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STATE OF MINNESOTA

IN SUPREME COURT

Deanna Brayton, et al ,

Respondents,

vs.

Tim Pawlenty, Governor of the State of Minnesota, et al.,

Appellants.

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ARGUMENT

I. SECTION 16A.152 AUTHORIZES THE COMMISSIONER'S UNALLOTMENTS.

Respondents and amici[1] make several arguments claiming that section 16A.152 does not unambiguously allow the Commissioner to make the challenged unallotments or that the statute should be construed to preclude the Commissioner from making the unallotments. At their core, these arguments attempt to impose requirements — such as the statute only applies to small, unanticipated deficits arising late in the biennium — found nowhere in section 16A.152. Respondents and amici rely on purported conditions in the statute that simply do not exist. They also ask the Court to resolve a political dispute. Their contentions are not supported by the statutory language and are without merit.

A. The Plain Language Of Section 16A.152 Authorizes The Commissioner's Unallotments Even If The $2.7 Billion Deficit Was Previously Known.

Respondents erroneously argue that the statute does not apply because the $2.7 billion deficit for the 2010-2011 biennium was anticipated by both the Governor and Legislature. See, e.g., Respondents' Brief at 10 (stating unallotment statute applies only

[1] Appellants' Reply Brief responds to arguments made in Respondents' Brief. This Reply Brief also responds to arguments of amici that do not duplicate arguments of Respondents. The Briefs of amici are referred to herein as follows: the Brief of Amici League of Minnesota Cities, City of Minneapolis, City of St. Paul, Coalition of Greater Minnesota Cities, Metro Cities, and Minnesota Association of Small Cities, as "Cities' Br."; the Brief of Amici Common Cause Minnesota and League of Women Voters Minnesota as "Common Cause's Br."; and the Brief of Amicus Minnesota House of Representatives as "House's Br."

"if the shortfall is unanticipated"). The statute makes no reference to the Commissioner's unallotment authority only applying to "unanticipated" budget deficits. Section 16A.152 requires the Commissioner to determine whether "*probable receipts* for the general fund will be less than anticipated." (Emphasis added.) If the Commissioner determines that probable receipts will be less than anticipated and a budget deficit exists, then the Commissioner is authorized to take action to correct the entire budget deficit. *Id.*, subd. 4(a)-(b) (subdivision 4(a) providing that the Commissioner shall first use the budget reserve account "as needed to balance expenditures with revenue" and subdivision 4(b) providing that "[a]n additional deficit shall . . . be made up by reducing unexpended allotments of any prior appropriation or transfer").

In this case, the February 2009 forecast projected a $4.6 billion deficit for the 2010-2011 biennium. Appellants' Appendix ("A") at A51. The Legislature then enacted some adjustments to the State budget, reducing that deficit to $2.7 billion. Appellants' Addendum ("Add.") at 5; A67. The Governor and Legislature unsuccessfully attempted to correct that $2.7 billion deficit. *Id.* The Commissioner then determined in his June 4, 2009 letter to the Governor and Legislature that revenue for the 2010-2011 biennium would be less than anticipated in the February 2009 forecast,[2] resulting in a bigger budget

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[2] Respondents mischaracterize the Commissioner's letter. See Respondents' Brief at 7-8, 22. After noting that there was a significant downward trend in State revenue from the November 2008 forecast to the February 2009 forecast, the Commissioner's letter reasoned, in part, as follows:

> I do not find sufficient evidence to suggest that our budget outlook for the upcoming biennium will improve with new information. *The national*

(Footnote Continued On Next Page)

deficit than the $2.7 billion deficit that was the subject of deliberations between the Governor and Legislature. *Id.*[3] Accordingly, due to the reduction in anticipated revenue, not whether a deficit was previously foreseen, the plain language of the statute authorizes the Commissioner to use his unallotment authority for the entire budget shortfall. Minn. Stat. § 16A.152, subds. 4(a)-(b); see Appellants' Brief at 12-16.

B. The Commissioner Has Discretion In Effecting The Unallotments And Was Not Required To Immediately Unallot For The Entire Deficit.

Similarly without merit is the contention of some amici that the Commissioner did not comply with section 16A.152 because he should have unallotted more money than he has thus far. See Cities' Brief at 4-5. As discussed in Appellants' Brief at 15, note 5,

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(Footnote Continued From Previous Page)

> *economy has worsened since the February forecast and other forecasters generally concur with this outlook.* Our national economic forecaster, Global Insights, suggests that Minnesota and the rest of the nation are in the midst of a *lengthy economic downturn.*
>
> Our state's revenue collections reflect this weakened economy and are *not matching expectations. Year to date receipts for FY 2009 are down $70.3 million compared to the February forecast.* Nearly all major revenue categories have collected *less than anticipated.*

Add. 5; A67 (emphasis added). Neither Respondents nor amici dispute that the February 2009 forecast is a proper benchmark of anticipated revenue or the accuracy of the Commissioner's determination that probable receipts for the 2010-2011 biennium would be less than anticipated in the February 2009 forecast. See Appellants' Brief at 13-14.

[3] The $2.7 billion deficit noted in the Commissioner's June 4, 2009 letter was based on the February 2009 forecast (as adjusted for legislative enactments). Add. 5; A67. The next forecast (November 2009) showed, in fact, that revenues had declined. The additional deficit resulting from the decrease in anticipated revenue from the February 2009 forecast was quantified in the Commissioner's November 2009 forecast at about $1.2 billion. A142.

once the Commissioner determined the applicability of section 16A.152 under subdivision 4(a) of the law, he could then exercise his discretion to determine how best to effect the unallotments. Nothing in the statute requires that unallotments be implemented within a specific period of time. He chose to immediately unallot approximately $2.5 billion (and take administrative action to save another $200 million) with an emphasis on unallotments for the second year of the biennium. A67-A111. The Commissioner properly exercised his discretion to await further developments including his statutorily required November 2009 forecast and possible legislative action during the 2010 session before unalloting additional funds. *Id.*; A139-A140.[4]

C. The Term "Remainder" In Section 16A.152 Does Not Create An Ambiguity Or Require A Construction Precluding The Commissioner's Use Of The Statute.

The Governor approved, and the Commissioner made, the unallotments during the current biennium. The specific unallotments at issue for the MSA-SD program, which is

[4] Respondents and one amicus contend that the Commissioner improperly deferred or suspended a statutory obligation to effectuate a few of his unallotments. See Respondents' Brief at 9, 27, 37, 40; House's Br. at 5-9, 13-14, 19-20. Although that issue is not before the Court, section 16A.152, subdivision 4(b), states that "[n]othwithstanding any other law to the contrary, the commissioner is empowered to defer or suspend prior statutorily created obligations which would prevent effecting such reductions." No issue is raised by Respondents regarding this statutory provision as it relates to the MSA-SD program. Whether the Commissioner properly deferred or suspended a statutory obligation to effect a certain unallotment must be decided on a case-by-case basis to the extent the issue is even raised in and justiciable by a court. This issue does not affect the propriety of the underlying unallotment, but rather how the reduced allotment will be distributed.

the subject of Respondents' motion and this appeal, eliminated funding for the program effective November 1, 2009. A95.

Respondents ignore this fact and erroneously argue that the use of the word "remainder" in the phrase "the amount available for the remainder of the biennium will be less than needed," Minn. Stat. § 16A.152, subdivision 4(a), indicates that the Commissioner cannot make any unallotments for the entire biennium. See Respondents' Brief at 19-20. The term "remainder" literally refers to whatever "remains or is left"[5] of the designated period, which can be the entirety of the period. Accordingly, the plain language of the statute, including the reference to "remainder," allows the Commissioner to determine that the amount available for the entire biennium "will be less than needed" and therefore unallot to correct a deficit for all of the 2010-2011 biennium.

Respondents' interpretation of "remainder" would mean that unallotment for the biennium could be effective July 2, 2009, but not as of July 1. There is no substantive difference between the two time periods. *See* Minn. Stat. § 645.17(1) (2008) (stating it is presumed that the Legislature does not intend an unreasonable or absurd result).

None of the Commissioner's unallotments predated the beginning of the biennium, and many of his unallotments do not actually take effect until well into the biennium. A92-A98. This is particularly true with the MSA-SD program, in which the unallotment took effect four months into the biennium. A95. Therefore, the challenged unallotments

[5]*See* Merriam-Webster's Dictionary of Law (1996), available at *http://dictionary.lp.findlaw.com/dictionary.html* (defining "remainder" as "that which remains or is left").

applied to the "remainder" of the biennium even based on Respondents' narrow interpretation.

D. The Commissioner Can And Must Allot For MSA Funding At The Beginning Of The Biennium.

Respondents misread Minn. Stat. § 16A.14, subdivision 4, by claiming that the Commissioner could not have allotted before "spending plans" were created by State agencies. See Respondents' Brief at 6, 20-21. Spending plans do not need to be submitted to the Commissioner until July 31. Minn. Stat. § 16A.14, subd. 3 (2008). However, Minnesota law does not prevent allotments from being made before a spending plan is in place. In fact, if particular State funds need to be available for expenditure at the beginning of the fiscal year, July 1, 2009 (as many do, including the MSA funding), an allotment needs to be in place at that time. Minn. Stat. § 16A.57 (2008) (providing that State money may not be spent without an allotment).[6]

Section 16A.14, subdivision 4, is merely part of a process involving the Minnesota Accounting and Procurement System ("MAPS"), *see* section 16A.14, subdivision 3 (stating that agencies must comply with the "requirements related to the policies and procedures of" MAPS), whereby the agency sets an allotment subject to the Commissioner's approval. If the Commissioner subsequently disapproves the allotment

[6] Respondents recognize in their Amended Complaint that funding for the MSA program is allotted at the beginning of the biennium (by July 1, 2009). Paragraph 115 of the Amended Complaint reads as follows: "Defendant Hanson's failure to *allot funds* up to the level of their appropriation *at the beginning of a biennium* pursuant to Minn. Stat. § 16A.14 violates his duty *to allot funds* as appropriated *at the beginning of a biennium*." A21 (emphasis added).

upon review of the agency's spending plan, he can then modify the allotment in accordance with section 16A.14, subdivision 4. This reflects a longstanding interpretation of the Commissioner and his predecessors that reconciles the provisions of section 16A.57 with section 16A.14. *See* Minn. Stat. § 645.26, subd. 1 (2008) (stating laws should be reconciled if possible to give meaning to all their respective provisions).

E. Appellants' Construction Of Section 16A.152 Prevents A Potential Shutdown Of State Government And Allows The Commissioner To Correct The Budget Deficit And Avoid A Financial Crisis.

Respondents and amici argue for a construction of the unallotment law that permits a potential shutdown of State government and renders the Commissioner unable to correct the budget deficit and avoid a financial crisis. Notwithstanding the explicit language of section 16A.152, they take great liberty to read into the law several alleged preconditions to the use of unallotment authority, such as the budget deficit must be small, unanticipated and occur near the end of the biennium. See Respondents' Brief at 10-11, 18-19; House's Br. at 9-13; Cities' Br. at 16-18.[7] No such preconditions exist in the statute. Although statutory construction principles provide some latitude in interpreting a law, the legal analysis of Respondents and amici improperly makes

[7] Some amici rely on Governor Stassen's Budget Message of February 1, 1939 to argue that the unallotment statute is limited in scope. See House's Br. at 15; Cities' Br. at 17-18. However, Governor Stassen's statement supports a contrary conclusion. He stated in his Budget Message that "[i]t should *also be mandatory* [for the commissioner] *to reduce allotments if revenues decrease* and to make regular reports to the public of the condition of the state finances." Budget Message at 6 (emphasis added), available at *http://archive.leg.state.mn.us/docs/2008/other/080624.pdf*. The language of the unallotment law is consistent with Governor Stassen's unqualified statement.

wholesale changes to the statutory language. *See, e.g., In re Welfare of J.M.*, 574 N.W.2d 717, 723 (Minn. 1998) ("Canons of statutory construction militate against reading into the statutory text a provision not already there."); *see also Van Asperen v. Darling Olds, Inc.*, 254 Minn. 62, 74, 93 N.W.2d 690, 698 (1958) (recognizing that in construing a statute "the legislature must be presumed to have understood the effect of its words and intended the entire statute to be effective and certain").[8]

As discussed in Appellants' Brief at 17-22, Appellants submit that the purpose of the statute, the constitutional mandate of a balanced budget,[9] the need to avoid the dire consequences of a government shutdown, the public interest, and the deference that

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[8] One of the amici contends that section 16A.152 should be narrowly construed. Cities' Br. at 10-13. However, there are longstanding legal principles such as the plain language doctrine and cannons of statutory construction that control the proper application of a statute. *See, e.g.,* Minn. Stat. § 645.16 (2008). None of these principles recognizes the narrow construction suggested by the amicus. The *Inter Faculty* case relied on by the amicus involved the construction of a constitutional provision, not the interpretation of a statute authorizing the executive branch to exercise its spending power to balance the State's budget in conformance with the constitutional mandate. *Inter Faculty Org. v. Carlson*, 478 N.W.2d 192, 194-95 (Minn. 1991). As the *Rukavina* case held, "[n]othing in the language of [section 16A.152] supports such a narrow construction and the authority to unallot from any prior transfer negates such a construction of the statute." *Rukavina v. Pawlenty,* 684 N.W.2d 525, 534 (Minn. Ct. App. 2004) (footnote omitted), *rev. denied* (Minn. Oct. 19, 2004). The constitutional provision that is relevant to construing the statute is the constitutional requirement of a balanced budget. This provision supports Appellants' construction of the law. See *infra* note 9.

[9] Respondents contend that their construction of section 16A.152 should prevail because otherwise the challenged unallotments and the statute would be unconstitutional. Respondents' Brief at 14. As discussed in Appellants' Brief at 22-29 and *infra* pp. 10-25, however, there is no merit to Respondents' constitutional argument. The constitutional consideration involved here is the constitutional requirement of a balanced budget, see Appellants' Brief at 6, 19, which supports Appellants' construction of the law.

should be given to the Commissioner's interpretation,[10] all support the Commissioner's use of the law. If an ambiguity exists, the statute should be construed to allow the government to continue to operate and the Commissioner to correct the budget deficit, avoid a financial crisis and comply with the constitutional requirement of a balanced budget.

F. Respondents' And Amici's Arguments Regarding The Governor's Interaction With The Legislature Do Not Render Section 16A.152 Inapplicable, But Rather Present Political Questions That Are Not Justiciable.

Respondents and amici take issue with the manner in which the Governor interacted with the Legislature. As discussed in Appellants' Brief at 29, the laws do not require the Governor to call a special session, veto appropriation bills or line-item veto any particular item of appropriation, or to agree with the Legislature to a balanced budget at the beginning of the biennium. Such arguments are therefore not a basis for ignoring the plain language of the statute or construing the law to preclude the Commissioner from correcting the State's budget deficit to avoid a financial crisis.

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[10] Based on misapplication of *In re Denial of Certification of the Variance Granted to Robert W. Hubbard,* 2010 WL 455278 (Minn. Feb. 11, 2010), Respondents and one amicus erroneously contend that the Commissioner's interpretation of section 16A.152 is not entitled to deference. See Respondents' Brief at 25; House's Br. at 16. Unlike *Hubbard*, 2010 WL 455278, at *3 n.4, the question in this case is not whether section 16A.152 gives the Commissioner any authority to unallot (it obviously does), but whether his exercise of that authority complies with the statute. As *Hubbard* recognizes, *id.,* deference is required in such a situation under *Geo. A. Hormel & Co. v. Asper,* 428 N.W.2d 47, 50 (Minn. 1988) (reiterating that "an agency's interpretation of the statutes it administers is entitled to deference and should be upheld, absent a finding that it is in conflict with the express purpose of the Act and the intention of the legislature").

These arguments are not even justiciable by the Court since they present political questions over which the Court lacks jurisdiction. *See, e.g., In re McConaughy*, 106 Minn. 392, 415, 119 N.W. 408, 417 (1909) (observing that the judiciary has no power to determine whether the Governor should have vetoed a bill or whether the Legislature should have passed a bill); *Brewer v. Burns*, 213 P.3d 671, 676 (Ariz. 2009) (recognizing that issues such as "whether the Legislature should include particular items in a budget or enact particular legislation" or "the Governor's decision whether to veto or approve a bill or the Legislature's decision whether to attempt an override" are clearly nonjusticiable political questions). To make such determinations would require the Court to act as the referee of a political dispute. *See Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710 (1962) (recognizing that an issue presents a nonjusticiable political question when there is "a lack of judicially discoverable and manageable standards for resolving it"). Such political questions are for the voters to resolve through elections.

II. SEPARATION OF POWERS HAS NOT BEEN VIOLATED.

In the district court, Respondents conceded that section 16A.152 does not violate separation of powers. Transcript at 11, 45. They nevertheless argued, as they do on appeal, that even if the statute authorizes the Commissioner to unallot, the unallotment violates separation of powers due to its timing. There is no basis for this apparent "as applied" challenge to section 16A.152. Respondents and two amici also argue on appeal that section 16A.152 is unconstitutional on its face because it does not contain an adequate standard to guide the Commissioner's unallotment authority. While this issue is not properly before the Court, the statute complies with applicable law.

A. There Is No "As Applied" Violation Of Separation Of Powers.

Respondents contend that the Commissioner violated separation of powers by unalloting at the beginning of the biennium. Respondents' Brief at 14, 26, 28. As discussed in Appellants' Brief at 28, it is the "nature of the power" delegated by the particular state law, *Lee v. Delmont,* 228 Minn. 101, 115, 36 N.W.2d 530, 539 (1949), not the timing of the exercise of that power, that controls whether purely legislative power has been delegated to the executive branch. The power to spend appropriated monies simply does not constitute purely legislative power. See Appellants' Brief at 24-28. Nor is the "manner" in which the power is exercised relevant to the separation of powers analysis. *Lee v. Delmont*, 228 Minn. at 115, 36 N.W.2d at 539. Therefore, the arguments of Respondents and amici regarding the Commissioner's particular unallotments, or when or why the Governor signed the appropriation bills, are not pertinent to whether purely legislative power was delegated to the Commissioner. See also *supra* pp. 9-10.

Respondents ignore the critically important distinction between the Legislature's power to appropriate funds and the executive branch's authority to spend and administer the State's budget. See Appellants' Brief at 24-28. In addition, Respondents' summary assertion that an unallotment is a veto, Respondents' Brief at 30, is just wrong. *See, e.g., University of Connecticut Chapter AAUP v. Governor,* 512 A.2d 152, 156 (Conn. 1986) (concluding that "a reduction of expenditures does not constitute a veto, or even have the effect of a veto" and explaining that "[a] reduction of an allotment is not a refusal to assent to an appropriations bill"). The Commissioner's compliance with section 16A.152

necessarily means that Respondents' "as applied" challenge has no merit. See Appellants' Brief at 22-28.

Similarly without substance is Respondents' new apparent "as applied" challenge to the standard for unallotment in section 16A.152. See Respondents' Brief at 35. If the statute is constitutional on its face, then it necessarily provides sufficient guidance to comply with separation of powers. *See, e.g., Rukavina*, 684 N.W.2d at 533-35 (reasoning that if an unallotment complies with section 16A.152, then there is no violation of separation of powers). Indeed, the requisite standard for separation of powers analysis is based on the "subject" of the authority delegated in the state law, *Anderson v. Commissioner of Highways,* 267 Minn. 308, 315, 126 N.W.2d 778, 782 (1964), not when the delegated authority is used or why the Governor signed the appropriation bills.

Even assuming *arguendo* that the "subject" of the legislative delegation somehow varies with the timing of the unallotment or the Governor's motive in signing the appropriation bills (which it does not), under Minnesota law the more complex the subject the more flexibility is necessary in the standard, if any standard is required at all. *See, e.g., Anderson,* 267 Minn. at 311-12, 126 N.W.2d at 780-81. Accordingly, even if an "as applied" challenge was possible, based on Respondents' contention any required standard for determining which allotments should be reduced would necessitate more flexibility, not less. Moreover, as discussed *supra* pp. 9-10, Respondents' assertions regarding the Governor's interaction with the Legislature present political questions that are not justiciable by the Court.

B. The Unallotment Statute Contains A Sufficient Standard That Complies With The Minnesota Constitution.

Respondents and one of the amici contend that the unallotment statute is unconstitutional because it does not contain a standard to guide the executive branch in reducing allotments to correct a budget deficit. See Respondents' Brief at 2, 13-14, 23, 35; Common Cause's Br. at 11-14. This issue is not a subject of the appeal in this case. As noted above and in Appellants' Brief at 1-2, 23, Respondents did not contest the facial constitutionality of the statute in the district court; in fact, they admitted that the statute is constitutional. Transcript at 11, 45; *Rubey v. Vannett,* 714 N.W.2d 417, 425 (Minn. 2006) (holding that an "argument was not raised in the district court and therefore is not properly before us"). In any event, the statute complies with applicable law.

1. A Statute Is Presumed To Be Constitutional.

Statutes are presumed constitutional and will be declared unconstitutional "with extreme caution and only when absolutely necessary." *State v. Tennin*, 674 N.W.2d 403, 407 (Minn. 2004) (quoting *State v. Larsen*, 650 N.W.2d 144, 147 (Minn. 2002)). To successfully challenge the constitutionality of a statute, the challenger "must overcome the heavy burden of showing beyond a reasonable doubt that the statute is unconstitutional." *Tennin*, 674 N.W.2d at 407 (citing *State v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990), *cert. denied*, 496 U.S. 931 (1990)).

2. The Court Liberally Permits Legislative Delegations To Facilitate The Administration Of State Laws.

Lee v. Delmont, 228 Minn. 101, 36 N.W.2d 530 (1949) and its progeny recognize that the Legislature may authorize others to do things that it might do itself. *Id.* at 112-

13, 36 N.W.2d at 538. Over the years, this Court has adopted a very liberal approach in permitting delegations by the Legislature. See Appellants' Brief at 23-24.

This liberality reflects a practical and realistic view of the "complexity of economic and governmental conditions" facing lawmakers and the corresponding need for administrative "flexibility" to carry out legislative enactments. *Anderson*, 267 Minn. at 312, 315, 126 N.W.2d at 781-82. So viewed, this Court has stated that discretionary power may be delegated if the law furnishes "a reasonably clear policy or standard to guide and control administrative officers." *City of Richfield v. Local No. 1215, Int'l Ass'n of Firefighters,* 276 N.W.2d 42, 45 (Minn. 1979). The policy or standard can be expressed in "very broad and general terms." *Lee v. Delmont,* 228 Minn. at 114, 36 N.W.2d at 539. The Court has also recognized that there are "exceptions" to this general rule where no specific standard is required because a standard could "straitjacket and interfere with the fair and efficient administration" of the law. *Anderson*, 267 Minn. at 311-12, 126 N.W.2d at 780-81.

Adequate standards guide the Commissioner's unallotment authority. In addition, the complex subject of management of the State's budget to correct a deficit, and in particular which allotments should be reduced to accomplish that purpose, is the very type of subject this Court recognized in the *Anderson* case as not requiring a specific standard.

3. The Unallotment Statute Furnishes A "Reasonably Clear Policy Or Standard."

As this Court has repeatedly stated, wide latitude in articulating a standard is permitted for a variety of practical reasons. Legislation must be "adapted to complex conditions involving a host of details with which the legislature cannot deal directly." *Lee v. Delmont*, 228 Minn. at 113, 36 N.W.2d at 539. A broad, flexible standard is therefore necessary because a rigid standard "could well destroy the administrative flexibility necessary to effectively carry out the legislative purpose" contemplated by the law. *State ex rel. Brown v. Johnson*, 255 Minn. 134, 140, 96 N.W.2d 9, 14 (1959). A flexible standard is also necessary in order to leave room for administrative officials to provide "expert analysis," *State v. King*, 257 N.W.2d 693, 697 (Minn. 1977), and to work out the "details," "particularly in a complex and fast-changing area." *Minnesota Energy & Econ. Dev. Auth. v. Printy*, 351 N.W.2d 319, 351 (Minn. 1984).

Some examples illustrate just how broad and general statutory standards can be under the Court's precedents. This Court has upheld, as containing a sufficient standard under the legislative delegation doctrine, statutes delegating authority to:

- the state board of optometry to determine what constitutes "unprofessional conduct," *Reyburn v. Minnesota State Bd. of Optometry*, 247 Minn. 520, 522-24, 78 N.W.2d 351, 354-55 (1956);
- the commissioner of highways to suspend the license of a "habitual violator of the traffic laws," *Anderson*, 267 Minn. at 311, 126 N.W.2d at 780;
- the fire department to determine the "lack of adequate exit facilities" or other "hazardous condition," *City of Minneapolis v. Krebes*, 303 Minn. 219, 220-24, 226 N.W.2d 617, 619-21 (1975);

- the commissioner of health to "determine if a significant health problem is presented by the use of building materials that emit formaldehyde gases," *Manufactured Housing Inst. v. Pettersen*, 347 N.W.2d 238, 241-43 (Minn. 1984).

The Court has also recognized that a standard of "in the public interest" can provide constitutionally sufficient guidance. *See Minnesota Energy & Econ. Auth.*, 351 N.W.2d at 349 n.10; *Lee v. Delmont*, 228 Minn. at 114 n.11, 36 N.W.2d at 539 n.11; *State ex rel. Interstate Air-Parts, Inc. v. Minneapolis-St. Paul Metro. Airports Comm'n*, 223 Minn. 175, 189-90, 25 N.W.2d 718, 727-28 (1947).

In this case, the unallotment statute provides multiple standards that satisfy constitutional scrutiny. Indeed, going far beyond what has been found to be sufficient in past cases, the unallotment statute specifically lays out *when* the unallotment authority may be invoked, and *how* the authority may be exercised.

The unallotment statute comes into effect only when 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." Minn. Stat. § 16A.152, subd. 4(a). These factual determinations trigger the Commissioner's authority to reduce the amount in the budget reserve account to correct a deficit. *Id.; see, e.g., King*, 257 N.W.2d at 697 (stating that the Legislature may "constitutionally authorize an administrative body to determine those facts that will make a statute effective"). Only if the budget reserve account is less than the deficit, is the Commissioner then authorized to unallot. Minn. Stat. § 16A.152, subd. 4(b).

Section 16A.152, subdivision 4(a) and (b), specify how the Commissioner may exercise his unallotment authority to, as subdivision 4(a) states, "balance expenditures with revenue." The Commissioner must "ma[k]e up" any additional deficit (after the budget reserve account is exhausted) "by reducing unexpended allotments of any prior appropriation or transfer," but only after obtaining the Governor's approval and consulting the Legislative Advisory Commission. *Id.*, subd. 4(a)-(b).[11]

In "reducing unexpended allotments," the Commissioner does not change the appropriated amount which can be spent if funding is subsequently restored as a result of economic circumstances or by legislative action *See* Minn. Stat. § 16A.011, subds. 3-4 (2008) (definitions of allotment and appropriation). The Commissioner also cannot use money appropriated for one purpose, for a different purpose. Minn. Stat. § 16A.139 (2008). The total amount of the unallotments cannot exceed the amount of the deficiency. Minn. Stat. § 16A.152, subd. 4(a)-(b). *See also New England Div. of American Cancer Soc'y v. Commissioner of Admin.* ("*New England*"), 769 N.E.2d 1248, 1257 (Mass. 2002) (in rejecting separation of powers challenge to Massachusetts unallotment law, court recognized and relied on restrictions on reducing appropriated amount and using appropriated funds for purpose other than provided for in the appropriation, and that total unallotments cannot exceed amount of deficit).

[11] The Commissioner must also give notice to four other legislative committees of any unallotments. *See* Minn. Stat. § 16A.152, subd. 6.

At all times when reducing allotments, the Commissioner may "consider" other sources of revenue available to recipients of State appropriations and may "apply" allotment reductions based on all sources of revenue available. Minn. Stat. § 16A.152, subd. 4(d). Likewise, the Commissioner must "reduce" allotments to an agency by the amount of any savings that can be made over previous spending plans through a reduction in prices or other cause. *Id.*, subd. 4(e). In addition, the Commissioner must act "in good faith" in making his allotment decisions. *See Kingsley v. Forsyth,* 192 Minn. 468, 472, 257 N.W. 95, 97 (1934) (stating that public official is presumed to perform his duties "in good faith according to his best judgment"); *see also* Minn. Const. art. V, § 3 (Governor must "take care that the laws be faithfully executed").

Section 16A.152 also does not apply to funding for the legislative and judicial branches. *See* Minn. Stat. § 16A.14, subd. 2a. Nor are certain aid payments to cities, the State's risk management fund, or unemployment benefits subject to unallotment because the Legislature specifically exempts those monies from section 16A.152. *See* Minn. Stat. § 477A.011, subd. 36(y)-(z) (2008) (city aid), § 16B.85, subd. 2(e) (2008) (risk management fund), and § 16A.14, subd. 2a(2) (unemployment benefits). *See also New England,* 769 N.E.2d at 1257 (recognizing that "the Legislature may pass 'conditions' to items in an appropriation bill, exempting the funds in question from allotment reductions").

The Commissioner's unallotment authority is guided by sufficient broad and general standards to carry out his administrative duties under section 16A.152. They provide the Commissioner with the "flexibility necessary to effectively carry out the

legislative purpose" of balancing expenditures with revenue and preventing deficits and financial crises. *Brown*, 255 Minn. at 140, 96 N.W.2d at 14. The unallotment statute meets, and exceeds, any minimum necessary standard.

Respondents erroneously suggest that the statute does not provide sufficient guidance to the Commissioner to determine whether revenue is less than anticipated. See Respondents' Brief at 23. Consistent with *Lee v. Delmont,* the statute contains a "broad and general" standard to provide the Commissioner with some flexibility in making this determination due to the varying facts and circumstances that could exist. *Lee v. Delmont,* 228 Minn. at 114, 36 N.W.2d at 539. In addition, there is no dispute that the Commissioner's immediately preceding forecast (in this case, the February 2009 forecast) is a proper benchmark of "anticipated" revenue. See Appellants' Brief at 13-14; *supra* note 2. Also without merit is any suggestion that the statute does not provide sufficient guidance as to how much the Commissioner can unallot. Section 16A.152, subdivision 4(b), expressly states that "[a]n additional deficit [after the budget reserve account is exhausted] shall . . . be made up by reducing unexpended allotments of any prior appropriation or transfer." Accordingly, the Commissioner is authorized to unallot to correct the entire budget deficit for the biennium. See *supra* p. 2. The statute certainly provides "reasonably clear" standards to invoke the Commissioner's unallotment authority.

Respondents also incorrectly contend that the Legislature did not provide sufficient guidance to determine which allotments should be reduced. Respondents' Brief at 35. As discussed above, see *supra* pp. 16-18, section 16A.152 and other

applicable law provide parameters to guide the Commissioner's determinations, but give the Commissioner flexibility to deal with this complex subject as permitted by the Court. This guidance suffices under *Lee v. Delmont* and its progeny. *See New England,* 769 N.E.2d at 1257 (recognizing adequate parameters exist within which Governor exercises unallotment authority to correct a budget deficit); *University of Connecticut,* 512 A.2d at 159 (concluding that as the Governor "deems necessary" is a "constitutionally sufficient" standard with respect to determining which allotments to reduce to prevent a budget deficit because the standard is as definite "as is reasonably practicable under the circumstances").[12]

Respondents and the amici cite to two cases which found laws allowing the executive branch in other states to reduce legislative appropriations to be unconstitutional, *State v. Fairbanks N. Star Borough,* 736 P.2d 1140 (Alaska 1987) and *Chiles v. Children A,B,C,D,E, & F,* 589 So.2d 260 (Fla. 1991). Their reliance on these cases is misplaced. Unlike section 16A.152, the statutes involved in *Fairbanks* and *Chiles* did not deal with the reduction of funds allotted by the executive branch, but rather authorized changes by the executive branch in the appropriations themselves. This distinction was critical in cases upholding unallotment statutes. *See, e.g., Rukavina,* 684 N.W.2d at 535; *New England,* 769 N.E.2d at 1256-57; *University of Connecticut,* 512

[12] The Connecticut unallotment statute limits reductions to no more than three percent of a fund and five percent of an appropriated account, but "deems necessary" was held sufficient to guide the Governor in the determination of which of the various allotments to reduce. *Id.*

A.2d at 158; *North Dakota Council of Sch. Adm'rs v. Sinner,* 458 N.W.2d 280, 286 (N.D. 1990); *Hunter v. State,* 865 A.2d 381, 392 (Vt. 2004). See also Appellants' Brief at 25-28.

Moreover, contrary to Minnesota law, both Alaska and Florida have adopted a very restrictive nondelegation doctrine and require far more stringent standards under their constitutions. *See Fairbanks,* 736 P.2d at 1143 (indicating that Alaska's nondelegation doctrine requires "explicit and detailed" standards and stating that the Alaska unallotment statute does not even "expressly require [the Governor] to limit his cuts to the extent of the shortfall"); *Chiles,* 589 So.2d at 266-68 (listing a history of cases in which the court had previously determined that Florida statutes provided "inadequate legislative direction" and stating that Florida's nondelegation doctrine requires "clearly established" guidelines that "can be directly followed" and "indicate which budgeting priorities to maintain or to cut").[13]

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[13] Respondents also wrongly assert that section 16A.152 is unconstitutional because it would allow the Governor to unallot all the funding for a program even after the Legislature had overridden the Governor's line-item veto of the appropriation for the program. See Respondents' Brief at 28, 38. Such a scenario is purely hypothetical and not before the Court. Neither the unallotments for MSA funding nor any of the Commissioner's other unallotments concern funding for which a line-item veto was over-ridden. *See also History of the Item Veto in Minnesota,* at pp. 16-17 (House Research Department, Dec. 2008) available at *www.house.leg.state.mn.us/hrd/topics.asp?topic=29* (noting that the only time the Legislature has ever overridden any line-item vetoes was in the 2000 legislative session). Moreover, the separation of powers analysis involves the generic power delegated by the Legislature, "not the liability of its abuse or the manner of its exercise." *Lee v. Delmont,* 228 Minn. at 115, 36 N.W.2d at 539. The assertion by Respondents also improperly assumes that a commissioner would exercise the unallotment authority in bad faith. *See, e.g., Kingsley,* 192 Minn. at 472, 257 N.W. at 97 ("A public official is entitled to the presumption that in the performance of his duties he

(Footnote Continued On Next Page)

Some of the arguments of Respondents and amici, including their reliance on *Fairbanks* and *Chiles*, simply do not reflect the legislative delegation jurisprudence developed by this Court over the last sixty years, since *Lee v. Delmont* was decided. They fail to apply the legal principles embodied in the Court's decisions and relied on by the Legislature in providing the executive branch with broad flexibility in the administration of state laws. *See, e.g., Anderson,* 267 Minn. at 314-15, 126 N.W.2d at 782. These arguments of Respondents and some amici, if accepted by this Court, could jeopardize the validity of many existing state statutes, including laws that have already been determined by this Court to be constitutional. The practical and liberal approach of this Court to legislative delegation is engrained in this Court's decisions and necessary to ensure the proper administration of state laws. *See, e.g., Brown,* 255 Minn. at 140, 96 N.W.2d at 14.

4. Alternatively, No Standard Is Required To Determine Which Allotments Should Be Reduced Because It Is Impracticable To Set A Specific Standard Given The Complexities Of The State Budget.

This Court has recognized that a constitutionally sufficient minimum standard is viewed on a spectrum — on one end, a broad and general standard is sufficient, while on the other end, no specific standard is required at all. "[W]hat is a sufficiently definite

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acts in good faith according to his best judgment."); *see also* Minn. Const. art. V, § 3 (Governor must "take care that the laws be faithfully executed").

declaration of policy and standard varies in degree according to the complexity of the subject to which the law is applicable." *Anderson*, 267 Minn. at 315, 126 N.W.2d at 782.

In *Anderson,* the Court stated that "[t]here are, however, exceptions and qualifications to the rule that a statute which vests discretion in a public official must prescribe precise rules of action." 267 Minn. at 311, 126 N.W.2d at 780. As the *Anderson* Court observed, "where it is impracticable to lay down a definite comprehensive rule . . . it is not essential that a specific prescribed standard be expressly stated in the legislation." 267 Minn. at 312, 126 N.W.2d at 781 (footnote omitted). "This is so because it is impossible for the legislature to deal directly with the many details in the varied and complex conditions on which it legislates, but must necessarily leave them to the reasonable discretion of administrative officers." *Id.* (footnote omitted).

Which funds should be unallotted to correct a budget deficit and prevent a financial crisis involves the very type of "varied and complex conditions" contemplated by the Court. *Anderson*, 267 Minn. at 312, 126 N.W.2d at 781. It would be "impracticable" for the Legislature to itemize all of the allotments the Commissioner can and cannot reduce. *Id.* Likewise, a meaningful general standard is impracticable considering all of the varying facts and circumstances that could exist at the time unallotment is necessary. Thus, the unallotment statute need not contain a specific prescribed standard. *Id.*

The *New England* case recognized the difficulty in providing a definitive standard for unallotment. In that decision, the court noted that the Massachusetts unallotment statute "contains no restrictions as to which allotments" can be reduced. *New England,*

769 N.E.2d at 1255 (footnote omitted). The plaintiffs in *New England* argued that the unallotment authority should be limited to pro rata allotment reductions, but the court noted uniform reductions "could produce arbitrary results." *Id.* at 1255 n.24.

In concluding that the Massachusetts unallotment statute was constitutional, the *New England* court described and relied on the appropriate balance struck by the legislative enactment of an unallotment law and the executive branch's power to spend:

> The over-all plan effects a *balance between the authority of the executive,* who is in charge of the day-to-day operations of a considerable sector of State government, and *the authority of the Legislature,* which generally has the final word in matters of the purse, and which *receives notice of the Governor's actions and has the ultimate right to undo anything done by her under the statute.*

Id. at 1257 (emphasis added). The practical approach exhibited by the *New England* court to legislative delegation is remarkably similar to the legal principles enunciated by this Court in *Lee v. Delmont* and its progeny.

In 1993, the Legislature enacted an unallotment provision to replenish the budget reserve account to the amount of $400 million. *See* Minnesota Session Laws 1993, 1st Sp. Sess., ch. 4, § 2. The provision authorized the commissioner (then the Commissioner of Finance) to reduce unexpended allotments for that purpose based on very specific criteria including, for example, "uniform[]" allotment reductions, subject to a maximum percentage of the appropriations, and the exclusion of a variety of State monies from the unallotment provision. *Id.* Accordingly, the Legislature knows of alternatives available to it in crafting an unallotment law. It consciously chose, however, to enact and thereafter retain a form of unallotment legislation in 16A.152 which provides the

Commissioner with flexibility in dealing with a budget deficit, preventing a financial crisis, and ensuring compliance with the constitutional mandate of a balanced budget.

Some amici discuss the impact of the Commissioner's unallotments on their constituents. See Cities' Br. at 6-8. There is no doubt that reductions in State expenditures to remedy the current financial crisis will have significant adverse impact on various State constituents. As the district court noted, however, the issue before the Court is not which expenditures should be reduced, but whether the Commissioner had the authority to resolve the current budget imbalance as he did. Add. 16. Appellants submit that the Commissioner, the appointee of the duly-elected Governor of the State, was authorized to make his unallotments in July 2009, including the unallotments of funding for the MSA-SD program, and is authorized to similarly unallot to correct the remaining $1.2 billion biennial deficit.

CONCLUSION

For the reasons stated herein and in Appellants' initial Brief, the Court should reverse the judgment of the district court.

Dated: March 2, 2010

Respectfully submitted,

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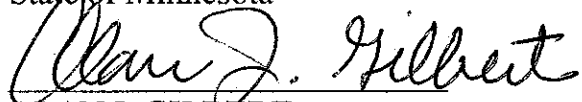

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with proportional font. The length of the brief is 6,976 words. This brief was prepared using Microsoft Word 2003, with 13-point Times New Roman font.

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