NO. A10-64

State of Minnesota
In Supreme Court

Deanna Brayton, et al.,

Respondents,

vs.

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

Appellants.

RESPONDENTS' BRIEF, ADDENDUM AND APPENDIX

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2010 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

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).

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LEGAL ISSUES

I. Did Appellants' unallotment of funding for the Minnesota Supplemental Aid-Special Diet program violate the plain meaning of Minn. Stat. § 16A.152?

This issue was raised in Respondents' amended complaint, in Respondents' motion for a temporary restraining order, in the parties' competing arguments on that motion, and in Appellants' motion to dismiss the amended complaint. Appellants' Appendix at A1-A-32; MNCIS Document Nos. 15-16, 18, 21, 23-24; Transcript of Nov. 16, 2009 Hearing. The district court ruled that this unallotment does not comply with the statute because the budget situation was neither unknown nor unanticipated. Appellants' Addendum at 12. The issue was preserved for appeal by the judgment entered on January 8, 2010. *Id.* At 19-24.

Molloy v. Meier, 679 N.W.2d 711 (Minn. 2004)
In re United Health Group Inc., 754 N.W.2d 544 (Minn. 2008)
Knopp v. Gutterman, 102 N.W.2d 689 (Minn. 1960)

Minn. Stat. § 16A.14
Minn. Stat. § 16A.152
Minn. Stat. § 645.08
Minn. Stat. § 645.17

II. Did Appellants' use of Minn. Stat. § 16A.152 to unallot the Minnesota Supplemental Aid-Special Diet program at the beginning of the biennium and when the budget situation was neither unknown or unanticipated violate the separation of powers provisions of the Minnesota Constitution?

This issue was raised and preserved for appeal in the same manner as the first issue. The district court ruled that the specific way in which the Governor exercised his unallotment authority trod upon the constitutional power of the Legislature and therefore violated the separation of powers doctrine of the Minnesota Constitution. Appellants' Addendum at 4.

Lee v. Delmont, 228 Minn. 101, 36 N.W.2d 530 (1949)
Inter Faculty Org. v. Carlson., 478 N.W.2d 192 (Minn. 1991)

Minn. Stat. § 16A.14
Minn. Stat. § 16A.152
Minn. Stat. § 645.08
Minn. Const. arts. III, IV, V, XI

III. Is Minn. Stat. § 16A.152 so vague or ambiguous that it violates the separation of powers provision of the Minnesota Constitution by delegating legislative authority to the executive branch?

This issue was raised by Appellants in their brief at 16-22. Respondents also raised this issue in their amended complaint. Appellants incorrectly state in their brief that Respondents admit the statute is constitutional. Appellants' Brief at 1, 2, 23. In fact, Appellants' choice not to argue the constitutionality of the statute in the context of a Motion for a Temporary Restraining Order was neither a concession nor waiver of their claim. The district court ruled that the constitutionality of the statute was determined by the Court of Appeals in *Rukavina v. Pawlenty,* 684 N.W.2d 525 and that it would be improper for the district court to revisit the constitutionality of the statute itself.

Alaska v. Fairbanks North Star Borough, 736 P.2d 1140 (Ala. 1987)
Childs v. Children A, B, C, D, E, and F, 589 So.2d 260 (Fla. 1991)
Hunter v. State, 177 VT 339, 805 A.2d 381 (2004)
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Minn. Stat. § 16A.152
Minn. Const. arts. III,IV, V, XI

STATEMENT OF THE FACTS

A. The Role of the Executive Branch in Developing and Implementing the State's Budget.

The creation of a biennial budget under Minnesota law is intended to be a structured process requiring input and participation by both the executive and legislative branches. The process begins with the Commissioner of Management and Budget who is required to prepare a series of forecasts of revenues and expenditures. Minn. Stat. § 16A.103, subd. 1 (2008).

The budget decisions that are at issue in the present litigation were made by the Governor and Legislature in May and June, 2009. Consequently, the material facts related to the present litigation involve the budget projections available to the legislative and executive branches in the months immediately before May and June 2009, when budget decisions were being made.

The basic numbers available to both the legislative and executive branches during deliberations concerning the 2010/2011 biennial budget were provided by the Commissioner of Management and Budget in his February 2009 budget forecast. *See* Appellants' Appendix ("A") at A51-62. Under this February forecast, the probable receipts for the general fund in the coming 2010-2011 biennium were anticipated to be $30.7 billion. *Id.* Based on these anticipated receipts, the February 2009 forecast predicted a 2010-2011deficit of $4.570 billion.[1] *Id.* (A comparable deficit ($4.847

[1] The February 2009 forecast projected a $236 million dollar balance for the end of the 2008-2009 biennium. Numbers from March and April 2009 later showed a decline in actual revenues of about $46 million. This reduction lowered the projected balance from

billion) had previously been anticipated in the November 2008 forecast.) A38-50. On March 17, 2009, the Governor submitted to the Legislature a revised budget which again recognized the deficit projected in the February forecast. *See* Respondents' Appendix ("RA") at RA4-22.

Based upon the existing public record, the following facts are established. At the beginning May of 2009, the probable receipts for the general fund in the coming 2010-2011 biennium were anticipated to be $30.7 billion. A51-62. Given $30.7 billion in anticipated receipts for the coming biennium, both the legislative and executive branches understood that the state faced a potential budget deficit in excess of $4.57 billion. A51-62.

In May of 2009, the Legislature presented its biennial budget to the Governor through the submission of a series of appropriation and revenue bills. Cuts were made by the Legislature in an attempt to reduce the projected deficit. In May, Governor Pawlenty signed each of the appropriations bills passed by the Legislature. *See* 2009 Minn. Laws at 134, 168, 542, 690, 1024, 1315, 1353, 1427, 1475, 1654, 1873, 1996 and 2446. These bills included H.F. No. 1362 (ch. 79), the Omnibus Health and Human Services bill which included the appropriation for the Minnesota Supplement Aid (MSA) special diet program. 2009 Minn. Laws 991.

In a letter dated May 14, 2009, Governor Tim Pawlenty notified the Speaker of the House that he signed H.F. 1362 (subject to a line-item veto involving General Assistance

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2009 and therefore increased the projected deficit in the coming biennium. A63-66. This potential increase in the deficit, however, was unrelated to the anticipated receipts for the coming biennium, which remained projected at $30.7 billion.

Medical Care). In this letter, he also announced "related, anticipated unallotments." *See*, Respondents' Addendum ("R. Add.)at 1-2. On the same day that the appropriations were signed into law, the Governor announced his intention to unallot. R. Add. 1-2. On May 14, 2009, when the Governor announced anticipated unallotments, the anticipated receipts for the general fund remained as in the February forecast, projected at $30.7 billion. A51-62.

Based upon the anticipated receipts for the coming biennium as understood on May 14, 2009 (i.e. $30.7 billion), the Legislature passed and the Governor signed into law appropriations that exceeded the state's projected revenues by approximately 2.7 billion. R. Add. 1-2. At this point, the Legislature and the Governor had enacted laws that created a potential deficit. On May 14, this potential deficit of $2.7 billion was known and anticipated.

On May 18, 2009, the Legislature then passed and submitted to the Governor HF 2323 (Chapter 179), a bill that increased taxes and delayed some expenditures by approximately $2.7 billion. *Journal of the House 2009 Supplement*, at 7481, available at: http://www.house.leg.state.mn.us/cco/journals/2009-10/Jsupp2009.htm#7481. This bill contained provisions for the increased revenue that would cover the appropriations already signed into law by Governor Pawlenty. It thereby produced a balanced budget from the Legislature for the 2010/2011 biennium.

On May 21, 2009, after allowing the legislative session to end, the Governor vetoed the May 18 revenue bill, HF 2323. RA28. In doing so, the Governor chose not to resolve through the legislative process the projected deficit of approximately $2.7 billion

created on May 14. Fiscal Analysis Department, Minnesota House of Representatives, *Chapter 179 (HF 2323/SF 2074) Conference Committee Report May 18, 2009 - - Vetoed* (showing a $2.7 billion deficit under the enacted budget bills and a $3,625 balance if H.F. 2323 had been enacted into law, rather than vetoed), available at: http://www.house.leg.state.mn.us/fiscal/files/tax09.pdf. The Governor's veto of this bill resulted in the legislative session ending without a balanced budget. No special session was called.

When the legislative session ended in May of 2009, the anticipated revenue for the 2010-2011 biennium remained projected, as it had been in February, at $30.7 billion. The projected deficit of $2.7 billion, and the unallotment promised in the Governor's May 14 letter were unrelated to any change in the probable receipts for the general fund for the coming biennium.

Once a budget is developed by the Legislature and signed into law by the Governor, it is the responsibility of the executive branch to implement that budget. Minn. Const. Art. § 3, Minn. Stat. § 16A.055 (2008). The Commissioner of Management and Budget is required to set allotments consistent with the legislative appropriations. Minn. Stat. § 16A.14 (2008), R. Add. 3. This is accomplished by first having each agency submit spending plans for the next allotment period certifying, among other things, that the amounts requested are consistent with legislative intent. Minn. Stat. § 16A.14, subd. 3 (2008), R. Add. 3. The Commissioner must then verify and approve that spending plans are within the amount and purpose of the appropriation. Minn. Stat. § 16A.14, subd. 4 (2008), R. Add. 4. Then, and only then, is the allotment established.

On May 14, 2009, as noted above, Governor Pawlenty announced in a letter to the Speaker of the House that he would use unallotment to balance the budget. R. Add. 1-2. He did this before any spending plans could have been presented and before any allotments could be approved for the legislative appropriations.

B. Unallotments by the Executive Branch for the 2010-2011 Biennium.

Immediately following the conclusion of the legislative session, the Governor and Commissioner Hanson took steps to implement the Governor's May 14, 2009, announcement that he would use unallotment. By the unilateral action of unallotment, rather than by line-item veto or by legislation in a special session, the Governor decided the manner in which the budget would be balanced.

Here is the manner in which the Governor sought to justify the use of unallotment: On June 4, 2009, Commissioner Hanson sent Governor Pawlenty a letter stating that the State's revenues were not going to be sufficient to support the spending authorized for the 2010/2011 biennium. Add. 5-6. Commissioner Hanson then did a comparison. He looked at his November 2008 forecast and compared it to his February 2009 forecast. Add. 5. He did not mention that both the Governor and the Legislature had relied only on the February 2009 forecast in forming the legislation passed or vetoed in May, 2009. Add. 5-6. Instead, the Commissioner reported that the revenues in the February 2009 forecast were less than he had anticipated in the forecast of November 2008.[2] Add. 5.

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[2] He also mentions a $70 million decline in 2009 revenues from amounts projected. Add. 5. As mentioned in footnote 1, such a reduction in revenue would reduce the projected balance from 2008-2009 below the $236 million projected as of February 2009. While a lower balance from 2009 would add to the deficit, it is not related to probable

Based on the public record, it is beyond dispute that Governor Pawlenty and the Legislature were both fully aware that $30.7 billion was the estimate of revenue upon which both the enacted budget and unallotment were based. These revenue estimates were published by the Minnesota Department of Management and Budget (MMB) in its February forecast. MMB, *February Forecast* (February 2009). A51-62. The February forecast showed $30,700 million in "current resources." MMB, *General Fund, Fund Balance Analysis, February 2009 Forecast* (March 3, 2009), p. 1, row titled "Subtotal current resources" and column titled "2-09 Fcst FY 2010-11". Ex. 1 to Marx Affidavit.[3] RA56-72. This is in fact the same number acknowledged by Commissioner Hanson in his June 4, 2010 letter to Governor Pawlenty. Add. 5

Nevertheless, having justified unallotment by comparing projections of November 2008 with projections of February 2009, Commissioner Hanson then recommended reductions to thirty-eight separate state expenditures. A69-79. Many of these reductions amounted to a complete elimination of funding for the programs chosen. A69-79. At least seventeen of the proposed reductions were scheduled to go into effect on the very first day of the biennium, July 1, 2009. A69-67. Another seven programs would be unallotted during the first year of the biennium. A69-79. The MSA special diet (MSA-SD) program was slated for unallotment on November 1, 2009. A76. Of the twenty-four

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receipts for 2010-2011. From February 2009 through June 2009, probable receipts remained projected at $30.7 billion.

[3] Note: Cited MMB documents state numbers in thousands of dollars. They are rounded here to millions of dollars.

programs to be unallotted during the first year of the biennium, only two were scheduled to take effect after the start of the next legislative session. A69-79.

C. Unallotments of Funding for the MSA-SD Program

The unallotments formally announced on June 16, 2009 included the elimination of funding for the MSA-SD program for the entire biennium. A69-79. Funding for the MSA program was included by the Legislature as part of the Omnibus Health and Human Services bill. 2009 Minn. Laws at 991. The entire MSA program was funded through a single appropriation, without division for the basic needs grant or any of the various special needs payments.

Appellants, as they did with the specific elimination of the MSA-SD program, repeatedly used the unallotment process to implement the Governor's view of proper spending priorities. In numerous cases, Appellants effected funding reductions for programs through unallotment in exactly the same manner that the Governor had originally tried to achieve in unsuccessful budget proposals to the Legislature.[4] Through unallotment the Governor unilaterally implemented legislative proposals that were specifically rejected by the Legislature.

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[4] For example the Governor's unallotment to the Renter Property Tax Refund Program exactly mirrored his earlier budget proposal. The Governor proposed in his budget that the program benefits be reduced by reducing the statutorily prescribed percentage of rent constituting property tax from 19% to 15%. Governor's Budget Recommendation, Fiscal Years 2010-2011, Tax Policy, Aid and Credits p. 17, available at http://www.mmb.state.mn.us/doc/budget/narratives/gov09/tax-policy. The Legislature rejected this recommendation. HF 1136 was introduced to amend the statute in this way. The bill failed to move out of committee. *See* https://www.revisor.mn.gov/revisor/pages/search_status/status_detail.php?b=House&f=HF1136&ssn=0&y=2009.

INTRODUCTION

A. Minn. Stat. § 16A.152 subd. 4 Authorizes the Commissioner of Management and Budget (MMB) and the Governor to Reduce Spending if and Only if Specified Conditions are Met. In June 2009, Appellants Exceeded the Authority Given by This Statute.

Appellants argue that this case should be resolved based upon a plain reading of Stat. § 16A.152 subd. 4. Respondents agree. However, Appellants' interpretation of the statute both ignores and subverts its plain meaning.

On May 14, 2009, the Governor announced he would use the unallotment statute to balance the budget. R. Add. 1-2. At that time, and throughout June when the unallotments were identified and later applied, the Governor knew that there would be a shortfall for the next [2010/2011] biennium. Did this shortfall exist because probable receipts for the next biennium were going to be ***less than anticipated***? No. Throughout May and June of 2009, the probable receipts were forecasted to be $30.7 billion. This is the amount set by Appellant Hanson in the February 2009 forecast. This is the amount that formed the basis for the Legislature's and for the Governor's own budget proposals—the probable receipts were anticipated and known.

Throughout their brief, Appellants discuss the Governor's authority or power to reduce a budget shortfall. In each instance, they fail to mention that this authority is limited. It only exists if the shortfall is "unanticipated." Appellants have no statutory authority to reduce allotments simply because the Governor decides to sign into law appropriations when he clearly knew that the appropriations exceeded anticipated revenues by $2.7 billion. This is precisely what occurred on May 14, 2009. On this

date, the Governor was aware of the revenues that were projected to be available for the biennium ($30.7 billion) and nevertheless chose to sign into law appropriation bills that exceeded the anticipated revenues.

If the Governor was not willing to sign a revenue bill to fund the appropriation bills presented to him in May, then the only options available to him under the Minnesota Constitution to reach a balanced budget for the next biennium were to veto one or more appropriation bills outright, or to use the line-item veto to reduce individual items of appropriations, or to call a special session. There is no Minnesota statute that gives him the authority to rewrite the budget or to otherwise reorder legislative spending priorities or to amend statutory language.

Appellants argue that the district court failed to apply or analyze the language of the statute and that the district court misconstrued the statute by considering the timing of the Governor's actions. However, the court's order clearly applied the statute to the facts of this case. After considering the facts, the district court concluded that the "[Governor] used the unallotment statute to address a situation that was *neither unknown nor unanticipated* when the appropriation bills became law." Add. 12 (emphasis added). This is precisely the legal analysis required by the law, because the express language of the statute requires a temporal interpretation in two places. The statute requires both that receipts be "less than anticipated" and that there be insufficient funds "for the remainder of the biennium."

In order to compare whether receipts are less than anticipated, there must be a starting reference point or baseline for receipts and revenues. For the 2010/2011 budget, that baseline is the one used by both Appellants and the Legislature when creating the budget – the February 2009 forecast. *See* Amicus Curiae Brief from the House to the District court, RA120, 128, and Ex. 2 to Marx Affidavit. RA73-91. *See also* Appellants' Brief at 13. That the budget did not balance is not because receipts or revenues were less than anticipated. They were known and for the most part unchanged throughout the process.[5] The budget did not balance because the Governor signed all of the appropriation bills without using the line-item veto to eliminate sufficient portions to achieve a balanced budget, and then chose not to sign the revenue bill passed by the Legislature to pay for the appropriations he signed into law.

The statute's second requirement that funds be less than needed for the "remainder of the biennium" also requires a temporal interpretation. In order to have a remainder, some portion of the biennium – a period of time – must have already passed. When the Governor announced on May 14, 2009 that he would use unallotment to balance the budget no part of the biennium had passed.

[5] There was a slight reduction in revenues between the February 2009 forecast and May of 2009 as evidenced by the April update; however, a reduction of $.07 billion ($70 million) in the projected FY 2009 balance cannot justify unallotments totaling 2.7 billion dollars. Moreover, this decline was in fact anticipated and known in May when the Governor signed the Health and Human Services appropriations bill into law. A63-66.

B. If the Unallotment Statute is Ambiguous or Otherwise Interpreted to Permit Appellants' Unallotments, Then the Statute is Unconstitutional.

Appellants also argue that if the Court deems the statute ambiguous then factors weigh in favor of their interpretation of the statute. However, Appellants fail to address the fundamental problem created by this argument. A statute delegating legislative authority to reduce appropriations must be clear. *Lee v. Delmont*, 36 N.W.2d 530, 538 (Minn. 1949). *See also City of Richfield v. Local No. 1215, Int'l Ass'n. of Fire Fighters*, 276 N.W.2d 42, 45 (Minn. 1979) If the unallotment statute is at all ambiguous then it is constitutionally infirm.

Appellants and the Amici Professors assert that Respondents admitted that the unallotment statute is constitutional. This is simply not true. This case is now before the Court following the district court's order granting Respondents' request for a temporary restraining order. In order to obtain a temporary restraining order, Respondents had to demonstrate a likelihood of success on the merits. Respondents raised the constitutionality of the statute in both their complaint and the brief in support of their motion. However, at the outset of the hearing on Respondents' motion, the district court stated that as a result of the Court of Appeals ruling in *Rukavina v. Pawlenty*, 684 N.W.2d 525 (Minn. Ct. App. 2004) – a ruling the District court was required to follow – the statute is constitutional. Transcript at 8. Given the need to demonstrate a likelihood of success on the merits, Respondents simply clarified at the hearing that they were not there to argue the constitutionality of the statute. Transcript at 6, 45. This choice of

arguments at a Temporary Restraining Order hearing is a far cry from an admission that the statute is constitutional.

Respondents' position remains the same as argued in their memorandum in support of their Temporary Restraining Order. A ruling in this case does not have to reach constitutional questions because the statute is clear. Because probable receipts and revenues for the 2010/2011 biennium were known, Appellants had no authority to reduce allotments. However, in the event the Court determines that the language of the statute does permit Appellants to reduce allotments under the facts now before the Court, then both the Governor's use of the statute and the statute itself is an unconstitutional violation of the Separation of Powers doctrine.[6]

ARGUMENT

I. APPELLANTS MISREAD BOTH MINN. STAT. § 16A.152 AND THE RULING IN *RUKAVINA V. PAWLENTY* WHEN THEY CLAIM AUTHORITY TO REDUCE AN ITEM OF APPROPRIATION PRIOR TO THE START OF A NEW FISCAL BIENNIUM.

The budgeting system that we have in Minnesota is straightforward. Finances are handled in a biennium, a two-year cycle. The revenues and expenditures for the two-year fiscal cycle are to balance.[7] Pursuant to the Minnesota Constitution, it is the duty of both

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[6] Because the Trial Court was compelled to follow the Court of Appeals holding in *Rukavina*, only the first of these issues (i.e. The Governor's inappropriate use of the statute) is raised by the district court's decision in this appeal, however this Court can address the latter issue (i.e. the statute itself is unconstitutionally vague) if the interest of justice so require. Minn. R. Civ. App. Pro. 103.04 (2009).

[7] Prior to 1973, the budget was to be brought into balance every quarter (three months). It was under this quarterly budget balancing requirement that Governor Stassen first cited a need for what was later enacted as the unallotment statute. In 1973, the time period was extended to one year. Since 1981, the requirement to balance the budget is applied to the

the Legislature – the branch that passes our spending and revenue laws – and the Governor, who signs appropriation and revenue bills after they are presented to him – to balance the budget. Minn. Const. art. XI, § 6. The Governor asks the Court to ignore his primary constitutional duty to sign into law revenue and appropriation bills achieving a balanced budget in the first place, and then to authorize him effectively to enact his own spending priorities (which were not achieved through the legislative process) through use of the allotment reduction statute. The result of the Governor's request is to ask the Court to ratify his ability wholly to disregard the Legislature's constitutional role in setting the state's spending priorities in order to replace them with those of the executive branch.

A. Appellants Have no Authority to Reduce Allotments Unless There is an Unanticipated Shortfall in Receipts and Revenues During a Biennium.

The authority to reduce allotments, or "unallot," is set forth in Minn. Stat. § 16A.152 subd. 4 (the "unallotment statute"). Among other things, it provides:

- (a) 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 . . . reduce the amount in the budget reserve account as needed to balance expenditures with the revenue (emphasis added).

- (b) An additional deficit shall . . . be made up by reducing unexpended allotments of any prior appropriation or transfer. The commissioner is empowered to defer or suspend prior statutorily created obligations which would prevent effecting such reductions.

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biennium. The extension of time provides the State with a longer period during which it can recover from unanticipated fiscal problems. RA37-52 (Legislative History of Unallotment Power).

The unallotment statute cannot be used unless certain conditions are met to trigger the application of the statute. There must be a decrease in "probable receipts" so that the receipts become "less than anticipated." If this unanticipated decline in receipts caused a shortfall for "the remainder of the biennium," the authority to unallot is conferred. Absent these triggers, there is no authority to unallot conferred by the statute.

B. Appellants Deviated From the Law.

What occurred in 2008 and 2009? The following chronology traces the relevant events as they pertain to the Governor's unallotments[8]:

November, 2008	Commissioner of Management and Budget forecasts a deficit of $4.847 billion **based upon anticipated receipts** of $31.866 billion. A38-39.
January, 2009	Governor submits a proposed budget **with anticipated receipts** of $34.221 billion. RA6.
February, 2009	Commissioner provides a revised forecast – still reflecting a deficit of $4.847 billion **based upon anticipated receipts** of $30.700 billion. A54
March, 2009	Governor submits a revised budget **with anticipated receipts** of $29.905 billion. RA26.
April, 2009	The Department of Management and Budget issues an economic update showing that receipts for March and April of 2009 were $46 million less than projected in the February forecast. A63.
May 11, 2009	Legislature passes and sends HF 1362, the Health and Human Services appropriations bill to the Governor for approval.

[8] This chronology is focused on the unallotment of the MSA-Special Diet program, but it is equally applicable to the unallotment of the Renter Property Tax Refund program and other allotment reductions by considering the dates that the other appropriations bills were passed, presented and signed into law by the Governor between May 4 and May 21, 2009.

May 14, 2009	the Governor signs HF 1362 into law, with one item subject to a line-item veto. R. Add. 1-2.
May 14, 2009	Governor announces that he will use the unallotment statute to balance the budget. R. Add. 1-2.
May 18, 2009	Legislature passes HF 2323, the revenue bill which would have resulted in a balanced budget, and sends it to the Governor for approval.
May 21, 2009	Governor vetoes the revenue bill. RA28.
June 16, 2009	Governor announces allotment reductions, including the reductions at issue in this litigation. A69-79.
July 1, 2009	Biennium begins.

When in the course of these events did the probable receipts for the general fund become "less than anticipated"? The answer is "Never."

Prior to the enactment of any appropriation and prior to the veto of any revenue bill, everyone involved in the process knew that revenues were projected to be $30.7 billion. The Governor's own proposals, as well as the bills enacted by the Legislature relied on this forecast. There was nothing unknown, and there was nothing unanticipated. Appellants were fully aware of the projected receipts available for spending in the 2010/2011 biennium.

When in the course of these events did the Governor become authorized to use "unallotment" authority granted by statute? The answer is "Never."

C. The Plain Language of the Statute Controls the Outcome of This Case.

When interpreting a statute, the court first looks to the plain language of the statute. *Munger v. State*, 749 N.W.2d 335, 338 (Minn. 2008). If the meaning of the statute is unambiguous, it is interpreted according to its plain language. *Molloy v. Meier*, 679 N.W.2d 711, 723 (Minn. 2004). The statutory triggers for the use of unallotment authority have never been met. The Governor's actions are not an attempt to adjust expenditures "for the remainder of the biennium" on the grounds that the projected "probable receipts for the general fund will be *less than anticipated.*" The Governor's actions are not authorized by law.

1. It is Appellants and not the District Court that Read Language Into the Statute

Appellants argue that the district court read language into the unallotment statute—a temporal limitation. This misstates the district court's opinion. The district court construed the statute according to its plain language. Statutory construction requires that legislative intent controls and that every law shall be construed, if possible, to give effect to all its provisions. Minn. Stat. § 645.16 (2008). A statute is to be construed "as a whole so as to harmonize and give effect to all its parts, and where possible, no word, phrase, or sentence will be held superfluous, void, or insignificant." *In re United Health Group Inc.,* 754 N.W.2d 544, 563 (Minn. 2008).

Appellants repeatedly omit the words "less than anticipated" when discussing the language of the unallotment statute or the power it conveys to the executive. The statute does not convey the authority to prevent all budget deficits to the Governor, only those that are unanticipated. The district court correctly applied this standard when it stated

that the Governor used the unallotment statute to address a situation that was "neither unknown nor *unanticipated.*" Add. 12. The district court was also correct when it stated that the authority to unallot is intended to save the state in time of a "*previously unforeseen*" budget crisis. Add. 12. The unallotment statute is triggered only when probable receipts are "less than anticipated." Consequently, determining whether the statute is being properly applied requires a court to consider what was known or unknown, anticipated or unanticipated.

The canons of construction also dictate that words and phrases are construed according to their common approved usage. Minn. Stat. § 645.08 (2008). The unallotment statute has two phrases joined by the conjunction "and". As a result, these two phrases must be read together to understand when reductions can occur. The Commissioner must determine 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. In addition to ignoring whether receipts were less than anticipated - they were not - Appellants also fail to address the necessary meaning the Court must give to the qualifying language in the second part of the statute – "for the remainder of the biennium."

Probable receipts and the amount available are two sides of the same coin. The receipts generate the revenue. But the inclusion of the word "remainder" in the phrase "for the remainder of the biennium" has to be given some meaning. Words are to be construed according to their common meaning. Minn. Stat. § 645.08(1) (2008). A remainder is only part of the whole. This provision makes little sense unless the use of

the statute is restricted to those situations where a budget shortfall – anticipated receipts and the amount available – is discovered after the biennium begins. Appellants' interpretation of the statute renders the word "remainder" superfluous. For Appellants' arguments to prevail, the Court must substitute the phrase "next biennium,"[9] for the actual statutory phrase "remainder of the biennium." Respondents, on the other hand, are simply asking the Court to read the statute in its entirety, giving effect to all of its words and provisions. In so doing, this Court should affirm the decision of the district court.

2. The Unallotment Statute Must be Read in Conjunction With the Other Provisions of Minnesota Statutes Chapter 16A

In addition to the plain language of the unallotment statute —limiting its application to situations where there truly is an unanticipated shortfall—there are statutory provisions that must be followed before the Commissioner can make an allotment. It necessarily follows that these conditions must be met **before** the Commissioner can make an unallotment. *See e.g., Knopp v.Gutterman,* 102 N.W.2d 689, 641 (Minn. 1960) ("In construing a legislative act, a section thereof is not to be considered apart from other sections of the act, but the act is to be read and construed as a whole.") (citations omitted).

Before the Commissioner can make an allotment, agencies must first submit spending plans for the next allotment period. These spending plans must *certify*, among other things, *that the amounts requested are consistent with legislative intent*, Minn. Stat. § 16A.14 subd.

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[9] This is in essence what Appellant Hanson inserted by adding "[2010-2011]" between the words "remainder of the" and "biennium" in his letter dated June 4, 2009, to announce that reduction in allotments would be necessary to balance the budget. Add. 5

3 (2008). The level of an appropriation demonstrates the legislative intent. Following this, the Commissioner *must* approve spending plans if they are within the amount and purpose of the appropriation. Minn. Stat. § 16A.14 subd. 4 (2008)., R. Add. 3-4.

These conditions further support an interpretation that the Legislature did not intend the statute permitting a reduction in allotments to be available for use by Appellants as an initial budget balancing tool. Considering these additional relevant provisions of the law lends added support to Respondents' analysis of whether and when allotments can legally be reduced. Minn. Stat. §§ 645.16, 645.17 (2008).

The legislative appropriation for the Health and Human Services budget embodied the legislative *intent to fund all of the programs* included within it including a decision by the Legislature to fund the MSA special diet program. It was signed into law by the Governor on May 14, 2009. On that same day, Governor Pawlenty announced that he would use the unallotment statute to balance the budget. He did this before any spending plans certifying that they are consistent with legislative intent could have been presented, and before any allotments could be approved for the appropriation. Indeed, the Department of Human Services could not certify that a spending plan would be consistent with legislative intent if it did not contain any funding for the special diet program and the Commissioner could not approve such a plan. It defies logic to suggest that these other provisions contained within Chapter 16A can and should be ignored when considering whether the preconditions in the unallotment statute may be triggered.

The fact that there must first be spending plans certifying compliance with legislative intent also lends support to the meaning of the phrase "for the remainder of the

biennium." Minn. Stat. § 16A.152 subd. 4 cannot be interpreted to apply before a biennium begins and where there has been no initial allotment that follows the requirements of Minn. Stat. § 16A.14. R. Add. 3-4.

3. Appellants' Interpretation of the Statute Leads to an Absurd or Unreasonable Result.

Courts "are not to assume that the Legislature will engage in a futile act nor attribute to it an intent to bring about an absurd or unreasonable result." *Knopp,* 102 N.W.2d at 695. "A construction of a statute which will lead to an impracticable and absurd result is to be avoided if the language used will reasonably bear any other construction." *Id.*

According to Appellants' logic, as set forth in Commissioner Hanson's June 4, 2009 letter justifying unallotment, the decline in projected revenues from the Commissioner's November 2008 forecast to his February 2009 forecast was "unanticipated" and therefore sufficient to confer on the Governor the statutory power to unallot. In this view of the law, nothing that occurs after February 2009 is of legal significance. After the February forecast, the Governor can sign any appropriation bill and can veto any revenue bill; then, having enacted into law a budget deficit, the Governor can implement his legislative priorities by use of unallotment. Appellants' logic leads to this absurd result.

The "trigger" for the use of unallotment power under this interpretation was pulled in February, before the Governor submitted his revised proposed budget to the Legislature, before the Legislature passed any of its appropriation bills for the next

biennium and before the Governor signed those bills into law—in sum, before any shortfall in the budget occurred. If this reading of the statute does not render it and the Governor's actions unconstitutional, it is difficult to imagine what would.

4. If the Unallotment Statute is Ambiguous Then it is an Unconstitutional Delegation of Legislative Power, and There is Nothing for the Court to Construe.

Appellants argue that if the statute is deemed to be ambiguous, then the Court may construe the statute by considering other factors. The flaw in this argument is that the unallotment statute involves a delegation of legislative power. Such a delegation can be made only if the law provides a "reasonably clear policy or standard of action which controls administrative officers in ascertaining the operative facts." *Lee v. Delmont*, 36 N.W.2d 530, 538 (Minn. 1949). *See also City of Richfield v. Local No. 1215, Int'l Ass'n of Fire Fighters*, 276 N.W.2d 42, 45 (Minn. 1979) ("where the law embodies a reasonably clear policy or standard to guide and control administrative officers...then the delegation of power will be constitutional.").

If the statute is at all ambiguous, then it fails the critical requirement of providing clear policies or standards of action. As a result, the statute would be unconstitutional and there is nothing for the Court to construe.

a. The Purpose of the Unallotment Statute is Limited to Addressing Unanticipated Budget Deficits.

Appellants argue that the purpose of the unallotment statute is to "prevent budget deficits and avert financial crises." Appellants' Brief at 17. What Appellants neglect to mention is that the purpose of the statute does not apply to all budget deficits. Rather, its

purpose is aimed only at addressing **unanticipated** budget deficits. Appellants also claim that the purpose is to prevent financial crises. However, this sweeping statement fails to consider that the current crisis was caused by the Governor's own actions when he knowingly signed into law appropriation bills that exceeded the anticipated revenues for the 2010-2011 biennium. Appellants cannot create a financial crisis and use that as a rationale to interpret the statute in their favor.

b. Appellants' Arguments of a Potential Government Shutdown are Speculative and Without Merit.

Appellants assert that the Commissioner's interpretation avoids grave consequences – a potential government shutdown – and that Respondents' interpretation does not. This completely ignores that the dire situation predicted—should it come to pass—is both avoidable **and** the direct result of actions taken by Appellants. By failing to take any one of several options available to obtain a balanced budget, the Governor created the very situation he then used the unallotment statute to correct. Now he asks the Court to sanction his use of that statute because the consequences of not doing so will leave the state with the situation he created.

Appellants' argument also ignores the fact that Appellants have other possible solutions at hand. Appellants can work with the currently sitting Legislature to reach agreement on additional reductions in spending or increased revenues necessary to pay for the appropriation bills the Governor signed into law. And if an agreement cannot be reached by the end of the legislative session, the Governor has the constitutional authority to call a special session in order to balance the biennium's budget. Minn. Const. art. IV.,

§ 12. The Governor has a constitutional duty to insure that the laws of this state are faithfully executed. Minn. Const. art V, § 3. This requires him to find a solution to resolve the problem created when he signed the appropriations bills into law, but vetoed the revenue bill passed to pay for those appropriations.

c. Courts do not Defer to an Administrative Agency's Interpretation of a Statute Where That Interpretation is Erroneous.

Appellants assert that courts defer to a Commissioner's interpretation of a statute that the Commissioner administers. However, "[a]dministrative agencies are creatures of statute and they have only those powers given to them by the Legislature." *In re Denial of Certification of the Variance Granted to Robert. W. Hubbard by the City of Lakeland*, 2010 WL 455278, at 7, (Minn. 2010). (citations omitted). Neither an agency nor the courts may enlarge the agency's powers beyond that which was contemplated by the legislative body. *Id.* Deference to the agency's determination of authority need not be given when the court considers the threshold question of whether the Legislature granted the agency the authority to take action. *Id.* at 14, fn 4.

Most importantly, a court is not required to defer to an administrative interpretation where it is erroneous and in conflict with the express purpose of the act and the intention of the Legislature. *Soo Line R.R. Co. v. Comm'r of Revenue*, 277 N.W.2d 7, 10 (Minn. 1979). And, although *Rukavina* held the unallotment statute constitutional, the use of the statute in a manner similar to that of Appellants in this case has never before occurred and consequently has never before been challenged. *See McCloud v. Comm'r Pub. Safety*, 394 N.W.2d 821, 824 (Minn. 1984). (If the statutes do not support the

Commissioner's interpretation, the significance is weak, particularly where the Commissioner's interpretation has not been challenged before.) Accordingly, whether the Commissioner acted within his statutory authority is a question of law that the court reviews de novo. *In re Hubbard*, 2010 WL 455278, at 7. The Commissioners' determination that Appellants were authorized to use the unallotment statute, in the words of the district court, as a weapon to break a stalemate in budget negotiations with the Legislature is erroneous.

Appellants' public policy arguments fail. The paramount policy is that it is in the interest of all Minnesotans that statutes are interpreted in such a way to avoid constitutional problems. It is also paramount that that the Constitution be followed and that statutes are not interpreted to permit an unlawful delegation of power from the legislative to the executive branch, or an unlawful usurpation of legislative powers by the executive branch.

II. APPELLANTS' USE OF MINN. STAT § 16A.152 SUBD. 4 VIOLATES THE SEPARATION OF POWERS DOCTRINE CONTAINED IN ARTICLE III, SECTION 1 OF THE MINNESOTA CONSTITUTION.

It is presumed that the Legislature does not intend to violate the Constitution. Minn. Stat. § 645.17(3) (2008). A plain reading of the statute supports affirming the decision of the district court. The unallotment statute as written simply did not authorize Appellants to ignore the legislative process and balance the 2010/2011 biennium budget through unallotment. Therefore, it is not necessary for the Court to reach constitutional questions.

Constitutional issues will, however, be addressed in order to respond both to Appellants' claims that the unallotments by the executive branch do not involve the

exercise of purely legislative power, and also to the arguments of the Amici Professors that the statute is constitutional. In addition, given the number of other programs that were unallotted, and the manner in which some of the reductions were made,[10] the interest of justice may also require the Court to consider these constitutional issues. Minn. R. Civ. App. Pro. 103.04 (2009).

The Constitution grants the executive branch only the power to approve or to veto legislation. Minn. Const. art. IV, § 23. In the case of appropriations and achieving a balanced budget for an upcoming biennium, the Constitution permits the Governor to exercise the veto power selectively by using a line-item veto on one or more appropriations within the bill.[11] *Id.* If a Governor vetoes all or any portion of an appropriation bill, the Constitution grants the power to the Legislature to try to override the veto. *Id.* If the Legislature is successful, the bill becomes law despite the veto. Once the Governor signs a bill or his veto is overridden, he is required by the Constitution to see that the law – as enacted – is faithfully executed. Minn. Const. art. V, § 3. If Minn. Stat § 16A.152 were to be construed in a manner permitting the executive branch first to sign an appropriation bill into law and then to ignore its provisions *from the very first day*

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[10] For example, in the Renter Property Tax Refund, Appellants effected unallotment by reducing the statutorily prescribed percentage of rent that constitutes the property tax from 19% to 15%, *See* Minn. Stat. § 290A.03, subd. 11 (2008).

[11] The Minnesota Constitution is a limit to – not a grant of – legislative power, *Citizens for Rule of Law v. Senate Committee on Rules & Administration,* 770 N.W. 2d 169,176, (Minn. Ct. App. 2009) (citations omitted) Similarly, it is also a limit to executive power. During the process of achieving a balanced budget for an upcoming biennium, the Minnesota Constitution confers no power to the executive branch to appropriate funds or to reduce an appropriation other than through a line-item veto.

the appropriations become law, then the statute is an unconstitutional delegation of legislative authority.[12] Minn. Const. art. III, § 1.

The Governor simply may not arrogate to himself the power to rewrite appropriations at the beginning of a biennium without violating Minnesota's Constitution. Appellants' use of unallotment before the beginning of a biennium circumvents the Legislature's prerogative to attempt to override line-item vetoes of appropriations, and represents an unconstitutional violation of Article III, section 1 of the Minnesota Constitution.

A. Appellants' Use of the Unallotment Statute at the Start of a Biennium is Flawed and Unprecedented.

Appellants' use of the unallotment statute to balance the budget at the start of a biennium is unprecedented. This use of the statute extends beyond the facts in *Rukavina,* a decision by the Court of Appeals that has not been addressed by the Supreme Court. It contradicts the Minnesota Constitution and its history.

Inter Faculty Org. v. Carlson, 478 N.W.2d 192 (Minn. 1991) illustrates the flaw in Appellants' arguments. At issue in *Inter Faculty* was Governor Carlson's use of the line-item veto. Before reaching its decision, the Supreme Court analyzed the power conveyed by the line-item veto in Article IV, § 23 of the Constitution. Because the authority is found in Article IV of the Constitution, the Court found it to be *an exception* to the

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[12] Permitting the statute to be used in this way also leads to unreasonable and illogical results. It would permit the Governor to unallot a program that he first rejected using his line-item veto of an appropriations bill even if the Legislature were to override that veto. *See Knopp,* 102 N.W.2d 689, Minn. Stat. § 645.17 (it is presumed that the Legislature does not intend a result that is absurd or unreasonable). *See also Alaska v. Fairbanks North Star Borough,* 736 P.2d 1140, 1143 (Alaska 1987).

authority of the Legislature, and as such "the power must be narrowly construed *to prevent an unwarranted usurpation by the executive of powers granted the Legislature* in *the first instance*." *Id.* at 194 (emphasis added).

Contrary to the arguments of the Amici Professors, if the line-item veto – as provided for in the Constitution – must be narrowly construed to prevent the usurpation by the Governor of legislative powers, then certainly a statute claimed by the Governor to delegate the power to reduce appropriations must also be narrowly construed. The liberal construction urged by the Amici Professors defies both logic and law. The Court in *Inter Faculty Org.* went on to note:

> Second, the language of the provision itself limits the authority to the veto of "items of appropriations," not of a part or parts of an item. We therefore view that power as a negative authority, not a creative one - in its exercise the power is one to strike, *not to add to or even to modify the legislative strategy.*

Id. (emphasis added). Pursuant to Articles III and IV of the Minnesota Constitution, the power to pass legislation to balance the budget cannot be delegated or limited beyond that provided for by the line-item veto. For the unallotment statute to pass constitutional muster, its use must be limited to those times when a shortfall is discovered after the balanced budget is complete and legislative priorities established.

1. The Executive Branch Does not Have the Authority to Reduce Appropriations in Order to Balance the Budget at the Beginning of a Biennium.

Within the full context of Chapter 16A, it would be an unreasonable interpretation of the unallotment statute to permit the statute to be used by the executive branch to balance the budget for an entire biennium.

Historically, Minnesota has been reluctant to accept any limitation to the power of the Legislature to set the level of appropriations. In 1915, a constitutional amendment was proposed that would have given the Governor the power to reduce an appropriation *in whole or in part.* (This is an item reduction veto.) *Id.* at 194, fn2. The amendment was rejected. The authority Appellants now claim to have by virtue of the unallotment statute – **to reduce items appropriated in whole or in part for the entire biennium in order to create a balanced budget at the start of a biennium** – is the equivalent of an item reduction veto. It differs in only one important respect – it does not provide the Legislature with a right to try to override the reduction.

It stands to reason that if this limitation on legislative power could not be given to the executive branch absent an amendment to the Constitution, then the Legislature cannot pass a statute that would have the same effect. *See, e.g., Citizens for Rule of Law v. Senate Comm. on Rules & Admin.,* 770, N.W.2d 169, 176 (Minn. Ct. App. 2009) (Legislature is presumed to act in a manner consistent with the Constitution). Appellants should not be permitted to do in two steps what the Constitution does not permit in one – taking an item of appropriation just signed into law and then immediately reducing the amounts. It defies logic to conclude that the Legislature can delegate such power to the Governor by statute when a proposed constitutional amendment that would have done so failed.

2. The Holding in *Rukavina* Does not Support Appellants' Unprecedented Use of the Unallotment Statute.

It is consistent with the decision in *Rukavina* to hold that the unallotment statute does confer an ability on the executive branch to reduce allotments after there is an unanticipated budget shortfall discovered during a biennium while still holding that the statute does not confer on the Governor the power unilaterally to create a balanced budget at the start of a biennium.

The unallotment statute was found to be constitutional by the Court of Appeals on the facts that were before the court in *Rukavina*. But no Minnesota court has considered the question in the context that is now before this Court. In the present case, the executive branch of government used the unallotment statute in lieu of the options available in Article IV of the Minnesota Constitution to achieve a balanced budget. These constitutional options included passing both appropriation and revenue bills to achieve a balanced budget, vetoing appropriations bills in their entirety until that result is achieved, and using the line-item veto to reduce appropriations to fit within anticipated revenues. Absent reaching an agreement, the Governor also had the authority to call the Legislature into special session to continue to work toward resolving the budget shortfall created when the Governor vetoed the revenue bill that would have resulted in a balanced budget.

The facts in *Rukavina* are distinctly different from those now presented to this Court. *Rukavina* involved a challenge to a reduction in funds from the mineral fund. The funds were available, they were not encumbered or otherwise obligated, and there were

no pending development project requests for money. In other words, the funds at issue were not needed to pay any current ongoing obligation. Furthermore, the unallotment occurred in February of 2003, a mere four months before the end of the biennium in which the shortfall occurred. In addition, the unallotment was announced at a time when the Legislature was in session and could have acted on its own. Against this backdrop of facts, the *Rukavina* court concluded that the statute was not unconstitutional. The court noted that while the:

> appropriation of money is the responsibility of the legislature under Minn. Const. Art. XI § 1, ***it is an annual possibility*** that the revenue streams to fund those appropriations may be insufficient to actually realize each appropriation. For that purpose, the legislature, by statute authorized the executive branch to avoid, or reduce *a budget shortfall* ***in*** *any given biennium.*

Rukavina, 684 N.W.2d at 535 (emphasis added). The court, further noted that "although purely legislative power cannot be delegated, the Legislature may authorize others to do things ... that it might properly but *cannot conveniently or advantageously do itself." Id.* at 538. citing *Lee v. Delmont,* 36 N.W.2d at 538 (emphasis added). *Lee* involved the question of whether regulatory powers conferred upon a board constituted a delegation of legislative power. In holding that it did not, the court reasoned that while the power to ascertain facts which automatically bring a law into operation by virtue of its own terms can be delegated, **it is not** the same as **the power to pass, modify or annul a law.** *Rukavina*, 684 N.W.2d at 535. This rationale does not apply when the executive branch, as in the present case, claims the power to modify or annul a duly enacted law on the very day that it becomes law.

Compare the *Rukavina* facts with the facts now before the Court. The court in *Rukavina* reached its conclusion only after noting that insufficient revenue streams are an *annual possibility*, and that the unallotment statute authorized the executive branch to reduce *a budget shortfall in any given biennium.* It then concluded that the statute *merely* enabled the executive branch to deal with an *anticipated shortfall* before it occurs. The *Rukavina* court's statement concerning the constitutionality of the statute must be limited to its distinctly different facts – it should not be extended to the facts now before the Court.

The premises for the holding in *Rukavina* do not support a similar holding in the case now before the Court. In the present case, economic forecasts of probable receipts and a projected budget deficit for the next biennium dated back at least to November of 2008. The Governor used the February 2009 forecast which noted the receipts anticipated to be available for the 2010/2011 biennium when drafting and submitting his budget proposals to the Legislature. He was aware of probable anticipated receipts and the projected deficit when he signed numerous appropriations bills into law in May. He had a constitutional right to use his line-item veto authority to reduce lines in any number of appropriation bills to achieve a balanced budget based on the $30.7 billion in anticipated revenue, but he chose not to do so. Instead he signed the appropriations into law, at which point he had a constitutional duty to see that these laws were faithfully executed. He was also presented with an opportunity to adhere to his duty – the Legislature sent him a revenue bill that would have balanced the budget, but he vetoed that bill. Then, in June, he unilaterally rewrote the State's budget through unallotment.

In so doing, he not only exceeded his constitutional authority, he also deprived the Legislature of its constitutional right to try to override line-item vetoes of appropriations bills.

In *Rukavina*, the court permitted the use of Minn. Stat § 16A.152 to divert funds that were not in use at the end of a biennium in order to avoid a shortfall in that biennium. This use is a far cry from the present claimed expansion of executive power unilaterally to balance the budget at the beginning of a biennium by eliminating statutory appropriations for disabled Minnesotans entitled to their receipt.

The Court should reject an overly broad interpretation of *Rukavina* because, "The tendency to sacrifice established principles of constitutional government in order to secure centralized control and high efficiency in administration may easily be carried so far as to endanger the very foundation upon which our system of government rests." *Juster Bros. v. Christgau*, 7 N.W.2d 501, (1943) citing *State ex rel. Young v. Brill,* 100 Minn. 499, 520; 111 N.W. 294, 639-40 (1907).

B. The Unallotment Statute is Unconstitutional if the Language is Interpreted to Permit Appellants' Actions.

1. A Delegation of Constitutional Power is Unconstitutional if it Does not Furnish Reasonably Clear Policy Standards or if it is Subject to the Whims or Caprice of Administrative Officers.

Purely legislative power may not be delegated. *Lee v Delmont*, 36 N.W.2d at 113. For a delegation of legislative power to be constitutional it must furnish "reasonably **clear policy or standards 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 whims or caprice of the administrative officers.**" *Id.* (emphasis added)

Minnesota's unallotment statute does not provide clear policy standards of action.[13] It merely states that if there is insufficient revenue in the budget reserve the executive branch is directed to reduce unexpended allotments **of any prior appropriation or transfer.** The statute provides absolutely no guidance to the executive as to which allotments should be reduced, the priority of programs to be reduced, or the manner in which they are to be reduced. This fact alone demonstrates the unconstitutionality of the unallotment statute.

If the Court, based upon the facts of this case, interprets the statute to permit Appellants' unallotments, that too would demonstrate the unconstitutionality of the

[13] The Amici Professors baldly assert that the unallotment statute satisfies the requirement for reasonably clear policies or standards to guide or control the administrative branch because, among other things, it provides a priority for unallotments. This is simply not true. The statute provides that the budget reserve be used first to balance expenditures with revenue. but it does not provide guidance as to priorities for unallotment.

statute—because it would render it subject to the whims or caprice of the executive branch. On May 14, 2009, the Governor signed the Health and Human Services appropriations bill—thereby making it law which the Minnesota Constitution then required him to faithfully execute. Yet on that very same day he did an about face and announced instead that he would use unallotments to undo what he just signed into law. His rationale for using unallotments was the deficit created by his decision to sign the appropriation bills.

The system that Appellants ask this Court to sanction is one which allows the executive branch to take a budget crisis as the occasion for claiming authority to wrest legislative power from the Legislature. It begins with the Governor's signing appropriation bills when, based upon existing projections of revenues for the biennium (in this case $30.7 billion), he knows that this action creates a budget shortfall. The appropriation bills under our Constitution contain spending priorities that have now been enacted into law both by the Legislature and the Governor. But then the Governor almost immediately announces his intention to reject these legally enacted spending priorities. He effects the budget shortfall by vetoing the revenue bill that would have balanced the budget, and he then unilaterally reorders spending priorities. If the unallotment statute can reasonably be read to justify such a course of action, it violates the fundamental principles of separation of powers embodied in our Constitution. Both the Governor's actions and the statute are unconstitutional.

2. Other Courts Reject Attempts by the Legislature to Delegate Powers Absent Clear Guidance to the Executive as to How the Powers Delegated are to be Applied.

Courts in other states have considered statutes very similar to Minn. Stat. § 16A.152 subd. 4 and found them to be constitutionally infirm. These decisions focus on the balance of power between the two branches of government.

In *Alaska v. Fairbanks North Star Borough*, 736 P.2d 1140 (Alaska 1987), the Governor of Alaska unallotted appropriated funds in a manner comparable to Governor Pawlenty's unallotments at issue in the present case. Such actions were judged to be an unconstitutional violation of limits imposed by separation of powers. Quoting Justice Brandeis, the Alaska Supreme Court gave the following description of the separation of powers doctrine:

> [T]he doctrine was adopted not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the government powers among three departments, to save the people from autocracy.

736 P.2d, at 1142, citing *Myers v. U.S.*, 272 U.S. 52, 293, 47 S. Ct. 21, 85 (1926).

Governor Pawlenty is asserting that Minn. Stat. § 16A.152 subd. 4 provides him with unbridled power unilaterally to reduce statutory allotments and to rewrite statutes (i.e. change the statutory 19% rate for calculating renters' rebates to his preferred rate of 15%). If Minn. Stat. § 16A.152 subd. 4 were to be interpreted to confer such power on the Governor, it would be unconstitutional. In holding the comparable Alaska statute unconstitutional, the Alaska Supreme Court rejected it because the powers conferred were overly broad and amounted to a legislative abdication. *Id.* at 1144.

In rejecting the statute, the Alaska court noted that the statute articulated no principles to guide the executive, and *most importantly*, that the executive was provided with no policy guidance as to how the cuts should be distributed. As a result, the court concluded that nothing in the statute would prevent the Governor from effectively vetoing a project where his veto had been previously overridden. As with the Alaska statute, Minn. Stat. § 16A.152 fails to articulate any principles to guide the executive or to provide any policy guidance as to how cuts should be distributed. Consequently, when it is used by the Governor as a tool to balance the budget unilaterally at the outset of a biennium—by modifying spending in some programs, completely eliminating spending for other programs and effectively amending statutes it is equally infirm. *See e.g., Lee*, N.W.2d 538.

Childs v. Children A, B, C, D, E, and F, 589 So.2d 260, (Fla. 1991) also involved the constitutionality of a statute remarkably similar to Minn. Stat. § 16A.152 subd. 4. In *Childs*, the court concluded that the statute was an impermissible attempt by the Legislature to abdicate a portion of its lawmaking responsibility and to vest it in the executive branch. *Id* at 267. The court's conclusion was based on the following analysis: The power to appropriate state funds is legislative, and it is to be exercised only through duly enacted statutes. The power to reduce appropriations is also a legislative function. The veto power is the power to nullify – it is not the power to alter or amend legislative intent. Therefore, the executive branch does not have the power to use the veto to restructure an appropriation. The court concluded that the Legislature cannot grant by

statute a power to the executive branch to do at a later date what it is forbidden by the Constitution during the initial appropriations process. *Id* at 265.

A thoughtful analysis of the principles at issue in balancing legislative and executive powers is also provided by the court in *Hunter v. State,* 177 VT 339, 347, 805 A.2d 381,390 (2004). The Vermont statute dealing with "unallotment" authorized the Governor to recommend reductions if, *after the passage of a balanced budget*, there was *a reduction* of 2% or more in the amount *of revenue projected at the time the budget was adopted.* The recommendation would be made to a Joint Fiscal Committee of the Legislature, *which could review and revise the recommendation.*[14] This alternative process for balancing the budget could be used only if the Legislature was not in session. This process was held to be constitutional. The discussion of applicable standards for assessing the constitutionality of the process is instructive.

The Vermont Supreme Court in *Hunter* noted: "...appropriations necessarily represent legislative determination of policy, by deciding which programs and activities to support financially, and therefore who obtains intended public benefits. If the Governor has a free hand to refuse to spend any appropriated funds, he or she can totally negate a legislative policy that lies at the core of the legislative function." *Id. at* 347, 390. However, the Vermont court went on to note that because the "activity of spending is essentially an executive task, the Governor is allowed some discretion to exercise his judgment not to spend money in a wasteful fashion, *provided that* he determines that such

[14] While the Minnesota unallotment statute requires Appellants to consult with the Legislature, the Legislature did not give itself the authority to revise recommended reductions.

a decision will not compromise the achievement of underlying legislative purposes and goals."[15] *Id.* at 348. (citing *Opinion of the Justices*, 375 Mass. 827; 376 N.E.2d 1217 (1978)), (emphasis added) *See*; *Colo. Gen. Assembly v. Lamm,* 700 P.2d 508,521 (Colo. 1985) (whatever inherent power the Governor has over administering the state budget, it does not extend to contradicting major legislative determinations.).

Appellants' reliance on *New England Div. of the Am. Cancer Soc'y v. Comm'r of Admin.*, 769 N.E.2d 1248 (Mass. 2002) to support the proposition that Appellants' unallotments fall within the Governor's spending power is misplaced. One of the key concepts guiding the *New England* court was that "a statute may grant the Governor discretion to determine how to spend appropriated funds, or, **in limited circumstances,** to withhold their expenditure." *Id.* at 1256 (emphasis added). It cannot be said that using a statute to reduce appropriations (or withhold their expenditure) by $2.7 billion falls within this concept of "limited circumstances." This is particularly true where the Governor himself created the circumstances that resulted in an unbalanced budget.

Additionally in *New England,* as in *Rukavina,* a reduction in allotments was made necessary by a decline in revenues **after** the Legislature enacted its fiscal year

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[15] Professors Amici suggest that this spending power is to be liberally construed. However they fail to note that the power at issue in *Hunter* involves discretion to limit wasteful spending (such as paying for snowplowing when there is no snow), and requires a prior determination that the reduction will not compromise the underlying legislative purpose and goals. *Hunter*, 177 Vt. 379. In the present case Appellants' unallotments fully compromised some programs. Spending for the MSA Special Diet program was completely eliminated. At other times they altered legislative intent by changing statutory requirements. The Renter Property Tax Refund changed the statutorily prescribed amount of rent constituting property tax.

appropriations, *Id.* 1249-50. And, while the Court found the statute in question to be an example of the executive power of expenditure, it noted:

> The probability that the Governor might abuse her authority under §9C, to reduce, or eliminate altogether, funding for certain programs based on her own ordering of social priorities, is minimal. "To the contrary, the Governor is bound to apply [her] full energy and resources, in the exercise of [her] best judgment and ability, to ensure that the intended goals of legislation are effectuated."

Id. at 1257 (citations omitted).

In the case now before the Court, it cannot be said that Governor Pawlenty applied his full energy to ensuring that the intended goals of Legislation were effectuated. On the same day he signed the Human Services Appropriation bill, he announced his intention to ignore its provisions and unallot appropriations for the programs he just approved. It also cannot be said that he did not reduce programs based on his own ordering of social priorities. Many of his unallotments were nearly identical to proposals he originally submitted to the Legislature in his proposed budgets.[16] These were rejected by the Legislature when they passed their appropriations bills. At nearly the same time, he vetoed a bill that would have raised the necessary revenue to fund the MSA-SD program as well as other programs which support the poor.

Applying well established principles of law to the unilateral actions of Governor Pawlenty in the 2009 unallotments, the powers claimed by the Governor under Minn. Stat. § 16A.152 would render the statute unconstitutional.

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[16] See footnote 4.

CONCLUSION

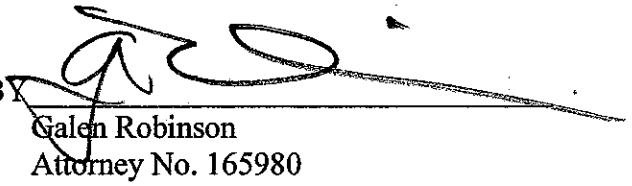
The decision of the district court should be affirmed. Judge Kathleen Gearin correctly assessed the law in her Memorandum supporting the Temporary Restraining Order. She held that the manner in which the Governor exercised unallotment in 2009 trod upon the constitutional power of the Legislature, and the Legislature alone, to make laws. His actions were unconstitutional.

It would dramatically change the structure of government created by the Minnesota Constitution if this Court were to sanction a process in which this or any other Governor could sign appropriations into law, then veto revenue bills, and then use unallotment to ignore legislative appropriations and to rewrite the budget according to the Governor's own legislative priorities. This in fact is what has occurred. This use of unallotment was unauthorized by any law and was unconstitutional.

The decision of the district court should be affirmed. Funding for MSA-SD and for the Renter Property Tax Refund Program may not be reduced based upon the 2009 unallotment, and Appellants should be permanently enjoined from implementing any reductions based upon this unallotment.

MID-MINNESOTA LEGAL ASSISTANCE

Dated: 2/23/2010

BY 

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