

NO. A10-432

State of Minnesota
In Court of Appeals

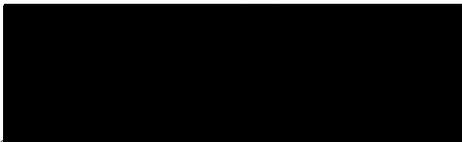
Robert Carney, Jr.,
on behalf of himself and all others similarly situated,
Appellants,

vs.

State of Minnesota, et al.,
Respondents.

APPELLANTS' REPLY BRIEF

Robert Carney, Jr.



LORI SWANSON
Attorney General, State of Minnesota
JOHN S. GARRY (#0208899)
Assistant Attorney General
445 Minnesota Street, Suite 1100
Saint Paul, MN 55101-2128
(651) 757-1451

Attorney pro se for Appellants

Attorneys for Respondents

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TABLE OF AUTHORITIES -- Reply Brief Authorities in **Bold**

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State Cases

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LEGAL ISSUES

Note: due to subsequent events, the Legal Issues stated here are modified from the Statement of the Case. The Legal Issues are further modified pursuant to Respondent's Brief, and to correct for slight errors due to haste in preparing Appellant's Brief.

I. Does Appellant's Complaint set forth a legally sufficient claim for relief?

The District Court dismissed Appellant's case, finding constitutional issues were not raised in the Complaint or initial pleadings, and ruling against Appellant on statutory interpretation. Subsequent to the District Court's January 11, 2010 Order to Dismiss, the Minnesota Supreme Court issued its opinion in *Brayton v. Pawlenty*. Appellant claims this subsequent precedent is "point on", controlling, and establishes Appellant has a legally sufficient claim for relief.

Brayton v Pawlenty, Minnesota Supreme Court Opinion issued 5/5/10
N. States Power Co. v. Franklin, 265 Minn. 391, 394, 122 N.W.2d 26, 29 (1963)
Brayton v Pawlenty, District Court Order filed 12/30/09 (see ADDENDUM)

Minn. Stat. §16A.14
Minn. Stat. §16A.152
Minn. Stat. §290.06
Minn. Stat. §270C.435

II. Is HR0001 of the first Special Session of the 2010 Legislature unconstitutional, null and void due to a violation of Art. IV, Sec. 21 of the Minnesota Constitution, which forbids passage of a bill by either House of the Legislature on the day "prescribed for adjournment"?

This bears on whether Appellant's case is now moot. HR0001 contains a provision stating: "the political contribution refund does not apply to contributions made after June 30, 2009, and before July 1, 2011." Of course, there is nothing in the District Court record regarding HR0001, because it was passed after the January 11, 2010 Order to Dismiss. Because *Brayton* was controlling law at the time HR0001 was (purportedly) enacted, the Legislature's 2009 appropriation for the PCR was effective. Per Art. IV, Sec. 21, HR0001 is null and void in its entirety.

Knapp vs O'Brien, 288 Minn. 103, 179 N.W.2d 88
State v. Hoppe, 298 Minn. 386, 215 N.W.2d 797 (1974)
HR0001, first Special Session of 2010
Minn. Const. Arts. I, IV

III. Should this Court grant Appellant a preliminary injunction, and/or take any other action as the interest of justice may require?

Because the District Court dismissed Appellant's case, Appellant's Motion for Preliminary Injunction was denied, but the District Court's Memorandum did not reach any issue respecting it. Appellant intends to file a Motion with the Appellate Court requesting an expedited schedule.

Cherne Industrial, Inc. v. Grounds & Assoc., Inc., 278 N.W.2d 81,92 (Minn. 1979)
AMF Pinspotters, Inc. v. Harkins Bowling, Inc., 110 N.W.2d 348,351 (Minn. 1961)
Dahlberg Bros., Inc. v. Ford Motor Co., 137 N.W.2d 314, 321-22 (Minn. 1965)

Minn. R. Civ. App. Pro., 103.04
Minn. Const. Art. I

Introduction

This case presently boils down to two substantive issues -- both are framed in Appellant's **Legal Issues**, both are addressed in Respondent's brief, and reply is in order for each.

I. Does Appellant's Complaint set forth a legally sufficient claim for relief?

It is important to bear in mind that Judge Gearin presided over both *Brayton* and the present case. While the Supreme Court affirmed Judge Gearin's granting of a Temporary Restraining Order in *Brayton*, the Supreme Court's basis for its decision was based on statutory interpretation, and did *not* reach the Constitutional Separation of Powers issue that was Judge Gearin's basis for her holding. See *Brayton v Pawlenty*, Supreme Court opinion, p 11-12.

Judge Gearin wrote regarding the present case:

"This lawsuit unlike the *Brayton* case involves only the issue of whether the Political Contribution Refund (PCR) program is subject to unallotment by the Governor. The Plaintiff argues that the unallotment of funding for political contribution refunds is substantively outside the authority of the Governor to unallot. He does not raise the constitutional issues previously ruled upon by this court in the *Brayton* case." See Judge Gearin's District Court Order for the present case, Memorandum, page 2.

Judge Gearin did not address the question of statutory interpretation that formed the basis for the Supreme Court's ruling in *Brayton* in her opinion for either case. See Appellant's ADDENDUM, *Brayton v Pawlenty*, District Court Order filed 12/30/09, Judge Gearin's District

Court opinion in *Brayton* for verification of this statement. In short, Judge Gearin appears to have regarded *only* the Constitutional issue of the Separation of Powers as dispositive. Neither of her opinions reached the issue of statutory interpretation on which the Supreme Court's opinion turned. This strongly suggests that, for whatever reason -- and no reason is given in either opinion -- Judge Gearin did *not* regard as dispositive the issue of statutory interpretation on which the Supreme Court's *Brayton* opinion turned.

Respondent's critique of Appellant's position turns on vague phrases -- "**timing**"... "**broader challenge**"..., and conflates Constitutional questions with statutory interpretation. To demonstrate this, we will commence with three statements by Respondent (vague phrases are emphasized):

"In *Brayton*, Judge Gearin ruled that the unallotment of funding for the Minnesota Supplemental Aid-Special Diet ("MSA-SD") program was unlawful due to its **timing**." See Respondent's Brief, page 4.

"Her decision specifically noted that Carney's complaint does not assert the **broader challenge** to unallotment that was made in the *Brayton* case." See Respondent's Brief, page 4.

"Carney argues that this lawsuit includes the **timing challenge** raised in his memorandum response to Respondent's motion to dismiss (MNCIS Doc. No. 14) and accepted later by the Supreme Court in *Brayton*. See Appellant's Brief at 8, 15-16, 18. The district court properly concluded that this claim is not asserted in Carney's complaint and, consequently, is not a basis to deny Respondents' motion to dismiss."

Here's how Respondent frames the **Legal Issue** (emphasis added): "Does appellant's complaint also challenge the unallotment of the political contribution refund program for the

2010-2011 biennium based on its **timing**?" See Respondent's brief, page 1.

Let's be clear: Judge Gearin wasn't talking about some vague question of "**timing**", or a "**broader challenge**". Judge Gearin held that Appellant did not assert as a cause of action the Constitutional issue of Separation of Powers. This question has *nothing* to do with Appellant's claim that Appellant has a cause of action founded on statute, including the statutory interpretation undertaken by the Supreme Court in *Brayton*. It is crucial to keep in view that while Judge Gearin and the Minnesota Supreme Court reached the same *result*, the foundations for their reasoning are fundamentally different.

Appellant submits that Respondent statement of the Legal Issue is poorly constructed. An improved rewrite would substitute the emphasized phrase for Respondent's ambiguous word "timing":

"Does appellant's complaint also challenge the unallotment of the political contribution refund program for the 2010-2011 biennium based on **the question of statutory construction that is the foundation of the Supreme Court's holding in Brayton?**" Appellant submits the answer to this question is: "Yes" -- as detailed in Appellant's Brief, pages 11-12, and 14-17, and in what follows.

Respondent claims (emphasis added): "The **timing challenge** to the use of the unallotment authority asserts a failure to satisfy the procedural conditions in subdivision 4(a) of section 16A.152, not the statute's substantive scope set out in subdivision 4(b)." See Respondents Brief, page 8. Respondent then states: "Carney's complaint, however, contains no allegation that any condition in subdivision 4(a) of section 16A.152 was violated." See Respondent's Brief, page 9.

As noted in Appellant's Brief, page 15, Appellant's Complaint *does* state: "Defendants' conduct violates the mandates and procedures of Minnesota Statutes §§ 16A.152," which of course *includes* subdivision 4(a). In addition, Appellant's Complaint, paragraph 15, cites directly to subdivision 4(a) as a predicate to subdivision 4(b): "The Governor is only empowered to 'defer or suspend prior statutorily created obligations.' Minn. Stat. §§ 16A.152(4)(a)."

At the October 13, 2009 hearing, Appellant's Counsel spoke at some length, and with additional specificity, regarding the Complaint's cause of action with respect to violations of "the mandates and procedures of Minnesota Statutes §§ 16A.152". See Transcript, pages 28-34.

Appellant wants to emphasize that the Supreme Court's *Brayton* Syllabus cites Minn. Stat. §§ 16A.152(4) in its entirety in holding the Executive exceeded its unallotment authority -- there is no restriction to 16A.152(4)(a).

In conclusion with respect to the question: **Does Appellant's Complaint sets forth a legally sufficient claim for relief?**, Appellant submits that the Complaint *clearly does state a cognizable claim or cause of action under the substantive law*, and thus, the District Court's dismissal was and is reversible error. See Respondent's Brief, page 6 for the standard of review.

II. Is HR0001 of the first Special Session of the 2010 Legislature unconstitutional, null and void due to a violation of Art. IV, Sec. 21 of the Minnesota Constitution, which forbids passage of a bill by either House of the Legislature on the day "prescribed for adjournment"?

A. Appellant withdraws the claim that HR0001 is an Ex Post Facto law.

Appellant acknowledges and cheerfully accepts Respondent's argument that HR0001 is not unconstitutional as an Ex Post Facto law. See Respondent's Brief, pages 11-12.

Appellant is cheerful for this reason: there need be no concern that the present case will upend the entire \$3 billion + budget balancing effect of HR0001. Applicant knows of no other pending litigation challenging HR0001 on Constitutional grounds. The legal process is slow. The next regular session of the Legislature *can* repass HR0001, or a modified version, and the corrective effect of HR0001 will be intact. Appellant will be content to see the Legislature and the Governor act *legally* to resolve a difficult budget situation. However, presently, appellant's fundamental concern is to preserve the Political Contribution Refund program for the current election cycle.

B. HR0001 is unconstitutional, null and void due to a violation of Art. IV, Sec. 21 of the Minnesota Constitution, which forbids passage of a bill by either House of the Legislature on the day "prescribed for adjournment".

Respondent cites *State v. Hoppe*, 298 Minn. 386,393-95, 215 N.W.2d 797, 802-803 (1974) as supporting precedent. See Respondent's Brief, p 14-15. This case is of no help to Respondent -- rather, it supports Appellant's position.

When *State v. Hoppe* was decided, the Legislature met according to the current provisions of our Minnesota Constitution, incorporating a revision of the Minnesota Constitution that is in force today. This revision became effective subsequent to *Knapp v. O'Brien* (1970), the apposite case cited in Appellant's Brief regarding Art. IV, Sec. 21. According to our current constitution provisions the Legislature now meets in a single regular

biennial session. The so-called "second session", in even numbered years, is a temporary adjournment from the so-called "first session", but is actually a continuation of a single biennial session. The Court wrote (Westlaw, p. 6): "It is true that art. 4, s 1, prohibits the legislature from meeting in regular session after the first Monday following the third Saturday in May of either year of the biennium. It does not follow that May 21, 1973, the day on which S.F. 386 was passed and the day which constituted the first Monday following the third Saturday in May of the first year of the biennium, is a 'day prescribed for the adjournment of the two houses' within the meaning of art. 4, s 22. Article 4, s1, merely prohibits the legislature from meeting in regular session after the first Monday following the third Saturday in May of any year but does not prohibit the passage of bills on such Monday in the first year of the biennium."

The Court's Syllabus for *State v. Hoppe* states in part:

"2. Minn. Const. art. 4,s 22, stating, in part, that '(n)o bill shall be passed by either house of the legislature upon the day prescribed for the adjournment of the two houses,' solely prohibits the passage of bills on the day of final adjournment of the legislative session. The day of adjournment in the odd-numbered year to a fixed date in the even-numbered year is not the day of final adjournment of the legislative session."

The Court held in *State v. Hoppe* that the day of adjournment in the odd-numbered year was a temporary adjournment, not a final adjournment sine die. Because the odd-numbered year adjournment was temporary, the session could continue in the even numbered year without reorganizing the Legislature, and without the need to start the process over from the beginning for all bills in process at the time of adjournment in the odd-numbered year.

The distinction made in *State v. Hoppe* between a temporary adjournment required in an

odd-numbered year, and the day prescribed for final adjournment sine die in an even numbered year, is crucial. *State v. Hoppe* holds (Westlaw, p 6): "... the summary judgment of the trial court upholding the validity of this act must be affirmed if it is determined that art. 4, s 22, prohibits only the passage of bills upon the day prescribed for final adjournment of the legislature"... in other words, adjournment sine die in the even numbered year.

Appellant acknowledges that *State v. Hoppe* would be controlling precedent favoring Respondents if, and only if, HR0001 of the 2010 first Special Session had been an *odd numbered* year. But of course, 2010 is an even-numbered year. Thus, *State v. Hoppe* affirms Appellant's claim that no bill may be passed by either house on the day prescribed for adjournment in the year 2010.

Respondent writes: "Thus, the prohibition against passing bills on the day prescribed for adjournment does not apply to bills passed on the last date in May on which the legislature can meet in regular session in the first year of the biennium." There is danger of confusion here. Budgetary bienniums figure prominently in the unallotment cases. However, the word "biennium" as used in *State v. Hoppe* is with reference to the Legislative biennial session, a two year period commencing on an odd numbered year. In contrast, Minnesota's Fiscal Year budgetary bienniums commence on even numbered years. Confusion is best avoided by sticking with the Court's system of reference in *State v. Hoppe* -- based on odd numbered years and even numbered years. When the Legislature adjourns for the year in an odd-numbered year -- the first year in the biennial legislative session -- this adjournment is temporary. However, when the Legislature adjourns for the year in an even-numbered year -- the second year in the biennial legislative session -- this is a final adjournment, sine die. *State v. Hoppe*

affirms that our Minnesota Constitution prohibits passage of a bill on the day prescribed for final adjournment in an even numbered year.

Respondent makes an alarming assertion, suggesting that Appellant's argument "would lead to an absurd result that virtually extinguishes the governor's power to call a special session... Under Carney's interpretation, however, the May date prescribed for adjournment of the biennial regular session would also become the day prescribed for adjournment of any special session, which would mean that a special session could never be called on or after this date in May." See Respondent's Brief, page 15.

There is no need for alarm. Appellant argues no such thing. Instead, Appellant argues that, per our Minnesota Constitution's Art. IV, Sec., 21, no bill can be passed on "the day prescribed for adjournment." Appellant accepts that *State v. Hoppe* establishes that this must be the day of final adjournment -- for even numbered years only. See Appellant's Brief, p. 21-22. Thus, according to Appellant's argument, as modified by *State v. Hoppe*, there is *only one day* in the entire 2009-10 Legislative biennium on which neither house of the Legislature may pass a bill. That day is May 17, 2010 -- the day HR0001 of the 2010 first Special Session was passed. If the 2010 first Special Session had been called a day later, or if HR0001 had been passed on *any* day of the Legislative biennium *other* than May 17, 2010, Appellant would have no quarrel.

Appellant's argument does not *in any way* call into question the Constitutional power of the Governor to call special sessions, or the ability of a special session to pass bills.

Respondent is wrong to suggest that Appellant's argument does this.

Respondent banishes Appellant's citation of *Knapp v. O'Brien* to a footnote (see page 14

of Respondent's Brief.) Appellant agrees with Respondent's footnoted statement -- *Knapp v. O'Brien* did hold that "... a bill cannot be passed on the 120th day of the regular session."

However, Respondent also claims in the footnote that *Knapp v. O'Brien* is "inapposite." This is wrong. As detailed in Appellant's Brief, p 22-26, the *basis* for the holding in *Knapp v. O'Brien* is that, according to the facts of the case, the 120th day of the regular session was "the day prescribed for adjournment." *Knapp v. O'Brien* is point-on precedent for Appellant's claim that neither house of the Legislature can pass a bill on "the day prescribed for adjournment."

In conclusion, there is no other way to decide the question of whether this case is moot than to consider the Constitutional issue raised by Appellant. Appellant has demonstrated beyond a reasonable doubt that according to the clear meaning of our Minnesota Constitution, as supported by controlling precedent, HR0001 is Unconstitutional, null and void, because it was passed on "the day prescribed for adjournment", and specifically for final adjournment *sine die*, in violation of the Minnesota Constitution, Art. IV, Sec. 21. See Respondent's Brief, p 6-7 for the Standard of Review.

III. Should this Court grant Appellant a preliminary injunction, and/or take any other action as the interest of justice may require?

Appellant has spoken with opposing counsel, and has agreed to provide a draft copy of a motion requesting an expedited schedule for deciding this case, in light of the rapidly approaching 2010 election. Appellant hopes that opposing counsel will support an expedited schedule. Due to the 2010 election calendar, justice (further) delayed would be justice denied.

CONCLUSION

This Court should reverse the District Court's January 11, 2010 Order to Dismiss Appellant's case, as Appellant has clearly demonstrated a cause of action per *N. States Power Co. v. Franklin*, 265 Minn., with particular reference to the point-on precedent: *Brayton v Pawlenty*.

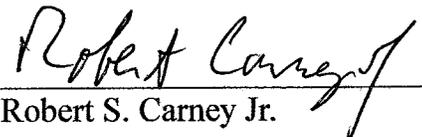
This Court should hold that HR0001 of the first Special Session of 2010 is unconstitutional, null, and void, as it violates the Minnesota Constitution, Art. IV, Sec. 21.

PASSAGE OF BILLS ON LAST DAY OF SESSION PROHIBITED.

This Court should stand by for a motion for an expedited schedule to resolve this case, per Rule 103.04, which authorizes the Court to "...take any other action as the interest of justice may require."

Dated: July 22, 2010

Respectfully submitted,


Robert S. Carney Jr.

4232 Colfax Ave. So.,
Minneapolis, MN 55409
(612) 824-4479

Attorney pro se; Appellant

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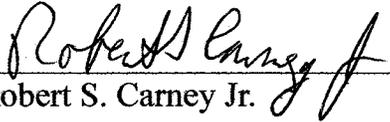
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Signed:


Robert S. Carney Jr.

Dated: 7/22/10