

No. A11-2162

STATE OF MINNESOTA

IN COURT OF APPEALS

Meriwether Minnesota Land & Timber LLC, et al.,

Respondents,

vs.

State of Minnesota; Myron Frans, Commissioner, Minnesota Department of Revenue,

Appellants.

APPELLANTS' REPLY BRIEF AND RESPONSE TO
RESPONDENTS' CROSS-APPEAL

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION.....	1
ARGUMENT	1
I. THE 2010 SFIA ANNUAL INCENTIVE PAYMENTS ARE FOR RESPONDENTS’ PERFORMANCE THROUGHOUT CALENDAR YEAR 2010.....	1
II. RESPONDENTS HAVE NO CONTRACT OR PROMISSORY ESTOPPEL RIGHT TO A 2010 ANNUAL INCENTIVE PAYMENT IN A PARTICULAR AMOUNT.	4
A. Respondents Concede That No Contract Right Exists.	4
B. No Promissory Estoppel Right Exists.....	7
1. The SFIA Does Not “Clearly and Unequivocally” Promise that the Incentive Payment Provisions Would Remain Unchanged.	7
2. Respondents Did Not Reasonably Rely On Any Purported Promise.....	9
3. Respondents Did Not Rely To Their Substantial Detriment On Any Purported Promise.....	10
a. Respondents provide recreational opportunities on their forest lands pursuant to the private certification programs. .	11
b. Respondents would not incur any penalties to withdraw from the SFIA program, and even if they chose to violate a covenant, the penalty amount would be nominal.....	13
4. Equity Does Not Require Enforcement Of Any Purported Promise.....	15
III. EVEN ASSUMING A PROMISSORY ESTOPPEL RIGHT EXISTS, THE RIGHT WAS NOT UNCONSTITUTIONALLY IMPAIRED.	17
A. Respondents Have No Contract Right, And In Any Event, Their Purported Promissory Estoppel Right Was Not Substantially Impaired.	17

B.	In Any Event, The 2010 Amendment Serves Significant and Legitimate Public Purposes.....	18
C.	The 2010 Amendment Was A Reasonable and Appropriate Means to Accomplish the Significant and Legitimate Public Purposes.....	20
IV.	RESPONDENTS’ TAKINGS CLAIM IS SPECIOUS.	23
V.	RESPONDENTS’ EQUAL PROTECTION CLAIM HAS NO MERIT.	24
VI.	SUMMARY JUDGMENT SHOULD BE GRANTED IN APPELLANTS’ FAVOR.....	27
VII.	IN THE ALTERNATIVE, THE DISTRICT COURT SHOULD HAVE ALLOWED APPELLANTS’ TO CONDUCT DISCOVERY PURSUANT TO MINN. R. CIV. P. 56.06.....	28
VIII.	THE “STATE OF MINNESOTA” IS NOT A PROPER PARTY.....	29
	APPELLANTS’ RESPONSE TO RESPONDENTS’ CROSS-APPEAL	31
I.	RESPONDENTS’ EQUAL PROTECTION CLAIM HAS NO MERIT.	31
II.	THE COURT SHOULD REJECT RESPONDENTS’ ATTEMPT TO OBTAIN AN EVEN GREATER WINDFALL THAN THE ONE ORDERED BY THE DISTRICT COURT.....	31
	CONCLUSION	33

TABLE OF AUTHORITIES

Page

Federal Cases

<i>Advanced Auto Transp., Inc. v. Pawlenty</i> , 2010 WL 2265159 (D. Minn. June 2, 2010)	28
<i>Atkins v. Parker</i> , 472 U.S. 115 (1985)	21
<i>Baltimore Teachers Union, Am. Fed'n of Teachers Local 340, AFL-CIO v. Mayor & City Council of Baltimore</i> , 6 F.3d 1012 (4th Cir. 1993)	22
<i>Cont'l Illinois Nat'l Bank v. Washington</i> , 696 F.2d 692 (9th Cir. 1983)	23
<i>Energy Reserves Group, Inc. v. Kansas Power & Light Co.</i> , 459 U.S. 400 (1983)	17, 19, 20
<i>Ex Parte Young</i> , 209 U.S. 123 (1908)	30
<i>Franklin Mem'l Hosp. v. Harvey</i> , 575 F.3d 121 (1st Cir. 2009)	23
<i>Gattis v. Gravett</i> , 806 F.2d 778 (8th Cir. 1986)	8
<i>Gen. Motors Corp. v. Romein</i> , 503 U.S. 181 (1992)	17
<i>Marks v. United States Congress</i> , 285 Fed. Appx. 762 (D.C. Cir. 2008)	30
<i>Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dep't of Pub. Welfare</i> , 742 F.2d 442 (8th Cir. 1984)	23
<i>Murray v. Charleston</i> , 96 U.S. 432, 445 (1877)	5

<i>Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.</i> , 470 U.S. 451 (1985).....	8
<i>New York City Managerial Empls. Ass'n v. Dinkins</i> , 807 F. Supp. 958 (S.D.N.Y. 1992).....	20, 21
<i>Pittman v. Chicago Bd. of Educ.</i> , 64 F.3d 1098 (7th Cir. 1995).....	8
<i>Quinones v. City of Evanston, Illinois</i> , 58 F.3d 275 (7th Cir. 1995).....	29, 30
<i>Travis v. Reno</i> , 163 F.3d 1000 (7th Cir. 1998).....	30
<i>United States Trust Co. of New York v. New Jersey</i> , 431 U.S. 1 (1977).....	5, 23
<i>Usery v. Turner Elkorn Mining Co.</i> , 428 U.S. 1 (1976).....	4
<i>Yee v. City of Escondido, California</i> , 503 U.S. 519, 527 (1992)	23

State Cases

<i>AFSCME Councils 6, 14, 65 & 96, AFL-CIO v. Sundquist</i> , 338 N.W.2d 560 (Minn. 1983).....	9, 11, 15, 28
<i>Anderson v. State</i> , 435 N.W.2d 74 (Minn. Ct. App. 1989).....	<i>passim</i>
<i>Ariz. Ass'n of Providers for Pers. with Disabilities v. State</i> , 219 P.3d 216 (Ariz. Ct. App. 2009).....	17
<i>Baertsch v. Minn. Dep't of Revenue</i> , 518 N.W.2d 21 (Minn. 1994).....	3
<i>Benson v. Alverson</i> , No. A11-811 (Minn. Ct. App. 2012).....	30
<i>Bixler v. J.C. Penny Co.</i> , 376 N.W.2d 209 (Minn. 1985).....	29

<i>Brown v. Minn. Dep't of Pub. Welfare,</i> 368 N.W.2d 906 (Minn. 1996).....	9
<i>Busbee v. Georgia Conference,</i> 221 S.E.2d 437 (Ga. 1975).....	31
<i>Campaign for Fiscal Equity, Inc. v. State,</i> 861 N.E.2d 50 (N.Y. Ct. App. 2006)	17
<i>Christensen v. Minneapolis Mun. Emps. Ret. Bd.,</i> 331 N.W.2d 740 (Minn. 1983).....	8
<i>Dale Props., LLC v. State,</i> 638 N.W.2d 763 (Minn. 2002).....	24
<i>Donaldson v. Chase Sec. Corp.,</i> 216 Minn. 269, 13 N.W.2d 1 (1943).....	4
<i>In re Gollnik's Estate,</i> 112 Minn. 349, 128 N.W. 292 (1910).....	9
<i>Javinsky v. Comm'r of Admin.,</i> 725 N.W.2d 393 (Minn. Ct. App. 2001)	9, 12, 15
<i>John Hancock Mut. Life Ins. Co. v. Comm'r of Revenue,</i> 497 N.W.2d 250 (Minn. 1993).....	24, 25
<i>Kolton v. County of Anoka,</i> 645 N.W.2d 403 (Minn. 2002).....	26
<i>Lewis-Miller v. Ross,</i> 710 N.W.2d 565 (Minn. 2006).....	3
<i>Minneapolis Teachers Ret. Fund Ass'n v. State,</i> 490 N.W.2d 124 (Minn. Ct. App. 1992)	16, 22
<i>Naftalin v. King,</i> 252 Minn. 381, 90 N.W.2d 185 (1958).....	5, 17
<i>Nash v. Wollan,</i> 656 N.W.2d 585 (Minn. Ct. App. 2003)	2
<i>Scott v. Minneapolis Police Relief Ass'n, Inc.,</i> 615 N.W.2d 66 (Minn. 2000).....	27

<i>Self v. City of Atlanta</i> , 377 S.E.2d 674 (Ga. 1989).....	31
<i>Sletto v. Wesley Constr., Inc.</i> , 733 N.W.2d 838 (Minn. Ct. App. 2007)	3
<i>Smith v. Holm</i> , 220 Minn. 486, 19 N.W.2d 914 (1945).....	28
<i>State ex rel. Merrick v. Dist. Ct. of Hennepin Cnty.</i> , 33 Minn. 235, 22 N.W. 625 (1885).....	25
<i>State v. Benniefield</i> , 678 N.W.2d 42 (Minn. 2004).....	25, 26
<i>State v. Cox</i> , 798 N.W.2d 517 (Minn. 2011).....	27
<i>State v. King</i> , 257 N.W.2d 693 (Minn. 1977).....	8
<i>State v. Tennin</i> , 674 N.W.2d 403 (Minn. 2004).....	20, 23
<i>Sylvestre v. State</i> , 298 Minn. 142, 214 N.W.2d 658 (1973).....	6, 17

State Statutes

2010 Minn. Laws 1st Spec. Sess. ch. 1, art. 13, § 4, subd. 3	3
2011 Minn. Laws 1st Spec. Sess., ch. 7, art. 6, § 12.....	14
Minn. Stat. § 88.49	5
Minn. Stat. § 290C.01	26
Minn. Stat. § 290C.03(a)(6)	11, 12
Minn. Stat. § 290C.04	<i>passim</i>
Minn. Stast. § 290C.05.....	4
Minn. Stat. § 290C.07	4, 7
Minn. Stat. § 290C.08	4, 7

Minn. Stat. § 290C.10	13
Minn. Stat. § 290C.13	15
Minn. Stat. § 645.17	3
Minn. Stat. § 645.21	3
Minn. Stat. § 645.31	26

State Constitution

Minn. Const. art. XII, § 1	27
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INTRODUCTION

As discussed in Appellants' principal brief, Respondents erroneously seek to restrict the Legislature's constitutional authority to amend legislation. In so doing, they request windfall payments for conduct they already privately and more rigorously engage in out of their own business self-interest. Through their related appeal, filed on December 30, 2011, Respondents seek an even greater windfall payment of public monies than ordered by the district court. Respondents' brief does not even address most of the arguments made in Appellants' principal brief. Indeed, for various reasons, Respondents' claims have no basis in law or fact. Accordingly, the Court should reverse the district court's order, vacate its judgment, and order the entry of summary judgment in Appellants' favor.

ARGUMENT

I. THE 2010 SFIA ANNUAL INCENTIVE PAYMENTS ARE FOR RESPONDENTS' PERFORMANCE THROUGHOUT CALENDAR YEAR 2010.

As explained in Appellants' principal brief at 8-10, the Sustainable Forest Incentive Act ("SFIA") program is administered on an annual calendar year basis pursuant to the provisions of the SFIA. Claimants who return a signed "annual certification form" to the Commissioner of Revenue ("Commissioner") by August 15 of a given calendar year receive an "annual incentive payment" by October 1 for their participation in the program during that same calendar year. Minn. Stat. §§ 290C.04, .05, .08, subd. 1.

Respondents nevertheless summarily assert throughout their brief that the annual incentive payments paid in a given year are for a claimant's participation in the SFIA program for the previous calendar year. See Resp'ts' Brief at 9, 19, 22, 24, 27. However, Respondents' analysis ignores the critical language of Minn. Stat. § 290C.04(a), which explicitly provides that a "claimant must . . . submit an application by September 30 *in order for the land to become eligible beginning in the next year.*"¹ (Emphasis added.) Accordingly, the plain language of the SFIA forecloses Respondents' strained construction. See, e.g., *Nash v. Wollan*, 656 N.W.2d 585, 589 (Minn. Ct. App. 2003) (stating courts must interpret a statute in accordance with its plain language).

Respondents' argument is also contrary to the Affidavit of John Hagen, the Director of the Property Tax Division of the Department of Revenue, who administers the SFIA program. The affidavit states in part that a "SFIA claimant's participation with the SFIA in 2009 is unrelated to the SFIA payment to that participant in 2010." Add. 38. Mr. Hagen further explains that since the inception of the SFIA program, the Commissioner has paid annual incentive payments to claimants for their participation in the program throughout the same calendar year. *Id.*

¹ As previously explained in Appellants' principal brief at 8, under the SFIA the Commissioner must notify the landowner whether his or her application "has or has not been approved" within 90 days of receipt of the application. Minn. Stat. § 290C.04(a), (b). Thus, because SFIA applications must be submitted to the Commissioner by September 30, all applications must be approved or denied by the Commissioner before the beginning of the new calendar year, when participation in the SFIA program for newly approved claimants begins. *Id.* § 290C.04(a).

Respondents' construction of the SFIA's timing provisions would also produce "phantom" payments. For example, under Respondents' construction a claimant who applies to enroll forest land in the SFIA program by September 30, 2011, would receive its first annual incentive payment in October 2012 for "participation" in the program for all of calendar year 2011, even though the land was not eligible to participate in the program until January 1, 2012. *See* Minn. Stat. § 290C.04(a). Likewise, a claimant who terminates participation in the SFIA program as of January 1, 2012, would still receive another annual incentive payment in October 2012. Such results are not only contrary to the plain language of Minn. Stat. § 290C.04(a), but also show the absurdity of Respondents' position. *See, e.g., Lewis-Miller v. Ross*, 710 N.W.2d 565, 569 (Minn. 2006) (stating courts "must presume that the legislature intended its statutes to be 'effective,' and not productive of 'absurd . . . or unreasonable' results." (quoting Minn. Stat. § 645.17)).

Respondents' description of 2010 Minn. Laws 1st Spec. Sess. ch. 1, art. 13, § 4, subd. 3 (modifying § 290C.07 by placing a \$100,000 per claimant limit on the annual incentive payments to be made on October 1, 2010) as "retroactive," Resp'ts' Br. at 22, is also incorrect. Statutes are presumed to operate prospectively, *Sletto v. Wesley Constr., Inc.*, 733 N.W.2d 838, 842 (Minn. Ct. App. 2007), and are not "retroactive" unless the Legislature "clearly and manifestly" so provides. Minn. Stat. § 645.21; *see also Baertsch v. Minn. Dep't of Revenue*, 518 N.W.2d 21, 24 (Minn. 1994) (holding that a retroactive statute is one which has an effective date prior to the date the law was enacted).

The 2010 amendment was enacted on May 21, 2010, with an effective date of May 22, 2010, and applied to the annual incentive payments to be made in October 2010. See Add. 25. Thus, the 2010 amendment was enacted before Respondents had completed their participation in the SFIA program in calendar year 2010, before they returned their signed “annual certification form” to the Commissioner in 2010, and before they received their 2010 annual incentive payments. See Minn. Stat. §§ 290C.04(a), .05, .07, .08; Add. 38. Accordingly, the 2010 amendment, by its very terms, applied prospectively.² See Appellants’ Br. at 19-20, 32-34.

II. RESPONDENTS HAVE NO CONTRACT OR PROMISSORY ESTOPPEL RIGHT TO A 2010 ANNUAL INCENTIVE PAYMENT IN A PARTICULAR AMOUNT.

A. Respondents Concede That No Contract Right Exists.

For all the reasons discussed in Appellants’ principal brief at 24-25, the SFIA did not confer a contract right on Respondents and the district court implicitly reached the same conclusion. On December 30, 2011, Respondents filed a notice of related appeal, but did not appeal the contract issue. Thus, Respondents have conceded that their contract claim is without merit. In any event, Respondents fail to respond to Appellants’ argument that the SFIA does not “clearly and unequivocally” create a contract right,

² Even assuming *arguendo* that the 2010 amendment was “retroactive,” the Legislature can retroactively amend a law. See, e.g., *Usery v. Turner Elkorn Mining Co.*, 428 U.S. 1, 15-20 (1976); *Donaldson v. Chase Sec. Corp.*, 216 Minn. 269, 277-78, 13 N.W.2d 1, 5 (1943).

including the fact that they affirmatively agreed 38 separate times that no contract existed.³ See Appellants' Br. at 24-25.

Respondents' reliance on *Naftalin v. King*, 252 Minn. 381, 90 N.W.2d 185 (1958) is misplaced. *Naftalin* involved the issuance of certificates of indebtedness to the public to fund the construction of a new state hospital and various other building improvements. *Naftalin*, 252 Minn. at 384, 90 N.W.2d at 188. Under such circumstances, the United States Supreme Court has recognized:

“States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons.”

United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 25 n.23 (1977) (quoting *Murray v. Charleston*, 96 U.S. 432, 445 (1877)). Thus, because the Legislature was acting as an “ordinary individual” and not in its “sovereign” capacity in *Naftalin*, the Supreme Court found the certificates of indebtedness could not be impaired by subsequent legislatures. *Naftalin*, 252 Minn. at 388-90, 90 N.W.2d at 190-92.

Unlike *Naftalin*, this case does not involve the Legislature executing debt instruments or borrowing money like an “ordinary individual” but rather amending the statutory benefit provisions of a voluntary government program. Accordingly, *Naftalin*

³ In stark contrast to the language of the SFIA, when the Legislature intends a statute to create a contract right it “clearly and unequivocally” so states. For example, the “auxiliary forest” legislation, which provides tax relief for certain small parcels of forest land, explicitly requires the execution of a “contract” between the Commissioner of Natural Resources and the property owner. See Minn. Stat. § 88.49 (2010). The legislation is also replete with references to the “contract.” See *id.* §§ 88.49-.51.

has no application to this case because the Legislature acted in its sovereign capacity in amending the SFIA.

Respondents' reference to *Sylvestre v. State*, 298 Minn. 142, 214 N.W.2d 658 (1973) is also misleading. In *Sylvestre*, six retired district court judges challenged a statute that diminished their pension benefits. The Supreme Court recognized that article VI, section 7 of the Minnesota Constitution provided that the compensation of judges "shall not be diminished during their term of office" and explained that this provision ensures "that the judiciary be independent of the legislature." *Id.* at 146, 150, 214 N.W.2d at 661, 663-64. Relying on this constitutional provision, the Court concluded that "retirement compensation constitutes deferred payment of part of the judge's salary . . . which cannot be diminished during his continuance in office" *Id.* at 155, 214 N.W.2d at 666. The Court reasoned that "[a]ny other construction would impair the independence of the judiciary as a separate, coequal branch of government under our concept of a separation of powers among the three branches of government." *Id.*

This case does not involve the employment relationship at issue in *Sylvestre*. Nor is there a specific constitutional provision like that enjoyed by the retired judges, or separation-of-powers considerations, which guarantee undiminished SFIA annual incentive payments to Respondents. To the contrary, the separation of powers doctrine fully supports the Legislature's authority to amend the SFIA. See, e.g., *infra* at 8-9, 16-17, 21.

B. No Promissory Estoppel Right Exists.

Respondents also have no promissory estoppel right for numerous independent reasons. See Appellants' Br. at 25-35.

1. The SFIA Does Not "Clearly and Unequivocally" Promise that the Incentive Payment Provisions Would Remain Unchanged.

As discussed in Appellants' principal brief at 27-28, Minn. Stat. § 290C.08, subd. 1 merely requires that annual incentive payments be paid in accordance with Minn. Stat. § 290C.07, which necessarily includes any subsequent amendments to the law. The language Respondents rely on to improperly "imply" a promise in Minn. Stat. § 290C.07 ("The payment shall equal the greater of"), Resp'ts' Br. at 20-22, was therefore changed by the 2010 amendment, which is the operative law for determining the annual incentive payments for calendar year 2010.

In addition, to the extent Respondents argue that the Legislature did not explicitly provide that the SFIA could be amended in the future, Resp'ts' Br. at 8, 18, Respondents improperly attempt to impose the burden of proof on the Legislature to "clearly and unequivocally" state that it could amend the law.⁴ The Legislature need not explicitly reference its power to amend legislation because such power is inherent, and in fact, has been exercised with regard to the SFIA's provisions on numerous occasions. See Appellants' Br. at 26-27, 28 n.5; *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa*

⁴ Likewise, Respondents' claim that the SFIA creates an enforceable contract or promissory estoppel right because it "contains no language disclaiming the creation of a contract," Resp'ts' Br. at 8, 18, 20, is meritless. Such a claim turns on its head the longstanding presumption that laws are not intended to create private contractual or vested rights unless "clearly and unequivocally" stated. See Appellants' Br. at 24-26.

Fe Ry. Co., 470 U.S. 451, 465-66 (1985) (recognizing laws are “inherently subject to revision and repeal”); *Gattis v. Gravett*, 806 F.2d 778, 780 (8th Cir. 1986) (recognizing the Legislature has the inherent power to modify or repeal statutory entitlements absent statutory language explicitly qualifying such power); *see also State v. King*, 257 N.W.2d 693, 698-99 (Minn. 1977) (“All members of an ordered society are presumed either to know the law or, at least, to have acquainted themselves with those laws that are likely to affect their usual activities.”).

Respondents’ reliance on *Christensen v. Minneapolis Mun. Emps. Ret. Bd.*, 331 N.W.2d 740 (Minn. 1983) for the broad proposition that promissory estoppel rights are liberally implied from statutes is also misplaced. See Resp’ts’ Br. at 17-20. As discussed in Appellants’ principal brief at 34-35, the special public employment relationship and facts involved in *Christensen* are not present in this case. *Christensen* is limited to its own unique circumstances, as evidenced by the fact that even subsequent Minnesota public employee pension cases have all rejected promissory estoppel claims, *see* Appellants Br. at 26, and to Appellants’ knowledge, no other appellate case in Minnesota or anywhere else in the nation has found a promissory estoppel right based on a statute.

Indeed, if statutory language such as “shall” or “will” were interpreted to grant promissory estoppel rights, as Respondents urge, courts would improperly “limit drastically the essential powers of a legislative body.” *Nat’l R.R. Passenger Corp.*, 470 U.S. at 465-66. Such a result “would enormously curtail the operation of democratic government,” *Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1104 (7th Cir. 1995) (Posner, C.J.), and contravene the separation of powers doctrine. *See, e.g., In re*

Gollnik's Estate, 112 Minn. 349, 350, 128 N.W. 292, 292 (1910) (recognizing under the separation of powers doctrine that “one of the highest duties resting upon the judicial department of the state is to refrain from trespassing upon the domain assigned to either” the legislative or executive branches of government).

2. Respondents Did Not Reasonably Rely On Any Purported Promise.

As discussed in Appellants’ principal brief at 28-29, Respondents’ alleged reliance on a purported promise is patently unreasonable. The Legislature repeatedly amended the SFIA throughout Respondents’ participation in the SFIA program and the covenant they signed 38 separate times stated that the provisions of the SFIA “could change in the future.” Respondents also knew or at least should have known that the Legislature has the authority to amend legislation, including the SFIA. *See, e.g., Brown v. Minn. Dep’t of Pub. Welfare*, 368 N.W.2d 906, 912 (Minn. 1996) (“[T]hose who deal with the government are expected to know the law.”).

Respondents’ brief does not even discuss, let alone refer to evidence that shows how, under these circumstances, they *reasonably* relied on the purported promise that the Legislature would not amend the incentive payment provisions of the SFIA. *See, e.g., AFSCME Councils 6, 14, 65 & 96, AFL-CIO v. Sundquist*, 338 N.W.2d 560, 568-69 (Minn. 1983), *superseded by statute on other grounds* (rejecting Appellants’ promissory estoppel claim because they provided no evidence of how they reasonably relied on a purported promise); *Javinsky v. Comm’r of Admin.*, 725 N.W.2d 393, 398-400 (Minn. Ct.

App. 2001) (same); *Anderson v. State*, 435 N.W.2d 74, 80-81 (Minn. Ct. App. 1989) (same).

Respondents are all sophisticated national and multinational corporations, yet they profess ignorance of the applicable law and the disclaimers in the SFIA covenants that they repeatedly signed. The absence of any supporting evidence for the *reasonableness* of their reliance on the purported promise does not comport with their burden of proof, the controlling law, or the facts.⁵

3. Respondents Did Not Rely To Their Substantial Detriment On Any Purported Promise.

Respondents have also failed to even mention, let alone establish, that they relied on the purported promise to their substantial detriment. See Appellants' Br. at 29-30. Respondents have not provided any evidence to prove that they would have used or developed even one acre of their forest land differently had they not participated in the SFIA program or that their enrolled land has diminished in value from their SFIA participation. Respondents cannot make such claims because, as recognized by the Legislature, they engage in far more rigorous sustainable forest management practices than those required by the SFIA through their participation in the SFI and FSC private

⁵ Respondents contention on pages 9 and 23 of their brief that they have offered "unchallenged testimony" that the availability of SFIA annual incentive payments was a significant factor in their decision to invest in Minnesota forest lands is also erroneous. See, e.g., Appellants' Br. at 11-17, 21-22, 29-31, 42, 44, 46, 48. In any event, as a matter of fact and law, the availability of SFIA incentive payments due to Respondents' mere participation in the SFIA program is irrelevant to proving the necessary reasonableness and substantial detrimental reliance on the purported promise that such payments could never be altered by the Legislature. See *id.* at 28-30.

certification programs, which is demanded of them by the forest-products market. See Appellants' Br. at 11-17, 21-22, 29-30.

Respondents make the conclusory assertion that their participation in the SFIA caused them to lose "their ability to be nimble with their land." See Resp'ts' Br. at 37. Again, however, they failed to submit any evidence showing how this alleged lack of "nimbleness" affected their actual use of even one acre of their forest land in 2010, let alone all 500,000 acres, to their substantial detriment. See Appellants' Br. at 29-30.

Although Respondents fail to specifically address the substantial-detrimental-reliance requirement in their brief, they refer to the SFIA provision regarding "year-round, nonmotorized access to fish and wildlife resources on [their SFIA] enrolled land," Minn. Stat. § 290C.03(a)(6), and the district court's calculation of potential penalties in the approximate amount of \$13 million. Resp'ts' Br. at 5-6, 10-11, 19, 23-26, 36-37. Neither of these considerations support Respondents' position. Respondents provide the same, or even greater, public access to their forest lands pursuant to the private SFI and FSC certification programs and no penalties would be applicable if they withdrew from the SFIA program.

a. Respondents provide recreational opportunities on their forest lands pursuant to the private certification programs.

Respondents have submitted no evidence to prove how "nonmotorized [public] access to fish and wildlife resources on [their SFIA] enrolled land" is substantially detrimental. See, e.g., *Sundquist*, 338 N.W.2d at 568-69 (rejecting Appellants' promissory estoppel claim because they failed to submit any evidence showing how they

specifically relied on a purported promise to their substantial detriment); *Javinsky*, 725 N.W.2d at 398-400 (same).

In any event, contrary to Respondents' claim, see Resp'ts' Br. at 10-11, and as previously explained in Appellants' principal brief at 12-13 and 16-17, the SFI and FSC private certification programs require Respondents to provide the same, if not more expansive, recreational opportunities to the public on their forest lands.⁶ For example, Respondent Meriwether admits in a press release that it provides "hunting, fishing, hiking, *cross-country skiing, and recreational vehicle use*" on its certified lands, S.R. at 242, which is more expansive than what is required under the SFIA. *Compare* Minn. Stat. § 290C.03(a)(6) (requiring only "nonmotorized access to fish and wildlife resources"). Respondent Potlatch's website also acknowledges that its privately certified forest land is accessible to the public for recreation, S.R. 249, 252, and is "available for a wide variety of public uses." *Recreation*, Potlatch, <http://recreation.potlatchcorp.com> (last visited Jan. 23, 2012). Respondent Blandin similarly states on its website that its "[c]ommercial forests are generally open to the public for hunting, fishing, berry picking, bird watching and hiking." S.R. 256.

Respondents never disputed in response to the Affidavit of Andrew Arends, see Add. 44, that the SFI and FSC standards require them to provide recreational activities to the public. Nor did they dispute the evidence in the Arends Affidavit, *id.*, that the third-

⁶ Contrary to Respondents' claim, see Resp'ts' Br. at 11, the FSC standards do include public access requirements. See S.R. at 129 (requiring landowners to maintain and/or enhance "forest services and resources that serve public values, including . . . recreation and tourism").

party auditors who conduct annual on-site SFI and FSC compliance audits require certified landowners, such as Respondents, to specifically identify such recreational opportunities. To the contrary, as noted above, all of the Respondents boast of the recreational opportunities that they provide to the public on their privately certified forest lands, see also Appellants' Br. at 16-17, and Respondents never disputed such facts after Appellants submitted them into the record.⁷ In addition, the SFIA involves sustainable forest management practices, and public access is only an incidental aspect of Respondents' participation in the program.

- b. Respondents would not incur any penalties to withdraw from the SFIA program, and even if they chose to violate a covenant, the penalty amount would be nominal.**

Respondents' rhetoric regarding penalties if they withdraw from the SFIA program is disingenuous. For the same reasons as discussed in Appellants' principal brief with regard to why Respondents cannot show substantial detrimental reliance, Appellants' Br. at 29-30, their withdrawal from the program need not, and as a practical matter would not, incur *any* penalties.

A claimant wishing to terminate its enrollment in the SFIA program must notify the Commissioner and termination "occurs on January 1 of the fifth calendar year that begins after receipt by the commissioner of the termination notice." Minn. Stat. § 290C.10. The four-year waiting period imposes absolutely no burden on Respondents because they undisputedly engage in sustainable forest management practices for their

⁷ Respondents did not produce any affidavits in response to the affidavits submitted by Appellants in opposition to Respondents' motion for partial summary judgment.

own business interests, and they do so under the more rigorous private SFI and FSC certification programs in order to remain competitive in the forest-products industry. See Appellants' Br. at 11-17, 21-22, 29-30. Thus, the argument that Respondents would incur \$13 million in penalties by withdrawing from the SFIA program is a red herring.

Respondents could also withdraw land from the SFIA program by December 31, 2011, without application of the four-year waiting period. 2011 Minn. Laws 1st Spec. Sess., ch. 7, art. 6, § 12. The district court was apprised of this statutory provision on July 21, 2011, the day after its enactment, see Appellants' Br. at 5, but the court did not mention this option in its November 3, 2011 decision.

In addition, even if a Respondent chose to violate one of its SFIA covenants, the penalty amount would be a miniscule fraction of the \$13 million alleged by Respondents. Respondents well know, and the record reflects, that the penalty would only include the incentive payments a Respondent received in the previous four years for the particular parcel of land found to be in violation of the covenant. See Ex. A to Aff. of Michael Houser in Opp'n to Defs.' Mot. Dismiss (letter of the Department of Revenue to Respondent Potlatch, dated November 20, 2008).⁸ The penalty would not apply to all the

⁸ In late 2008, Respondent Potlatch wrote a letter to the Department of Revenue inquiring about how the penalty provisions of the SFIA operate. Specifically, Respondent Potlatch asked if a particular parcel of SFIA-enrolled land was in violation of the covenant, whether the penalty would be based on the annual incentive payments it received in the previous four years for all the land subject to the covenant or only for the particular parcel of land found to be in violation of the covenant. On November 20, 2008, the Department of Revenue wrote back to Respondent Potlatch, informing it that the penalty would only include the incentive payments it received in the previous four years for the particular parcel of land found to be in violation of the covenant. See Ex. A to Aff. of Michael Houser in Opp'n to Defs.' Mot. Dismiss.

land covered by the covenant, let alone all of Respondents' land participating in the SFIA program. Again, Respondents have failed to submit any evidence (or even allege) that they would have used their property differently if they had not participated in the SFIA program. See, e.g., *Sundquist*, 338 N.W.2d at 568-69; *Javinsky*, 725 N.W.2d at 398-400; *Anderson*, 435 N.W.2d at 80-81.

The Commissioner also has the authority to reduce any penalty amount. Minn. Stat. § 290C.13, subd. 7. As discussed in Appellants' principal brief at 11-17, 21-22, 30-31, 44, 48, any such speculative penalty would be inconsequential compared to the critically important economic benefits derived from Respondents' more stringent participation in the private SFI and FSC certification programs.

4. Equity Does Not Require Enforcement Of Any Purported Promise.

As explained in Appellants' principal brief at 30-33, even assuming *arguendo* that Respondents could establish the other elements of their promissory estoppel claim, the enforcement of the purported promise is not required to prevent injustice for numerous reasons.

Respondents argue that it is inequitable to reduce their 2010 annual incentive payments after they had "satisfied all conditions of the [SFIA] program in 2009." See Resp'ts' Br. at 27. As already extensively explained *supra* at 1-4 as well as in Appellants' principal brief at 8-10, 32-33, Respondents' argument misconstrues the timing provisions of the SFIA. Contrary to Respondents' claim, the 2010 annual

incentive payments are for their participation in the SFIA program throughout calendar year 2010, not calendar year 2009.

In addition, as explained *supra* at 13-15 and in Appellants' principal brief at 21, Respondents would not incur any penalties if they withdrew from the SFIA program, let alone \$13 million.

Moreover, in 2010 the average per-acre property tax for SFIA-enrolled land was approximately \$6.16 per acre. S.R. 308. Nevertheless, Respondents seek to reap a windfall payment of \$15.67 per acre, which includes an error that mistakenly increased the incentive payments by 80% in 2010.⁹ See Appellants' Br. at 31. Indeed, Respondents appear to concede that such a payment is a windfall to them, but erroneously argue the SFIA cannot be amended to avoid such a result. See Resp'ts' Br. at 34-35.

Respondents' claim also fails to give any deference to the many important policy choices and judgments the Legislature necessarily must make to balance the State's budget. See Appellants' Br. at 37-39. The separation of powers doctrine prohibits courts from second-guessing the Legislature's policy decisions, including budget matters. *See, e.g., Minneapolis Teachers Ret. Fund Ass'n v. State*, 490 N.W.2d 124, 131 (Minn. Ct. App. 1992) ("It is not within the power of the court to second guess the policy determinations of the legislature.").

⁹ The district court ordered that Respondents be paid a 2010 annual incentive payment of \$10.38 per acre, an amount that greatly exceeds the \$8.74 per-acre amount they received in 2009. See Add. 3; S.R. 6. Thus, the district court's order allows Respondents to partially benefit from the error in calculating the 2010 per-acre annual incentive payment rate. See Appellants' Br. at 18-19.

As stated by the court in *Campaign for Fiscal Equity, Inc. v. State*, 861 N.E.2d 50, 58 (N.Y. Ct. App. 2006):

Deference to the Legislature is especially necessary where it is the State's budget plan that is being questioned. Devising a state budget is a prerogative of the Legislature and Executive; the Judiciary should not usurp this power. The legislative and executive branches of government are in a far better position than the Judiciary to determine funding needs throughout the state and priorities for the allocation of the State's resources.

See also *Ariz. Ass'n of Providers for Pers. with Disabilities v. State*, 219 P.3d 216, 226 (Ariz. Ct. App. 2009) (deferring to the legislature's power "to appropriate funds and later to reduce that appropriation to account for revenue shortfalls").

For all these reasons and the reasons stated in Appellants' principal brief, equity does not support Respondents' promissory estoppel claim.

III. EVEN ASSUMING A PROMISSORY ESTOPPEL RIGHT EXISTS, THE RIGHT WAS NOT UNCONSTITUTIONALLY IMPAIRED.

A. Respondents Have No Contract Right, And In Any Event, Their Purported Promissory Estoppel Right Was Not Substantially Impaired.

Respondents' unconstitutional-impairment-of-contract claim¹⁰ fails because they have conceded that the SFIA did not confer any contract rights to them and no such right otherwise exists. See Appellants' Br. at 24-25; *supra* at 4-5; see also, e.g., *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992) (recognizing the first component of the unconstitutional-impairment-of-contract analysis is determining "whether there is a contractual relationship" and rejecting such a claim because no contract existed as to the

¹⁰ For the reasons discussed *supra* at 5-6, Respondents' reliance on *Naftalin* and *Sylvestre*, is misplaced. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983) provides the proper legal framework for analyzing Respondents' unconstitutional-impairment-of-contract claim.

specific issue being litigated). Absent the unique *Christensen* case—which, as previously explained, is limited to its own exceptional circumstances—Appellants are unaware of any appellate case in Minnesota or anywhere else in the nation that has considered a promissory estoppel right to be a contract for purposes of an unconstitutional-impairment-of-contract claim.

Respondents also cannot establish a substantial impairment of their purported promissory estoppel right because they received 2010 annual incentive payments, and they knew the SFIA was subject to amendment and had been amended repeatedly by the Legislature. See Appellants’ Br. at 28 n.5, 36-37. In fact, Governor Pawlenty approved an unallotment placing a \$100,000 per-claimant cap on the 2010 SFIA annual incentive payments in July 2009, which was subsequently ratified by the Legislature. Thus, Respondents’ were specifically on notice of such a change in the law before they began performance with respect to their 2010 annual incentive payments.

B. In Any Event, The 2010 Amendment Serves Significant and Legitimate Public Purposes.

As explained in Appellants’ principal brief at 37, the 2010 amendment served significant and legitimate public purposes by addressing the State’s immediate fiscal crisis and the use of public money to pay windfalls. *See also, e.g., Anderson*, 435 N.W.2d at 78 (recognizing the repeal of a tax exclusion as part of a comprehensive tax reform package served a significant and legitimate public purpose “in allowing the legislature considerable flexibility to respond to everchanging social and economic

needs”); *Energy Reserves*, 459 U.S. at 411 (recognizing that a significant and legitimate state interest includes the elimination of “windfall profits”).

Respondents assert that significant and legitimate public purposes can only arise in unprecedented emergency situations like the Great Depression. See Resp’ts’ Br. at 33. However, this argument was long ago rejected by the United States Supreme Court. See, e.g., *Energy Reserves*, 459 U.S. at 412 (“Since *Blaisdell*, the Court has indicated that the public purpose need not be addressed to an emergency or temporary situation.”).

Respondents also erroneously claim that the 2010 amendment did not involve “a broad and pressing social or economic need.” See Resp’ts’ Br. at 30. Addressing “a broad and general social or economic” problem is merely one way that a “significant and legitimate public purpose” can be established. See *Energy Reserves*, 459 U.S. at 412. In any event, there can be no doubt that the above-stated public purposes involved a broad and general economic need of the State, and were otherwise significant and legitimate in addressing the State’s budget crisis and the use of public funds to make windfall payments. See *supra* at 18.

It should also be noted that the purpose of requiring the State to proffer a significant and legitimate public purpose supporting the challenged statute is to ensure that the State is exercising its authority in favor of the public, “rather than providing a benefit to special interests.” *Energy Reserves*, 459 U.S. at 412. There is no dispute that the comprehensive budget-balancing bill (of which the 2010 amendment was a part) served the public interest and did not benefit any private special interests.

C. The 2010 Amendment Was A Reasonable and Appropriate Means to Accomplish the Significant and Legitimate Public Purposes.

For all the reasons stated *supra* at 16-17 and in Appellants' principal brief at 37-39, Respondents' contention that the 2010 amendment is unreasonable because the savings from the law is "*de minimis*," is erroneous.¹¹ Resp't's' Br. at 13, 34. Respondents admit that the 2010 amendment saved the State at least \$7.7 million¹² and that the overall budget-balancing bill saved billions more. As stated in *New York City Managerial Employees Association v. Dinkins*:

While plaintiffs contend that these [savings from salary freezes] are insignificant in relation to the size of the overall budgets of defendants, the savings are real. Moreover, . . . the challenged salary actions *were part of comprehensive programs by various defendants to generate budgetary savings*. Each component of such a large-scale budget savings plan—if examined in isolation—may appear small. Yet, in challenging the rationality of a single portion of a budget-saving scheme, *plaintiffs impliedly challenge defendants' entire program to reduce and control government spending*. Plaintiffs do not attempt to argue that defendants' austerity programs *as a whole produced insignificant savings*. Thus, once

¹¹ To the extent Respondents suggest that it is Appellants' burden to prove "such a significant impact on the State's general fund that the State's promise to [Respondents] cannot reasonably be kept," they also err. See Resp'ts' Br. at 31. The only burden Appellants bear is to demonstrate the existence of a "significant and legitimate public purpose" supporting the legislation. See *Energy Reserves*, 459 U.S. at 411-12. As stated above, Appellants have explained the significant and legitimate public purposes that support the 2010 amendment, see *supra* at 18-19; Appellants' Br. at 37, and Respondents have the heavy burden to establish their unconstitutional-impairment-of-contract claim. See, e.g., *State v. Tennin*, 674 N.W.2d 403, 407 (Minn. 2004) (recognizing that a law is presumed to be constitutional and a person challenging the law "must overcome the heavy burden of showing beyond a reasonable doubt that the statute is unconstitutional.").

¹² Respondents' argument does not include the amount of money the State saved with respect to the other three SFIA claimants who were paid the \$100,000 maximum amount, but did not challenge the cap.

again plaintiffs have failed to establish that defendants' salary actions are irrational.

807 F. Supp. 958, 970-71 (S.D.N.Y. 1992) (emphasis added); *accord Anderson*, 435 N.W.2d at 79 (recognizing repeal of a tax exclusion “should not be evaluated in isolation but as part of a comprehensive legislative package” and holding “the particular adjustment of the rights and liabilities” enacted in the comprehensive reform package, of which the repeal “was a small part,” were “reasonable and appropriate to the public purpose behind” the overall reform package).

Like *Dinkins*, it is “inappropriate and misleading” for Respondents to attempt to compare the savings generated from the 2010 amendment to the overall State budget. *Id.* at 971 n.8. In addition, Respondents' argument fails to give proper deference to the difficult policy choices and prioritization of State resources that the Legislature must make when enacting a comprehensive bill to balance the State's budget. See *supra* at 16-17; see also *Atkins v. Parker*, 472 U.S. 115, 129 (1985) (recognizing Congress has the power “to increase, to decrease, or to terminate [government] benefits based on its appraisal of the relative importance of the recipients' needs and the resources available to fund the program.”).

Respondents also wrongly assert that the 2010 amendment was not a reasonable and appropriate approach because “less drastic alternatives” were allegedly available to the Legislature. Respt's' Br. at 32. Avoiding the use of public funds to pay windfalls is always less drastic than cutting the budgets of programs that serve the public interest.

Moreover, capping annual incentive payments at \$100,000 per claimant and preserving the SFIA program is itself a less drastic alternative to termination of the program.

Respondents' argument is merely an attempt to impermissibly shift the burden to Appellants and second-guess the many difficult policy determinations the Legislature must make when balancing the State budget. *Minneapolis Teachers Ret. Fun Ass'n*, 490 N.W.2d at 131; *see also Baltimore Teachers Union, Am. Fed'n of Teachers Local 340, AFL-CIO v. Mayor & City Council of Baltimore*, 6 F.3d 1012, 1021-22 (4th Cir. 1993) (holding the Contract Clause does not require the courts to "sit as superlegislatures" determining whether it would have been more appropriate for the State to adopt one of many budget-cutting policy alternatives because "no objective standards" exist "to assess the merit of the multitude of alternatives"); *accord Anderson*, 435 N.W.2d at 80 ("The delicacy of the overall balancing of benefits and burdens [of comprehensive tax reform legislation] cannot depend on keeping any one tax exclusion sacrosanct."). The legislation reasonably accomplished its significant and legitimate public purposes.

Respondents also claim the Court must apply increased scrutiny based on the notion that Respondents have a purported "contract" with the State. Resp'ts' Br. at 28. There is no contract, and even if there was, meaningful deference must still be given to the Legislature's chosen course of action.¹³ *See, e.g., Baltimore Teachers Union, Am.*

¹³ Respondents similarly suggest that the supposed "financial arrangement" between Appellants and Respondents "is not entitled to any special deference simply because the State is a party to it." *See* Resp'ts' Br. at 31. However, even the cases cited by Respondents recognize that when a State is a party to a "contract" complete deference may not be warranted, but some meaningful deference must still be given to legislative

Fed'n of Teachers Local 340, AFL-CIO, 6 F.3d at 1019 (recognizing that when the State is a party to a contract meaningful deference must still be accorded to legislative judgments). As discussed above and in Appellants' principal brief at 35-39, the 2010 amendment easily survives the appropriate scrutiny. Respondents cannot overcome the presumption of constitutionality and their heavy burden of proof to show that the law is unconstitutional beyond a reasonable doubt. *See, e.g., State v. Tennin*, 674 N.W.2d 403, 407 (Minn. 2004).

IV. RESPONDENTS' TAKINGS CLAIM IS SPECIOUS.

As explained in Appellants' principal brief at 39-43, Respondents takings claim fails as a matter of law because they cannot satisfy either of the two-steps necessary to establish such a claim.

In their cursory takings discussion, Respondents only argue that the SFIA imposed restrictions on the use of their land. Respt's Br. at 36-37. As previously stated, however, Respondents' voluntary participation in the SFIA program precludes finding that a cognizable property interest in their land has been taken from them physically or by regulation. *See, e.g., Franklin Mem'l Hosp. v. Harvey*, 575 F.3d 121, 129 (1st Cir. 2009) ("Of course, where a property owner voluntarily participates in a regulated program, there can be no unconstitutional taking.") (citing *Yee v. City of Escondido, California*, 503 U.S. 519, 527 (1992)); *Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dep't of Pub. Welfare*, 742 F.2d 442, 446 (8th Cir. 1984) (holding plaintiff's voluntary

judgments. *See, e.g., United States Trust Co. of New York*, 431 U.S. at 25-26, *Cont'l Illinois Nat'l Bank v. Washington*, 696 F.2d 692, 701 (9th Cir. 1983).

participation in a government program “forecloses the possibility that the statute could result in an imposed taking of private property which would give rise to the constitutional right of just compensation”). Respondents’ brief nowhere addresses this well-established principle.¹⁴

Any attempt by Respondents to find a cognizable property interest in a specific payment under the SFIA is also specious because the alleged right to the payment of money pursuant to a statute is not protected as property under the Takings Clause. See Appellants’ Br. at 40-41. Indeed, it appears Respondents have abandoned this frivolous argument by failing to raise it in their brief. Nor do Respondents address the *Penn Central* factors, the second-step of the takings analysis. See Appellants’ Br. at 42-43.

For these reasons and those stated in Appellants’ principal brief at 39-43, Respondents’ takings claim fails as a matter of law.

V. RESPONDENTS’ EQUAL PROTECTION CLAIM HAS NO MERIT.

As discussed in Appellants’ principal brief at 43-45, Respondents’ equal protection claim is meritless because they merely complain about the effect the \$100,000 cap had on their 2010 SFIA annual incentive payments. As stated previously, the uneven effects from a statutory cap that applies to all participants in a government program does not create a classification for equal protection purposes. See Appellants’ Br. at 43-44. Respondents do not address this argument, nor the applicable case law cited by

¹⁴ For example, Respondents cite *Dale Props., LLC v. State*, 638 N.W.2d 763 (Minn. 2002) for the proposition that they have stated a viable takings claim. However, that case is inapposite because it involved an alleged “regulatory taking” based on the government’s closure of a median cross-over, *id.* at 764, not voluntary participation in a government program.

Appellants, which is dispositive of their equal-protection claim. For example, *John Hancock Mut. Life Ins. Co. v. Comm’r of Revenue*, 497 N.W.2d 250 (Minn. 1993) rejected an equal-protection claim by reasoning “any difference of effect that may have arisen from the [tax statute] is the result, not of discriminatory treatment, but of the unique financial situation of individual insurance company taxpayers.” *Id.* at 254 (quoting *State ex rel. Merrick v. Dist. Ct. of Hennepin Cnty.*, 33 Minn. 235, 245-46, 22 N.W. 625, 628 (1885)).

In any event, the 2010 amendment also easily satisfies Minnesota’s construction of the rational basis test. See Resp’ts’ Br. 41-45. First, as previously described in Appellants’ principal brief at 44-45, there is a genuine or substantial reason to differentiate between “capped” large landowners such as Respondents and “uncapped” participants with smaller holdings. See, e.g., *State v. Benniefield*, 678 N.W.2d 42, 47 (Minn. 2004) (stating the first part of the rational basis test is “whether there is a genuine or substantial reason” for the classification). Unlike smaller landowners participating in the SFIA program, Respondents derive huge economic benefits from their sustainable forest-management practices, which is amplified by the enormity of their forest-land holdings—over 500,000 acres, amounting to approximately 60% of the total forest land participating in the SFIA program in 2010. See Appellants’ Br. at 44. Also, unlike smaller SFIA claimants, Respondents privately and necessarily engage in such conduct even more rigorously to advance their business interests. *Id.*

Second, there is no question that the purported differentiation between “capped” or “uncapped” SFIA claimants “is relevant to the purpose of the law.” See, e.g.,

Benniefield, 678 N.W.2d at 47 (stating the second part of the rational basis test is whether the classification “is relevant to the purpose of the law”). As previously explained, the purposes of the 2010 amendment were to address the State’s immediate fiscal crisis and the use of public money to pay windfalls.¹⁵ See *supra* at 18-19; Appellants’ Br. at 37. Capping the 2010 SFIA annual incentive payments was relevant to these purposes. See *supra* at 18-23.

Third, as previously discussed *supra* at 18-19 and in Appellants’ principal brief at 37, the objectives of addressing the State’s fiscal crisis, balancing the budget, and the use of public funds to make windfall payments, are all “legitimate one[s] for the state.” See, e.g., *Benniefield*, 678 N.W.2d at 47 (stating the third part of rational basis test is whether the purpose of the statute is one that “the state can legitimately attempt to achieve”).

Respondents also attempt to distinguish *Kolton v. Cnty. of Anoka*, 645 N.W.2d 403 (Minn. 2002) from the case at bar.¹⁶ However, Appellants only cited *Kolton*, see Appellants’ Br. at 43, for the broad and undisputed proposition that equal protection

¹⁵ Respondents mistakenly claim that the 2010 amendment’s purported “classification” does not satisfy this standard because it allegedly fails to comport with the purpose stated in Minn. Stat. § 290C.01. Resp’ts’ Br. at 42. To satisfy the relevancy element, the classification need only be relevant to the purpose of the challenged statute. See, e.g., *Benniefield*, 678 N.W.2d at 47 (considering the purpose of the challenged statute to determine whether it satisfies the relevancy element of the equal-protection rational basis test). Moreover, the 2010 amendment must be given effect. See Minn. Stat. § 645.31, subd. 1 (stating that an “amendment shall be construed as merging into the original law, becoming a part thereof, and replacing the part amended, and the remainder of the original enactment and the amendment shall be read together and viewed as one act passed at one time”).

¹⁶ In addition, Respondents’ characterization of their participation in the voluntary SFIA program as constituting a “business relationship” with Appellants is ridiculous. See Resp’ts’ Br. at 45.

requires similarly situated individuals to be treated alike, but only “invidious discrimination” violates the U.S. and Minnesota Constitutions. *See, e.g., State v. Cox*, 798 N.W.2d 517, 529 (Minn. 2011) (recognizing this broad principle); *Scott v. Minneapolis Police Relief Ass’n, Inc.*, 615 N.W.2d 66, 74 (Minn. 2000) (same).

VI. SUMMARY JUDGMENT SHOULD BE GRANTED IN APPELLANTS’ FAVOR.

For all the reasons previously explained in Appellants’ principal brief at 45-46 and the reasons stated herein, the district court should have granted partial summary judgment in Appellants’ favor. Indeed, summary judgment should be granted in Appellants’ favor on all of Respondents’ claims.

Appellants filed a motion to dismiss Respondents’ complaint in its entirety. *See* App. 39. As explained in Appellants’ principal brief at 45-46, the district court should have converted Appellants’ motion to dismiss into a summary judgment motion based on the factual record they submitted, and awarded Appellants’ summary judgment.

Nevertheless, the district court subsequently permitted Respondents to supplement and amend their complaint to challenge the 2011 SFIA \$100,000 cap on the same legal grounds asserted as to the 2010 cap, as well as on the basis that the 2011 cap is “special legislation.” *See* Minn. Const. art. XII, § 1; Appellants’ Br. at 5-7. Respondents’ contract, promissory estoppel, unconstitutional-impairment-of-contract, takings, and equal-protection claims are specious with regard to the \$100,000 cap enacted in 2011 for the same reasons Respondents’ arguments are without merit as to the 2010 \$100,000 cap. *See supra* at 4-26; Appellants’ Br. at 23-45; Defs.’ Resp. to Plfs.’ Mot. to Supplement & Amend Compl. In addition, the analysis of Respondents’ special-legislation claim is

identical to the analysis of their meritless equal-protection claim. *Id.* at 6-12; *see Sundquist*, 338 N.W.2d at 570 n.12 (“[T]he prohibition against arbitrary legislative action embodied in the state equal protection clause . . . the state uniformity clause . . . and the state special legislation clause . . . [is] coextensive with those afforded by the federal equal protection clause.”).

As previously explained, the law and the undisputed facts do not support any of Respondents’ claims. Accordingly, the Court not only should grant partial summary judgment to Appellants with respect to the 2010 SFIA incentive payments, but it is also appropriate to order the entry of summary judgment in Appellants’ favor on the entirety of Respondents’ complaint.

VII. IN THE ALTERNATIVE, THE DISTRICT COURT SHOULD HAVE ALLOWED APPELLANTS TO CONDUCT DISCOVERY PURSUANT TO MINN. R. CIV. P. 56.06.

On February 24, 2011, counsel met in person to meet and confer regarding defendants’ motion to dismiss, and in particular, the propriety of suing the Minnesota House of Representatives, the Minnesota Senate, and the Governor. *See* Defs.’ Mem. in Supp. Mot. Dismiss at 5. Respondents’ counsel refused to dismiss these three defendants even though they were all clearly immune from suit based on the separation of powers provision and the speech or debate clause of the Minnesota Constitution. *See, e.g., Smith v. Holm*, 220 Minn. 486, 491, 19 N.W.2d 914, 916 (1945) (“The division of powers leaves the legislature free from compulsion.”); *Advanced Auto Transp., Inc. v. Pawlenty*, 2010 WL 2265159, at *3, n.7 (D. Minn. June 2, 2010) (holding “a governor cannot be sued for signing a bill into law under the doctrine of absolute legislative immunity”).

Defendants then asked the district court in their informational statement to defer discovery until their motion to dismiss was decided, including the propriety of naming the House, Senate, and Governor as parties and thereby subjecting them to party discovery. See S.R. 1-4. The district court never issued a scheduling order as it was required to do. See Appellants' Br. at 47. At the very least, and in the alternative, Appellants should be allowed to conduct discovery pursuant to Minn. R. Civ. P. 56.06.¹⁷ See Appellants' Br. at 47-49.

VIII. THE "STATE OF MINNESOTA" IS NOT A PROPER PARTY.

As explained in Appellants' principal brief at 49-52, the "State of Minnesota" is not a proper-party defendant in this action.

Respondents claim that the "State of Minnesota" is an "indispensable party" to this action because they "are challenging the State's legislative amendment." Resp'ts' Br. at 38-39. However, such a claim directly contradicts the broad legal principle that "a person aggrieved by the application of a legal rule does not sue the rule *maker*" but rather the particular "person whose acts hurt him." *Quinones v. City of Evanston, Illinois*, 58 F.3d 275, 277 (7th Cir. 1995) (emphasis in original). Respondents' attempt to distinguish

¹⁷ Respondents erroneously claim Appellants have failed to meet the requirements of Minn. R. Civ. P. 56.06 because they failed to state why discovery may be needed. Resp'ts' Br. 38. Respondents did not mention this argument before the district court, nor did the court make any such finding in its order. In any event, Appellants asserted before the district court that the undisputed facts supported their position; and alternatively, if the court believed otherwise, Appellants requested the opportunity to conduct discovery of specified subjects to further support their position. See Defs.' Mem. Opp'n to Pls.' Mot. Partial S.J. at 20-21; S.R. 238-40; *see also, e.g., Bixler v. J.C. Penny Co.*, 376 N.W.2d 209, 216 (Minn. 1985) ("Continuances should be liberally granted under Rule 56.06").

Quinones from this case, Resp'ts' Br. at 39-40, is unavailing because this fundamental legal principle is not limited to the facts in *Quinones*.¹⁸ See, e.g., *Travis v. Reno*, 163 F.3d 1000, 1007 (7th Cir. 1998) (citing *Quinones*, among other cases, for the general proposition that “the proper defendant is the person whose actions cause injury, not the author of the legal rule that leads to those actions.”); *Marks v. United States Congress*, 285 Fed. Appx. 762, 763 (D.C. Cir. 2008) (same).

Respondents seek to enjoin application of the law imposing the \$100,000 cap with regard to the Commissioner of Revenue's administration of the SFIA program. The Commissioner is therefore the proper-party defendant, not the “State of Minnesota.” See Appellants' Br. at 49-50; see also *Ex Parte Young*, 209 U.S. 123, 155-59 (1908) (explaining the naming of the state official actually responsible for the enforcement of the State law in question ensures that the requested injunction will be effective without unnecessarily constraining the discretion of other state officials).

Rather than address the fundamental legal principles discussed by Appellants, Respondents argue that a state has been named as a party in other cases. Resp'ts' Br. at 39. However, of the cases cited by Respondents that are at all analogous to this case, they included as a defendant a specific state official or agency, such as a commissioner, who allegedly administered the subject law and from whom injunctive or other specific relief was requested. No effort was made to dismiss the “state” apart from the other

¹⁸ Subsequent to the filing of Appellants' principal brief, on January 23, 2012, the Court of Appeals issued its opinion in *Benson v. Alverson*, No. A11-811 (Minn. Ct. App. 2012), affirming the district court's dismissal of the “State of Minnesota” as an improper-party defendant to an action challenging the constitutionality of state legislation. *Id.* at 4.

defendant(s). *See, e.g., Busbee v. Georgia Conference*, 221 S.E.2d 437, 442 (Ga. 1975) (“Too often a finding that one public defendant is or is not subject to being sued has resulted in a like judgment against another public co-defendant, with the result that the doctrine of sovereign immunity has been misapplied), *overruled on other grounds by Self v. City of Atlanta*, 377 S.E.2d 674 (Ga. 1989). Moreover, none of the cases cited by Respondents analyze the proper-party status of the “State of Minnesota.”

APPELLANTS’ RESPONSE TO RESPONDENTS’ CROSS-APPEAL

I. RESPONDENTS’ EQUAL PROTECTION CLAIM HAS NO MERIT.

For the reasons stated *supra* at 24-27 and in Appellants’ principal brief at 43-45, Respondents’ equal-protection claim is specious.

II. THE COURT SHOULD REJECT RESPONDENTS’ ATTEMPT TO OBTAIN AN EVEN GREATER WINDFALL THAN THE ONE ORDERED BY THE DISTRICT COURT.

The district court ordered that Respondents be paid an uncapped 2010 annual incentive payment of \$10.38 per acre, an amount that greatly exceeds the \$8.74 per-acre amount they received in 2009. *See* Add. 3; S.R. 6. Thus, the district court’s ordered amount allows Respondents to at least partially benefit from the error that mistakenly resulted in an approximate 80% increase in the 2010 annual incentive payments. *See* Appellants’ Br. at 18-19. Respondents have filed a related appeal seeking to fully benefit from the error in the statutory formula rate and receive an uncapped 2010 annual incentive payment at the rate of \$15.67 per acre. *See* Resp’ts Br. at 44.

As exhaustively explained herein and throughout Appellants’ principal brief, Respondents are entitled to nothing more than the \$100,000 payment they have already

received for their 2010 participation in the SFIA program. Even assuming *arguendo* that Respondents were entitled to uncapped 2010 annual incentive payments, equity demands that they only receive payments in the amount of no more than \$8.74 per-acre, which they received in 2009. See *supra* at 16.

In any event, the \$15.67 per-acre amount Respondents attempt to reap through their related appeal would constitute an additional windfall due to the undisputed error in the 2010 per-acre SFIA annual incentive payment calculation. Respondents, like the district court, have even acknowledged that such a payment is an additional windfall to them. See Resp'ts' Br. at 34-35, Appellants' Br. at 7. Respondents are entitled to nothing more than the \$100,000 annual incentive payments they already received and the relief requested in their related appeal only further violates any notion of justice as well as undermines the separation of powers doctrine.

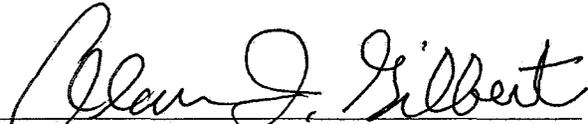
CONCLUSION

Based on the foregoing, Appellants respectfully request that the district court's order be reversed, the judgment be vacated, and the entry of summary judgment be ordered in Appellants' favor.

Dated: January 24, 2012

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
WITH MINN. R. APP. P. 131.01, Subd. 5(d)(7)(c)**

The undersigned certifies that the Brief submitted herein contains 8,858 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2003, the word processing system used to prepare this Brief.

A handwritten signature in cursive script, reading "Alan I. Gilbert". The signature is written in black ink and is positioned above a horizontal line.

ALAN I. GILBERT

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