

A06-840

State of Minnesota In Court of Appeals

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

Appellants,

vs.

Peggy Ingison, in her official capacity as Commissioner of Finance,
or her successor, and the State of Minnesota,

Respondents.

Brief of Amicus Curiae Eighty-fourth Minnesota Senate in Support of Appellants

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Interest of Amicus Curiae

The Minnesota Senate is one of the two houses of the Legislature created by article IV, § 1, of the Minnesota Constitution, to which article XI, § 1, gives the power to control the payment of money out of the state treasury. Fifteen members of the Eighty-fourth Minnesota Senate are individual plaintiffs in this action.¹ By Senate Resolution 167,² the Senate voted to support this appeal on behalf of itself and all future Legislatures and directed the Office of Senate Counsel, Research, and Fiscal Analysis to submit a brief in support of appellants.³

Argument

I. The Power of the Purse is Reserved for the Legislature

A. The Common Law Gave the Power of the Purse to the Legislature

¹ State Senators Ellen Anderson, Michele Bachmann, Leo Foley, David Hann, John Hottinger, Cal Larson, Warren Limmer, Sharon Marko, Tom Neuville, Sean Nienow, Jane Ranum, Mady Reiter, Ann Rest, David Senjem, and Charles Wiger.

² *Journal of the Senate* 6047 (May 20, 2006). Text also available at: <<http://www.senate.leg.state.mn.us/resolutions/l84/0/SR0167.htm>>.

³ The following disclosure is made to comply with Rule 129.03 of the Minnesota Rules of Civil Appellate Procedure: This brief was not authored by counsel for any party in whole or in part, though counsel for appellants was given an opportunity to review and comment on it. No one other than the Minnesota Senate made a monetary contribution to the preparation or submission of the brief.

Modeled on the U.S. Constitution, article I, § 9, cl. 7,⁴ the Minnesota Constitution, article XI, § 1, provides: “No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law.”⁵ Both provisions codify the common law maxim that the legislature holds the power of the purse. Every other state, except Mississippi, Rhode Island, and Utah, has a similar provision.⁶ The supreme courts of Mississippi and Rhode Island have found it implied in their constitutions as a gift of the English common law:

Under all constitutional governments recognizing three distinct and independent magistracies, the control of the purse strings of government is a legislative function. Indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the Legislature This supreme prerogative of the Legislature, called in question by Charles I, was the

⁴ “No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of receipts and expenditures of all public money shall be published from time to time.”

⁵ Before the Constitution was restructured in 1974, article IV, § 12, included a sentence that said, “No money shall be appropriated except by bill.” The ballot question presented this deletion to the people as having no legal consequence. *See* Act of Apr. 10, 1974, ch. 409, § 3, 1974 Minn. Laws 787, 819. It is clear that “an appropriation by law” means a law enacted by the Legislature passing a bill.

⁶ Ala. Const. 1901, art. IV, § 72; Alaska Const. art. IX, § 13; Ariz. Const. art. 9, § 5; Ark. Const. 1874, art. 5, § 29; Cal. Const. art. XVI, § 7; Colo. Const. art. V, § 33; Conn. Const. art. IV, § 22; Del. Const. art. VIII, § 6(a); Fla. Const. art. VII, § 1(c); Ga. Const. art. III, § IX(I); Haw. Const. art. VII, § 5; Idaho Const. art. VII, § 13; Ind. Const. art. X, § 3; Ia. Const. art. III, § 24; Kan. Const. art. II, § 24; Ky. Const. § 230; La. Const. art. III, § 16(A); Me. Const. art. V, pt. third, § 4; Md. Const. art. III, § 32; Mich. Const. 1963, art. IX, § 17; Mo. Const. art. IV, § 28; Mont. Const. art. VIII, § 14; N.C. Const. art. V, § 7(1); N.D. Const. art. X, § 12; Neb. Const. art. III, § 25; Nev. Const. art. 4, § 19; N.J. Const. art. VIII, § II (2); N.M. Const. art. IV, § 30; N.Y. Const. art. VII, § 7; Ohio Const. art. 2, § 22; Okla. Const. art. V, § 55; Ore. Const. art. IX, § 4; Pa. Const. art. 3, § 24; S.C. Const. art. X, § 8; S.D. Const. art. XII, § 1; Tenn. Const. art. II, § 24; Tex. Const. art. 8, § 6; Vt. Const. ch. II, § 27; Va. Const. art. X, § 7; Wash. Const. art. VIII, § 4; Wis. Const. art. VIII, § 2; W. Va. Const. art. X, § 3; Wyo. Const. art. 3, § 35. *Compare* Ill. Const. art. VIII, § 2(b); Mass. Const. pt. 2, ch. II, § I, art. XI; N.H. Const. art. 56.

issue upon which Parliament went to war with the King, with the result that ultimately the absolute control of Parliament over the public treasure was forever vindicated as a fundamental principle of the British Constitution. The American commonwealths have fallen heirs to this great principle, and the prerogative in question passes to their Legislatures without restriction or diminution, except as provided by their Constitutions, by the simple grant of the legislative power.

Colbert v. State, 39 So. 65, 66 (Miss. 1905). See also *In re Incurring of State Debts*, 37 A. 14 (R.I. 1896).

One of the first statements of the maxim can be found in clauses 12⁷ and 14⁸ of the *Magna Carta* that the barons forced King John to sign in 1215. Those clauses required the king to convene a representative assembly of nobles and clergy and obtain their consent before levying certain taxes.

After four more centuries of struggle with the Crown, Parliament invited William and Mary to the throne after the Glorious Revolution of 1688. As part of the invitation, to which the new monarchs assented, Parliament included the clause: "That levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal." *The English Bill of Rights*, Feb. 13, 1689 (visited July 5, 2006) <<http://www.yale.edu/lawweb/avalon/england.htm>>.

⁷ "No [taxes] may be levied in our kingdom without its general consent" *Magna Carta*, as numbered and translated from the Latin by the British Library (visited July 4, 2006) <<http://www.fordham.edu/halsall/source/magnacarta.html>>.

⁸ "To obtain the general consent of the realm for the assessment of [a tax] . . . we will cause the archbishops, bishops, abbots, earls, and greater barons to be summoned individually by letter. To those who hold lands directly of us we will cause a general summons to be issued, through the sheriffs and other officials, to come together on a fixed day . . . and at a fixed place. In all letters of summons, the cause of the summons will be stated. . . ." *Id.*

The Supreme Court of Nebraska has explained the conflict that gave rise to the clause:

Legislative appropriations are the outgrowth of the long struggle in England against royal prerogative. By degrees, the power of the crown to levy taxes was restrained and abolished, but it was found that so long as the crown might, at its own discretion, disburse the revenue, the reservation to the people, through parliament, of the power to raise revenues, was not a complete safeguard. Efforts to control the crown in disbursement, as well as in the collection, of revenues, culminated with the revolution in 1688; and since then the crown may only disburse moneys in pursuance of appropriations made by act of parliament. Three evils were at that time felt: In the first place, the use of the realm's revenue for purposes unlawful or distasteful to the people; secondly, the inability to control the crown in the amounts expended for particular objects; and, thirdly, the disposition of the crown to avoid encroachments upon its self-asserted prerogatives, by dispensing for long periods with sessions of parliament. By requiring appropriations for limited periods, it was sought to remedy all three evils,— the first two by making appropriations specific in amount and object, and the third by making them for limited periods, so that frequent parliamentary sessions should be absolutely necessary.

State ex rel. Norfolk Beet-Sugar Co. v. Moore, 69 N.W. 373, 375 (Neb. 1896). See also, *Edwards v. Childers*, 229 P. 472, 474, 1924 OK 652, ¶¶ 10-11; *State ex rel. Birdzell v. Jorgenson*, 142 N.W. 450, 457 (N.D. 1913); *Humbert v. Dunn*, 24 P. 111 (Cal. 1890); *Journal Pub. Co. v. Kenney*, 24 P.96, 97 (Mont. 1890).

At the Federal Convention of 1787, the maxim that the legislature held the power of the purse was discussed on June 13 in connection with a proposal by Elbridge Gerry of Massachusetts that “money bills” must originate in the house. *Journal of the Federal Convention* (Boston, 1819) 121; 1 *Records of the Federal Convention of 1787*, 233 (M. Farrand ed. 1911) <<http://memory.loc.gov/ammem/amlaw/lwfr.html>>. As James Madison recorded him saying, “it was a maxim that the people ought to hold the purse strings” and the house was closer to the people. 1 *Farrand Records* 233.

As Justice Story said in his 1833 *Commentaries on the Constitution*:

[I]t is highly proper, that congress should possess the power to decide, how and when any money should be applied for [government] purposes. If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources to his pleasure. . . . It is wise to interpose, in a republic, every restraint, by which the public treasure, the common fund of all, should be applied, with unshrinking honesty to such objects, as legitimately belong to the common defence, and the general welfare. Congress is made the guardian of this treasure

III J. Story, *Commentaries on the Constitution of the United States*, § 1342 (1833 ed., reprinted in Const. Soc. online ed. 1997) <http://www.constitution.org/js/js_332.htm>.

For 600 years after the *Magna Carta*, the legislative branch had fought to wrest control of the public purse from the executive. With enactment of the English Bill of Rights and ratification of the U.S. Constitution, it seemed that the public purse strings were securely in the hands of the legislature on both sides of the Atlantic. As the U.S. Supreme Court said:

No officer, however high, not even the President, much less a Secretary of the Treasury or Treasurer, is empowered to pay debts of the United States generally, when presented to them. . . . It is a well-known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation by Congress. See Constitution, art. 1, 9 (1 Stat. at Large, 15).

However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion.

Reeside v. Walker, 52 U.S. 272, 291 (1850). *Accord*, *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 427-28 (1990); *Cincinnati Soap Co. v. United States*, 301 U.S. 308 (1937).

When federal agencies shut down during a budget impasse, the Attorney General looks to the law as enacted by Congress to determine what functions to continue. 43 U.S.

Op. Atty. Gen. 293, 5 U.S. Op. Off. Legal Counsel 1 (1981). No money is paid out of the treasury of the United States without an appropriation by law.

B. The Legislative Power of the Purse is Preserved in the Minnesota Constitution

The legislative power of the purse was preserved in the Minnesota Constitution of 1857 as article IX, § 9, (renumbered as article XI, § 1, in the restructured Constitution of 1974).

Seven hundred years after the *Magna Carta*, the Minnesota Supreme Court had no doubt that the legislative branch controlled the public purse: “The purpose of the Constitution in prohibiting the payment of money from the state treasury, except upon an appropriation made by law, was intended to prevent the expenditure of the people’s money without their consent first had and given.” *State ex rel. Nelson v. Iverson*, 125 Minn. 67, 71, 145 N.W. 607, 608 (1914).

C. A State Obligation May Not Be Liquidated Without an Appropriation

In the years when the taxes at issue in *Nelson v. Iverson* were distributed, the State of Minnesota maintained many departments using open and standing appropriations of department fees and receipts. *See State ex rel. Bradley v. Iverson*, 126 Minn. 110, 147 N.W. 946 (1914). As part of a progressive reform of state government budgeting practices, Laws 1913, chapter 140, abolished all open and standing appropriations, with certain exceptions, and began the biennial budget system used today.

The budgetary reform of 1913 caused the Minnesota Supreme Court to look more closely at the distinction between the legal obligation to pay money and the authority to liquidate the obligation by making the payment. In 1920, the Court held that a statute directing the State Auditor to reimburse counties for one-third the amount paid to dependent mothers under the law, did not authorize the State Auditor to issue warrants when the Legislature had not appropriated money for that purpose. As the Court said:

The mere creation of the liability on the part of the state, or promise of the state to pay, if the statute may thus be construed, is of no force in the absence of an appropriation of funds from which the liability may be discharged.

State ex rel. Chase v. Preus, 147 Minn. 125, 127; 179 N.W. 725, 726 (1920). *Accord*, *Beltrami County v. Marshall*, 271 Minn. 115, 135 N.W.2d 749 (1965); *State ex rel. Spannaus v. Schneider*, 297 Minn. 520, 211 N.W.2d 516 (1973); *Morris v. Perpich*, 421 N.W.2d 333, 339-40 (Minn. App. 1988).

The Court in *Preus* noted that Minnesota's system of biennial budgeting, in which direct appropriations are made by the Legislature every two years in specific amounts and for limited times, was different from the budgetary system of open and standing appropriations that had been in effect before 1913. Statutory language that imposed an obligation would no longer be considered an implied appropriation to carry it out. "Decisions of other states operating under different and perhaps more liberal systems are not helpful and cannot be followed." 147 Minn. at 127, 179 N.W. 725 at 726. As the Court said more recently in summarizing the meaning of those earlier decisions, "A statute creating a liability on the part of the state is not an 'appropriation by law' within the meaning of this

constitutional provision.” *Butler v. Hatfield*, 277 Minn. 314, 323, 152 N.W.2d 484, 493 (1967).

The rule summarized in *Butler v. Hatfield* has been followed by the Minnesota appellate courts in subsequent cases. When the Minnesota Zoological Board constructed its monorail “Zoo Ride” in 1977, pursuant to statutory language that made Zoo Board operations subject to biennial appropriations, the Legislature limited its appropriations for the Zoo Ride to the receipts generated by the ride. When those receipts were insufficient to make debt service payments as they came due, the Minnesota Supreme Court held that “the state cannot be required to pay money from the general fund for the Zoo Ride unless and until the legislature appropriates funds for that purpose.” *U.S. Fire Ins. Co. v. Zoological Board*, 307 N.W.2d 490, 496 (Minn. 1981).

In the 1980s, the State University Board constructed wood-fired boiler heating plants at its Bemidji and St. Cloud campuses under a statutory authorization to pay for them with the energy savings they generated. When there were no savings, and the Legislature first limited and then eliminated appropriations to pay for the boilers, the Court of Appeals ruled that “the state’s obligation [to pay for the boilers] ended when the appropriation was not made.” *First Trust Co. v. State*, 449 N.W.2d 491, 496 (Minn. App. 1990).

Without an appropriation by the Legislature of money to liquidate an obligation, the obligation must remain outstanding until the Legislature sees fit, by making an appropriation, to liquidate it.⁹

⁹ Amicus does not concede that the constitutional language cited by Appellants’ Brief at 24-25, 34, other than that relating to debt service on state bonds, authorizes

D. Minnesota Statutes Impose Additional Restrictions on Expenditures from the State Treasury

Eliminating most open and standing appropriations to run state departments was not the only way the Minnesota Legislature in the Twentieth Century sought to plug holes in the public purse. It enacted several other laws restricting the payment of money out of the state treasury without or in excess of an appropriation.

Laws 1907, ch. 272, § 2 (codified as amended at Minn. Stat. § 16A.138 (2004)), makes it a misdemeanor and cause for removal from office for a state official to incur indebtedness on behalf of the state without an appropriation by the Legislature to pay it. Laws 1937, ch. 457, § 36 (codified as amended at Minn. Stat. § 16A.139 (2004)) makes it illegal and cause for removal from office for a state official or employee to spend money for any purpose other than the purpose for which the money was appropriated.

Governor Harold Stassen's reform act of 1939 (Laws 1939, ch. 431) imposed a number of new restrictions designed to ensure that state money was spent only as directed by the Legislature. Article 3, § 3 (codified as amended at Minn. Stat. § 16A.57 (2004)) prohibits a state official from spending state money without an appropriation. Article 2, § 16(c) (codified as amended at Minn. Stat. § 16A.14, subd. 3 (2004)) prohibits a state agency from spending an appropriation until a spending plan for that appropriation has been approved by the Commissioner of Finance. Article 2, § 16(d) (codified as amended at Minn. Stat. § 16A.14, subd. 4 (2004)) requires an agency's spending plan to be within the amount

payment without a legislative appropriation. Debt service on state bonds is also covered by statutory appropriations. *E.g.*, Minn. Stat. § 16A.641, subd. 10 (2004) (general obligation bonds); § 167.50, subd. 1 (2004) (trunk highway bonds).

and purpose of the appropriation on which it is based. Article 2, § 16(h), (codified as amended at Minn. Stat. § 16A.15, subd. 3(a) (2004)) makes a state employee who pays money out of the state treasury without or in excess of an appropriation subject to removal from office and personally liable for the amount paid out.

The law in Minnesota requiring an appropriation before money is paid out of the state treasury is clear.

II. The Judicial Branch is not Authorized to Exercise this Legislative Power

In addition to reserving the power of the purse for the Legislature, the Minnesota Constitution prohibits the other branches from exercising legislative powers “except in the instances expressly provided in this constitution.” Minn. Const. 1974, art. III.

The Governor is expressly given a role in the appropriation process: the Governor may sign or veto a bill containing an appropriation, or sign the bill and veto an item of appropriation. Minn. Const. 1974, art. IV, § 23. But to rule that the Governor may veto the transportation appropriations bill and then spend the money covered by those appropriations brings a result that is absurd. *See* Minn. Stat. § 645.17(1) (2004).

Nowhere in the Constitution is it “expressly provided” that the judicial branch may authorize the executive branch to pay money out of the treasury when the Legislature has not appropriated it.

The judicial branch must not assume a power the Framers gave expressly to the Legislature, not to the courts. As George Washington warned in his Farewell Address:

If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an

amendment in the way which the constitution designates. But let there be no change by usurpation; for, though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.

September 17, 1796, as published in *The Independent Chronicle*, September 26, 1796

<<http://www.earlyamerica.com/earlyamerica/milestones/farewell/text.html>>.

III. The Authorities Relied On by the Trial Court Do Not Support its Ruling

The trial court cited three Minnesota Supreme Court cases and one case from Kentucky in support of its order that money be paid out of the state treasury without an appropriation by law.¹⁰ None of those cases support its ruling.

A. Constitutional Mandates Were Not Being Ignored

The trial court cited *State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777 (Minn. 1986), for the proposition that “the legislature could not ‘gut’ a constitutional executive office by removing ‘core functions’ of that office and necessary funding.”¹¹ *State ex rel. Sviggum v. Ingison*, slip op. at 7, Appellants’ App. 317.

The 2005 Legislature had not “guttled” any constitutional office. No constitutional mandates were being ignored. The “legislative department” described in article IV was

¹⁰ *State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777 (Minn. 1986); *Clerk of Court’s Compensation for Lyon County v. Lyon County Commissioners*, 308 Minn. 172, 241 N.W.2d 781 (1976); *Sharood v. Hatfield*, 296 Minn. 416, 210 N.W.2d 275 (1973); *Fletcher v. Commonwealth*, No. 2005-SC-000046-TG, 163 S.W.3d 852 (Ky. 2005).

¹¹ This case was about responsibilities, not appropriations. The Court ordered that funding transferred to the Commissioner of Finance be returned to the Treasurer. 391 N.W.2d at 783. It did not order that the 7.5 positions abolished by the Legislature, 391 N.W.2d at 779 n.3, be reinstated or that any money be spent that had not been appropriated by the Legislature.

funded.¹² All the constitutional officers named in article V were funded.¹³ The judiciary described in article VI was funded.¹⁴ General education aid for a uniform system of public schools¹⁵ and support for the University of Minnesota¹⁶ under article XIII were funded.

It is true that the bill passed by the Legislature to fund the public highway system described in article XIV had been vetoed by the Governor. If any action defied a constitutional mandate to fund certain “core functions,” it was that veto. Article XIV, § 2, mandates that the state construct, improve, and maintain the trunk highway system, § 3, the county state-aid highway system, and § 4 the municipal state-aid street system.

So, why did the Ramsey County District Court not rule the Governor’s veto invalid? Because the veto was a political act. In the political duel between the executive and legislative branches, when the Legislature thrust with a bill that raised new revenue from a gasoline tax, the Governor parried with a veto. The two branches were still dueling when the court issued its order of June 23 continuing highway funding notwithstanding the veto of the bill that would have provided new revenue. The Constitution does not require, or even permit, a single judge of the district court to step between the duelists and declare one of them the political winner.

¹² Act of June 3, 2005, ch. 156, art. 1, § 2, 2005 Laws 1628, 1630.

¹³ Act of June 3, 2005, ch. 156, art. 1, §§ 3-6, 2005 Laws 1628, 1632-33.

¹⁴ Act of June 2, 2005, ch. 136, art. 1, §§ 1-5, 2005 Laws 901, 903-04.

¹⁵ Minn. Stat. § 126C.20 (2004).

¹⁶ Act of May 26, 2005, ch. 107, art. 1, § 4, 2005 Laws 619, 627.

B. The Budget Duel Did Not Threaten Judicial Authority

The trial court cited *Sharood v. Hatfield*, 296 Minn. 416, 210 N.W.2d 275 (1973), and *Clerk of Court's Compensation for Lyon County v. Lyon County Commissioners*, 308 Minn. 172, 241 N.W.2d 781 (1976), for "the proposition that the court has the inherent judicial authority to preserve the court's power." *State ex rel. Sviggum v. Ingison*, slip op. at 7, Appellants' App. 317.

But there was no threat to the court's power posed by the political battle over the budget in 2005. The courts had been fully funded during the regular session.

When the political branches are as closely divided as they have been in this state in recent decades, the judicial power of the court is not threatened by staying out of political duels. On the contrary, their involvement in the budget battle of 2005 makes it more likely the courts will be drawn into the political fray in 2007, 2009, and beyond.

Were the judiciary intending to participate in the budget battle again in 2007, it would be appropriate for candidates for district judge in Ramsey County, judge of the Court of Appeals, and justice of the Supreme Court all to be queried on their position on the gas tax, so that the voters might be better informed about the officials who will be making that political decision. That is a scenario neither the judiciary nor anyone else wants.

C. The State Was Not about to Commit "Suicide"

The final justification the trial court gave for its decision was that "the constitution is not a suicide pact." *State ex rel. Sviggum v. Ingison*, slip op. at 7-8, Appellants' App. 317-

18 (Johnson, C.J.) (quoting *Fletcher v. Commonwealth*, No. 2005-SC-000046-TG, slip op. at 11, 163 S.W.3d 852, 877 (Ky. 2005) (Lambert, C.J., dissenting)).

In July 2005, Minnesota state government was not about to commit suicide. Four of the seven omnibus appropriation bills had already been enacted. Appropriations to fund the constitutional officers, the courts, administrative state departments, public safety, corrections, natural resources, higher education, and many other departments and agencies were in effect. The largest single appropriation in the budget, \$10 billion for general education aid to school districts, was covered by a statutory appropriation, Minn. Stat. § 126C.20 (2004),¹⁷ as were other significant expenses for which previous legislatures had found open and standing appropriations to be advisable. *E.g.*, Minn. Stat. § 16A.641, subd. 10 (2004) (debt service on general obligation bonds); § 167.50, subd. 1 (2004) (debt service on trunk highway bonds); § 273.1384, subd. 5 (2005) (market value homestead credit); and § 477A.03, subd. 2 (2005) (local government aid). Only six major agencies were not fully funded by July 1: Education, Health, Human Services, Transportation, Metropolitan Council transit operations, and the trunk highway portion of Public Safety.

The health and human services appropriations had not yet been enacted, and the Governor had vetoed the transportation appropriations bill. But, while continuing their negotiations toward a final budget agreement, the Legislature was considering alternatives for funding state government temporarily.

¹⁷ As for other education appropriations, not even George Wallace could fund education by executive order when the Alabama Legislature adjourned its regular session without enacting appropriations for education. *Wallace v. Baker*, 336 So.2d 156 (Ala. 1976).

On June 30, 2005, the Senate passed S.F. No. 65, *Journal of the Senate* 521-22, which would have funded education, health and human services, and transportation for the biennium at reduced base levels. On July 2, 2005, the Senate passed S.F. No. 88, *Journal of the Senate* 586-87, which funded education, health and human services, and transportation until July 11, 2005, at the base levels appropriated in 2003. Once a budget agreement was reached on July 8, the House passed the same language as in S.F. No. 88, with the date changed to July 14, in the form of H.F. No. 111, *Journal of the House* 129 (July 8, 2005).

In July 2005, almost 800 years after the *Magna Carta*, the State of Minnesota was not about to grind to a halt. Had the court refused to order that “core functions” be continued without appropriations, the political process was poised to enact them. There was no need for judicial intervention to “preserve the state.”

D. Federal Law Does Not Require a State Legislature to Surrender the Power of the Purse

The trial court made no mention of federal law in its order of March 3, 2006. But in his order of June 23, 2005, ¶ 8, slip op. at 10, Appellants’ App. 163, Chief Judge Johnson adopted the Memorandum of Law submitted by the Attorney General arguing that federal law required the State to continue to make payments under various human service programs notwithstanding the absence of appropriations for them. *See* Petitioner’s Memorandum in Support of Motion for Relief, 7-9, Appellants’ App. 50-52, *In re Temporary Funding of Core Functions* (June 15, 2005). The Memorandum cited four cases¹⁸ to that effect. Each of those

¹⁸ *Pratt v. Wilson*, 770 F. Supp. 539, 543-44 (E.D. Cal 1991); *Coalition for Basic Human Needs v. King*, 654 F.2d 838, 841 (1st Cir. 1981); *Knoll v. White*, 595 A.2d 665 (Pa. Cmwlth. Ct. 1991); *Coalition for Economic Survival v. Deukmejian*, 171 Cal. App.3d

courts examined the federal laws requiring prompt payment to recipients of Aid to Families with Dependent Children (“AFDC”) and concluded that the Supremacy Clause of the U.S. Constitution, article VI, cl. 2, mandated that state constitutional requirements yield to the federal aid program.

None of those courts considered whether that was what Congress intended. When the issue is not a denial of eligibility or a refusal to pay, but rather only a temporary delay in payments occasioned by a political duel between the chief executive and the Legislature over the biennial budget, it is unlikely that Congress, itself a guardian of the public purse having some experience with government shutdowns, would side with the chief executive. *See Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (“We cannot believe that Congress – itself a staunch advocate of legislative freedom – would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.” (Frankfurter, J.) (regarding whether Congress had intended to abolish legislative immunity for state legislators when it enacted the Civil Rights Act of 1871)). Each of the AFDC cases was litigated in haste, and was over in a matter of days or weeks, so there was never time to reflect on what Congress may have intended. Now, away from the heat of the moment, it is possible to see that those cases were wrongly decided.

Where the Ninth Circuit did a more careful review of federal law governing a program other than AFDC, it found that medical assistance need not be paid during a budget stalemate

954, 957 (Cal. App. 2 Dist. 1985).

that lasted less than a month: “Delayed payment is an inherent feature of the Medicaid statutory and regulatory framework.” *Dowling v. Davis*, 19 F.3d 445, 447 (9th Cir. 1994).

The services the Ramsey County District Court ordered to continue during the shutdown went far beyond Temporary Assistance to Needy Families (the successor to AFDC), and far beyond what Congress intended to continue during a state shutdown.

IV. The Spending Questions Addressed by the Court are Nonjusticiable Political Questions

Even if the common law, the Minnesota Constitution, Minnesota Statutes, and the decisions of the Minnesota appellate courts did not prohibit the payment of money out of the state treasury without an appropriation, the spending questions addressed by the trial court would be outside its jurisdiction because they are nonjusticiable political questions. “What constitutes an essential service [or “core function”] depends largely on political, social and economic considerations, not legal ones.” *Fletcher v. Commonwealth*, No. 2005-SC-000046-TG, slip op. at 11, 163 S.W.3d 852, 860 (Ky. 2005).

Among the factors that make a question nonjusticiable is “a lack of judicially discoverable and manageable standards for resolving it.” *Baker v. Carr*, 369 U.S. 186, 217 (1962). A few examples of the “core functions” identified by the Ramsey County District Court illustrate its “lack of judicially discoverable and manageable standards” for identifying them and why identifying “core functions” is not a function for the judiciary.

On June 23, 2005, with a week to go before the start of the new biennium, while the political branches were locked in another end-of-the-biennium partisan deadlock, the Ramsey

County District Court ruled that “Metro Transit services (one month only),”¹⁹ MinnesotaCare,²⁰ the Marriage and Family Therapy Board,²¹ and the Board of Podiatric Medicine,²² were “core functions” that would continue even without appropriations.

A. Metro Transit Services

When did running a metropolitan transit system become a “core function” of state government mandated by the Constitution? Publicly owned metropolitan transit systems did not even exist in this state in 1857. Running the metropolitan transit system was a function of private enterprise until the 1960s, when Twin City Rapid Transit Company collapsed and its functions were taken over by the Twin Cities Area Metropolitan Transit Commission.²³ When Metro Transit employees go on strike and Metro Transit services shut down, are they violating the Constitution?

Even if it were a constitutional mandate, what “judicially discoverable and manageable standards” limit the funding for this “core function” to “one month only?” The amount and duration of funding for public transit assistance is a political question, not one to be answered by a single judge of the district court.

¹⁹ *In re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota*, Findings of Fact, Conclusions of Law, and Order Granting Motion for Temporary Funding, No. C9-05-5928 (2nd Dist. Ramsey Cty. June 23, 2005) (Johnson, C.J.), Ex. B at 9.

²⁰ *Id.*

²¹ Ex. B at 8.

²² Ex. B at 11.

²³ *See* Act of May 25, 1967, ch. 892, 1967 Minn. Laws 1891.

B. MinnesotaCare

MinnesotaCare has many advocates, as well as critics trying to shut it down. It has suffered significant budget cuts in recent years. It did not exist before 1992.²⁴ When did continuation of MinnesotaCare become a constitutional mandate? If its critics succeed at getting it repealed, will this Court hold the repealer unconstitutional?

C. Marriage and Family Therapy and Podiatric Medicine

The Marriage and Family Therapy Board and Board of Podiatric Medicine are doubtless useful agencies, but are they really a “core function” of state government? How many Minnesota marriages would have collapsed because family therapists could not renew their licenses for a few days while the budget was being negotiated? The wisdom of continuing these agencies during the negotiations was clearly a political question.

D. Ombudspersons

The court did rule that the Ombudsperson for Families was not a “core function” and must be closed.²⁵ But it continued the Ombudsman for Older Minnesotans,²⁶ and the Ombudsman for Mental Health-Mental Retardation.²⁷ Why the difference? Did the court conclude that, as long as family therapists could renew their licenses, families could scrape

²⁴ See Act of Apr. 23, 1992, ch. 549, 1992 Minn. Laws 1487.

²⁵ Ex. B at 10.

²⁶ Ex. B at 9.

²⁷ Ex. B at 10.

by without their ombudsperson? The court articulated no reason for this disparate treatment.

The decision was a political one.

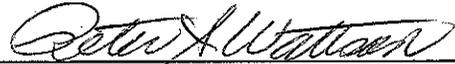
V. Conclusion

The Ramsey County District Court's order of June 23, 2005, and its supplemental orders thereafter, ignored 800 years of history, the plain language of the Minnesota Constitution, and numerous Minnesota Statutes. They were unsupported by any prior decisions of this Court or the Minnesota Supreme Court.

For the foregoing reasons, the March 3, 2006, judgment of the Ramsey County District Court should be reversed and the case remanded to the district court with an instruction to issue the writ. In the alternative, this Court should issue a declaratory judgment that a district court may not authorize the payment of money out of the state treasury in the absence of an appropriation by law.

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