

No. A12-0622

STATE OF MINNESOTA
IN SUPREME COURT

James D. Schowalter, in his capacity as Commissioner of the Minnesota
Department of Management and Budget,

Petitioner,

vs.

The State of Minnesota and the Taxpayers and Citizens of the State of Minnesota,

Respondents.

PETITIONER'S REPLY IN SUPPORT OF VERIFIED COMPLAINT

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Petitioner James D. Schowalter, in his capacity as Commissioner of the Minnesota Department of Management and Budget, submits the following reply in support of the relief sought in his Verified Complaint.¹

INTRODUCTION

The Attorney General admits “the absence of any legal obligation on the part of a future legislature to appropriate funds” in connection with the Appropriation Refunding Bonds. (Respondent Minnesota Attorney General’s Brief (“AG Brief”) at 15.) The Appropriation Refunding Bonds are not public debt. Moreover, even if the Appropriation Refunding Bonds were to be issued as public debt, they are to be issued for the constitutionally permissible purpose of refunding outstanding bonds. The Attorney General’s Brief fails to establish beyond a reasonable doubt that Minnesota Statute Annotated § 16A.99 (2011 Supp.) and the Appropriation Refunding Bonds to be issued thereunder are unconstitutional. This Court should issue an order validating the Appropriation Refunding Bonds.

ARGUMENT

I. THE ATTORNEY GENERAL’S BRIEF FAILS TO FOCUS ON THE PERTINENT STANDARD OF REVIEW AND CONSTITUTIONAL INQUIRY.

As set forth in Petitioner’s Opening Brief, statutes enacted by the Legislature are presumed constitutional, and the standard of review is whether “the statute is unconstitutional beyond a reasonable doubt.” *Irongate Enters., Inc. v. Cnty. of St. Louis*, 736 N.W.2d 326, 332 (Minn. 2007) (citations omitted); *see also The Minnesota Court of Appeals Standards of Review* (Aug. 2011) (“*Standards of Review*”) at 2, available at

¹ For purposes of this Reply, Petitioner hereby adopts the defined terms set forth in Petitioner’s Brief in Support of Verified Complaint (“Petitioner’s Opening Brief”).

<http://www.lawlibrary.state.mn.us/casofrev.pdf>. The relevant constitutional inquiry in this case is: (a) whether the Appropriation Refunding Bonds are “public debt” under Section 4, and (b) if so, whether the public debt is being contracted for one of the purposes enumerated in Section 5. *See* Minn. Const. art. XI, §§ 4-5.

The Attorney General’s argument misapprehends both the correct standard of review and the relevant constitutional inquiry. The Attorney General attempts to argue the Appropriation Refunding Bonds run afoul of a supposed “subterfuge” standard of review because the proposed issuance is “a subterfuge to circumvent the balanced budget mandate of the State Constitution.” (AG Brief at 16-17.) No such standard exists in Minnesota. *See generally Standards of Review*.

Nor is the so-called “balanced budget mandate” an absolute prohibition on the incurrence of public debt.² To the contrary, under the Minnesota Constitution, “[t]he state may contract public debts for which its full faith, credit and taxing powers may be pledged at the times and in the manner authorized by law, but only for the purposes and subject to the conditions stated in section 5.” Minn. Const. art. XI, § 4; *see also* Minn. Const. art. XI, § 5(d) (“Public debt may be contracted . . . for the following purposes,” including “to refund outstanding bonds”). “Public debt includes any obligation payable directly in whole or in part from a tax of state wide application on any class of property,

² While the Attorney General cites *Brayton v. Pawlenty*, 781 N.W.2d 357 (Minn. 2010), for the proposition “expenditures cannot exceed revenues for the biennium” (AG Brief at 8), *Brayton* itself recognizes that the State may tap other sources of funds to supplement current revenues in order to address a budget deficit (*see* Petitioner’s Opening Brief at 34). As noted in Petitioner’s Opening Brief, Sections 4 and 5 of Article XI do not explicitly prohibit expenses in excess of current revenues. (*Id.*)

income, transaction or privilege, but does not include any obligation which is payable from revenues other than taxes.” Minn. Const. art. XI, § 4.

II. THE APPROPRIATION REFUNDING BONDS ARE NOT “PUBLIC DEBT” SUBJECT TO THE LIMITATIONS OF ARTICLE XI OF THE MINNESOTA CONSTITUTION.

A. The Appropriation Refunding Bonds Are Not Public Debt.

The Petitioner’s position is that the proposed Appropriation Refunding Bonds are not “public debt.” The Attorney General asserts: “Petitioner argues that the proposed issuance of \$800 million in appropriation bonds is permissible debt under the State Constitution because the State is technically not required to pay off the bonds.” (AG Brief at 2.)³ The Attorney General’s assertion misses the point that the Appropriation Refunding Bonds are not “permissible debt,” but, for purposes of Minnesota’s constitutional limitations on public debt, *they are not debt at all.*⁴

Although the Attorney General is dismissive of the limitations expressly stated in and imposed by Section 16A.99, the Commissioner’s Order, the Preliminary Official Statement and the form of the Appropriation Refunding Bonds themselves (collectively, the “Bond Documents”), these documents do in fact control the legal rights of the bond issuer and bondholders. *See Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 123 (Minn. 2007) (“We construe statutes to effect their essential purpose but will not disregard a statute’s clear language to pursue the spirit of the law.”); *In re Hennepin County 1986 Recycling Bond Litigation*, 540 N.W.2d 494, 498 (Minn. 1995) (“A bond is

³ To clarify, the proposed Appropriation Refunding Bonds will be issued in an amount *up to* \$800 million. (JSOF ¶ 16.)

⁴ As discussed below, *even if* the Appropriation Refunding Bonds were “public debt,” they still would be permissible because they refund outstanding bonds, as explicitly authorized by the Minnesota Constitution.

a contract, and a determination of ‘when bonds are callable for payment should be made from the recitals in the instruments themselves.’”) (citations omitted). These limits cannot be dismissed as mere “technical[ities].” (*See, e.g.*, AG Brief at 2.) While courts will not and should not elevate form over substance, this Court has never disregarded the very language that defines the substance of the law in favor of a subjective “reality,” as suggested by the Attorney General. (*See, e.g.*, AG Brief at 31 (“*Any language to the contrary in Section 16A.99 or the bonds themselves does not prevent the Court from recognizing the reality and legal effect of the proposed appropriation bonds.*”) (emphasis added).)

In this case, the key limitations of the Appropriation Refunding Bonds for purposes of analyzing their constitutionality include:

- (a) the full faith and credit of the State is not pledged to the payment of the Bonds;
- (b) the taxing powers of the State are not pledged, and the Bonds shall not be obligations paid directly from a tax of state wide application; and
- (c) the Bonds shall be payable in each fiscal year only from amounts that the Legislature may appropriate for principal and interest payments for any such fiscal year and shall be canceled if the Legislature does not appropriate amounts sufficient for principal and interest payments for such fiscal year.

(*See* JSOF ¶ 28 (citing Ex. 1, Order, at ASR 16; Ex. 2, Preliminary Official Statement, at ASR 38, 42, 47; Minn. Stat. § 16A.99, subds. 3(b), 6).)

B. The Appropriation Refunding Bonds Do Not Create an Obligation for Future Legislative Appropriations.

The Attorney General cites a treatise rather than the Minnesota Constitution or case law for her proffered test of “public debt” as “payable from future legislative appropriations.” (AG Brief at 7 (citing Mary Jane Morrison, *The Minnesota State Constitution* 256 (G. Alan Tarr ed., 2002)).) While that language appears to have been adapted from *Minnesota Energy and Economic Dev. Auth. v. Printy*, 351 N.W.2d 319 (Minn. 1984), the rule articulated in that case actually is more subtle: “The general rule is that an obligation for which an appropriation is made at the time of its creation from funds already in existence is not within the operation of a limitation on public debt clause.” 351 N.W.2d at 347 (cited in AG Brief at 7). The Appropriation Refunding Bonds by their terms do not create any obligation *unless and until* an appropriation is made in a given biennium, in which case the appropriation will be made from funds already in existence in the General Fund for that biennium. (See JSOF ¶ 28.)⁵

There can be no “public debt” – under the plain language of Section 4 of the Minnesota Constitution as construed by this Court in *Printy* and the *Naftalin* cases – without an *obligation* undertaken by the State. See Minn. Const. art. XI, § 4 (“Public debt includes any *obligation* payable directly . . . from a tax of state wide application”) (emphasis added); *Printy*, 351 N.W.2d at 347 (no public debt where “obligation” was “from funds already in existence” and “the evil of pledging the future credit of the state [wa]s simply not present”); *Naftalin v. King*, 90 N.W.2d 185 (Minn. 1958) (“*Naftalin I*”)

⁵ A determination that declaring any amount “payable from future appropriations” constitutes “public debt” would have broad implications, potentially reaching arrangements such as public service contracts in which indebtedness is created as the services are rendered.

(stating argument certificates of indebtedness were public debt “might well prevail if the present court were passing on the issue for the first time” where it found the State had been “*bound* to carry out [the certificate’s] terms without repealing . . . or otherwise impairing the tax levies”) (emphasis added); *Naftalin v. King*, 102 N.W.2d 301, 304 (Minn. 1960) (“*Naftalin II*”) (stating “future laws *pledging* the credit of the state as security such laws should be declared in violation of Minn. Const.”) (emphasis added). (See also Petitioner’s Opening Brief at 19-20 (key feature of public debt is irrevocable pledge of State credit, which is not present here).)

While the Attorney General insists either the State has an “obligation” to pay the Appropriation Refunding Bonds from future appropriations or the Bonds constitute an illusory contract (AG Brief at 29), this is a false dichotomy. In fact, in each biennium the State *may* appropriate funds for the payment of principal and interest on the Appropriation Refunding Bonds, at which time the bondholders have an enforceable right to payment *from the currently-appropriated funds only* (subject to unallotment). (See JSOF ¶ 28 (“**THE BONDS SHALL BE PAYABLE IN EACH FISCAL YEAR ONLY FROM AMOUNTS THAT THE LEGISLATURE MAY APPROPRIATE . . . PROVIDED THAT NOTHING . . . SHALL BE CONSTRUED TO REQUIRE THE STATE TO APPROPRIATE FUNDS . . .**”).) If funds sufficient to pay the principal and interest on the Appropriation Refunding Bonds are not appropriated, however, the Bonds automatically will be cancelled. (JSOF ¶ 28 (“**THE BONDS SHALL BE CANCELED AND SHALL NO LONGER BE OUTSTANDING ON . . . THE FIRST DAY OF A FISCAL YEAR FOR WHICH THE LEGISLATURE SHALL NOT HAVE APPROPRIATED AMOUNTS SUFFICIENT FOR DEBT SERVICE .**”).)

. .”).) Should the Legislature choose, however, not to appropriate funds for principal and interest payments on the Appropriation Refunding Bonds, the bondholders would have no recourse; thus, in that event, there would be no legally enforceable obligation. (*Id.*)

C. The Appropriation Refunding Bonds Are Not Payable From a Tax of State Wide Application.

The Attorney General argues the Appropriation Refunding Bonds are “expressly ‘payable’ from future general fund appropriations, which consist of state-wide taxes.” (AG Brief at 29.) The Attorney General further characterizes statements that the bonds “are payable from future general fund appropriations, but not a state-wide tax” as “contradictory” and “def[ying] reality and common sense.” (AG Brief at 30.) These arguments reflect a misreading of Article XI. Correctly stated, Section 4 of Article XI defines public debt to include “any obligation payable *directly* in whole or in part from a tax of state wide application.” Minn. Const. art. XI, § 4 (emphasis added).

Examples of obligations payable *directly* from a tax of state wide application include certificates of indebtedness or bonds for which “the full faith and credit of the state has been pledged for payment” (i.e., general obligation bonds). Under Sections 6 and 7 of Article XI of the Minnesota Constitution, respectively, the state auditor is directed to levy upon all taxable property in the state a tax sufficient to pay such obligations. Minn. Const. art. XI, §§ 6-7. Similarly, in *Naftalin I* and *Naftalin II*, the certificates of indebtedness at issue were payable directly from a “special fund” tax levied on all taxable property in the state. *Naftalin I*, 90 N.W.2d at 188-89; *Naftalin II*, 102 N.W.2d at 302. Therefore, certificates of indebtedness, general obligation bonds and the so-called “special fund” certificates in the *Naftalin* cases represent “obligation[s]

payable *directly* in whole or in part from a tax of state wide application.” See Minn. Const. art. XI, § 4 (emphasis added).

In contrast, no such tax is authorized for payment of the Appropriation Refunding Bonds, and, as required by Section 16A.99, the Appropriation Refunding Bonds expressly disclaim that they are so payable. (JSOF ¶ 28 (“**THE BONDS SHALL NOT BE OBLIGATIONS PAID DIRECTLY, IN WHOLE OR IN PART, FROM A TAX OF STATEWIDE APPLICATION . . . [AND] SHALL BE PAYABLE IN EACH FISCAL YEAR ONLY FROM AMOUNTS THAT THE LEGISLATURE MAY APPROPRIATE . . .**”).)

D. The Appropriation Refunding Bonds Are Not a “Subterfuge” or Attempt To Surreptitiously Amend the Minnesota Constitution.

The Attorney General’s repeated mischaracterization of the Appropriation Refunding Bonds as a “subterfuge” is misplaced and unwarranted. (See, e.g., AG Brief at 2.) As noted above, the word “subterfuge” only appears once as dictum in a single footnote in *Naftalin I*, and nowhere else.⁶ A “subterfuge,” however, is by definition a deceit. See MERRIAM-WEBSTER’S DICTIONARY, available at <http://www.merriam-webster.com/dictionary/subterfuge>. In contrast, the Bond Documents clearly and precisely describe what the Appropriation Refunding Bonds are and are not. (See JSOF ¶

⁶ As noted in Petitioner’s Opening Brief discussion of the *Naftalin* cases, the Court’s “word of caution” in footnote 6 of *Naftalin I*, 90 N.W.2d at 387 n.6, was directed to “the special-fund type of financing,” where the State “entered upon a contract” binding it “to carry out [that contract’s] terms without repealing” and a tax was levied on all taxable property in the State to pay certificates of indebtedness by the State building fund. (Petitioner’s Opening Brief at 16-17.) In this case, however, there is no special-fund financing or tax levied on all taxable property in the State to pay any part of the principal and interest on the Appropriation Refunding Bonds. (See JSOF ¶ 28.) In other words, in enacting Section 16A.99, the Legislature heeded the *Naftalin I* court’s word of warning, dictum though it was.

28.) There is no attempt to deceive the courts, the bondholders, or the public as to the nature of the transaction.

As described in the Verified Complaint and Petitioner's Opening Brief, the bond rating and interest rate differential between general obligation and appropriation bonds demonstrate the market's recognition that appropriation bonds are not a mere "subterfuge" masking the incurrence of public debt. (*See* Verified Complaint at ¶ 23; Petitioner's Opening Brief at 9-10, 38-39.) Appropriation bonds, by their very nature because they are subject to legislative action, carry greater risk than true public debt backed by the full faith and credit of a state, and bond rating agencies typically rate appropriation bonds one or two gradations below (e.g., AA to AA- or A+) the rating for general obligation bonds in recognition of that distinction. (*See* JSOF ¶ 11.)

The Attorney General makes the paradoxical argument that because "the Minnesota debt limitation provisions are *far less restrictive* than most states," this Court should reach a *more restrictive* conclusion as to the constitutionality of appropriation bonds. (AG Brief at 22-23 (emphasis added).) But this is not a case in which the Court is asked to "stretch Minnesota's constitutional debt limitations" or "in effect . . . amend the constitution." (*Id.* at 23.) Indeed, this Court simply is asked to examine the Appropriation Refunding Bonds under the applicable standard as set forth in Minnesota's Constitution and case law. (*See* Verified Complaint at ¶¶ 6, 28; Petitioner's Opening Brief at 14-22.) Appropriation bonds have been analyzed and found to be constitutional in the courts of numerous states (*see* Petitioner's Opening Brief at 23-30), and appropriation-contingent financing has a well-established history in Minnesota (*id.* at 30-32).

Because the Appropriation Refunding Bonds create no public debt, they are constitutionally permitted, regardless of how the Attorney General feels about the policy and budget determination made by the Minnesota Legislature when it authorized their issuance.

III. EVEN IF THE APPROPRIATION REFUNDING BONDS WERE INSTEAD ISSUED AS PUBLIC DEBT, THE PURPOSE OF ISSUANCE, TO REFUND OUTSTANDING BONDS, NEVERTHELESS WOULD BE CONSTITUTIONALLY PERMISSIBLE.

The Minnesota Constitution explicitly permits public debt to be issued to refund outstanding bonds. Section 5(d) of Article XI states: “Public debt may be contracted . . . for the following purposes: . . . to refund outstanding bonds of the state or any of its agencies whether or not the full faith and credit of the state has been pledged for the payment of the bonds.” Minn. Const. art. XI, § 5(d).⁷ Accordingly, the State, although it chose not to, constitutionally could have issued “public debt” in the form of general obligation bonds in order “to refund the outstanding bonds of the state.” (*See* Petitioner’s Opening Brief at 35 n.10; *see generally* AG Brief (not challenging constitutionality of issuing general obligation bonds to refund outstanding bonds).)

Such general obligation refunding bonds, in contrast with the Appropriation Refunding Bonds, would have been secured by the full faith and credit of the State. This is not a situation in which the Legislature sought to accomplish indirectly what it may not do directly. *Cf.* AG Brief at 16 (citing *Sanborn v. Van Duyne*, 96 N.W. 41, 42-43 (Minn.

⁷ The Attorney General’s Brief conspicuously fails to acknowledge Section 5(d)’s explicit authorization of refunding outstanding bonds in its discussion of permissible uses of public debt, choosing instead to focus on Section 5(a), which permits public debt to be issued for capital improvements of public property and is irrelevant to the issue at hand. (*See* AG Brief at 8.)

1903)). Instead, it is a situation in which the Legislature accomplished what it *could* have done directly but elected, in the alternative, to accomplish indirectly by issuance of the now-outstanding Tobacco Settlement Revenue Bonds, followed by issuance of the proposed Appropriation Refunding Bonds. Both the Tobacco Settlement Revenue Bonds and proposed Appropriation Refunding Bonds are wholly consistent with the constitutional limitations on the purposes for which public debt may be incurred, but both limit the State's financial exposure, as compared to true public debt, because the State's full faith and credit is not irrevocably pledged.

The Tobacco Settlement Revenue Bonds are revenue bonds and, as such, are not public debt. Minn. Const. art. XI, § 4. The Legislature could have contracted public debt (i.e., issued general obligation refunding bonds) for the same purpose – “to refund outstanding bonds of the state” – without running afoul of the Minnesota Constitution. *See* Minn. Const. art. XI, § 5(d). In order to address the projected 2012-13 budget shortfall, the State sold an asset, i.e. the tobacco settlement revenues, to the Authority, which in turn issued the Tobacco Settlement Revenue Bonds for the purpose of refunding and prepaying certain outstanding debt obligations of the State. “The \$640 Million [the net proceeds to the State of the Tobacco Settlement Revenue Bonds] was used to pay the debt service obligations of the State that became due or were to become due during the 2012-13 biennium.” (JSOF ¶ 19; *see also* Ex. 5, Official Statement for the Tobacco Settlement Revenue Bonds, at ASR 151 (“[T]he State will sell to the Authority . . . all tobacco settlement revenues The State will use the net sale proceeds of the Series 2011 Bonds to refund certain of the State's General Obligation State Various Purpose Bonds and other payment obligations.”); Minn. Stat. Ann. § 16A.98, subd. 12(c) (2011

Supp.) (“The amounts deposited into the tobacco settlement bond proceeds fund . . . are appropriated to the commissioner for . . . debt service on outstanding obligations of the general fund”); Petitioner’s Opening Brief at 4.)

The \$640 million proceeds of the Tobacco Settlement Revenue Bonds went directly into escrow for purposes of defeasing and refunding the outstanding obligations, and not into the General Fund to be used directly for current biennial expenses. (Ex. 5, Official Statement for the Tobacco Settlement Revenue Bonds, at ASR 251 (“In accordance with the Act, the purchase price of the Pledged Settlement Payments payable to the State . . . shall be transferred . . . to the Commissioner for deposit into the Tobacco Settlement Bond Proceeds Fund created by the Act.”).) Instead, by reducing the amounts necessary to pay the debt service on the State’s outstanding obligations, the State freed up money it would otherwise have been obligated to appropriate for such debt service. (See JSOF ¶ 19.) Accordingly, the refunding of general obligation bonds with the proceeds of the Tobacco Settlement Revenue Bonds indirectly contributed to the State’s balanced budget for the 2012-13 biennium.⁸

Similarly, although the proposed Appropriation Refunding Bonds are not public debt, they would be constitutionally permissible even if they were. The Appropriation Refunding Bonds will be issued “to refund in advance of maturity the outstanding Tobacco Settlement Revenue Bonds” issued by the Authority. (JSOF ¶ 21.) The effect

⁸ The Attorney General’s balanced budget argument suggests the Minnesota Constitution permits the Legislature to contract public debt for the purpose of refunding outstanding obligations but prevents the Legislature from redirecting funds that otherwise would have been used for debt service payments. The Attorney General does not and cannot provide support for such an absurd rule.

of this refunding will be to reduce the cost to the State of the refunding of its general obligation indebtedness by the Tobacco Settlement Revenue Bonds. In other words, the effective purpose of the Appropriation Refunding Bonds is “to refund outstanding bonds of the state or any of its agencies,” which would be a constitutionally sanctioned purpose for contracting public debt. *See* Minn. Const. art. XI, § 5(d).

IV. THE ATTORNEY GENERAL FAILS TO ESTABLISH THAT SECTION 16A.99 AND THE APPROPRIATION REFUNDING BONDS TO BE ISSUED THEREUNDER ARE UNCONSTITUTIONAL BEYOND A REASONABLE DOUBT.

Although the only relevant issue presented to this Court is whether the Appropriation Refunding Bonds are constitutionally permissible (which they are), “economic reality” and “practical considerations” also weigh in favor of validating the Appropriation Refunding Bonds.

First, the Appropriation Refunding Bonds seek to reduce interest costs, not address a budget deficit. The Attorney General argues “[i]t is undisputed the proposed appropriation bonds were authorized to generate net proceeds of \$640 million for the express purpose of balancing the 2012-13 biennial budget.” (AG Brief at 17-18.) In fact, however, the projected budget shortfall for the 2012-13 biennium *already* has been addressed by the Tobacco Settlement Revenue Bonds, and the issue now before the Court is Petitioner’s ability under Section 16A.99 to *refund* the Tobacco Settlement Revenue Bonds with the Appropriation Refunding Bonds, thereby saving the State tens of millions of dollars in interest payments. As noted in Petitioner’s Opening Brief, although these millions in savings will be available to the State to put to uses other than interest

payments, the proposed Appropriation Refunding Bonds do not address any current projected budget deficit.⁹

Another important economic reality is that the anticipated net present value of the savings to be realized by the State from its refunding of the Tobacco Settlement Revenue Bonds with the Appropriation Refunding Bonds is over \$65 million. (JSOF ¶ 25.) From a fiscal perspective, Section 16A.99 presents the prospect of immediate and actual interest cost savings, albeit with some speculative risk of relatively higher interest costs on new state obligations if funds sufficient to pay principal and interest on the Appropriation Refunding Bonds are not appropriated. Petitioner, pursuant to the authority granted by the Legislature under Section 16A.99, has balanced these considerations and determined it would be in the State's best interest to lock in savings of tens of millions of dollars now by refunding the Tobacco Settlement Revenue Bonds by issuing the Appropriation Refunding Bonds.¹⁰

⁹ For the reasons set forth herein, even if the Court found appropriation bonds under Section 16A.99 to be “public debt” – which conclusion Petitioner opposes for the reasons set forth herein – the Appropriation Refunding Bonds as proposed in this case, which are “for the purpose of refunding . . . tobacco securitization bonds,” Minn. Stat. Ann. § 16A.99, subd. 4, would be constitutional under Article XI, Section 5. Similarly, Section 16A.99 would be constitutional unless Subdivision 2(a) were interpreted to authorize issuance of appropriation bonds exceeding the limits of Section 5. Note, however, Section 2(a) is explicitly limited to authorize appropriation bonds only for “public purposes *as provided by law*.” See Minn. Stat. Ann. § 16A.99, subd. 2(a) (emphasis added); see also *Olmanson v. LeSueur County*, 693 N.W.2d 876, 879 (Minn. 2005) (“If a statute is ambiguous, the construction that avoids constitutional problems should be used, even if such a construction is less natural.”) (citation omitted); Minn. Stat. Ann. § 645.20 (2011 Supp.) (Construction of Severable Provisions) (“If any provision of a law is found to be unconstitutional and void, the remaining provisions of the law shall remain valid . . .”).

¹⁰ Another “economic reality” is that the tobacco settlement payment revenues, which the State sold to the Authority and currently secure the Tobacco Settlement Revenue Bonds

Finally, the Attorney General urges the Court to declare the Appropriation Refunding Bonds an unconstitutional issuance of public debt “[d]espite *the absence of any legal obligation* on the part of a future legislature to appropriate funds” (AG Brief at 15 (emphasis added).) In other words, the Attorney General concedes the law does not impose an obligation, but nevertheless argues the Court should declare the Appropriation Refunding Bonds to be unconstitutional for non-legal reasons, such as the credit market and bond rating agencies’ “expectation that, as a practical matter, a future legislature will continue to fund appropriation bonds’ debt obligations *even though the bonds are not legally secured by any such pledge.*” (*Id.* (emphasis added).)¹¹ Of course, a third party’s “expectation” that a party will act does not create an “obligation,” especially where there are express disclaimers that the party has no duty to do so. *See*

(JSOF ¶ 18), would then be available to cover appropriations from the General Fund for principal and interest payments on the Appropriation Refunding Bonds even though the tobacco settlement payment revenues are not specifically pledged for the payment of the Appropriation Refunding Bonds. (*See* JSOF ¶ 27; *see also* Ex. 1, Order § 1.02, at ASR 12 (“by defeasing the [Tobacco Settlement Revenue Bonds] with the proceeds of [Appropriation Refunding Bonds], . . . the State will receive back from the Tobacco Settlement Authority for deposit into the General Fund of the State the tobacco settlement revenues”); Ex. 5, Official Statement for Tobacco Settlement Revenue Bonds at D-13, ASR 373 (discussion of defeasance); Minn. Stat. Ann. § 16A.98, subd. 3(a) (2011 Supp.) (“Upon termination of the existence of the authority [12 months after discharge of Tobacco Settlement Revenue Bonds], all of its rights and property shall pass to and be vested in the state.”).)

¹¹ The Attorney General’s citations to the charged rhetoric of opponents to the legislation authorizing the Appropriation Refunding Bonds (*see* AG Br. at 11-12) are irrelevant to this Court’s analysis, particularly where the Attorney General has failed to identify any ambiguity in Section 16A.99 to be remedied by reference to legislative history. Minn. Stat. § 645.16 (2011 Supp.) (“When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.”). The Attorney General’s citation to her own February 23, 2009 letter regarding an earlier appropriation bond proposal is similarly irrelevant. *Star Tribune Co. v. Bd. of Regents*, 683 N.W.2d 274, 289 (Minn. 2004) (“Opinions of the Attorney General are not binding on the courts”).

Wurm v. John Deere Leasing Co., 405 N.W.2d 484, 486 (Minn. Ct. App. 1987) (“[S]trangers to a contract acquire no rights under the contract.”); *Hennepin County*, 540 N.W.2d at 499 (even “[t]he rights of third-party beneficiaries ‘depend upon, and are measured by, the terms of the contract’”). Moreover, the credit market and bond rating agencies themselves expressly recognize the reality that the Legislature is not *obligated* to comply with any such “expectation,” as reflected in the higher interest rates and lower bond ratings of appropriation bonds as compared to general obligation bonds. (See JSOF ¶ 11.)

CONCLUSION

For the reasons set forth above and in Petitioner’s Opening Brief, Petitioner respectfully submits that this Court should enter an Order of judgment validating the Appropriation Refunding Bonds and all actions of Petitioner in connection with the issuance of the Appropriation Refunding Bonds and making such other adjudications as may be proper or necessary in connection with the matters before it.

Dated this 23rd day of July, 2012.

JAMES D. SCHOWALTER, IN HIS
CAPACITY AS COMMISSIONER OF THE
MINNESOTA DEPARTMENT OF
MANAGEMENT AND BUDGET,
PETITIONER

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CERTIFICATION

Pursuant to Minn. R. Civ. App. P. 132.01, subd. 3, the undersigned attorney certifies that this brief complies with the word count limitation of Rule 132.01, subd. 3(a). This brief was prepared using the word processing software Microsoft Word 2010 and contains 4,780 words.

By: _____

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