of a 1941 opinion in *State ex rel Lommen v Galvin,* 255 N W. 654 (Minn. 1941), that has for all tends and purposes rendered non-binding through modern day interpretation and usage of the Writ of Quo Warranto in Minnesota.

The writ for quo warranto disappeared from usage in 1959 with the adoption of the Minnesota Rules of Civil Procedure. *Rice v Connolly,* 488 N.W.2d 241, 244 (Minn.

[36] Minn. Const. Art. VI, sec. 2 and Minn. Stat. Sec. 480.04 provides the Minnesota Supreme Court with original jurisdiction, however, the Court directed the Appellants to first file our Petition in District Court. App. pp. 271-274.

1992). It has since reemerged with expanded scope to include challenges to actions of both the executive and legislative branches of government For example, in the past, Minnesota Courts have exercised jurisdiction in quo warranto proceedings to determine the right to an office which turned on the scope of a constitutional officer's constitution-granted power or in determining the constitutionality of certain legislative acts. *See, e g , State ex rel Mattson v. Kiedrowski,* 391 N.W.2d 777 (Minn. 1986*), State v ex rel Palmer v Perpich,* 182 N.W.2d 182 (1971); *State ex rel Douglas v Westfall*, 89 N W 175 (1902*); State ex rel Getchell v O'Conner,* 83 N.W 498 (1900); *State ex rel Douglas v Ritt,* 79 N.W. 535 (1899).

Originally, a writ could only be issued upon the petition of the attorney general *ex officio. See, e.g , State ex rel Danielson v Village of Mound,* 48 N.W 2d 855, 860 (1951). As the law involving writs of quo warranto evolved, private persons were also permitted, at the discretion of the Court, to file a petition for writ of quo warranto. *State ex rel. Simpson v Dowlan*, 24 N.W 188, 189 (1885). While the consent of the attorney general was initially required in cases initiated by private persons, the Minnesota Supreme Court has held that a writ could be issued, in its discretion, even though the attorney general had not consented to the writ. *See Rice v Connolly*, 488 N.W.2d 241 (Minn. 1992); *Town of Burnsville v City of Bloomington,* 117 N.W.2d 746 (1962); *State ex rel. Town of Stuntz v City of Chisholm,* 264 N.W. 798 (1936). Consequently, private individuals and entities may now seek a writ of quo warranto with or without the consent of the attorney general.

Although under the current law, Appellants did not need to seek consent of the Attorney General for a writ, counsel for Appellants sought an appointment as special

counsel for this proceeding. The request was denied on August 24, 2005.[37] Nevertheless, this proceeding is much the same as a proceeding brought by the attorney general in his *ex officio* capacity. This Petition is brought by the Petitioners in their *ex officio* capacity as state legislators.

The public interest factors which compel this Court to exercise jurisdiction in quo warranto proceedings brought by the attorney general in his *ex officio* capacity are present in this proceeding. This case involves the constitutional division of powers between the legislative, executive and judicial branches. The three branches of state government daily use their power and respect the powers of the other branches. For example, the Commissioner of Finance routinely waits to honor state court judgments against the state until the state legislature enacts appropriations to pay the judgment creditors.[38] However, in this instance, the executive and judicial branches in a pre-meditated fashion in 2001 and 2005 have usurped powers reserved for the legislative branch – preventing the state legislature from conducting its constitutional duties.

More egregious to the public interest and protections afforded within the Minnesota Constitution, however, was the Commissioner of Finance's actual acts to disburse funds without an appropriation by law. As elected officials, the individual legislators, within the political process make determinations affecting state taxes and appropriations that support or reduce public programs and agencies. Their respective responsibilities make them accountable directly to the citizen electorate. The public's interest in ensuring the process of government is not subverted or superceded through

[37] App. pp. 253-54.
[38] App. p. 258.

procedures foreign to the doctrine of separation of powers demand for the issuance of a writ of quo warranto.

Chief Judge Johnson reliance on *Galvin* prevented an adjudication of constitutional violations to prevent or remedy the legality of an official's misconduct and contradicts the Minnesota Supreme Court decision in *Mattson*. In other words, the District Court prevented the legislative branch of government to correct the excessive use of executive branch power. In *State ex rel. Mattson v. Kiedrowski,* 391 N.W.2d 777 (Minn. 1986), the Supreme Court granted the writ of quo warranto for the executive branch of government to challenge the actions of the state legislature. The *Mattson* Court found that the legislature improperly and unconstitutionally transferred the responsibilities of the Treasurer's Office, a constitutional office, to the Commissioner of Finance. *Id.*

Similarly, the issues in this proceeding are suitable for this Court to resolve on a petition for writ of quo warranto because they are constitutional and legal questions. *See Matter of Johnson*, 358 N.W.2d 469 (Minn. Ct. App. 1984); *State ex rel. Law v. District Court of Ramsey County*, 150 N.W.2d 18, 19 (Minn. 1967) (writ of prohibition will normally issue only where all essential facts are undisputed); *Minneapolis Star & Tribune Co. v. Schmidt*, 360 N.W.2d 433, 434 (Minn. Ct. App. 1985) (where constitutional issues may be involved, a writ of prohibition is proper). Even before the writ's temporary disappearance, the Supreme Court understood the writ of quo warranto as a "proceeding to correct the usurpation, misuer, or nonuser of a public office. . ." *Danielson* 48 N.W.2d at 863. "Usurpation" was defined as "unauthorized arbitrary assumption and exercise of power" and "misuser" as "use unlawfully in excess of, or varying from one's right. . ."

Id. These are the claims the state legislators are making and the Court should determine the claims made herein.

A. Since it is Not Unusual for the Legislature to Fail to Enact all Appropriation Bills Within a Regular Legislative Session the Individual Legislators' Claims are not Moot and are Capable of Repetition.

The Brief of Amicus Curiae for the 84th Minnesota Senate states the likelihood of repetition of the legislative political process regarding appropriation bills succinctly: "Of the eighteen regular biennial sessions since 1971, nine failed to enact all the appropriations necessary to start the new fiscal biennium." Brief of Amicus Curiae at p 2. Furthermore, the individual legislator's decision not to participate in the District Court proceedings is not fatal to an argument of mootness.

Mootness is "a flexible discretionary doctrine, not a mechanical rule that is invoked automatically " *Jasper v Comm'r of Pub. Safety,* 642 N.W.2d 435, 439 (Minn. 2002), *(citing State v Rud,* 359 N.W.2d 573, 576 (Minn.1984)). The court will dismiss a case as moot if the court is unable to grant effectual relief. *Kahn v Griffin,* 701 N.W.2d 815, 821 (Minn. 2005), *citing In re Schmidt,* 443 N.W.2d 824, 826 (Minn.1989). The court will deem a case not moot if it implicates issues that are capable of repetition, yet likely to evade review. *Kahn,* 701 N.W.2d 815, 821, *citing Elzie v Comm'r of Pub Safety,* 298 N.W.2d 29, 32 (Minn 1980).

The U.S. Supreme Court has determined that the "capable of repetition yet evading review" doctrine is "limited to the situation where two elements are combined· (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same

complaining party would be subjected to the same action again." *Weinstein v Bradford,* 423 U.S. 147, 149 (1975).

The Kentucky Supreme Court in *Fletcher v Commonwealth of Kentucky,* 163 S.W.3d 852 (Ky. May 19, 2005) applied the "capable of repetition yet evading review" doctrine in a case with remarkably similar facts – a perennially deadlocked budgeting process case. The Kentucky Supreme Court held that mootness did not apply:

> On three occasions within a ten-year period, the General Assembly convolved itself into a partisan deadlock and adjourned *sine die* without enacting an executive department budget bill. After the two most recent such occasions, the respective governors promulgated their own budgets and ordered appropriations drawn from the treasury in accordance therewith. On each occasion, lawsuits were filed to test the constitutionality of those actions. On each occasion, the General Assembly enacted an executive department budget bill and ratified the governor's actions before the issue could be finally resolved by the Court of Justice. **Having no assurance that similar partisan brinkmanship will not recur in the General Assembly, resulting in future gubernatorially promulgated budgets, we conclude that this issue is capable of repetition, yet evading review, and will address its merits.** *See Burlington Northern R. Co v Bhd. of Maint of Way Employees,* 481 U.S. 429, 436 n. 4, 107 S.Ct. 1841, 1846 n. 4, 95 L.Ed.2d 381 (1987) ("Because these same parties are reasonably likely to find themselves again in dispute over the issues raised in this petition, and because such disputes typically are resolved quickly by ... legislative action, this controversy is one that is capable of repetition yet evading review.")

Fletchter, 163 S.W.3d at 859 (emphasis added). Similarly, the Petitioners' claims satisfy the two requirements for application of "capable of repetition, yet evade review" doctrine.

The first requirement that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" is satisfied. Both the 2001 and 2005 Ramsey County District Court proceedings were too short to allow for full litigation of the constitutional issues involved. The 2001 Ramsey County District Court proceeding lasted less than ten days before legislative appropriations were made. The

2005 Ramsey County District Court proceeding lasted approximately thirty days before legislative appropriations were made – an proposed intervenor Ryan P. Winkler's motion to intervene was still pending when the case concluded. Thirty days is a blink in the eye of a litigator – certainly not enough time for serious briefing and court analysis of the constitutional claims (including appellate review) present in this case.

The second requirement that "there was a reasonable expectation that the same complaining party would be subjected to the same action again" is also satisfied. As with Kentucky in the *Fletcher* case, Minnesota voters have chosen divided government – one political party controlling the state legislature and another political party having the governor's office. Rightly or wrongly, the state legislature in two of the last four years has adjourned without enacting certain, necessary appropriation bills. Since the Court can not be assured that Minnesotans won't continue to vote for divided government and that there won't be more adjournments without enacting certain necessary appropriation bills in the future, the Court should conclude – as the Kentucky Supreme Court did – that there is a reasonable expectation that the state legislature, the Commissioner of Finance and the Ramsey County District Court will find themselves in the same position on June 30, 2007 – the end of the next biennium, - or on June 30, 2009 – the end of the next biennium and so on.

Additionally, the Minnesota Supreme Court has stated that it will not deem a case moot and will retain jurisdiction if the case is "functionally justiciable" and is an important public issue "of statewide significance that should be decided immediately " *State v. Brooks,* 604 N.W.2d 345, 347-48 (Minn. 2000). The facts of this case satisfy the requirements of *Brooks*. The case is functionally justiciable because this Court has

jurisdiction over this proceeding as well as the parties and has an available remedy -- the writ of quo warranto. The case is of statewide significance because it addresses the allocation of powers of the state government between the legislative, executive and judicial branches and involves hundreds of millions of dollars – if not billions.[39]

For these reasons, the Court should find that the Petitioners' claims are not moot because they are capable of repetition, but evade review.

B. The Doctrine of Laches Also Does not bar the Individual Legislators From Seeking Relief Through a Writ of Quo Warranto

The equitable doctrine of laches is not applicable to the facts governing the circumstances of the Petition for a Writ of Quo Warranto. All of the Appellants are legislators. In 2001 and again in 2005, the Attorney General initiated the proceedings entitled "In Re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota" in district court. When the proceedings were initiated the legislature was in session.[40] The legislators were engaged in their constitutional duties as elected representatives, seeking resolution of issues between individual members, between the House and the Senate, and between the legislature and the Governor to pass appropriation bills.

Furthermore, any suggestion that the individual legislators should be required to intervene whenever the district court has a case before it that discusses the possibility of

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[39] Another indication of casewide significance is that the *Star Tribune* and *St. Paul Pioneer Press* ran August 25, 2005 articles on the state legislators' constitutional claims prior to filing their petition for writ of quo warranto.

[40] The regular session ended on May 23, 2005. Governor Pawlenty convened a special session of the Legislature on May 24, 2005. The Attorney General commenced his action in district court on June 15, 2005. The special session ended on July 14, 2005 with the Governor signing into law appropriation bills passed by the full legislature. App. pp. 258-259.

the encroachment of legislative authority is contra-intuitive to the assumption legislators ought to hold—that the district courts should not inject itself in a political controversy. The budgetary impasse was a political controversy between and among the individual members themselves and the Governor. It did not involve the courts. Nevertheless, the individual legislators were diligent in asserting their known constitutional rights against the Commissioner of Finance with no prejudice to her. The fact that the Petition for Writ of Quo Warranto was filed after the legislative session does not affect her immediate duties as Commissioner of Finance. *See Clayton v Kiffmeyer,* 688 N.W.2d 117, 122 (Minn. 2004).

While the legislature is in session, if a legislative member is a party to an action, civil or criminal, there can be no proceeding tried or heard. Minn. Stat. Sec 3.16 states in relevant part that:

> No cause or proceeding, civil or criminal, in court or before a commission or an officer or referee of a court or commission or a motion or hearing on the cause or proceeding, in which a member or officer of, or an attorney employed by, the legislature is a party, attorney, or witness shall be tried or heard during a session of the legislature or while the member, officer, or attorney is attending a meeting of a legislative committee or commission when the legislature is not in session.[41]

Participating in the judicial proceedings in 2001 or 2005 would have necessitated legislators to become parties. To do so would have been contrary to the statute. Minn. Stat. § 3.16 was first derived for practicing attorneys but is applicable to all legislative

[41] Minn. Stat. § 3.16 also has a provision in which a waiver of this privilege can be sought. None of the individual legislators waived their privilege nor had sufficient time to retain separate counsel during the legislative session to become a party to the district court action commenced by the Attorney General's office. Even if sufficient time was available under other circumstances, the state legislators had a right to be represented by the Attorney General's office or for the Attorney General to appoint special counsel paid for by the State. *See* Minn. Stat. § 8.06. But, the Attorney General violated their rights by refusing to appoint Appellants' attorneys as special counsel. See App. pp. 253-56.

members -- so that legislators shall not be "called away from their legislative duties during the session of the legislature." *State ex rel S.L. Johnson v. Independent School District No 810, Wabasha County,* 109 N.W.2d 596, 602 (Minn. 1961)

Participating in the Attorney General's effort to engage the judiciary in the budgetary process while the Petitioners were fulfilling their constitutional obligations to debate public policies governing appropriation bills would have been a dereliction of duty to their respective constituents and the State of Minnesota. That there was an impasse or a governor's veto on issues relating to appropriations is a political reality to which all elected officials will be subjected to through the scrutiny of the electorate at the appropriate time.

The issues relating to the Commissioner's unconstitutional disbursements of State funds without an appropriation by law are now the very issues for the court to resolve necessarily after the legislative session. As the Minnesota Supreme Court has stated on issues requiring constitutional interpretation "[t]he delay in presenting the question is no excuse for not giving it full consideration and determining it in accordance with the true meaning of the Constitution." *State ex rel. Gardner v Holm*, 241 Minn 125, 140, 62 N.W.2d 52, 61(Minn. 1954), quoting *Fairbank v United States*, 181 U.S. 283, 312 (1901) (affirmed the validity of a legislative act prescribing the salaries of district court judges).

Unlike in the case relied on by the Commissioner below, *Apple Valley Square v City of Apple Valley,* 472 N.W.2d 681, 683 (Minn. Ct. App. 1991), effective relief is possible. The constitutional issues presented before this court are not moot and present a justiciable controversy. The Petitioners seek a determination by what constitutional

authority the Commissioner could disburse state funds without an appropriation by law in the first instance, and second, to ensure the Commissioner shall not disburse state funds without an appropriation by law in the future. The court's decision and relief will expressly outline the restrictions of the Commissioner's duties under constitutional and statutory provisions regarding the disbursements of state funds when there is a legislative impasse.

The result will be no more judicial intervention in the budgetary process until or unless federal and/or state law requires it.

III. The Commissioner of Finance did Disburse State Funds Without an Appropriation by Law in Contravention of Articles III, IV, and XI of the Minnesota Constitution

The individual legislators assert that Articles III, IV and XI of the Minnesota Constitution should be interpreted literally because they are unambiguous regarding the legislative prerogative to appropriate state funds

To interpret these provisions literally also means reading them in the context of other laws. See *State ex rel Chase v. Babcock*, 220 N.W. 408, 410 (Minn. 1928) Other laws – federal laws and regulations (via the Supremacy Clause of the U.S. Constitution), the Minnesota constitution and previously-enacted statutory law – may provide a basis for disbursement of state funds without further legislative appropriations. For instance, provisions of the Minnesota Constitution constitutionally require disbursements of State funds without enactment of specific legislative appropriations. These include Article 5, Section 4, funding salaries of executive officers (the governor, lieutenant governor, secretary of state, auditor, and attorney general); Article 6, Section 5, funding for judges; Article 11, Section 7, funding for state bonds be funded and debt payments on bonds;

Article 11, Section 8, funding of a permanent school fund; and Article 11, Section 14, requiring funding of a environmental and natural resources fund. But, if there is no federal law, state constitutional or statutory requirement requiring disbursement, then the Commissioner must wait for a legislative appropriation before disbursing state funds.

The Appellants assert that the Commissioner violates three constitutional provisions -- Articles III, IV and XI of the Minnesota Constitution -- by disbursing state funds pursuant to a court order without federal law, the state constitution or state statutory law requiring it.

First, the disbursement of state funds by the executive branch's Commissioner pursuant to a judicial court order without a prior legislative appropriation violates Article III's separation of powers provisions. Article III is unambiguous and prohibits the Executive Department and Judiciary Department from exercising the power of the Legislative Department without an express constitutional provision allowing it to do so:

> The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.

The Commissioner acting pursuant to a court order usurped a legislative prerogative in violation of Article III by making expenditures without an appropriation by law enacted by the state legislature.

Appellants concede that Minnesota's republican form of government – sometimes because of and sometimes in spite of the exercise of democracy -- can be imperfect and sometimes even messy. Nevertheless, the wisdom of the framers of Minnesota's

Constitution -- collected from the national experience in transitioning from the unwieldy Articles of Confederation to drafting and ratifying the Constitution of 1787 and subsequent state experiences of drafting and adopting state constitutions -- enlightened the Framers regarding the benefits of dividing government into the legislative, the executive, and the judicial branches. This tri-partite system of government is embodied within the Minnesota Constitution.

This constitutional separation of powers establishes prophylactic high walls of distinctive responsibilities to avoid the overreaching of one branch into the power of the other. As the United States Supreme Court declared, "[t]he Constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983). "The doctrine of the separation of powers was adopted... not to promote efficiency but to preclude the exercise of arbitrary power The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Fletcher v Commonwealth of Kentucky*, 163 S.W.3d 852, 863 (Ky. 2005), citing *Myers v United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

The Minnesota Supreme Court has even recognized evil in deviating from this principle of separation of powers. The three branches of government are "independent of

each other to the extent, at least, that neither can exercise any of the powers of the others not expressly provided for.... This not only prevents an assumption by either department of power not properly belonging to it, but also prohibits the prohibition, by one, of any duty upon the others not within the scope of its jurisdiction; and 'it is the duty of each to abstain from and to oppose encroachments on either.' **Any departure from these important principles must be attended with evil**." *In re Matter of Application of the Senate*, 10 Minn.78, 80 (Minn. 1865) (emphasis added).

Second, the disbursement of state funds by the executive branch's Commissioner pursuant to a judicial court order without a prior legislative appropriation violates Article XI's requirement that state funds only be paid pursuant to an "appropriation by law." Article XI states:

> Section 1. Money paid from state treasury. No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law.

The phrase "appropriation by law" is unambiguous and literally means appropriation by "law" enacted under Article IV of the Constitution. Since the Commissioner was paying money from the state treasury pursuant to a Ramsey County District Court Order – not an appropriation by law – she was violating Article XI's ban on such payments from the State Treasury.

The United States Constitution has a similar provision as that of the Minnesota Constitution. Article 1, Section 9, Clause 7 states in part that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." The United States Supreme Court has stated that this "simply means that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Cinncinnati Soap*

Co. v. United States, 301 U.S. 308, 321 (1937). Regardless of how much money is in the Treasury at any particular time, "...not one dollar of it can be used in the payment of any thing not thus previously sanctioned." *Reeside v. Walker*, 52 U.S. 272, 291 11 How. 272, 291, 13 L.Ed. 693 (1850).

The similarities of the United States Constitution and the Minnesota Constitution also mirror the underlying intent as summarized through Supreme Court precedent. "[T]he Clause has a more fundamental and comprehensive purpose .... It is to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *Office of Personnel Management v. Richmond*, 496 U.S. 414, 427-28 (1990). The Clause restricts the disbursing authority of the Executive department. *Cincinnati Soap Co* , 301 U.S. at 321. Without the expressed restriction the executive branch of government would have unlimited power over the public purse strings disbursing State funds at the pleasure of the person in power.

The Minnesota Supreme Court has been keenly aware of the requirement of appropriations by law to disburse state funds. In a matter determining if funds were available to satisfy a court order for attorney fees or required special legislative appropriation, the Minnesota Supreme Court characterized the issue as follows: "Whether the court had control over the funds or savings to the state resulting from the litigation so that it could, in effect, impound such funds, whether in the hands of its clerk or in the state treasury as part of the state trunk highway fund, and order payment of the plaintiff's expenditures therefrom, without a special legislative appropriation, is the question." *Regan v. Babcock,* 243 N.W. 803, 806 (Minn. 1936).

In fact, when court-ordered judgments against the State are entered creating new judgment debt obligations for the State, a special legislative appropriation is required to fulfill the State's judgment debt obligations. Only then does the Commissioner disburse State funds to pay those court judgments.[42]

No court order as contemplated through the actions of the Minnesota executive branch in 2005 is considered an "appropriation by law." First, the constitutional provision is unambiguous and must be read in the context of Articles IV and XI which use the phrase "appropriation" to refer to appropriation bills enacted by the state legislature, signed by the Governor or otherwise enacted pursuant to Article IV. In this context, the phrase literally means an appropriation enacted by the state legislature pursuant to Article IV. Second, the phrase "appropriation by law" should be given its ordinary meaning. *See Rice*, 488 N.W 2d 241 (Minn 1992), *citing State ex rel Gardner v. Holm*, 62 N.W.2d 52, 55 (Minn. 1954) (unambiguous constitutional provisions should be given their "ordinary meaning"). According to Black's Law Dictionary (8th ed 2004), the ordinary meaning of "appropriation" is "a legislative body's act of setting aside a sum of money for a public purpose." So, "appropriation by law" must mean a legislative appropriation enacted under Article IV. Third, the purpose of Article XI – similar to its federal counterpart – is to preserve the legislative prerogative to appropriate state funds against executive and judicial encroachments. For these reasons, the Court should reject the Commissioner's argument that a court order can be an "appropriation by law."

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[42]See App. pp. 249-52; 258-59.

The third constitutional violation is that the Commissioner's expenditures violate Article IV of the Minnesota Constitution which provides a list of requirements for an "appropriation by law" to occur. Article IV's requirements include the state legislature approving the appropriation bill, then presenting the appropriation bill to the Governor who then signs it into law or vetoes the bill (including appropriation line item veto) and, if a veto occurs, the state legislature voting to override the veto. Article IV states:

> Sec. 23. APPROVAL OF BILLS BY GOVERNOR; ACTION ON VETO. Every bill passed in conformity to the rules of each house and the joint rules of the two houses shall be presented to the governor. If he approves a bill, he shall sign it, deposit it in the office of the secretary of state and notify the house in which it originated of that fact. If he vetoes a bill, he shall return it with his objections to the house in which it originated. His objections shall be entered in the journal. If, after reconsideration, two-thirds of that house agree to pass the bill, it shall be sent, together with the governor's objections, to the other house, which shall likewise reconsider it. If approved by two-thirds of that house it becomes a law and shall be deposited in the office of the secretary of state. In such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for or against the bill shall be entered in the journal of each house. Any bill not returned by the governor within three days (Sundays excepted) after it is presented to him becomes a law as if he had signed it, unless the legislature by adjournment within that time prevents its return. Any bill passed during the last three days of a session may be presented to the governor during the three days following the day of final adjournment and becomes law if the governor signs and deposits it in the office of the secretary of state within 14 days after the adjournment of the legislature. Any bill passed during the last three days of the session which is not signed and deposited within 14 days after adjournment does not become a law.
>
> If a bill presented to the governor contains several items of appropriation of money, he may veto one or more of the items while approving the bill. At the time he signs the bill the governor shall append to it a statement of the items he vetoes and the vetoed items shall not take effect. If the legislature is in session, he shall transmit to the house in which the bill originated a copy of the statement, and the items vetoed shall be separately reconsidered. If on reconsideration any item is approved by two-thirds of the members elected to each house, it is a part of the law notwithstanding the objections of the governor.

The Commissioner paying money out of the state treasury pursuant to a court order violates Article IV because the state legislature did not pass the appropriation bill, the appropriations bill was not presented to the Governor and no appropriation bill was enacted. For a lawful expenditure to occur, the appropriation bill must be passed by the state legislature, presented to the Governor and enacted as law by the Governor signing it or by a legislative veto override. The only exceptions are when a federal requirement or a state constitutional or statutory requirement for the disbursement exists.

The Minnesota Court of Appeals has addressed Article IV and legislative delegation in an appropriations case -- *Rukavina v Pawlenty,* 684 N.W.2d 525, 535 (Minn. Ct. App. 2004). "Pure legislative power, which can never be delegated, is the authority to make complete law...." *Id.* The Minnesota Court of Appeals stated that while pure legislative power cannot be delegated, "the legislature may authorize others to do things (insofar as the doing involves powers that are not exclusively legislative)." *Id.* In *Rukavina,* the legislature constitutionally passed a specific statute authorizing the executive branch to avoid or reduce a budget shortfall in a biennium (Minn. Stat. Sec. 16A.152). However, the statute to allow the executive branch to deal with anticipated budget shortfalls before they occur does not represent the legislature's delegation of its' ultimate authority to appropriate money. The statute allowed the executive branch to deal with a financial crisis "in a manner specifically designated by the legislature." *Id.*[43]

[43] Additionally, Minn. Stat. 16A.152 is very specific regarding the establishment of a cash flow account, a budget reserve account, when the Commissioner of Finance is to transfer money to the budget reserve account, the amounts to establish and the priority of allocating money to fund certain state obligations. This also included the notification to specific legislative committees of the Commissioner's actions.

Appellants' claim is different. The state legislature in 2005 did not pass a law that would have directed the Commissioner to expend funds in case of a budgetary impasse on June 30, 2005. If the legislature wanted to enable the executive branch to distribute state funds during this perceived "political crisis" it could have authorized – as in *Rukavina* -- the executive branch with that limited authority through statutory provisions. But the legislature did not and accordingly, the Commissioner acted unconstitutionally when it disbursed State funds.

IV. The Commissioner Usurped the Legislative Authority to Appropriate State Funds by Law When She Exceeded the Limited Powers of her Office.

The Commissioner is not an elected State Treasurer with constitutional powers. *See Mattson v. Kiedrowski,* 391 N.W.2d 777 (Minn. 1986). The Commissioner is not a constitutional officer, is not elected, and has no powers allocated by the Minnesota Constitution.

To the contrary, Minnesota's Constitution -- specifically Article XI on Appropriations and Finance – only <u>restricts</u> the Commissioner regarding disbursement of State funds:

> Section 1. Money paid from state treasury. No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law.

Under Article XI, the Commissioner shall not disburse state funds without an appropriation by law enacted by the state legislature and signed by the Governor or otherwise enacted pursuant to Article IV (veto override).

Thus, all of the powers of the Commissioner are of a statutory creation –enacted by the state legislature. Minn. Stat. Sec. 16A.01. The most important and mandatory responsibility of the Commissioner is to "receive and record all money paid into the state

treasury and safely keep it until **lawfully** paid out." Minn. Stat. Sec. 16A 055, Subd. 1(1) (emphasis added).

Minnesota statutes direct the Commissioner that "[u]nless otherwise expressly provided by law, state money may not be spent or applied without an **appropriation**, an allotment, **and** issuance of a warrant or electronic fund transfer." Minn. Stat. Sec. 16A.57. *See also* Minn. Const. Art. 11, Sec. 1 (emphasis added). "Appropriation" means "an authorization by law to expend or encumber an amount in the treasury." Minn. Stat. Sec. 16A.011, Subd. 4.

State statutes are explicit in restricting the Commissioner's authority. For instance, the Commissioner may not exceed appropriations or cause the state to incur debt. Minnesota statutes make it a criminal misdemeanor and grounds for removal from office to do so:

> When there has been an appropriation for any purpose it shall be unlawful for any state board or official to incur indebtedness on behalf of the board, the official, or the state in excess of the appropriation made for such purpose. It is hereby made unlawful for any state board or official to incur any indebtedness in behalf of the board, the official, or the state of any nature until after an appropriation therefore has been made by the legislature. Any official violating these provisions shall be guilty of a misdemeanor and the governor is hereby authorized and empowered to remove any such official from office.

Minn. Stat. § 16A.138.

In summary, the above-quoted constitutional and statutory provisions unquestionably restrict the ability of the Commissioner to disburse state funds without an appropriation by law, unless and only if the State Constitution mandates it; if federal law requires it subject to the U.S. Constitution's Supremacy Clause; and if specific statutory authority demands continued funding without a subsequent appropriation by law.

Other than in these limited situations, legislators as elected officials in representing the people and through the legislative process determine how state funds are disbursed.

For instance, there are provisions within the Minnesota Constitution that are constitutional mandatory disbursements of State funds regardless of specific appropriation bills. These include Article 5, Section 4, funding salaries of executive officers (the governor, lieutenant governor, secretary of state, auditor, and attorney general); Article 6, Section 5, funding compensation for judges; Article 11, Section 7, funding state bonds and debt payments on bonds; Article 11, Section 8, funding of a permanent school fund; and Article 11, Section 14, requiring funding of a environmental and natural resources fund. None of these require a court order to effect disbursement of State funds.

Educational expenditures present an example of a specific continuing monetary funding statute that requires no subsequent legislative action or court order.[44] Minn. Stat. Sec. 126C.20 in conjunction with Minn. Stat. Sec. 126C.10, specifically directs how money is to be disbursed to the state's school districts annually without a further appropriation by law. Minn. Stat. Sec. 126C.20 states:

> There is annually appropriated from the general fund to the department the amount necessary for general education aid. This amount must be reduced by the amount of any money specifically appropriated for the same purpose in any year from any state fund.

The specific legislative mandated formula, the "general education aid," for the disbursement of funds for education is enumerated under Minn. Stat. Sec. 126C. 10.

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[44] App. pp. 154-165.

Similarly, Minn. Stat. Sec. 16A.641 governing general state obligation bonds for highway projects, the Commissioner provides for her to sell the bonds as authorized by law.[45] The statute also specifically proclaims how to appropriate the proceeds of the bonds without any further appropriation by law or by court order. Minn. Stat. Sec. 16A.641, subd. 8, states that "(a) [t]he proceeds of bonds issued under each law are appropriated for the purposes described in the law and in this subdivision. This appropriation may never be canceled."

Minn. Stat. Sec. 16A.125 governing state trust lands further reflects how the legislature specifically mandates the ability of the Commissioner to disburse state funds without a further appropriation by law or need of a court order. Here, the Commissioner is to credit revenue from the forest trust fund lands, to a suspense account. Minn. Stat. Sec. 16A.125, subd. 5(b). After the fiscal year, the receipts credited to the suspense account during that fiscal year are specifically distributed in accordance with the enumerated statutory provisions. *Id.* Subd. 5 (d)(1) – (3). Finally, the statute delineates how money accruing and credited to a state development account is to be appropriated to the department of natural resources division of forestry. *Id.* Subd. 5a. And one further limitation is placed on the Commissioner. The statute concludes with the following: "[a]n obligation to spend money may not be made unless there is an available balance not otherwise encumbered in the appropriation." *Id.*

Under certain circumstances federal mandates may require the Commissioner to disburse state funds provided that the United States Constitution Supremacy Clause is

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[45] The statute also reflects the control of the legislature over the ability to incurr debt on behalf of the state. No bond (debt) may be issued without authorization by law in accordance with Article XI, sections 5 and 7 of the Minnesota Constitution. See Minn. Stat. Sec. 16A.641, subd. 1.

applicable. There is some doubt governing the constitutionality of the federal government mandating states to expend State funds pursuant to federal law. *See Printz v United States,* 521 U.S. 898, 925 (1997). And certainly the state legislature is intimately interested in the federal programs and monies coming into the state that may affect state appropriations and commitments. Furthermore, state engagement in a federal program does not preclude the necessity of a legislative appropriation by law.

Minn. Stat. Sec. 3.3005 requires an opportunity for legislators to review federal monies received by the state and how they are expended. Minn. Stat. Sec. 3.3005, Subd.2 states in part:

> A state agency shall not expend money received by it under federal law for any purpose unless a request to spend federal money from that source for that purpose in that fiscal year has been submitted by the governor to the legislature as a part of a budget request...

Subdivision 5 also reflects the interest of legislators regarding how, when, and where federal monies coming into the state affect state appropriations. It states in part:

> Federal money that becomes available under subdivision 3 [state matching money], 3a [change in how federal money is to be used], 3b [increase in the amount of federal money available], and 4 [interim procedures when legislature is not in session] may be allotted after the commissioner of finance has submitted the request to the members of the legislative advisory committee for their review and recommendation for further review. Minn. Stat. Sec. 3.3005, Subd.5.

Such reviews become necessary in light of what impact state appropriations may have on how much federal money comes into the state especially if matching state funds are required. The fact that the state chooses to participate in a federal program does not necessitate a mandatory obligation to continue participating with that program at previous state funding limits. These types of decisions are pure aspects of public policy directly tied to appropriations by law governed only through the legislators' votes of "yea" or

"nay" within the legislative process. Unless the "federal mandate" via the Supremacy Clause is clear, the Commissioner is limited in disbursing state funds used to support or supplement federal programs.

For example, the state is required under the Temporary Assistance to Needy Families Program ("TANF") to share in the cost of the program. 42 U.S.C. Sec. 601, *et. seq* . However, there remains a state appropriation to be made to effect the provisions of Minn. Stat. Sec. 256J.02 that in turn implement TANF block grant money Failure of the state to maintain a certain historic level of participation under TANF could result in a reduction in federal grant money. 42 U.S.C. Sec. 609 (7)(A). Such a reduction may occur through how the state maintains the federal program via state appropriations. This type of control can only be the right of the legislators, again through votes of "yea" or "nay" and not that of a statutorily created figure such as the Commissioner. To the extent the Supremacy Clause may prevail, so may the Commissioner, but narrowly construed within her own right and certainly without the necessity of a court proceeding.

So, there are circumstances that the Commissioner may disburse state funds without an appropriation by law. <u>In all these instances, a court order is not required</u> Issuing such an order would be an improper advisory opinion *See Izaak Walton League of America Endowment, Inc. v. State Dep't of Natural Res.*, 252 N.W.2d 852, 854 (Minn. 1977). Courts only have jurisdiction over justiciable controversies involving definite and concrete assertions of rights on established facts. *St Paul Area Chamber of Commerce v Marzitelli*, 258 N.W.2d 585, 587-88 (Minn. 1977).

So, the 2005 District Court proceeding was additionally flawed insofar as it ordered disbursements that the Commissioner was already required to make That is why

the Commissioner – who is represented by the same Attorney General's office that initiated the 2005 District Court proceeding – testified by affidavit in the lower court:

> Based on court-ordered mandated services and programs, $569,623,962 of interim appropriation authority was established. **Of this total, $300,000,000 was established for the July 15 General Education aid payment for which open appropriation authority also exists.** Minn. Stat. § 126C.20 (2004) [46]

So, the Court on the Attorney General's petition issued an advisory opinion mandating $300,000,000 of already required spending.[47] This advisory opinion may have been great politics for someone ("saving the schools") -- but it was an improper plaintiff use of the District Court to issue advisory opinions where no case or controversy existed. Furthermore, these kind of huge mistakes will continue to occur when appropriations are made outside the normal appropriations process.

V. Appellants are Entitled to Attorney Fees and Costs in Responding to an Improper Motion for Rule 11 Sanctions

After the Appellants filed their Petition for a Writ for Quo Warranto, based the suggestion of the State Supreme Court in its opinion of September 9, 2005, the Minnesota Attorney General, counsel for the Commissioner of Finance, served upon Appellants' counsel and filed with the court a motion to dismiss the Petition. On November 15, 2005 the Attorney General served upon Petitioners attorneys and filed with the district court a motion for sanctions pursuant to Minn. R. Civ. P. Rule 11 and Minn. Stat. Sec. 549.211.

The hearing on the Petition for Quo Warranto was scheduled for December 13, 2005 as was the Respondents' motion to dismiss and the motion for sanctions.

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[46] App. pp. 324 - ;Ingison Aff. § 6

[47] *See* App. pp. 154- 165; Court Order dated June 23, 2005.

Because the Attorney General failed to follow the specific requirements of Rule 11 and Minn. Stat. Sec. 549.211 the Appellants demanded the district court to reject the motion Furthermore, because the Attorney General failed to follow the specific requirements of Rule 11 and Minn. Stat. Sec. 549.211, subd. 4, Appellants counsel mad a motion that they were entitled to attorney fees and costs. However, the District Court ruled against the Appellants.

The Appellants counsel are entitled to attorney fees and costs for two reasons: first, the Attorney General's motion was frivolous and violated the required procedures to serve the motion. Second, the Attorney General failed to show clear and convincing evidence required under Rule 11 to award sanctions.

Minn. R. Civ. P. Rule 11.03(a)(1)[48] states specifically how to initiate a motion for sanctions:

> A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate Rule 11.02. It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or other such period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney fees incurred in presenting or opposing the motion....

The Minnesota statute is identical to the Rule with one important difference. Minn. Stat. Sec. 549.211, subd. 4 states that the motion for sanctions "...must be served as provided under the Rules of Civil Procedure, but **may not** be filed with or presented to the court unless, within 21 days after service of the motion, or another period as the court may

[48] Fed. R. Civ. P. Rule 11(c)(1)(a) is the same as the Minnesota rule for sanctions.

prescribe ...." The court rule is explicit and states that a motion for sanctions "**shall not** be filed with or presented to the court ...." (Emphasis added).

The Attorney General was specifically required to serve the Rule 11 motion "as provided under the Rules of Civil Procedure." Minn. Stat. Sec. 549.211, subd. 4. The Minnesota Rules of Court state that the Attorney General "shall" serve his motion as provided under Rule 5. The Rules of Court also specifically state that the Attorney General "shall not file" with the court his motion unless Appellants' attorneys "within 21 days after service of the motion" act to withdraw the Petition outright or amend their Petition to correct alleged flaws.

Minnesota courts have followed the strict requirements of Rule 11 motions and have declared them mandatory· "Minn. R. Civ. P. 11.03(a)(1) ... requires a party seeking sanctions serve its motion on the nonmoving party, wait 21 days, and if the challenged material has not been withdrawn or corrected by then, file the motion for sanctions in the district court... If the moving party does not follow the procedure provided in rule 11.03(a)(1), the motion for sanctions must be rejected." *Gibson v Coldwell Banker Burnet*, 659 N.W.2d 782, 791 (Minn. Ct. App. 2003)

Likewise, in *Wright & Miller*, 5A Fed. Prac. & Proc. Civ. 3d Sec. 1337.2:, "[a] party seeking sanctions under Rule 11 first must serve – but not file- the motion for sanctions upon the party against whom sanctions are sought as provided under Rule 5 " "[T]he Motion for Sanctions could not have been '*filed* with or *presented to* the court *unless,* within 21 days after service of the motion ... the challenged ... claim ... is not withdrawn...'" (Emphasis supplied.)" *Kirk Capital Corporation v Bailey*, 16 F.3d 1485, 1488, 28 Fed. R. Serv.3d 88 (8th Cir. 1994). As an example of the procedural

requirements of Rule 11, the Eighth Circuit Court of Appeals explained that "defendants would *file* their Motion to Dismiss and at some time *serve* (not file) their Motion for Sanctions. Then the plaintiffs would have 21 days to voluntarily withdraw their Complaint if they wished to avail themselves of the "Safe Harbor" provision." *Id* at 1488-89. "Since the procedural requirements of the Rule 11 safe harbor provision are designed to protect the person against whom sanctions are sought and forestall unnecessary motion practice, a failure to comply with them will result in the rejection of the motion for sanctions." *Wright & Miller*, 5A Fed Prac. & Proc. Civ. 3d Sec. 1337 2

As other Minnesota courts have emphasized, "[t]he requirements for obtaining sanctions are explicitly set out in the text of the rule; given the serious ramifications of an award of sanctions, the party seeking sanctions must comply with those procedural requirements." *Tri v Bosie Cascade Office Products, Inc.*, WL 31108190 (D. Minn. 2002) (correspondence is insufficient notice, motion for sanctions must be separate from other motions and cannot be simultaneously served and filed at the conclusion of the case). Serving and filing simultaneously is not complying with the unambiguous language of either the rules of civil procedure or the Minnesota statute governing sanctions. "[A]pplying the doctrine of substantial compliance ... would ignore the unambiguous, mandatory statutory requirement..." *Wagner v Minneapolis Public Schools*, 581 N.W.2d 49, 52 (Minn. Ct. App. 1998) (motion for sanctions must fail because it was filed more than one month of the filing of a responsive brief). When a motion for sanctions is filed with the court prior to the 21 day "safe harbor" period it must be dismissed for failing to follow the required procedures of Minn. Stat. Sec. 549.211, subd. 4(a). *Id.* at 51.

The Attorney General served his Rule 11 motion more than 21 days before a scheduled hearing date of December 13, 2005. However, the Attorney General also simultaneously filed the motion with the court in violation of the unambiguous and mandatory procedural requirements of Minn. R. Civ. P. Rule 11.03(1)(a) and Minn. Stat. Sec. 549.211, subd 4. Therefore, the motion for sanctions had to be rejected as they were by the court. However, Appellants counsel were entitled to attorney fees and costs against the Attorney General because the Attorney General had no excuse for his total disregard of the rules of court and statutory requirements in efforts to impose sanctions upon the Appellants' attorneys. Also, upon notice of the defects as presented in Appellants' response brief filed below and oral argument, the Attorney General refused to withdraw the Rule 11 motion at the hearing.

The Appellants' petition for a writ of quo warranto was non-frivolous being modeled after the successful petition of the Attorney General in *State of Minnesota ex rel Robert W Mattson v Peter Kiedrowski,* 391 N.W.2d 777, 778 (Minn. 1986). Furthermore, the Minnesota Supreme Court also provided a jurisdictional guideline for the individual legislators in its order of September 9, 2005. The Court stated that the "petitioners have several procedural alternatives to effectively raise their claims in district court. In accordance with *Rice,* they can file an information in the nature of quo warranto raising the issues they raised here...."[49]

The Attorney General sought to secure his motion for sanctions claims based on frivolous claims that the individual legislators acted in bad faith. The claims of the Appellants are based within the context of a constitutional disagreement regarding the

[49] App. at p. 271, Order at 4.

separation of powers that is also the foundation upon which the State's government stands. The controversy required a petition for a writ of quo warranto. Issues of legal regarding standing, mootness, laches, not to mention the merits of the constitutional issues raised are not frivolous. The Attorney General's motion for sanctions was knowingly improper and frivolous. To defend against the motion for sanctions was based on improper and frivolous grounds should entitle the Appellants to attorney fees and costs.

Conclusion

The Minnesota Constitution establishes the process for the enactment of laws regarding the disbursements of state funds. It requires that the individual legislators vote upon bills that are appropriations by law. The Constitution does not allow for the Commissioner of Finance to circumvent the Constitution, nor does it allow any other branch of the government to create a process to avoid the messy process of democratic politics. Budgetary impasses are a necessary evil that have happened in the past and will happen again and again. But that does not detract from the specific responsibilities given solely to legislators regarding appropriations by law.

The Commissioner of Finance must be held accountable and be required to state to the courts, for the public interest, by what constitutional authority in 2005 she disbursed funds without an appropriation by law. Or in the absence of such a showing, the Court should issue an order demanding the Commissioner of Finance and her successor to cease and desist from any further disbursements of state funds at the end of the fiscal biennium without an appropriation by law. Therefore, the District Court's decision must be reversed.

Finally, the individual legislators are entitled to their attorney fees and costs for their defense of a knowingly improper and frivolous motion for Rule 11 sanctions filed by the Attorney General. The Attorney General had no basis to file the motion in the first instance, and in the second instance, failed to follow the required procedure to consider the motion. When faced with these facts at the District Court hearing, the Attorney General refused to withdraw the Rule 11 motion. Ultimately, the Appellants' defense against the improper and frivolous motion was an unnecessary waste of the individual legislators legal resources. Therefore, the individual legislators should be awarded their attorney fees and costs in the defense of the improper and frivolous Rule 11 motion of the Attorney General.

Dated: July 25, 2006.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).