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STATE OF MINNESOTA
IN SUPREME COURT

Deanna Brayton, Darlene Bullock, Forough Mahabady, Debra Branley, Marlene Griffin and Evelyn Bernhagen, on behalf of themselves and all others similarly situated,

Respondents,

vs.

Tim Pawlenty, Governor of the State of Minnesota, Thomas Hanson, Commissioner, Minnesota Department of Management and Budget, Cal Ludeman, Minnesota Department of Human Services, and Ward Einess, Commissioner, Minnesota Department of Revenue,

Appellants.

BRIEF OF AMICI CURIAE COMMON CAUSE MINNESOTA AND LEAGUE OF WOMEN VOTERS MINNESOTA

Martin A. Carlson
LAW OFFICES OF MARTIN A. CARLSON, LTD.
Atty. Reg. No. 0299650
247 Third Ave. S.
Minneapolis, MN 55415
Tel: (612) 359-0400

Attorney for Amicus Curiae

Mike Dean, Executive Director
COMMON CAUSE MINNESOTA
2323 E. Franklin Ave.
Minneapolis, MN 55406
Tel: (612) 605-7978

Keesha Gaskins, Executive Director
LEAGUE OF WOMEN VOTERS MINNESOTA
550 Rice Street
St. Paul, MN 55103
Tel: (651) 224-5445

Amicus Curiae

[Counsel for the parties appear on inside cover]

Attorneys for Appellants:

LORI SWANSON
Attorney General
ALAN I. GILBERT
Solicitor General
Atty. Reg. No. 0034678
JOHN S. GARRY
Assistant Attorney General
Atty. Reg. No. 0208899
JEFFREY J. HARRINGTON
Assistant Attorney General
Atty. Reg. No. 0327980

445 Minnesota Street, Suite 1100
St. Paul, MN 55101
(651) 757-1450

Attorney for Appellant Governor Tim Pawlenty:

PATRICT D. ROBBEN
General Counsel to the Governor
Atty. Reg. No. 0284166

130 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd
St. Paul, MN 55155
(651) 282-3705

Attorneys for Respondents:

GALEN ROBINSON
Atty. Reg. No. 165980
DAVID GASSOWAY
Atty. Reg. No. 389526

430 First Avenue North, Suite 300
Minneapolis, MN 55401
(612) 332-1441

ROLANDA J. MASON
Atty. Reg. No. 194487

830 West St. Germain, Suite 300
P.O. Box 886
St. Cloud, MN 56302
(320) 253-0121

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INTRODUCTION

The unallotments made by Appellants in the summer and fall of 2009 call squarely into question the constitutionality of the statute on which they are based, Minnesota Statute § 16A.152, subd. 4. The manner in which Appellants have wielded this statute is unprecedented not only in its size and scope, but also in its arbitrary application. If allowed to stand, these unallotments will represent a significant and dangerous shift in power from the Legislative Branch to the Executive Branch, permitting the Governor to engage in lawmaking with respect to the budget, spending levels and spending priorities. Lawmaking is a purely legislative function, however, and it cannot be delegated to any other branch of government. Maintaining separation of powers between governmental branches is essential to any healthy democracy, and to permit the centralization of power claimed here by the Executive Branch would open the door to a power that is more monarchical than republican in nature.[1]

ARGUMENT

I. SEPARATION OF POWERS IS A BASIC TENET OF AMERICAN DEMOCRACY, AND THIS COURT MUST CLOSELY SCRUTINIZE ANY SCHEME WHICH HAS THE POTENTIAL TO CENTRALIZE POWER IN ONE BRANCH OF GOVERNMENT.

The basic concept of separation of powers is straightforward and well-established: "Under the separation-of-powers doctrine, each branch of government

[1] Pursuant to Minn. R. App. P. 129.03, amici curiae certify that counsel for none of the captioned parties authored this brief, in whole or in part, and that no other person or entity made a monetary contribution to the preparation or submission of this brief.

is prohibited from intruding upon another branch's unique constitutional functions." *Citizens for Rule of Law v. Senate Committee on Rules and Administration*, 770 N.W.2d 169, 173 (Minn. Ct. App. 2009). While the application of this doctrine has evolved over time, its underlying rationale remains unquestioned: "The separation of powers doctrine is based on the principle that when the government's power is concentrated in one of its branches, tyranny and corruption will result." *Holmberg v. Holmberg*, 588 N.W.2d 720, 723 (Minn. 1999). This concern predates not just the Constitution, but America itself:

> Political philosophers such as Locke and Montesquieu were concerned that if all power were concentrated in one branch of the government, tyranny would be the natural and probable result. While their formulation of the actual workings of such a balanced government has been altered through the years, the basic principle remains: too much power in the hands of one governmental branch invites corruption and tyranny.

Wulff v. Tax Court of Appeals, 288 N.W.2d 221, 222-23 (Minn. 1979).

Separation of powers is implicit but well-recognized in the United States Constitution, *see generally, Mistretta v. United States*, 488 U.S. 361, 381, 109 S. Ct. 647, 659 (1989), and is expressly recognized in most state constitutions, including the Minnesota Constitution. Minnesota's Constitution expressly provides for the separation of powers into "three distinct departments: legislative, executive, and judicial." *See* Minnesota Constitution, Art. III § 1. Usurpation of power by one branch from another is prohibited: "No person or persons belonging to or constituting one of these departments shall exercise any of the powers

properly belonging to either of the others except in the instances expressly provided for in this constitution." *Id.*

Maintaining the separation of powers does not involve a bright-line rule; as the task of governance has required more specialized decision-making, courts have tolerated an increased amount of friction among the three coordinate branches. In particular, Minnesota courts have joined the national trend of being more liberal in permitting delegations of discretionary power to administrative agencies with technical expertise in a particular area. *See generally Anderson v. Comm'r of Highways*, 126 N.W.2d 778, 780-81 (Minn. 1964); *Wulff*, 288 N.W.2d at 223. While such discretionary delegations can involve important interests and become sources of considerable controversy, *see, e.g., State v. Underdahl*, 767 N.W.2d 677 (Minn. 2009) (ordering production of computer source code for breath testing instrument previously approved by the Commissioner of Public Safety pursuant to legislative delegation), it is rare for opinions relating to these specialty delegations to contain words as strong as "tyranny" or "corruption." Such is not the case with delegations which implicate the core power of another branch. In those instances, this Court has consistently expressed concerns about the foundations of government being subverted, and it has given such delegations of discretionary power close scrutiny, regardless of outcome.

This Court's decisions in *Wulff v. Tax Court of Appeals*, 288 N.W.2d 221 (Minn. 1979), and *Holmberg v. Holmberg*, 588 N.W.2d 720, 723 (Minn. 1999), are good examples of judicial caution and close scrutiny. In *Wulff*, 288 N.W.2d at

224-25, this Court held that the creation of the Minnesota Tax Court did not represent an unconstitutional intrusion on the judicial branch, largely because the statute creating that court did not fully divest original jurisdiction from the district court, nor did it eliminate the right to eventual judicial review. By contrast, in *Holmberg*, 588 N.W.2d at 726, this Court struck down a statute creating an "expedited" child-support process because it did infringe on the district court's original jurisdiction and improperly conveyed district court power to executive branch administrative law judges.

Regardless of outcome, this Court expressed the need for caution in both instances. In *Wulff* – in which the challenged delegation was upheld – the Court observed that while a strict interpretation of the separation of powers doctrine was impractical, "a too liberal interpretation could severely undermine the basis of our democratic system." *See Wulff*, 288 N.W.2d at 223. *Holmberg* clearly echoed the same concern, with the Court holding that "[t]he legislature's delegation of an area of the district court's original jurisdiction calls for this court's close scrutiny." *See Holmberg*, 588 N.W.2d at 724. Furthermore, *Wulff* was clearly a close call and this Court ended its opinion with cautionary language, stating that while the unique nature of taxation power, coupled with judicial checks, ultimately saved the tax court statute, "[w]e can envision circumstances in which administrative adjudications could constitute an encroachment on the judicial power." *Wulff*, 288 N.W.2d at 225. That vision of potential encroachment became reality in *Holmberg*, and this Court did not hesitate to act.

The need for caution and close scrutiny extends to executive branch reductions of legislative appropriations. In *Inter Faculty Organization v. Carlson*, 478 N.W.2d 192 (Minn. 1991), this Court held that Governor Carlson's attempted line-item veto of some – but not all – portions of an appropriation for higher education was unconstitutional. In the course of its analysis, the Court recognized the basic proposition that the power to appropriate state funds is a legislative power, and observed that the governor's line-item veto authority is found not in the executive branch portions of the Minnesota Constitution, but rather was included as an exception in the legislative department article. *Id.* at 194. The Court immediately cited separation of powers concerns: "As an exception, the power must be narrowly construed to prevent an unwarranted usurpation by the executive of powers granted the legislature in the first instance." *Id.*

The above-cited cases have important implications that the Court should keep in the forefront of its own analysis. First, the separation of powers issue in this case is not trivial or insubstantial. To the contrary, the separation of powers doctrine is clearly implicated, and the concerns underlying that doctrine run straight to the foundation of our democracy. As a result, and in order to prevent the potential for centralization of power and abuse, the actions at issue in this case should be given close scrutiny, and the powers claimed by the executive should be narrowly construed.

II. MINNESOTA'S UNALLOTMENT STATUTE CANNOT STAND BECAUSE, ON ITS FACE, IT UNCONSTITUTIONALLY DELEGATES PURE LEGISLATIVE POWER TO THE EXECUTIVE BRANCH.

Minnesota's unallotment statute, as currently written, is facially unconstitutional because it provides a delegation of pure legislative power which allows the governor to engage in lawmaking without any meaningful participation by the legislature, effectively granting the governor a new veto power free from the threat of legislative override, in violation of the constitution's presentment clause. *See* Minnesota Constitution, Art. IV, § 23. Although the unallotment statute has been on the books for decades, its previous use has been infrequent and relatively restrained. Appellants' attempt to apply it in sweeping fashion, however, lays bare its constitutional infirmities. Left unchecked, the statute provides the governor with the authority to not merely control spending levels, but also to alter funding priorities in a way that allows him to *de facto* create wholly new legislation. This latter authority unconstitutionally impinges on the legislature's pure legislative power, and if appellants' actions were allowed to stand would represent a real and substantial shift of traditional legislative power from the legislative branch to the executive branch, leaving open the possibility of abuse.

Although amici are deeply concerned about the negative impact appellants' actions could have on the balance of power in state government, they do not take the position that unallotment power cannot be delegated to the executive under any circumstances. Rather, their contention is that any such delegation must contain

sufficient checks to ensure that any "pure" legislative power implicated by the unallotment process remains with the legislature. The inclusion of such checks has been the deciding factor for virtually all courts nationwide that have examined this issue, and amici believe that the absence of such checks should determine the result here. Left unchecked, the governor can – at his whim – reduce specifically allocated funds in a range from zero to one hundred percent, a fact graphically illustrated by Appellants' reduction or elimination of funding for programs as diverse as the MSA Special Diet Program, the Political Contribution Refund, Local Government Aid, and the Property Tax Refund program.

A. Unallotment Is A Statutory Power, Not A Constitutional Power, And Is Therefore Subject To Constraints On Delegation Between Governmental Branches.

The power to unallot is not provided for in the Minnesota Constitution, but instead is a creature of statute. The unallotment statute in its original form was passed by the Legislature in 1939, in the midst of the Great Depression. *See* Laws of Minnesota, Chapter 431, Art. II § 16. In its current form, the statute provides in relevant part that:

> If the commissioner determines that probable receipts for the general fund will be less than anticipated, and that the amount available for the remainder of the biennium will be less than needed, the commissioner shall, with the approval of the governor, and after consulting the Legislative Advisory Commission, reduce the amount in the budget reserve account as needed to balance expenditures with revenue.

Minn. Stat. § 16A.152, subd. 4(a).

In *Lee v. Delmont*, 36 N.W.2d 530, 538-39 (Minn. 1949), this Court set the basic parameters for determining whether a particular legislative delegation violates the separation of powers doctrine. In that case, the Court stressed that while the Legislature can – and often does – delegate fact-finding authority to the executive branch in determining whether a law's applicability has been triggered, the Legislature must also provide meaningful guidance as to how that law is to be enforced:

> Pure legislative power, which can never be delegated, is the authority to make a complete law – complete as to the time it shall take effect and as to whom it shall apply – and to determine the expediency of its enactment... The power to ascertain facts, which automatically brings a law into operation by virtue of its own terms, is not the power to pass, modify, or annul a law. If the law furnishes a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies, so that the law takes effect upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers, the discretionary power delegated... is not legislative.

Id. In short, any delegation of legislative power to the executive branch must be accompanied by guidelines that inform the executive both of when the law must be applied and of how it is to be applied. Absent such guidance, the law can be invoked unevenly, at the "whim or caprice" of the executive.

B. The Absence Of Constraints On Delegation Has Resulted In Unallotment Statutes In Other States Being Held Unconstitutional.

The presence or absence of meaningful guidance and restraints has determined the outcome of similar unallotment laws in other states. In *Fairbanks*

North Star Borough, and North Star Borough School District v. State of Alaska et al., 736 P.2d 1140 (Alaska 1987), the Alaska Supreme Court was confronted with a constitutional challenge to a statute strikingly similar to Minnesota's unallotment statute. At the outset, the Court noted both the breadth of the delegation to the governor and the absence of meaningful limitations and guidance on how that delegation was to be administered. *Id.* at 1143. The court also noted that "[t]his is not a case where the legislature has delegated broad authority to an agency with expertise to regulate a narrowly defined field." *Id.* Accordingly, the Alaska court applied a standard of close scrutiny, and ultimately struck down the statute, concluding that its lack of standards left open the possibility of abuse:

> The legislature has articulated no principles, intelligible or otherwise, to guide the executive. Under [the unallotment statute], the governor decides when projected revenues are inadequate to meet appropriations. Once he makes that determination, he has total discretion as to which appropriations to cut and to what extent. The statute does not expressly require him to limit his cuts to the extent of the shortfall, nor does it provide for adjustment of the cuts to the actual revenues received... The State conceded at oral argument that the statute would permit the Governor to cut the entire budget for a particular department or project. Indeed, nothing in the statute would prevent him from effectively vetoing a project where his veto had been previously overridden. An appropriation could be eliminated entirely, cut in half or left untouched. In short, the effect of an exercise of authority under [the statute] is no more predictable than the identity and priorities of our next governor.

Id.

Similar concerns regarding the breadth of power and lack of standards determined the outcome in *Chiles v. Children A, B, C, D, E, and F*, 589 So.2d 260 (Fla. 1991), in which Florida's unallotment statute was also struck down as

unconstitutional. In its opinion, the Florida Supreme Court held that the power to unallot amounted to an unconstitutional delegation of the legislature's appropriation power:

> We construe the power granted in [the unallotment statute] as precisely the power to appropriate... [T]he constitutional efforts to set forth a deliberate veto and enforcement mechanism for the executive branch would seem an elaborate exercise in futility if the Governor and Cabinet, by stroke of the executive pen, could excise whole portions of the appropriations act and totally restructure legislative priorities... This delegation strikes at the very core of the separation of powers doctrine, and for this reason [the statute] must fail as unconstitutional.

Id. at 265-66.

Although *Fairbanks* and *Chiles* are certainly the most-discussed opinions in this line, other state courts have struck down similar unallotment statutes or powers for essentially the same reasons. *See, e.g., Colorado General Assembly v. Lamm,* 700 P.2d 508, 521 (Colo. 1985) (holding that while the governor has power to administer the state budget, that power does not extend to contradicting major legislative determinations); *State ex rel. Schwartz v. Johnson*, 907 P.2d 1001, 1002 (N.M. 1995) ("[T]he fact that respondent acted only under certain self-imposed restraints can in no way serve to supply what has been omitted. It is not what has been done but what can be done under a statute that determines its constitutionality."); *State of Nevada Employees Ass'n v. Daines*, 824 P.2d 276, 279 (Nev. 1992) ("The executive branch has attempted to impound the funds specifically appropriated for this salary increase in a manner that would defeat the legislative purpose and essentially rewrite the act. The executive is not

empowered to disregard the mandate of the legislature that certain salaries be paid.").

In contrast, the Supreme Court of Vermont has explained that with sufficient guidance, the power to unallot need not necessarily intrude on pure legislative power. *See Hunter v. State of Vermont*, 865 A.2d 381 (Vt. 2004). In *Hunter*, the court upheld a differently structured unallotment statute, holding that it provided sufficient safeguards to ensure that reductions in legislative allotments did not unconstitutionally intrude on fundamental legislative power. The Vermont statute barred executive unallotment unless three factors were present: (1) estimates from its emergency board must have shown that a fund was reduced in its previous estimate by at least 2%; (2) the General Assembly was not in session, and (3) a deficit-prevention plan was "necessary to ensure a balance budget." *Id.* at 387. In that instance, a Joint Fiscal Committee ("JFC") made up of members of the legislature could "accept, reject, or amend the plan" prior to implementation. *Id.* at 385. Absent such substantive checks, the court explained that a governor "has a free hand to refuse to spend any appropriated funds, [and] can totally negate a legislative policy decision that lies at the core of the legislative function." *Id.* at 384.

C. Minnesota's Unallotment Statute Is Facially Unconstitutional Because It Attempts to Delegate Pure Legislative Power And Contains No Meaningful Restrictions On The Executive Branch.

The present case should be decided in the same manner as *Fairbanks* and *Chiles*. Other than requiring the presence of an unanticipated shortfall,

Minnesota's unallotment statute provides no clear policy or standard of action for determining when to unallot, how much to unallot, or in what areas to unallot. In *Lee v. Delmont*, 36 N.W.2d at 538-39, this Court identified pure legislative power as "the power to pass, modify, or annul a law." These powers are disjunctive, and the power to perform any one of these tasks should be considered purely legislative.

Here, Appellants' actions have demonstrated in the clearest possible terms that Minnesota's unallotment statute purports to convey the power to modify or annul duly enacted appropriations laws. Although this appeal concerns the elimination of funding for just one program, the cuts made by Appellants -- in their totality -- are real-world examples of the hypothetical abuses which motivated the result in *Fairbanks*. What the court feared in *Fairbanks*, we have seen in Minnesota: the governor truly can "cut the entire budget for a particular department or project... [and] an appropriation could be eliminated entirely, cut in half or left untouched." *See Fairbanks*, 736 P.2d at 1143. In the absence of meaningful checks and balances, the application of Minnesota's unallotment statute "is no more predictable than the identity and priorities of our next governor." *Id.*

In addition to encompassing the power to modify or annul laws passed by the legislature, Minnesota's unallotment statute can be fairly construed as conveying the power to pass legislation with virtually no input from the legislature itself. If there is one aspect of the legislative process that is as predictable as the

seasons, it is this: There will be an appropriations bill, and there will be a revenue bill. Appellants have proven that if the executive branch wishes to exercise near total control over the appropriations process, all that need be done is to sign the appropriations bill and veto the revenue bill. At that point, Minnesota's unallotment statute can be invoked, and the governor can reduce or eliminate funding for a shockingly wide range of programs without any regard whatsoever for the legislative priorities expressed in the original bill. The potential for such a sweeping assertion of power is what caused the court in *Chiles* to "construe the power granted in [Florida's unallotment statute] as precisely the power to appropriate." 589 So.2d at 265. "The legislative responsibility to set fiscal priorities through appropriations is totally abandoned when the power to reduce, nullify, or change those priorities is given over to the total discretion of another branch of government." *Id.* In the absence of meaningful guidance or restraints, the "whim or caprice" of the executive branch that concerned this Court in *Lee v. Delmont* will become our present reality, and Appellants have left little doubt that the actions disputed in this case are likely to be repeated in the near future. *See* Baird Helgeson, Pat Doyle, *Pawlenty Digs In, Will Fight Budget Ruling*, STAR TRIBUNE, Dec. 31, 2010 (quoting Appellant Governor Pawlenty as noting that the state faces its worst financial hardship since World War II, and stating "If we can't use unallotment now, I don't know when we could.").

In addition to providing a delegation of legislative power that is impermissibly broad, Minnesota's unallotment statute also allows a governor to

unconstitutionally evade the presentment clause of the Minnesota Constitution, Art. IV, § 23. While the constitution does provide the governor with specific veto powers as an exception to the legislature's general power to make laws, *see id.*, Appellants' use of the unallotment statute when the legislature is out of session shows that a governor can effectively veto legislation with no meaningful opportunity for legislative override. This failing demonstrates graphically the manner in which the statute violates the separation of powers expressly provided for in the Minnesota Constitution. This Court must, therefore, strike down the statute as unconstitutional.

D. Appellants And Their Amici Offer Justifications For The Unallotment Statute That Are Illusory.

Appellants and their amici curiae urge the opposite result, employing a variety of different rationales. All should be rejected.

1. *Appellants and their amici err in asking this Court to be broadly protective of the governor's executive spending power, while narrowly construing the legislature's power to make the budget and set legislative priorities.*

Amici Law Professors assert that the power contained in the unallotment statute is not purely legislative because it involves the power to spend, which is a hallmark of executive branch power. *See* Brief of Amici Curiae Law Professors at 7-8. Where amici err in their analysis is in their disregard for the concept of legislative priority, and in their over-reliance on federal precedent, which is a wholly separate body of law. Amici's argument is asymmetrical, in that it makes executive spending power paramount over the legislature's power to make the

budget and set spending priorities, despite the co-equal nature of the two branches. Minnesota's unallotment statute vests all these powers in the executive branch. In addition to including the power to withhold funds, the unallotment statute conveys on its face the power to prioritize spending, and the power to prioritize spending is the power to make law, which is a purely legislative function. Take, for example, the following:

In their brief, Amici Law Professors observe that "[c]ost savings might make it possible to spend less than the full amount appropriated for a highway project. No separation-of-powers principle prevents the executive from responding to those situations by declining to spend the full amount of every appropriation." *See* Brief of Amici Curiae Law Professors at 7-8. This assertion is indisputably correct. A governor who completes a highway project for less money than was appropriated is the portrait of an effective executive; the will of the legislature has been executed and cost savings have resulted. Contrast that example with a governor who receives an appropriation for a highway project, but independently decides that cost savings are paramount and makes no attempt whatsoever to complete the project. Cost savings have resulted, but what about the will of the legislature? If one of a governor's key jobs is to execute the will of the legislature, then the governor in this latter example can only be described as ineffective and overreaching.

What Amici Law Professors ignore is the fact that an appropriations bill is not just a cap on spending, but is also one of the most concrete possible

expressions of legislative will. An appropriations bill that authorizes $100 for public works and $10 for human services reflects very different priorities than an appropriations bill authorizing $100 for human services and $10 for public works. Absent the power to totally re-write the bill, the governor has two choices: Veto the measure or sign it and "take care that the laws be faithfully executed." *See* Minn. Const., Art. V, § 3. Here, Appellants are claiming the power to totally re-write the bill, and if the final version -- enacted without any legislative consent -- allocates $10 for public works and $10 for human services, one could be pardoned for asking "Why have a legislature at all?" The legislature's voice and the legislature's judgment has been totally quashed. Amici have narrowly construed the law-making power of the legislature, while tacitly asserting that the spending power of the executive cannot be limited or encroached upon, and permitting the governor to completely avoid the threat of legislative override.

2. *The persuasive precedent cited by Appellants and their amici is far from persuasive, in that it fails to anticipate or respond to assertions of power of the type or scale at issue here.*

Appellants and their amici also urge this Court to adopt two other decisions as persuasive precedent, *New England Division of the American Cancer Soc'y v. Comm'r of Administration*, 769 N.E.2d 1248 (Mass. 2002), and the Court of Appeals' decision in *Rukavina v. Pawlenty*, 684 N.W.2d 525 (Minn. Ct. App. 2004), *rev. denied* (Oct. 19, 2004). Both cases were wrongly decided and should be rejected.

In *New England*, 769 N.E.2d at 1257, the Massachusetts Supreme Court upheld that state's unallotment statute on the rationale that the law permitted the governor to unallot only "in a time of true financial emergency." The court rated "[t]he probability that the Governor might abuse her authority... to reduce, or eliminate altogether, funding for certain programs based on her own ordering of social priorities" as "minimal" because the Massachusetts Constitution bound the governor "to ensure that the intended goals of legislation are effected." *Id.*

The problem with this analysis is that while it requires the governor to show fealty to *legislation*, it leaves no role for the *legislature*. If a governor can fundamentally reorder legislative appropriations without meaningful input from the legislature, then the role of the legislature is seriously reduced, and the balance of power between co-equal branches of government is seriously tilted. The Massachusetts Supreme Court simply discounted the possibility of unallotments on the scale seen here, and the facts of this case graphically expose the faults in that court's reasoning, including the failure to consider the chance that the governor might create a "true financial emergency" by approving the appropriations bill and then vetoing the revenue bill immediately after the legislative session ends.

The court in *New England* was also swayed by the argument that unallotment means merely spending less money than authorized, and that "the underlying appropriation remains fully in force to establish an upper limit on what may be spent for that line item, should sufficient revenue be forthcoming." 769

N.E.2d at 1257. This argument is purely semantic and should be rejected. If funding for construction of a bridge is completely unalloted, the result is no different than if the law authorizing its construction is simply vetoed: No bridge is built. This Court held in *Lee v. Delmont* that nullification of an existing law is a purely legislative power. To permit such nullification in the guise of unallotment would effectively overturn that decision.

Rukavina v. Pawlenty, 684 N.W.2d 525 (Minn. Ct. App. 2004), *rev. denied* (Oct. 19, 2004), is similarly flawed. In that decision, the court treated constitutionality as a side issue in comparison to the issues of standing and statutory authorization, disposing of the question in less than a page. No one in that case anticipated the breadth of authority claimed here, in which the Governor claims the power to unilaterally resolve a political deadlock at the very start of the biennium wholly outside the normal system of checks and balances. Furthermore, while the court correctly recited the definition of pure legislative power, it failed to recognize that the unallotment statute purports to convey that very power. According to the court, "[p]ure legislative power, which can never be delegated, is the authority to make a complete law – complete as to the time it shall take effect and as to whom it shall apply – and to determine the expediency of its enactment." *Rukavina*, 684 N.W.2d at 535. Unallotment conveys that pure legislative power to the governor, who alone determines when to unallot, which programs to unallot, and whether to unallot at all – all free from the threat of override.

3. *Minnesota's unallotment statute contains no meaningful checks on the exercise of legislative power by the governor.*

Amici Law Professors also assert, incorrectly, that Minnesota's unallotment statute contains sufficient constraints on executive power, making it similar to the Vermont unallotment statute upheld in *Hunter*. *See* Brief of Amici Law Professors at 15-17. Unlike the checks outlined in *Hunter*, a brief examination of the constraints claimed here reveals their illusory nature.

First, amici claim limits on the circumstances in which unallotments may be made, in that "[a]uthority to reduce allotments is not triggered unless 'the commissioner determines that probable receipts for the general fund will be less than anticipated, and that the amount available for the remainder of the biennium will be less than needed.'" *Id.* at 15 (quoting Minn. Stat. § 16A.152, subd. 4). While this statement is literally true, it affords no true protection if the governor can simply create a deficit at will when the legislature is out of session.

Second, amici claim that the legislature has provided sufficient guidance as to the purpose and priority of unallotments. *Id.* at 16. A review of the provisions cited, however, reveals that the statute uses "may" in all instances, other than the common-sense provision that the commissioner "shall" save money where possible. *See id.* "May" is not a limit, and while it may be some form of guidance, that guidance is constitutionally insufficient.

Third, amici assert that the statute "ensures actual *guidance by the legislature*" because of the requirement that the governor must first "consult" with

the Legislative Advisory Commission ("LAC") before engaging in unallotment. *Id.* (emphasis in original). This argument is feeble at best, and stands in sharp contrast to the Joint Fiscal Commission found sufficient in *Hunter*, which had the ability to "accept, reject, or amend the [governor's] plan" prior to implementation. *See Hunter*, 865 A.2d at 385. Despite heated rhetoric at its meetings this year, the LAC is in reality utterly toothless, that reality evidenced plainly by the fact that the Minnesota House has weighed in on behalf of Respondents and not of Appellants. Furthermore, even if the LAC did have the powers granted to Vermont's Joint Fiscal Commission, it does not necessarily follow that a delegation from the full legislature to a narrow sub-group of legislators is free from constitutional question. *See generally Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764 (1983) (holding one-house veto unconstitutional).

Finally, amici assert that the unallotment statute permits the prevention or override of the governor's unallotment decisions. *See* Brief of Amici Law Professors at 17. This is only a half-truth. While the legislature can and has exempted funds from unallotment, there was no reason to believe that the governor would attempt to assert this power on such an unprecedented scale or in such an unprecedented manner.

In the seventy-plus years since the unallotment statute was first passed, the power to unallot has been exercised by only three governors in four prior instances. *See generally* PETER S. WATTSON, SENATE COUNSEL, LEGISLATIVE

HISTORY OF UNALLOTMENT POWER, 4-13 (June 29, 2009). In all of these instances, the unallotments were undertaken towards the end of the fiscal biennium in the face of shortfalls that were not effectively addressed during the course of that biennium. *Id.* Never before have unallotments been announced before the start of a fiscal biennium, nor made at the first available opportunity in that biennium, nor made on the scale of the 2009 unallotments, which are ten times greater than any previous unallotment in Minnesota history.

That the power to unallot was not used until more than forty years after the original statute was passed – and then only four prior times on a much smaller scale – should be construed as a party admission that the power asserted by Appellants in this case was never intended when the statute was passed. The legislature therefore cannot be faulted for failing to anticipate it. Furthermore, the legislature cannot call itself back into session, so if unallotments are undertaken when the legislature is not in session, it has no opportunity whatsoever to assert its will and prevent immediate cuts. It is doubtful that the legislature intended to convey the power to thwart its basic constitutional powers, including completely untethering the governor's power from the override provisions of the presentment clause.

CONCLUSION

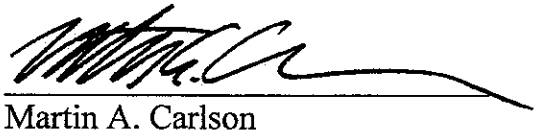
Minnesota's unallotment statute, in its current form, is impermissibly vague and unconstitutionally treads on the power of the legislature to determine when – and upon whom – a duly allotted appropriation may be reduced or eliminated.

Without more specific guidance and limitations, a governor is left with near total authority to determine on whim or caprice whether, when, why, and how any duly enacted legislative appropriation is actually put into practice. Left unchecked by the Court, this claimed power by the governor threatens to undermine the system of checks and balances which lies at the heart of our state and federal constitutions.

Dated: February 23, 2010

Respectfully submitted,

LAW OFFICES OF MARTIN A. CARLSON, LTD.



Martin A. Carlson
Atty. Reg. No. 0299650

247 Third Ave. S.
Minneapolis, MN 55415
Telephone: (612) 359-0400
Fax: (612) 341-0116

ATTORNEY FOR AMICI CURIAE
COMMON CAUSE MINNESOTA AND
LEAGUE OF WOMEN VOTERS
MINNESOTA

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief of amici curiae Common Cause Minnesota and League of Women Voters Minnesota conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and subd. 3(c)(1), for a brief produced with a proportional font. The font used in this brief is Times New Roman 13-point. The length of this brief is 5,570 words, exclusive of cover page, table of contents, and table of authorities. This brief was prepared using Microsoft Word 2008 for Mac.

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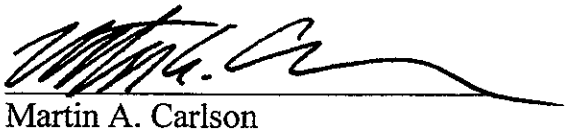

Martin A. Carlson
Atty. Reg. No. 0299650

247 Third Ave. S.
Minneapolis, MN 55415
Telephone: (612) 359-0400
Fax: (612) 341-0116

ATTORNEY FOR AMICI CURIAE
COMMON CAUSE MINNESOTA AND
LEAGUE OF WOMEN VOTERS
MINNESOTA