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State of Minnesota
In Supreme Court

Case No. A11-1222

State Senator Warren Limmer, State Senator Scott J. Newman,
State Senator Sean R. Nienow, State Senator Roger C. Chamberlain,
State Representative Glenn H. Gruenhagen, and State Representative Ernest G. Leidiger,

Petitioners,

vs.

Lori Swanson in her official capacity as Attorney General, Mark Dayton in his official capacity as Governor, Jim Schowalter in his official capacity as Commissioner of Department of Management and Budget, and Kathleen R. Gearin in her official capacity as Chief Judge of the Ramsey County District Court,

Respondents.

PETITIONERS' REPLY
TO RESPONSE MEMORANDA OF ATTORNEY GENERAL LORI SWANSON, GOVERNOR MARK DAYTON AND INTERVENOR LEAGUE OF MINNESOTA CITIES, ET AL.

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The Petitioners are impelled to reply to the Respondents' submissions to this Court responding to the granted Writ of Quo Warranto.

I. The Minnesota Constitution does not intend the judiciary to function as both the executive and legislature.

> "District courts should not exercise jurisdiction over matters that intrude into the policy decisions of the legislature and executive branches."[1]

The Attorney General's 2011 Petition to the lower court failed to allege that a violation of legal rights had occurred. Instead, she relied on previous 2001 and 2005 budget impasse and government shutdown district court orders that "constitutional rights "would be infringed."[2] The fundamental flaw of the Attorney General's argument is that she did not seek a court concluding that legal rights *were being* violated. Thus, when she commenced an action on June 13, 2011,[3] and the lower court accepted jurisdiction,[4] the Attorney General presented no justiciable controversy. Every case the Attorney General cited in her response brief is inapposite to the present controversy.[5] Each cited case adjudicates in the first instance a justiciable case and controversy, determining whether a violation of legal rights had occurred.

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[1] *R.G.C. v. Minnesota Dept. of Corrections,* 760 N.W.2d 329, 330 (Minn. App. 2009) *quoting, Zuehlke v. Indep. Sch. Dist. No. 316,* 538 N.W.2d 721, 725 (Minn. App. 1995), *citing, Dokmo v. Independent Sch. Dist. No. 316,* 538 N.W.2d 671, 673 (Minn. 1990).

[2] Atty. Gen. Resp. Br. 19 (July, 18, 2011).

[3] App.32-33; 34-121.

[4] App. 1-31.

[5] *Id.19-22.* Furthermore, none of the cases dealt with government shutdowns.

The Attorney General's reliance for example, on *Abbott v. Burk,*[6] where the court held that the appropriation power could not be a shield from the responsibility to fund education is misplaced is relied upon to show a funding requirement despite a lack of legislative appropriation. She failed to note the state was under previous remedial orders for a constitutional violation of the plaintiffs as a particular class of pupils[7]: "denominated victims of a violation of constitutional magnitude for more than twenty years."[8]

Likewise, the Attorney General's reliance upon *Watson v. City of Memphis*[9] is inapposite to the central issue before this Court. In *Watson,* the city violated the Fourteenth Amendment claiming it had no duty to immediately terminate its policy of segregation in public parks and recreational facilities.[10] The segregation policy, determined unconstitutional, demanded to be rectified, and no excuse was allowed for continuing the unconstitutional policy upon its citizens.[11]

The Ramsey County District Court justified its appointment of a Special Master, on the basis it created an "orderly process to resolve requests for, or objections to, funding, thereby preventing the necessity for multiple individual lawsuits to be filed and

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[6] *Abbot v. Burke,* 20 A.3d 1018 (N.J. 2011).

[7] *Id.*

[8] *Id.* at 340.

[9] *Watson v. City of Memphis,* 373 U.S. 526 (1963).

[10] *Id.* at 537.

[11] *Id.* at 538.

adjudicated."[12] Yet, the process did not adjudicate any case or controversy. As the lower court acknowledged, the petitions before the Special Master were "*requests for, or objections to, funding.*"[13] First, requests for funding from the state treasury are a legislative political function — a policy decision. Second, objections about funding are a legislative political function — a policy decision. Compromises are possibly enacted into law. Hence, it is the legislature that makes "critical policy decisions."[14] Third, the enforcement of laws is an executive function — the Governor is to "take care that the laws are faithfully executed."[15]

Here, although most of the appropriation bills passed in the 2011 legislative session were not enacted into law (vetoed), the Executive still maintained authority — because there were laws to "be faithfully executed." As the Petitioners noted, these laws included not only the disbursements of enacted appropriation bills, but also the disbursement of state funds for constitutional officers and functions, statutory mandates, and federal mandates. None required court supervision or orders for disbursements to occur. Here, the lower court not only issued advisory opinions on the powers already within the Governor's province, but further and impermissibly injected itself into both the Legislative and Executive branches' policy-making decisions usurping their respective

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[12] Or. Granting Atty. Gen. Pet. 12, Pet. App. 12.

[13] *Id.* (emphasis added).

[14] *Saratoga county Chamber of Com. Inc., v. Pataki,* 740 N.Y.S.2d 733, 735 (N.Y.App. Div. 3d Dept 2002), *aff'd as modified sub nom, Saratoga County Chamber of Com, Inc. v. Pataki,* 798 N.W.2d 1047 (N.Y. 2003).

[15] Minn. Const. art. V, § 3.

constitutional mandates. As this Court has stated, "[u]nder the Separ)ation of Powers Clause, no branch can usurp or diminish the role of another branch."[16]

Although this Court has recognized that "'some interference between the branches does not undermine the separation of powers; rather it gives validity to the concept of checks and balances critical to our notion of democracy,'"[17] the application of this principle is not appropriate here. There is no Minnesota law or court rule that authorizes the district court (let alone the Ramsey County District Court solely the right to exercise powers that are within the provinces of the Legislative and Executive branches.[18] Hence, the lower court's action to accept and exercise jurisdiction — as well as the Attorney General, Commissioner, and Governor actions relating thereto — are offensive to the separation of powers doctrine.

As a consequence of the lower court's perspective on judicial economy and efficiency, the lower court entered into prohibited justiciablility areas of issuing advisory opinions and acting contrary to the authority of both the legislative and executive branches of government: "The existence of a justiciable controversy is prerequisite to adjudication. The judicial function does not comprehend the giving of advisory

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[16] *Brayton v. Pawlenty,* 781 N.W. 2d 357, 365 (Minn. 2010).

[17] *Brayton,* 781 N.W.2d at 378 (J. Gildea dissenting).

[18] The lower court's actions do not comply with the dissenting opinion's premise that "'the legislature may authorize others to do things (insofar as the doing involves powers which are not exclusively legislative) which it might properly, but cannot conveniently or advantageously, to do itself'" because it does involve something exclusively that of the legislature's — make laws decided upon policy.*Id.*781 N.W.2d at 378, *quoting Hampton in Lee v. Delmont,* 228 Minn. 101,112-13, 36 N.W.2d 530, 538 (1949).

opinions."[19]

In other words, justiciability demands not only adverse interests and concrete assertions of rights, but also a controversy that allows for specific relief by a decree or judgment of a specific character.[20] The redressable injury requirement and the corollary rule against advisory opinions, rooted within this State's constitutional text, curtail the judiciary from encroaching on the powers of the other co-equal branches of government:

> The constitutional function of Minnesota courts is to resolve disputes and to adjudicate private rights ... And, as part of our tripartite constitutional structure, the judiciary must act prudentially to abstain from encroaching on the power of a coequal branch.[21]

The petitions offered to the district court's appointed Special Master did not present disputes or adjudicate private rights. Each requested court-ordered disbursement of funds from the state treasury. The Commissioner did not refuse a disbursement. The legislature did not authorize a disbursement by bill. The Executive did not enact a law for funding. Therefore, no controversy existed.

The court, on its own accord, determined for the Commissioner, for the legislature and for the executive, whether to disburse funds. This is an overreach of the judicial function. However narrow the lower court sought to be — "the Court must construe any authority it has to order government spending to maintain critical core functions in a very

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[19] *Izaak Walton League of Am. Endowment, Inc. v. State, Dept. of Nat. Resources*, 252 N.W.2d 852, 854 (Minn. 1977).

[20] *Holiday Acres No. 3 v. Midwest Fed. Sav. & Loan Ass'n of Minneapolis,* 271 N.W.2d 445, 447 (Minn.1978).

[21] *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 321 (Minn. App. 2007) (citations omitted).

narrow sense"[22] — until a justiciable controversy arose, the court must constitutionally concede to the "province of the legislature"[23] regarding appropriations.

The Attorney General, using her *parens patriae* theory for the health, safety, and welfare of Minnesota citizens, involved the lower court in policy-making decisions that are outside the constitutional limitations under our tripartite republican form of government. Minnesota elected officials individually know their respective constitutional obligations to the people in the Attorney General's parlance, to protect their health, welfare, and safety. While the Attorney General believes her in intervention on behalf of Minnesota citizens, her actions are likewise political in the sense of interfering with the natural balance of powers not only between the three branches of government, but between the citizens and self-government. As Professor Lawrence Tribe has written about the constitutional guarantee of representative democracy:

> No doubt many options exist.... for implementing the ideals of representative democracy through the requirement of 'republican' form. But... the authority to decide, consistent with the equal protection of the laws how one's people will represent themselves and take part in their own governance - seems the very essence of all self government.[24]

In other words, the elected officials had definitely spoken by their respective actions deciding not to fund all government programs and agencies — by passing bills during the regular legislative session the Legislators knew or should have known would

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[22] Or. Granting Atty. Gen. Pet. 10, Pet. App. 10.

[23] *Id.*

[24] Tribe, *American Constitutional Law,* 3rd *Ed.*, vol. 1, pp. 908-09 (200) (emphasis in original);

be vetoed and having not overridden those vetoes. During the regular session, the Legislature could also have passed a continued funding bill, but choose not to.[25] Likewise, the Governor used his veto power and with the closing of the regular session decided not to use his constitutional authority to call a legislative special session to consider any appropriation bill — a political decision and constitutionally proper.

In a similar vein, the Attorney General's present successful effort to involve the judiciary is an individual usurpation of the Governor's constitutional mandate: "[h]e shall take care that the laws be faithfully executed." In one sense, because there were no appropriation laws to "faithfully execute," the Attorney General asked for court intervention to disburse moneys from the state treasury *in absentia* of the governor and legislators because of the *absence* of appropriation *laws*. But the Governor did have laws to faithfully execute and constitutional mandates that he apparently understood and stated as much in his initial opposition to the Attorney General's Petition.

As this Court knows, the Governor *opposed* the Attorney General's lower court petition. The Governor's recent participation in the lower court proceedings, however, is nevertheless an illustration of the Governor's unfortunate and ill-advised acquiescence of authority.[26] It is constitutionally improper for the Governor to allow the court to act as the sole arbiter in representing the interests of the people through judge-made policy decisions whether to fund certain so-called essential services or core functions without an

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[25] *State ex rel. Sviggum v. Hanson,* 732 N.W.2d 312, 323 (Minn. App. 2007).

[26] Pet. Supp. App. 9 and 24 ("David Lillehaug, Special Counsel to the Office of the Governor; Joseph Cassioppi, Special Counsel to the Office of the Governor....")

appropriation by legislatively passed bills and enacted law. He had the authority. Instead, the Governor perpetuated and enabled the district court process for political purposes.

The political impotency of the executive office cannot be transferred to the judiciary to insulate that office from the electorate or as an effort for the Governor to regain political strength as an advantage over the Legislature. The Governor has the sole constitutional authority to call the legislature into a special session to debate the political policies of government expenditures but chose not to. Therefore, the court's orders to fund essential services, regardless of the perceived stabilizing affect it may or may not have, has directly interfered with democracy and the republic form of government. However flawed and however critical the shutdown, the judiciary has no role in making political decisions disguised as judicial controversies in shifting or balancing the political status quo as it may have been.

The Legislature's and the Governor's actions — or inactions — placed the state on the path of a government shutdown. It is not the court's place to resolve, mediate, or mitigate the resulting political carnage.

Here, the District Court actions since July 1, 2011 violated the "political question" and separation of powers doctrines as previously argued. Having acknowledged the province of monetary appropriations as that of the legislature,[27] the lower court nevertheless interfered with the exercise of the textually demonstrable provisions of the

[27] *Id.*

Constitution reserved for the other departments. [28] As previously stated, the court may not seek to resolve an issue for which it lacks judicially discoverable and manageable standards.[29]

The Attorney General in her petition to the District Court sought and obtained advisory opinions of what is and what is not a so-called "core function" to command the Commissioner to disburse state treasury moneys to fund a request accordingly. But what constitutes an essential service or "core function" depends largely on political, social and economic considerations, not legal ones.[30] They are nonjusticiable political questions. The courts simply are not equipped to decide these political questions. Therefore, the power to appropriate funds is confided to the competency of the legislative branch and the questions regarding disbursing state funds nonjusticiable from the constitutionally imposed judicial limitation of power.[31]

Although the submitted petitions to the lower court for requests for state treasury moneys reflected serious and possibly immediate needs, they were nevertheless political questions. In acting on what would otherwise be biennial budget requests, the district court did *per se* inject itself into the political domain of the legislative and executive branches of government. The wisdom of fiscal policy and appropriation of revenue is

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[28] *Baker v. Carr,* 369 U.S. 186, 210(1962).

[29] *Vieth v. Jubelirer,* 541 U.S. 267, 276 (2004); *Powell v. McCormack,* 395 U.S. 486, 518 (1969).

[30] *Fletcher v. Commonwealth*, 163 S.W.3d 852, 860 (Ky. 2005).

[31] *See State ex rel. Swiggum v. Hanson*, 732 N.W.2d 312, 322-23 (Minn. App. 2007.

outside the purview of judicial authority. The court had no role in the efficacy or necessity of a particular disbursement as a substitution for an appropriation, even if temporary.

II. Executed special sessions laws affirm a justiciable controversy continues.

The Intervenor Minnesota League of Cities[32] suggests the Petition before this Court is or largely moot since, it contends, the disbursements of funds to "LGA and CPA is expected to occur."[33] While there are serious doubts about the League's interpretation of what is or is not an appropriation (an "open and standing amount" is not necessarily an appropriation by law) under Minn. Stat.§ 273.1384, that issue is not before this Court.[34] The League, however, did obtain an order from the District Court granting that funding. The constitutional question is whether the Chief Judge of the District Courts had the authority and jurisdiction to do so. Therefore, even if moneys were paid, the legality of the lower court's jurisdiction remains as does the actions of the Attorney General, Commissioner, and Governor.[35]

The recent passage of appropriation laws, and the legislature's attempt to

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[32] Although referenced here as only one intervenor, the Petitioners recognize that there are multiple intervenors besides the League. They include the Coalition of Greater Minnesota Cities and the Association of Minnesota Counties.

[33] Resp. Memo. of League of Minn. Cities 18 (July 18, 2011). As this Court knows, the government shutdown has generally ceased with the recent passage of appropriation bills enacted into law on July 20, 2011. This does not moot the instant matter as explained herein.

[34] *Id.* 10.

[35] *Id.* 17-18.

supercede the funding actions of the court, does not moot the constitutional issues before this Court.[36] The Petitioners have previously explained that the factual and legal basis of the Petition should not be deemed moot because they are capable of repetition but evade review.[37] Likewise, any argument that the instant matter is moot because of the enactment of appropriation laws as evidence of discontinued official action can be considered but should be dismissed accordingly.

Previously stated numerous times, but it bears repeating one last time: the budget impasse, the Attorney General' petitioning activities to the court, the district court's acceptance of jurisdiction, and the lower court granting the Attorney General's Petition has occurred 3 times in the last 10 years — 2001, 2005, and 2011. To place this in a more meaningful perspective — 3 times in the last 6 biennium-budget cycles.

In 2005 and 2011, the lower court utilized a Special Master and issued orders to disburse funds from the state treasury without an appropriation by law (the 2001 court action ended before the Special Master process started). In 2001 and 2005 the Governor joined the Attorney General. In 2011, the Governor initially challenged the process, but then joined in the process as an active participate.

Regardless of the legislative acts to end the government shutdown, the voluntary discontinuance does not of itself make the matter moot. If there is any reasonable

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[36] Each appropriation law includes the following language: "Unless otherwise specified, this article is effective retroactively from July 1, 2011, and supercedes and replaces funding authorized by orders of the Second Judicial District Court ...."

[37] Limmer Pet. 31-34 (July 8, 2011).

expectation that the challenged conduct will be repeated, mootness is avoided. Where discontinued official action is at issue, the court must consider "whether there has been complete discontinuance, whether effects continue after discontinuance, and whether there is any other reason that justifies decision and relief."[38] As one court determined, "[w]here ... the challenged acts is short-term in nature and discontinued after having achieved its objective, the voluntary cessation standard is not applicable."

In light of historic events, a government shutdown and budget impasses have become increasingly the norm rather than the exception. This is the second time a petition has sought adjudication of the constitutional issues. The first, after the 2005 government shutdown, the Court of Appeals determined the retroactivity of the legislative action mooted the Petitioner constitutional claims. The court did not reach the arguments now before this Court. If this Court now determines the issues as moot, the constitutional crisis will continue in 2013 and beyond.

But in light of the legislative language regarding the retroactive application of funding as superceding and replacing the orders of the lower court, the separation of powers issues remain intact. Can the Legislature supercede and replace orders of a district court without violating the separation of powers doctrine?[39]

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[38] 13A Charles A. Wright et al., *Federal Practice and Procedure* § 3533.7, at 350 (2d ed. 1984).

[39] "Where one branch purports to perform completely a function assigned to one of the other branches, such encroachment violates the separation of powers principle...For example, where the Legislature purports to remove from the judiciary a class of cases that the constitution vests in the judiciary, the Legislature has violated the separation of powers doctrine." *Brayton,* 781 N.W.2d at 375 (J. B. Anderson dissenting) *citing, Lee v.*

The Petitioners' relief asks to enjoin the illegal activities of the lower court now and in the future; the Governor now and in the future, the Attorney General now and in the future; and the Commissioner now and in the future. The Petitioners also ask for "[a]ny other remedy, legal or equitable, that the Court deems just." A controversy exists and a remedy for relief is available. Therefore the matter should not be considered moot regardless of the recent passage of appropriation laws.

The Petitioners arguments are timely and ripe for review. Adjudication and relief for the Petitioners is appropriate.

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Dated: July 22, 2011.

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Belmont, 228 Minn. 101, 112-13, 36 N.W.2d 530, 538 (1949) and *Holmberg v. Holmberg,* 588 N.W.2d 720, 726 (Minn. 1999).