

No. A12-0622

STATE OF MINNESOTA
IN SUPREME COURT

James D. Schowalter, in his capacity as Commissioner of the Minnesota
Department of Management and Budget,

Petitioner,

vs.

The State of Minnesota and the Taxpayers and Citizens of the State of Minnesota,

Respondents.

RESPONDENT MINNESOTA ATTORNEY GENERAL'S BRIEF AND ADDENDUM

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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

1. Whether the proposed appropriation bonds constitute a subterfuge to evade the balanced biennial budget requirement of the Minnesota Constitution.

Apposite Authority: Minn. Const. art. XI, §§ 4, 5; *Brayton v. Pawlenty*, 781 N.W.2d 357 (Minn. 2010); *Naftalin v. King*, 257 Minn. 498, 102 N.W.2d 301 (1960); *Naftalin v. King*, 252 Minn. 381, 90 N.W.2d 185 (1958); *Fleckten v. Lamberton*, 69 Minn. 187, 72 N.W. 65 (1897).

2. Whether the proposed appropriation bonds are public debt under the State Constitution.

Apposite Authority: Minn. Const. art. XI, §§ 4, 5; Minn. Stat. § 16A.99, subd. 8; *Minn. Energy & Econ. Dev. Auth. v. Printy*, 351 N.W.2d 319 (Minn. 1984); *Naftalin v. King*, 257 Minn. 498, 102 N.W.2d 301 (1960).

STATEMENT OF CASE AND FACTS

This proceeding presents the Court with an issue of first impression, *i.e.*, whether so-called “appropriation” bonds can be used to balance the State’s 2012-13 biennial budget. The Minnesota Constitution prohibits the State from borrowing money to balance the biennial budget. *See, e.g., Brayton v. Pawlenty*, 781 N.W.2d 357, 360 (Minn. 2010).

Petitioner argues that the proposed issuance of \$800 million in appropriation bonds is permissible debt under the State Constitution because the State is technically not required to pay off the bonds. The Court should not allow the use of appropriation bonds, referred to by some courts as “moral obligation” debt, to deficit spend in violation of the clear mandate of the State Constitution. Such funding is merely a subterfuge to evade the balanced budget requirement of Minnesota’s Constitution, and the Court has previously warned against the use of “a subterfuge for evading the purpose of constitutional state debt limitations.” *See Naftalin v. King*, 252 Minn. 381, 387 n.6, 90 N.W.2d 185, 190 n.6 (1958) (“*Naftalin I*”).

I. BACKGROUND.

A. State Constitutional Debt Limitation Clauses.

Unlike the federal constitution, state constitutional provisions have typically limited the states from incurring debt. These “debt limitation clauses” have taken many different forms and vary considerably in their language.

For example, a few states prohibit all state debt.¹ A large number of states impose an absolute limit, by dollar amount or a percentage calculation, on the debt a state can incur.² Many states require proposed state debt to be approved by a three-fourths or two-thirds vote of the legislature and/or an affirmative vote of the electorate.³

¹ See, e.g., Ark. Const. art. 16, § 1; Tenn. Const. art. 2, § 24.

² See, e.g., Ariz. Const. art. 9, § 5 (setting \$350,000 cap on state debt); Colo. Const. art. 11, § 3 (setting \$100,000 cap for debt contracted in any one year); Ga. Const. art. 7, § 4, ¶ 2 (prohibiting the state from incurring new debt if the state's outstanding debt service exceeds 10% of total revenue receipts from the previous fiscal year); Iowa Const. art. 7, § 2 (setting \$250,000 cap on state debt); Kans. Const. art. 11, § 6 (setting \$1 million cap on state debt); Me. Const. art. 9, § 14 (setting \$2 million cap on state debt, with certain exceptions); Neb. Const. art. 13, § 1 (setting \$100,000 cap on state debt); Nev. Const. art. 9, § 3 (setting debt limit at 2% of the assessed valuation of the state); Ohio Const. art. 8, § 1 (setting \$750,000 cap on state debt); Or. Const. art. 11, § 7 (setting \$50,000 cap on state debt); S.D. Const. art. 13, §§ 1, 2 (setting \$100,000 cap on state debt and limiting state debt to fund internal improvements to 0.5% of the assessed valuation of the property of the state); Wis. Const. art. 8, §§ 4, 6-7 (setting \$100,000 cap on state debt and limiting issuance of general obligation bonds); Wyo. Const. art. 16, § 1 (limiting state debt to 1% of the assessed value of the taxable property in the state).

³ See, e.g., Ala. Const. art. 11, § 213 (requiring two-thirds of both houses of legislature to approve issuance of new state debt); Alaska Const. art. 9, § 8 (requiring voter ratification before state debt for capital improvements or housing loans can be issued); Cal. Const. art. 16, § 1 (requiring a vote of two-thirds of both houses of the legislature and voter ratification for debt to exceed \$300,000); Del. Const. art. 8, § 3 (requiring a vote of three-fourths of both houses of legislature before state can create debt); Fla. Const. art. 7, § 11 (requiring voter approval of state general obligation debt); Idaho Const. art. 8, § 1 (requiring voter approval of state debt); Ky. Const. § 50 (same); Mass. Const. art. 62, §§ 1-4 (requiring a vote of two-thirds of each house of the general court before the Commonwealth may "give, loan or pledge its credit" or "borrow money"); Mich. Const. art. 9, § 15 (requiring a vote of two-thirds of each house of the legislature and voter ratification before the State "may borrow money for specific purposes"); Mo. Const. art. 3, § 37 (requiring voter ratification before bond debt exceeding \$1 million may be incurred by the state); Mont. Const. art. 8, § 8 (requiring a vote of two-thirds of each house of the legislature or a majority of the electorate before the state can incur debt); N.Y. Const. art. 7, § 11 (requiring voter ratification before certain state debt can be incurred); N.C. Const. art. 5, § 3 (same); Okla. Const. art. 10, § 25 (requiring voter

The restrictive limitations on a state's ability to incur debt caused many state courts to liberally interpret their respective debt limitation provisions to allow for more, rather than less, state debt. *See, e.g.,* Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 Rutgers L.J. 907, 948 (2003) (“Many state constitutions either prohibit long-term debt outright, or impose laughably low dollar limits that date back to the nineteenth century. Such provisions, inspire, if they do not justify, evasion.”). This led to creative methods of financing state and local government operations, including “subject-to-appropriation debt” which “dramatically expands the opportunities for evasion” of state constitutional debt limitations. *Id.* at 920. *See also* Stewart E. Sterk & Elizabeth S. Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 Wis. L. Rev. 1301, 1329 (1991) (recognizing that “state courts have been uneven in their enforcement of constitutional debt limitations,” and “have developed a variety of escape devices that permit legislatures to evade constitutional limitations.”).

B. Minnesota's Constitutional Debt Limitation Clauses.

Minnesota's Constitution as adopted in 1857 allowed the State, for the purpose of “defraying extraordinary expenditures,” to incur debt in the aggregate maximum amount of \$250,000 based on an affirmative vote of two-thirds of both the Minnesota House of Representatives and the Minnesota Senate. *See* William Anderson, *A History of the*

ratification before state debt can be incurred); Pa. Const. art. 8, § 7(a)(3) (requiring voter ratification before state debt can be incurred without limit); R.I. Const. art. 6, § 16 (requiring the “consent of the people” before state debt exceeding \$50,000 can be incurred); S.C. Const. art. 10, § 13(5) (requiring a vote of two-thirds of both houses of the legislature or voter ratification before unrestricted state debt can be incurred).

Constitution of Minnesota 240-41 (Univ. of Minn. ed., 1921) (containing in the appendix the full text of the Minnesota Constitution as adopted on October 13, 1857); *see also Naftalin v. King*, 257 Minn. 498, 516, 102 N.W.2d 301, 312 (1960) (“*Naftalin I*”) (Knutson, J., dissenting) (quoting article 9, sections 5, 6, and 7 of the Minnesota Constitution as adopted on October 13, 1857). The debt had to be repaid within ten years by the use of tax levies that paid the annual interest and the principal. *Id.*

Minnesota courts, like other state courts, were viewed as being “lax” in their enforcement of the state constitutional debt provisions, including the interpretation of “public debt.” Mary Jane Morrison, *The Minnesota State Constitution* 257 (G. Alan Tarr ed., 2002); *see also Recent Cases*, 23 Minn. L. Rev. 371, 392 (1939) (recognizing the efficacy of the Minnesota Constitution’s debt limitation provisions “has, for practical purposes, been emasculated by the Minnesota court’s interpretations”). In 1960, however, this Court reversed course and strictly enforced the State’s debt limitation provisions. *Naftalin II*, 257 Minn. at 503, 102 N.W.2d at 304 (overturning prior Court decision which found state debt to be constitutional, but applying new analysis prospectively); Morrison, *supra* page 5, at 257 (recognizing the *Naftalin II* decision signaled that the Court “no longer would follow its past lax enforcement” of the Minnesota Constitution’s debt limitation provisions).

The earlier *Naftalin I* opinion, issued in 1958, reluctantly found the subject indebtedness to be constitutional, but the Court stated as follows:

[I]t is the opinion of all members of the court that *a word of caution as to future state financing is in order*. As forcefully pointed out in *Brunk v. City of Des Moines*, 228 Iowa 287, 291 N.W. 395, 134 A.L.R. 1391, the special-

fund type of financing may be so abused that *it becomes merely a subterfuge for evading the purpose of constitutional state debt limitations*. A constitutional provision which has become so outmoded that only an ever-increasing application of legal ingenuity makes it workable in meeting the modern needs of state finance should be amended. The abuse of the special-fund doctrine has become apparent to many authorities.

Naftalin I, 252 Minn. at 387 n.6, 90 N.W.2d at 190 n.6 (emphasis added; citations omitted). In the Court's *Naftalin II* decision in 1960, it reiterated the cautionary language from the 1958 *Naftalin I* opinion. *Naftalin II*, 257 Minn. at 503, 102 N.W.2d at 304.

As a result of the Court's change in enforcement of the constitutional debt limitation provisions, in 1962 the State Constitution was amended to delete the \$250,000 limit on state debt and to require only a three-fifths (down from two-thirds) vote of the House and Senate to incur State debt for the purpose of improving public facilities. Morrison, *supra* page 5, at 257; *see also* 2011-2012 Minnesota Legislative Manual (Blue Book), ch. 2, at 82, available at <http://www.sos.state.mn.us/index.aspx?page=1676>. As part of the reorganization of the Minnesota Constitution in 1973 (effective November 5, 1974), the debt limitation clauses were simplified and consolidated in Article XI, and in particular, Sections 4, 5 and 7 of that article. As amended, unlike virtually all other states, the Minnesota debt limitation provisions do not place a cap on the amount of State debt that can be incurred, or require a vote of the electorate, and/or a three-fourths or two-thirds vote of the Legislature before State debt can be incurred.

1. The Definition Of "Public Debt."

Article XI, Section 4 reads as follows:

POWER TO CONTRACT PUBLIC DEBT; PUBLIC DEBT DEFINED. The state may contract public debts for which its full faith,

credit and taxing powers may be pledged at the times and in the manner authorized by law, but only for the purposes and subject to the conditions stated in section 5. *Public debt includes any obligation payable directly in whole or in part from a tax of state wide application on any class of property, income, transaction or privilege, but does not include any obligation which is payable from revenues other than taxes.*

(Emphasis added.) “Public debt” is therefore payable from future legislative appropriations. Morrison, *supra* page 5, at 256 (stating that “‘public debt’ under [Article XI, Section 4] is debt that is to be covered by future appropriations”). *See also Minn. Energy & Econ. Dev. Auth. v. Printy*, 351 N.W.2d 319, 347 (Minn. 1984) (“The general rule is that an obligation for which an appropriation is made at the time of its creation from funds already in existence is not within the operation of a limitation on public debt clause.”).

This Court has held, consistent with the language of Article XI, Section 4, that “public debt” does not include so-called “revenue bonds,” which are paid from revenue that is not a state-wide tax. Minn. Const. art. XI, § 4 (“Public debt...does not include any obligation which is payable from revenues other than taxes.”); *Minn. Hous. Fin. Agency v. Hatfield*, 297 Minn. 155, 162-64, 210 N.W.2d 298, 303 (1973) (stating “bonds do not constitute a ‘debt’ if they are to be paid solely out of earnings or income.”). *See also* Morrison, *supra* page 5, at 256 (“There is no public debt, by the definition under [Article XI, Section 4], if bonds are to be paid solely by event or entity income, not the state treasury.”). *See also* Joint Submission of Petitioner and Attorney General (“Joint Submission”) at 4-5.

2. Permissible Uses Of Public Debt.

Article XI, Section 5, states the limited purposes for which public debt can be incurred by the State. The principal purpose for the use of public debt is found in section 5(a). As noted above, it allows for capital improvements of public property if both the House and Senate approve the debt by a vote of at least 60% of their respective members. The State's bonding bills are enacted pursuant to this provision. The other permitted uses of public debt are not subject to the 60% vote requirement. *See* Minn. Const. art. XI, § 5(b)-(j).

Article XI, Section 5 does not allow for the use of public debt to balance the State's biennial budget. In other words, it does not authorize the State to borrow money to pay for current biennial expenses. As this Court most recently stated in *Brayton v. Pawlenty*:

The Minnesota Constitution allows the state to borrow money for only limited purposes. *See* Minn. Const. art. XI. As a result, the state's biennial operating budget must be balanced—that is, expenditures cannot exceed revenues for the biennium.

781 N.W.2d at 360. *See also id.* at 370 (Gildea, C.J., dissenting) (“In our constitution, the people of Minnesota restricted the ability of the state government to deficit spend.”). Accordingly, unlike the federal government, Minnesota's Constitution requires a balanced budget each biennium where expenditures equal revenues. Minnesota cannot deficit spend like the federal government by borrowing money to balance the budget.

3. Public Debt Incurred By Issuance Of Bonds.

Article XI, Section 7 provides for the manner in which bonds are issued to incur public debt. Such bonds are referred to as “general obligation” bonds, and have a term of no longer than twenty years. General obligation bonds are backed by the full faith and credit of the State and its taxing powers. The bonds must be issued for a public purpose, specify the particular purpose for which they are issued, and the debt service (principal and interest) on the bonds is paid by monies appropriated by the Legislature. *See* Joint Submission at 4.

II. THE 2010-2011 BIENNIAL BUDGET PROPOSAL REGARDING TOBACCO APPROPRIATION BONDS.

In 2009, the previous Governor proposed as part of the 2010-11 biennial budget that “tobacco appropriation” bonds be issued in the amount of \$1 billion to pay current expenses, including debt service obligations and other costs due during the 2010-11 biennium. *See* Add. at 12. In response to an inquiry from the then-Majority Leader of the Minnesota Senate, dated February 23, 2009, Attorney General Lori Swanson prepared an analysis of the constitutionality of the proposed appropriation bonds. *See id.* at 1-11. After discussing case law and the practical effect of moral obligation debt, the Attorney General concluded her analysis as follows:

The [appropriation bond] proceeds would effectively be used to fund the general operating expenses of the State. In other words, *the State would essentially borrow money to balance its budget.* Section 5 of Article XI does not list the funding of operating costs as a permissible purpose for incurring public debt. A court may be concerned that, if it allowed funding for this purpose here, *there would be very little to stand in the way of future legislatures from borrowing to fund general operating expenses, thereby*

rendering meaningless the balanced budget requirement in the Minnesota Constitution.

. . . . A court would need to participate in a certain level of legal gymnastics to sustain the borrowing contemplated by the Tobacco Appropriation Bonds as constitutional *in light of the balanced budget requirement in the Minnesota Constitution*. Under these facts and circumstances, *I am not confident* that a court would be willing to do so.

Id. at 10-11 (emphasis added).

The proposed appropriation bonds were not included as part of the final 2010-11 biennial budget. Joint Submission at 7. A bill which would have authorized appropriation bonds in the amount of \$1,085,000,000 was introduced in the Senate on March 11, 2009, and referred to the Committee on Environment and Natural Resources, where no further action was taken on it. *See* S.F. 1395, art. 2, § 3, 86th Leg. Sess. (Minn. 2009), *available at* <https://www.revisor.mn.gov/bin/showPDF.php>. A similar bill was introduced in the House on March 26, 2009, and referred to the Committee on Finance, but it was also never passed out of committee. *See* H.F. 2196, 86th Leg. Sess. (Minn. 2009), *available at* <http://wdoc.house.leg.state.mn.us/leg/LS86/HF2196.0.pdf>.

III. THE 2012-13 BIENNIAL BUDGET AND THE ENACTMENT OF MINN. STAT. §§ 16A.98 AND .99.

In 2011, during the regular legislative session, the Legislature and the Governor could not agree on a balanced budget, and in particular, resolve a shortfall between biennial revenue and expenses of approximately \$800 million. Joint Submission at 8. This led to a government shutdown beginning on July 1, 2011. The 19-day government shutdown was the longest in American history. The shutdown was ultimately ended on July 20, 2011, with the enactment of 2011 Minn. Laws 1st Spec. Sess., ch. 7, art. 11,

§§ 3, 4 (codified as Minn. Stat. §§ 16A.98, and .99), which authorized the State to borrow money in order to balance the biennial budget. See Joint Submission at 8; Petitioner’s and Attorney General’s Agreed Statement of the Record (“ASR”) at 146-50.

The summary of the legislation prepared by the Minnesota House of Representatives states that “[t]his article authorizes the commissioner of Minnesota management and budget (MMB) to issue a combination of tobacco securitization bonds or tobacco appropriation bonds to provide \$640 million to the general fund.” ASR at 147. The floor debate in the House and Senate also reflect that these provisions were enacted for the purpose of balancing the 2012-13 biennial budget. For example, one member of the House stated:

They’re going to issue under this plan \$640 Million in appropriation bonds. When we pay those back over a period of 20 years, its going to cost \$1.2 Billion dollars. *That’s deficit spending. . . . That will be the first time in the history of the State of Minnesota, that we’ve issued appropriation bonds for on-going programs. The first time Members, that we’ve entered into deficit spending.* In fact, there’s even constitutional questions about the approach of using appropriation bonds. . . . But again, my main point on this section of the bill, *deficit spending.*

See 87th Leg. Sess., 1st Spec. Sess., House Floor Session Part 3, at 38:55–41:21 (July 19, 2011), *available at* http://www.house.leg.state.mn.us/htv/archivesHFS.asp?ls_year=87 (emphasis added). Another legislator stated on the House floor: “What this family is doing, as I see that family sitting around the kitchen table, I’m the dad and I’m saying, ‘honey, on your way to the grocery store, swing by the bank *and take out a 20 year mortgage on the food you’re going to buy.*’ . . . Because under this bill, *we’re literally mortgaging the future of the State. . . .*” *Id.* at 42:52–43:26 (emphasis added). Another

member of the House stated the following: “*You are not passing a balanced budget. . . . You are carrying over \$700 Million dollars of indebtedness from this biennia, this biennium and into the next one. It’s not balanced. This is the first budget in Minnesota’s history that won’t be balanced. . . .*” *Id.* at 48:35–49:16 (emphasis added).

Numerous senators similarly described the legislation. For example, one senator stated:

No question, this [tax bill] is the centerpiece of the so-called solution to the budget crisis. . . . We spend money that we don’t have. We increase spending and *we do so by borrowing money. . . . So we’re obviously foisting this debt on future generations*

See 87th Leg. Sess., 1st Spec. Sess., Senate Floor Session Part 3, at 19:47–22:19 (July 19, 2011), available at http://www.senate.leg.state.mn.us/media/media_list.php?ls=87&ver=new&0archive_year=2011&category=floor&type=video#header (emphasis added).

Another senator echoed these sentiments: “I will just say one thing quickly about the borrowing and that is the \$700 Million, we’re not investing that money, we are spending that money and *using the bond sales to spend money now and then we’re going to have to pay it back.*” *Id.* at 26:53–27:10. Another senator stated: “*So let’s be honest with Minnesotans about the idea of a balanced budget, Members when we go home, because we’re handing off to the next legislature. . . . And how with a straight face can we say we’ve balanced the budget?*” *Id.* at 38:59–39:28.

The legislation passed the House by a vote of 71 to 57 (55.5%) and the Senate by a vote of 37 to 27 (57.8%). *See* Journal of the House, 87th Leg., 1st Spec. Sess., Tuesday,

July 19, 2011, page 21; Journal of the Senate, 87th Leg., 1st Spec. Sess., Tuesday, July 19, 2011, page 21.

Section 16A.98, subdivision 5 authorized the issuance of revenue bonds in the aggregate amount of no greater than \$900 million to be secured by payments made by tobacco companies under Minnesota's tobacco settlement agreement, for the purpose of generating net proceeds to the State of no more than \$640 million. Section 16A.99, subdivision 2(b) authorized Petitioner to issue appropriation bonds in the aggregate amount of no greater than \$800 million, to generate net proceeds to the State of no more than \$640 million. Subdivision 4 of Section 16A.99 also authorizes Petitioner to issue appropriation bonds "for the purpose of refunding any appropriation bonds or tobacco securitization bonds authorized under section 16A.98 then outstanding"

Petitioner chose to initially issue tobacco settlement revenue bonds under section 16A.98 ("Tobacco Settlement Revenue Bonds"), rather than appropriation bonds under section 16A.99. See Joint Submission at 9. Petitioner did so because there was insufficient time to conduct a validation proceeding under section 16A.99, subd. 9, regarding the issuance of appropriation bonds. *Id.* Petitioner intended, as soon as practicable, to refund the outstanding Tobacco Settlement Revenue Bonds with appropriation bonds under section 16A.99. *Id.*

A. The Tobacco Settlement Revenue Bonds.

The Tobacco Settlement Revenue Bonds were issued on November 29, 2011, in the par amount of approximately \$757 million. *Id.*; see also ASR at 151-52. The total amount of proceeds generated by the issuance of these bonds was approximately \$784

million, to be paid back over a period of three to fifteen years (depending on the series). Joint Submission at 9; ASR at 152, 174. The Tobacco Settlement Revenue Bonds are not currently secured by the tobacco settlement payments, but would be secured by such payments beginning in fiscal year 2014 if the bonds are outstanding at that time. Joint Submission at 9-10; ASR at 174. The debt service on the Tobacco Settlement Revenue Bonds prior to 2014 is secured by and payable from part of the gross proceeds generated by issuing the bonds. Joint Submission at 10; ASR at 174. The State netted a total of \$640 million from the transaction. Joint Submission at 10; ASR at 174. The \$640 million was used to pay current biennial expenses of the State in the form of State debt service obligations that became due or were to become due during the 2012-13 biennium. Joint Submission at 10.

B. The Proposed Appropriation Bonds.

Petitioner proposes to issue appropriation bonds pursuant to Section 16A.99, in a maximum amount of \$800 million, to refund in advance of maturity the outstanding Tobacco Settlement Revenue Bonds. See Joint Submission at 10. The appropriation bonds will be paid back over a period of up to thirty years and will be “payable in whole or in part from tobacco settlement revenues and from money appropriated by law in any biennium for payment of principal and interest on the Bonds.” Minn. Stat. § 16A.99, subd. 2(c), ASR at 47. *See also* Minn. Stat. § 16A.99 subd. 1(b) (“‘Appropriation bond’ means a bond ... payable during a biennium in whole or in part from tobacco settlement revenues and from one or more of the following sources [including] (1) money appropriated by law in any biennium for debt service due ...”).

The Preliminary Official Statement also states that the bonds will be paid based on a standing appropriation, but subject to a future legislature's discretionary authority to modify or repeal the standing appropriation or a future governor's unallotment. ASR at 47. A nonappropriation to pay debt service on the bonds would adversely affect the State's credit rating for the debt it incurs, which would result in higher interest costs for subsequent bonds issued (including general obligation bonds) by the State. Joint Submission at 6. A nonappropriation could therefore potentially affect the State's ability to access capital markets, at least in a cost-effective manner. *Id.* As a result, future legislatures will experience economic and reputational pressure to annually appropriate sufficient funds to pay the principal and interest on the appropriation bonds, as they become due. *Id.*

Bond rating agencies analyze a state's general creditworthiness when they propose to issue appropriation bonds in the same manner as if the state were issuing general obligation bonds. *Id.* Despite the absence of any legal obligation on the part of a future legislature to appropriate funds, the bond rating agencies evaluate appropriation bonds as "obligations" of the state and reflect them in the state's debt statement and ratios. *Id.* Credit markets and bond rating agencies have an expectation that, as a practical matter, a future legislature will continue to fund appropriation bonds' debt obligations even though the bonds are not legally secured by any such pledge. *Id.* A nonappropriation would negatively affect the market's perception of the State's willingness to repay its obligations. *Id.*

ARGUMENT

I. THE PROPOSED APPROPRIATION BONDS ARE A SUBTERFUGE FOR EVADING THE BALANCED BUDGET REQUIREMENT EMBODIED IN THE STATE CONSTITUTION AND THEREFORE THE COURT SHOULD NOT VALIDATE THE BONDS.

A. Standard Of Review.

As discussed *supra* at 2, this Court has made it clear that creative forms of state financing will be scrutinized to ensure that the “purpose of constitutional state debt limitations” are not undermined. *Naftalin I*, 252 Minn. at 387 n.6, 90 N.W.2d at 190 n.6 (stating that financing scheme cannot be a “subterfuge” to evade purpose of state debt limits); *Comm’r of Revenue v. Safco Prods. Co.*, 266 N.W.2d 875, 877 (Minn. 1978) (“Under proper circumstances, this court will disregard a transaction’s form to examine its economic substance.”); *Sanborn v. Van Duyne*, 90 Minn. 215, 223, 96 N.W. 41, 42-43 (1903) (recognizing the “elementary” principle that the Legislature cannot “do indirectly what it cannot do directly” and that any legislation that attempts to indirectly “accomplish what the Constitution forbids” is “clearly unconstitutional and void”). *See also, e.g., State ex rel. Ohio Funds Mgmt. Bd. v. Walker*, 561 N.E.2d 927, 932 (Ohio 1990) (invalidating state debt financing scheme and stating “[t]his court must examine a transaction not only for what it purports to be, but what it actually is”); *Witzenburger v. State ex rel. Wyo. Cmty. Dev. Auth.*, 575 P.2d 1100, 1117 (Wyo. 1978) (invalidating bond issuance and stating “[w]e must look to the substance, not the form. Whether a statute authorizes a debt of the State contrary to constitutional curbs is a judicial question, rather than a legislative question. . . . The legislature cannot do indirectly what it cannot do

directly.”); *Winkler v. State Sch. Bldg. Auth.*, 434 S.E.2d 420, 432 (W. Va. 1993) (invalidating bond issuance and stating that in determining the validity of state bonds, “it is the duty of this Court to consider the substance of the plan envisioned by the statute in determining the question of constitutionality”) (quotation and modifications omitted).

The proposed appropriation bonds cannot withstand such review. The proposed financing is a subterfuge to circumvent the balanced budget mandate of the State Constitution.

B. The Proposed Appropriation Bonds Were Designed To Balance The 2012-13 Biennial Budget, And If Validated By The Court, Will Result In Deficit Spending In Violation Of The State Constitution.

The principal purpose of the State Constitution’s debt limitations is to require that each biennial budget be balanced, *i.e.*, revenues equal expenditures, so that the State does not engage in deficit financing. As this Court explained in *Fleckten v. Lamberton*, 69 Minn. 187, 190, 72 N.W. 65, 66 (1897):

It seems to us that the object of [the state constitutional debt limitation] sections is to *compel the legislature to provide sufficient yearly revenue to meet the current, ordinary expenses of the state government*, and thereby prevent the accumulation of indebtedness for such expenses, *and to prohibit the incurring of indebtedness, even for extraordinary expenses, except to a limited extent*, and under restrictions and provisions which will insure prompt and certain repayment. *The object is to prevent the legislature from mortgaging the future at all for ordinary expenses, and to prevent it from mortgaging the future for extraordinary expenses, except to a limited extent, and in a restricted manner.*

(Emphasis added.) *See also Brayton*, 781 N.W.2d at 360.

It is undisputed that the proposed appropriation bonds were authorized to generate net proceeds of \$640 million for the express purpose of balancing the 2012-13 biennial

budget. See Minn. Stat. § 16A.99, subds. 2(a), 4 (allowing Petitioner to issue appropriation bonds immediately to raise the \$640 million necessary to balance the budget or “refund” revenue bonds that generated the \$640 million); see also ASR at 147 (recognizing the bill authorized Petitioner to issue “tobacco appropriation bonds to provide \$640 million to the general fund”); Joint Submission at 14, 17, 19, 21; Pet’r’s Br. at 3-5. The legislative history is clear that the purpose of the appropriation bonds was to balance the 2012-13 budget. See *supra* at 11-13; see also ASR at 149 (recognizing the \$640 million in proceeds from the appropriation bonds would be used to pay the debt service obligations of the State that became due or were to become due during the 2012-13 biennium).

Petitioner chose to issue the tobacco settlement “revenue”⁴ bonds first under section 16A.98 because the validation proceeding for the appropriation bonds would have been too time consuming. Joint Submission at 9. As he intended, shortly after issuance of the revenue bonds, Petitioner now proposes to “refund” the bonds with the appropriation bonds. See Joint Submission at 9 (“Petitioner intended, as soon as practicable, to refund the outstanding Tobacco Settlement Revenue Bonds with appropriation bonds under section 16A.99.”); ASR at 11-37. Accordingly, the proceeds from the proposed appropriation bonds will directly or indirectly balance the State’s

⁴ The bonds are actually a form of bridge financing until the proposed appropriation bonds can be issued. The revenue bonds, which raised \$784 million, with net proceeds to the State of \$640 million, Joint Submission at 9-10; ASR at 174, are not actually secured by the tobacco settlement payments until fiscal year 2014. Joint Submission at 9; ASR at 179. Until that time, a portion of the gross proceeds from the sale of the bonds pay the bonds’ debt service. Joint Submission at 10; ASR at 174.

biennial budget for the 2012-13 biennium, fulfilling the express purpose of the 2011 legislation, which resolved the government shutdown. As such, these bonds are entirely inconsistent with the primary purpose of the state constitutional debt limits, which is to “prevent the legislature from mortgaging the future *at all* for ordinary expenses.” *Fleckten*, 69 Minn. at 190, 72 N.W. at 66 (emphasis added).

Petitioner’s argument that the State is able to refuse to repay the bonds does not change the reality of the transaction. The practical effect of the bonds is that future legislatures will have little choice but to pay off the bonds because failure to do so would have a significant adverse effect on the State’s credit rating and its ability to borrow money in the future. *See, e.g.*, Joint Submission at 6. (“Credit markets and bond rating agencies have an expectation that, as a practical matter, a future legislature will continue to fund appropriation bonds’ debt obligations even though the bonds are not legally secured by any such pledges.”); *id.* (stating that bond rating agencies “evaluate appropriation bonds as ‘obligations’ of the state” and “analyze a state’s general credit-worthiness when they propose to issue appropriation bonds in the same manner as if the state were issuing general obligation bonds”).

As reasoned by the court in *Winkler v. State Sch. Bldg. Auth.*, 434 S.E.2d 420, 432, 435 (W. Va. 1993):

While we may admire the legal sophistry of this argument [that the State is not obligated to pay], it *defies our practical judgment*. If the bonds are not paid, it is obvious that the State’s credit will be impaired.

....

[U]nless we are to *abandon our logic and common sense*, we cannot help but conclude that the statutory scheme surrounding these bonds bespeaks a legislative requirement that they be funded. . . . *Even if we were to close our eyes to this statutory language, we could not close our minds to the practical consequences of this revenue arrangement. To accept the premise that the Legislature is not bound to fund the bonds and would allow a default, thereby impairing the credit rating of the State, assumes a naivete on our part that we simply do not possess.*

(Emphasis added; footnote omitted.) *See also, e.g., Witzenburger*, 575 P.2d at 1127 (stating “as a practical matter, a state legislature will not permit a default because of its effect on the State’s credit rating,” and “[w]hat alarms us is the obvious pressure the enacting legislature is putting on future legislatures”); Joint Submission at 6 (stating “[a] nonappropriation to pay debt service on the bonds would adversely affect the State’s credit rating for the debt it incurs” and “future legislatures will experience economic and reputational pressure to annually appropriate sufficient funds to pay the principal and interest on the appropriation bonds, as they become due”)

This conclusion is also supported by *United States Trust Company v. New Jersey*, 431 U.S. 1, 25 n.23 (1977), in which the U.S. Supreme Court reasoned as follows:

The truth is, States and cities, when they borrow money and contract to repay it with interest, are *not acting as sovereignties*. They come down to the level of ordinary individuals. Their contracts have the *same meaning as that of similar contracts between private persons*. Hence, instead of there being in the undertaking of a State or city to pay, a reservation of a sovereign right to withhold payment, *the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.*

(quoting *Murray v. Charleston*, 96 U.S. 432, 445 (1877)) (quotation marks omitted; emphasis added). *See also Welsh v. Baines-Duluth Shipbuilding Co.*, 221 Minn. 37, 44, 21 N.W.2d 43, 47 (1945) (“An unenforceable promise is really no promise at all, but an

illusory one. Unless a promise is enforceable, the promisee receives nothing for his promise, and therefore it is without consideration.”); *Franklin v. Carpenter*, 309 Minn. 419, 422, 244 N.W.2d 492, 495 (1976) (“When there is a lack of consideration, no valid contract is ever formed.”).

Finally, the proposed appropriation bonds are no less of a subterfuge to evade state constitutional debt limitations than the financing scheme considered and rejected prospectively by the Court in the 1960 *Naftalin II* decision. In that case, the legislature appropriated approximately \$52 million from a “special fund,” referred to as the “State Building Fund,” for construction and repairs of various buildings as well as operating expenses for numerous state functions such as prisons, reformatories, and colleges. *Naftalin II*, 257 Minn. at 499-500, 102 N.W.2d at 302-03. At the same time, the legislature authorized the issuance of long-term certificates of indebtedness to replenish the State Building Fund in the same amount appropriated by the legislature, and the certificates were expressly payable from the fund, not the State’s general fund. *Id.* at 506-08, 102 N.W.2d at 306-07 (Knutson, J., dissenting). A state-wide tax was also imposed to collect monies during the term of the certificates equal to the proceeds from the certificates and applicable interest. *Id.* at 506-07, 102 N.W.2d at 306-07. The taxes were deposited in the State Building Fund. *Id.* at 507, 102 N.W.2d at 307.

The Commissioner of Administration argued that since the certificates were payable from a “special fund” and not the State’s general fund, no public debt was incurred, and therefore the then-existing \$250,000 constitutional limit on public debt was inapplicable. The Court found this financing scheme to be a subterfuge to evade the

\$250,000 constitutional limit on public debt because the certificates were, in reality, payable from a state-wide tax. *Id.* at 502-03, 102 N.W.2d at 303-04. Similarly, as discussed above, the proposed appropriation bonds in this case are a subterfuge to evade the Minnesota Constitution's balanced budget requirement because the bonds, in reality, are payable directly from a standing appropriation of future general fund monies into as much as the next 15 biennia. *See* Minn. Stat. § 16A.99, subd. 2(c); ASR at 47.

C. Petitioner's Reliance On Case Law From Other States Is Misplaced.

The cases cited by Petitioner (Pet'r's Br. at 23-29, 36-38) involve a variety of constitutional provisions and fact situations. They are distinguishable from this case for a number of reasons.

First, none of the cases cited by Petitioner involve a blatant attempt, like this case, to balance a state budget with deficit spending. Validation of appropriation bonds for this purpose would open the floodgates to deficit financing. Much like the federal government, if those bonds are acceptable, there would be no real restriction on balancing a biennial budget with debt. *See, e.g., Winkler*, 434 S.E.2d at 431 (recognizing that if the subterfuge financing scheme at issue was validated, "the Legislature could authorize the State or its agencies to issue bonds in any amount" so long as this deceptive method was utilized).

Second, as discussed above, the Minnesota debt limitation provisions are far less restrictive than most states. *See supra* at pp. 3-6. Therefore, unlike cases relied on by

Petitioner,⁵ there is no need or justification to stretch Minnesota's constitutional debt limitations. In any event, this Court has instructed that the proper way to remedy overly restrictive debt limitations is not by evasion, but by amendment of the constitution. See *Naftalin I*, 252 Minn. at 387 n.6, 90 N.W.2d at 190 n.6 (“A constitutional provision which has become so outmoded that only an ever-increasing application of legal ingenuity makes it workable in meeting the modern needs of state finance should be amended.”); accord *Knapp v. O'Brien*, 288 Minn. 103, 106, 179 N.W.2d 88, 90 (1970) (“Neither the legislature nor this court has any right to bypass the people under the guise of a liberal interpretation which in effect would amend the constitution, no matter how desirable the amendment might be.”).

Third, the cases cited by Petitioner did not apply the “subterfuge” standard embraced by the Court in the *Naftalin v. King* decisions, but instead relied only on a technical application of the subject law. See, e.g., *Wilson v. Ky. Transp. Cabinet*, 884 S.W.2d 641, 644-46 (Ky. 1994) (disregarding practical consequences and evasive nature of transaction); *Schulz v. State*, 639 N.E.2d 1140, 1148-50 (N.Y. 1994) (refusing to apply “moral obligation” and practical realities of appropriation-backed debt transaction); *Dykes v. N. Va. Transp. Dist. Comm'n*, 411 S.E.2d 1, 9-10 (Va. 1991) (ignoring, on rehearing, practical consequences of subject-to-appropriation financing transaction);

⁵ For example, in *Municipal Building Authority of Iron County v. Lowder*, 711 P.2d 273 (Utah 1985), the court upheld a financing scheme, but readily admitted that it was a subterfuge to evade the “rigid debt ceiling . . . or . . . taxpayer approval requirement” of the state constitution. *Lowder*, 711 P.2d at 275, 277, 279-80 (“Of course the Act is intended to permit avoidance of the constitutional debt limitations. It is the very rigidity of those limitations that has led the courts to narrowly construe them and the legislature to actively assist local government in avoiding them.”).

Dep't of Ecology v. State Fin. Comm., 804 P.2d 1241, 1245-47 (Wash. 1991) (rejecting argument, solely due to inclusion of a nonappropriation clause, that subterfuge transaction would render the constitutional debt-limit provision meaningless).

Fourth, the vast majority of the cases cited by Petitioner involve some variation of real property or equipment leases which implicate other analyses or practical consequences and realities not involved here. See Pet'r's Br. at 23-29 (citing cases from other jurisdictions where 17 out of the 22 cases cited involved real property or equipment leases). For example, many jurisdictions, including Minnesota, have held that long-term executory contracts (like an office or building lease) entered into by governmental entities to purchase necessary or everyday services do not create impermissible debt. See, e.g., *Ambrozich v. City of Eveleth*, 200 Minn. 473, 485, 274 N.W. 635, 641 (1937) (stating that "[t]he weight of authority is that public service contracts, calling for payment in installments as the service is rendered, do not create an indebtedness against the municipality until the service is performed, at which time the installments fall due"); *Struble v. Nelson*, 217 Minn. 610, 615, 15 N.W.2d 101, 104 (1944) (finding that agreement for ongoing water service to city did not constitute debt and stating that "periodic installments as the service is rendered" does not create "present indebtedness").⁶ In addition, unlike the proposed appropriation bonds, the property

⁶ *Accord City of Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1, 19-21 (1898) (finding contract for water services did not constitute indebtedness and distinguishing between contracts involving rental payments for necessary services from cases where "an absolute debt is created at once, as by the issue of . . . bonds . . . [where] the time of payment [is] only postponed"); *State ex rel. Charleston Bldg. Comm'n v. Dial*, 479 S.E.2d 695, 710 (W. Va. 1996) (holding State's periodic rental payments under lease-

owner or service provider under a lease agreement has available remedies such as discontinuing use of the property or the subject service if there is a nonappropriation.⁷

In addition, many of the decisions relied on by Petitioner are deeply divided with strong and vigorous dissents. *See, e.g., In re Okla. Capitol Improvement Auth.*, 958 P.2d 759, 778-79, 782, 787 (Okla. 1998) (5-4 decision) (Lavender, J., dissenting) (“[T]he majority is allowing State officials to circumvent [the constitution’s debt-limit

purchase agreement was not unconstitutional debt and stating, “[l]ong term contracts for the purchase of necessary services, such as electricity and water, have long been held not to violate constitutional and statutory provisions prohibiting...incurring indebtedness, when the agreements specify that periodic installments will be paid as the service is furnished”) (quotation omitted); *State ex rel. Ross v. Donahey*, 113 N.E. 263, 265 (Ohio 1916) (recognizing a “necessary current expense [of the state] . . . is not a debt” and an installment payment under a lease “does not become an existing debt” until “the month, quarter, or year the premises are so used and occupied”).

⁷ Petitioner’s reliance on some existing forms of purported “appropriation debt” authorized under certain Minnesota statutes (Pet’r’s Br. at 30-33) is misplaced for several reasons. First, neither this Court, nor any other court in Minnesota, has considered the propriety of such financing. Second, the funding referred to by Petitioner involves office or equipment leases, *see* Minn. Stat. §§ 16A.85 (authorizing the establishment of a master lease equipment financing program whereby the Commissioner of Management and Budget may enter into long-term lease-purchase agreements for equipment used in the normal course of the government’s business such as computers and related equipment, telephones, machinery, cars, trucks, office furniture, and the like); 16A.81-.82, 270C.145 (authorizing the Commissioner of Management and Budget to enter into a lease-purchase agreement and issue certificates of participation to fund a statewide accounting and procurement technology system and integrated tax software package), which implicates legal and practical considerations not relevant to the proposed appropriation bonds. *See supra* at pp. 24-25. Third, the appropriation of payments for the University of Minnesota do not involve the issuance of bonds or any other financing by the State, but rather simply a payment to the University from the State. *See* Minn. Stat. §§ 137.50-.60 (appropriating funds to pay the debt service of bonds the University issued for the construction of a football stadium and granting the University certain rights if there is a nonappropriation); 137.61-.70 (appropriating funds to pay up to 75% of the debt service of bonds the University issued to finance biomedical science research facilities). Fourth, and most significantly, none of these matters involve an attempt to circumvent the balanced biennial budget requirement of the State Constitution.

provisions].... From a realistic perspective...the State will, in fact, be obligated to repay the bonds and interest thereon.... To rule otherwise...simply ignores the economic reality of the situation and, at a minimum, permits violation of the spirit of our fundamental law, something I am unwilling to sanction.”); (Wilson, J., dissenting) (“[T]his Court gives its imprimatur to deficit spending by our legislative and executive officers,” resulting in “the demise of our conservative fiscal management that is the hallmark of the Oklahoma Constitution.”); (Watt, J., dissenting) (“In sanctioning the bond issue before us, the majority’s decision flies in the face of our prior case law, runs afoul of the plain language of our Constitution, and sounds the death knell to Oklahoma’s constitutional balanced budget provisions.”); *McFarland v. Barron*, 164 N.W.2d 607, 612-13 (S.D. 1969) (3-2 decision) (Rentto, J., dissenting) (“A careful reading of the act convinces me that it is a studied effort to circumvent the Constitution.... To hold otherwise would be to exalt artifice over reality. It is fundamental that the legislature may not accomplish indirectly what it is not permitted to do directly. In determining whether this is being done we must look through form to the substance of a transaction.”); *Dykes*, 411 S.E.2d at 11 (4-3 decision, upon rehearing) (Whiting, J., dissenting) (“A rehearing of this case has produced no arguments which were not made and considered when a majority of this Court decided that the proposed bond issue was invalid. No matter how the new majority phrases it, the present decision is simply an approval of an end run around the constitutional requirement of voter approval before a county can be saddled with long-term indebtedness.”); (Stephenson, J., dissenting) (“I find the scheme employed by the County to be a shocking, patent attempt to circumvent

and nullify [Virginia's constitutional debt-limit provisions].... Is anyone so naïve that they truly believe that the County, in reality, is not compelled to make annual appropriations until the bonds are retired?"); *Dep't of Ecology*, 804 P.2d at 1259 (5-4 decision) (Dore, J., dissenting) ("The financing arrangement proposed...is merely an attempt to circumvent the debt limitation provisions of [the Washington Constitution]. It will saddle the State with an expensive form of financing in contravention of the expressed will of the people. Furthermore, because of the flexible debt limitation now contained in [Washington's Constitution] there is no compelling need to attempt to circumvent the debt limitations.").

See also State v. Sch. Bd. of Sarasota Cnty., 561 So.2d 549, 553-554 (Fla. 1990) (McDonald, J., dissenting) ("Today the Court approves form over substance.... By approving these financing agreements we have approved a method of nullifying the provisions of [our constitution's debt-limit provision]."); *Wilson*, 884 S.W.2d at 647 (Stumbo, J., dissenting) ("Through smoke and mirrors we have allowed debt to be labeled something else for too long. The economic reality is that these bonds are debts of the Commonwealth. They are therefore in violation of [Kentucky's constitutional debt-limit provisions]."); *Caddell v. Lexington Cnty. Sch. Dist. No. 1*, 373 S.E.2d 598, 602 (S.C. 1988) (Finney, J., dissenting) ("The lease agreements are a subterfuge to enable the District and the Corporation to evade the District's constitutional debt limitations, which were provided generally to protect the public.... [N]o matter how worthy the endeavor, contravening the constitution cannot be justified."); Briffault, *supra* page 4, at 923 ("Many of the cases in which state supreme courts have found subject-to-appropriation

agreements are not debt have been marked by close votes and sharp dissents, with the dissenters calling for a ‘common sense’ or realistic interpretation that would recognize that these borrowings are binding in practice.”).

The proposed appropriation bonds improperly circumvent the State’s balanced biennial budget requirement. Such deficit spending is clearly contrary to the purpose underlying the State’s modern constitutional debt limitation provisions. The Court should not validate the bonds.⁸

⁸ At a minimum, the Court should make clear that, *prospectively*, appropriation bonds cannot be used directly or indirectly to balance the State’s biennial budget. *See, e.g., Naftalin II*, 257 Minn. at 503, 102 N.W.2d at 304 (upholding, reluctantly, the constitutionality of the certificates of indebtedness at issue but stating “if this court is again presented with the issue” it would declare such a financing unconstitutional); *City of Phoenix, Ariz. v. Kolodziejcki*, 399 U.S. 204, 213-15 (1970) (applying decision invalidating issuance of bonds prospectively only); *Montano v. Gabaldon*, 766 P.2d 1328, 1330 (N.M. 1989) (holding lease-purchase agreement created unconstitutional debt but giving the ruling “modified prospective effect only”), *Winkler*, 434 S.E.2d at 436-37 (holding issued bonds were unconstitutional debt but applying ruling prospectively so as not to invalidate previously issued bonds).

Generally, decisions are given retroactive effect, unless “special circumstances” exist or the Court specifically provides that “its decision is to be applied prospectively only.” *Hoff v. Kempton*, 317 N.W.2d 361, 363 (Minn. 1982); *see also State v. Baird*, 654 N.W.2d 105, 112 (Minn. 2002) (stating the rationale of this “special circumstances” test is that, in some cases, “the disruptive effect retroactivity has on parties and their individual situations outweighs the countervailing interests in treating all similarly situated parties alike”). In determining whether a decision should be applied prospectively only under this standard, the Court must weigh three factors: (i) whether “the decision...establish[es] a new principle of law...by deciding an issue of first impression whose resolution was not clearly foreshadowed;” (ii) whether retroactive application of the decision “will further or retard” operation of the rule the decision announced; and (iii) whether the decision “could produce substantial inequitable results if applied retroactively” and prospective application would avoid such “injustice or hardship.” *Hoff*, 317 N.W.2d at 363-64 (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971)). *See also Bendorf v. Comm’r of Pub. Safety*, 727 N.W.2d 410, 414 n.5 (Minn. 2007) (recognizing that although *Chevron* had been overruled in part, the Court has “continued to apply the *Chevron* test”).

II. THE PROPOSED APPROPRIATION BONDS ALSO ARE LITERALLY AN OBLIGATION “PAYABLE” FROM FUTURE APPROPRIATIONS, AND THEREFORE, THE BONDS CONSTITUTE “PUBLIC DEBT” WHICH CANNOT BE USED TO BALANCE THE STATE BUDGET.

Apart from being a subterfuge to balance the State budget contrary to the State Constitution’s purpose, the proposed appropriation bonds literally constitute “public debt” under the Constitution. As discussed above, such debt cannot be used to balance the 2012-13 biennial budget. See *supra* at pages 2, 8.

The plain language of Article XI, Section 4 provides that “ ‘[p]ublic debt’ includes any obligation payable directly in whole or in part from a tax of state wide application....” The proposed appropriation bonds to be issued by the State are an “obligation” of the State. See Joint Submission at 6 (stating “bond rating agencies evaluate appropriation bonds as ‘obligations’ of the state”). As noted above, a contrary conclusion would render the \$800 million bond issuance to be an illusory contract with the investing public. See *supra* at pages 19-21.

The bonds are also expressly “payable” from future general fund appropriations, see Minn. Stat. § 16A.99, subd. 8; ASR at 47, which consist of state-wide taxes. See ASR at 84-88 (stating the general fund’s revenue sources principally consist of “taxes of various types,” including taxes on income, sales and use, statewide property, corporate franchise, insurance gross earnings, motor vehicle sales, liquor, wine and fermented malt beverages, cigarette and tobacco products, estates, mortgages, deeds, legalized gambling, rental motor vehicles, taconite and iron ore occupation, and health care providers); see also *Printy*, 351 N.W.2d at 347-48 (holding certain bond insurance and loan insurance

programs did not create “public debt” under Minnesota Constitution because they were “not funded out of future appropriations”); Morrison, *supra* page 5, at 256 (“[P]ublic debt’ under [Article XI, § 4] is debt that is to be covered by future appropriations.”). Indeed, a standing appropriation is in place to pay all the debt service on the bonds until they are paid in full and retired. *See* Minn. Stat. § 16A.99, subd. 8; ASR at 47.

The disclaimer regarding the legislature’s appropriation of funds does not change the fact that the bonds are expressly “payable” directly from future general fund appropriations. Nor does it change the practical reality that future legislatures are obligated to continue to appropriate sufficient funds to satisfy the debt service on the bonds, or the illusory nature of the financing if no such practical consequence existed. *See supra* at pages 19-21.

The bonds’ contradictory statements that they are payable from future general fund appropriations, but not a state-wide tax,⁹ also defies reality and common sense, as well as this Court’s precedent. As discussed above, the State’s general funds are principally derived from state-wide taxes, such as income tax. *See* ASR at 84-88 (stating the State’s general funds’ “principal sources of non-dedicated revenues are taxes of various types” and describing such taxes). Accordingly, as discussed above, the constitutional definition of “public debt” includes the State borrowing money to be repaid by future general fund appropriations. *See also Naftalin II*, 257 Minn. at 502, 102

⁹ *Compare* ASR at 47 (“[T]he Bonds are payable in whole or in part...from money appropriated [from the State’s general fund] by law in any biennium for payment of principal and interest on the Bonds), *with* ASR at 48 (“The bonds are not payable directly, in whole or in part, from a tax of statewide application on any class of property, income, transaction, or privilege.”) (caps removed).

N.W.2d at 303-04 (stating that certificates of indebtedness that are to be retired from moneys derived from a state-wide property tax creates “public debt” within the meaning of the Minnesota Constitution).

Any language to the contrary in Section 16A.99 or the bonds themselves does not prevent the Court from recognizing the reality and legal effect of the proposed appropriation bonds. See *supra* at 16-17. See also, e.g., *State ex rel. Shkurti v. Withrow*, 513 N.E.2d 1332, 1336 (Ohio 1987) (stating court is not bound by legislative declaration of legal effect of financing); *Witzenburger*, 575 P.2d at 1117 (same); *Winkler*, 434 S.E.2d at 432 (same).

CONCLUSION

Based on the foregoing, the Court should not validate the proposed appropriation bonds.

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