

A06-840

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## State of Minnesota In Court of Appeals

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State of Minnesota ex rel. Speaker of House of Representatives  
Hon. Steve Sviggum, et al.,

Appellants,

vs.

Peggy Ingison, in her official capacity as Commissioner of Finance,  
Or her successor, et al.,

Respondents.

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### Reply Brief of Appellants/Individual Legislators

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## ARGUMENT

### I. THE COMMISSIONER OF FINANCE IS VIOLATING THE CONSTITUTIONAL AND STATUTORY LIMITATIONS ON HER OFFICE.

The Respondents' brief fails to squarely address the legal issues before the Court. The Commissioner of Finance's continuing usurpation of the legislature's authority to appropriate state funds contradicts the constitutional and statutory limitations of her office. The Respondents' brief fails even to cite legal standards to appropriately interpret the constitutional and statutory limitations to her office.

Questions of constitutional interpretation as well as questions of statutory interpretation are issues of law which appellate courts review de novo. *See Star Tribune Co v. Univ. of Minn. Bd. of Regents*, 683 N.W.2d 274, 283 (Minn.2004) (interpreting constitutional provisions); *Yoraway v Comm'r of Pub. Safety*, 669 N.W.2d 622, 625 (Minn.App.2003) (interpreting statutory provisions).

The Court's role, as Justice Holmes noted, is "not [to] inquire what the legislature meant; we ask only what the statute means." Holmes, *The Theory of Statutory Interpretation*, 12 Harv. Law Rev. 417, 418-9 (1899). "Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings needs no discussion." *Caminetti v United States*, 242 U.S. 470, 485 (1917).

As the Minnesota Supreme Court has repeatedly stated, Minnesota Courts can "disregard a statute's plain meaning only in rare cases where the plain meaning 'utterly confounds a clear legislative purpose.'" *Hyatt v Anoka Police Dep't*, 691 N.W.2d 824, 827 (Minn. 2005) (quoting *Mut. Serv. Cas. Ins. Co v League of Minn. Cities*, 659

N.W.2d 755, 760 (Minn.2003)). See also *Weston v McWilliams & Associates, Inc* , 716 N.W.2d 634, 640 (Minn. 2006). Thus, only where there is an ambiguity, where words are reasonably susceptible to two or at least a finite few meanings, may courts resort to other aids or rules than the “plain meaning.”

It is also true that a constitutional provision or statute and especially its component parts should be read in context. See *Gen. Dynamics Land Sys., Inc. v Cline*, 540 U.S. 581, 583-584 (2004)(“[s]tatutory language must be read in context [since] a phrase gathers meaning from the words around it”) (quoting *Jones v United States*, 527 U.S. 373, 389 (1999)(quotation omitted)) (alterations in original) “Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived……” *United States v Fisher*, 6 U.S. (2 Cranch) 358, 385-89, 2 L.Ed. 304 (1805)(Marshall, C.J.) (analyzing statutory language in the context of the title of the statute). See generally R. Dickerson, *The Interpretation and Application of Statutes* 1158 (1975) (“One is liberated from literalism by learning to read in context.”)

Under our constitutional system of separation of powers, both the search for constitutional and statutory meaning and the determination of the law’s application to the facts of a case are quintessentially judicial power. While “[i]t is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society,” wrote Chief Justice Marshall, “would seem to be the duty of other departments.” *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136, 3 L.Ed. 162 (1810). See *Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (“[O]nce Congress makes its choice in enacting legislation, its participation ends.”) At least in ascertaining

constitutional and statutory meaning and its scope, that “other department” is the judiciary:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

*Marbury v Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).

**A. THE COURT SHOULD LEGALLY DETERMINE THAT THE COMMISSIONER OF FINANCE HAS LIMITED AUTHORITY AS A NON-ELECTED, NON-CONSTITUTIONAL AND STATUTORILY-CREATED PUBLIC OFFICIAL.**

In Minnesota, the Constitutional limitations adopted by the people and the statutory limitations adopted by the State Legislature on the Commissioner of Finance are unambiguous. Absent federal mandates or other state constitutional requirements, the Commissioner of Finance only disburses funds pursuant to state legislative enactments and appropriations – not court orders.

Petitioners request that the Court interpret unambiguous constitutional and statutory provisions - involving purely legal issues – and apply them to the Commissioner of Finance.

First, the Commissioner of Finance is not an elected State Treasurer with constitutional powers. *See Mattson v Kiedrowski*, 391 N.W.2d 777 (Minn. 1986). The Commissioner is not a constitutional officer, is not elected, and has no powers allocated by the Minnesota Constitution.

Second, Article XI of Minnesota’s Constitution restricts the Commissioner authority to disburse State funds:

Section 1. Money paid from state treasury. No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law.

Under Article XI, the Commissioner shall not disburse state funds without an appropriation by law enacted by the state legislature and signed by the Governor or otherwise enacted pursuant to Article IV -- i.e., veto override.

Third, all of the powers of the Commissioner are of a statutory creation – laws enacted by the state legislature. Minn. Stat. § 16A.01. The most important and mandatory responsibility of the Commissioner is to “receive and record all money paid into the state treasury and safely keep it until **lawfully** paid out.” Minn. Stat. § 16A.055, Subd. 1(1) (emphasis added).

Fourth, Minnesota statutes direct the Commissioner that “[u]nless otherwise expressly provided by law, state money may not be spent or applied without an **appropriation**, an allotment, **and** issuance of a warrant or electronic fund transfer.” Minn. Stat. § 16A.57. *See also* Minn. Const. art. XI, § 1 (emphasis added).

“Appropriation” means “an authorization by law to expend or encumber an amount in the treasury.” Minn. Stat. § 16A.011, Subd. 4.

Fifth, state statutes are explicit in restricting the Commissioner’s authority. For instance, the Commissioner may not exceed appropriations or cause the state to incur debt. Minnesota statutes make it a criminal misdemeanor and grounds for removal from office to do so:

**When there has been an appropriation for any purpose it shall be unlawful for any state board or official to incur indebtedness on behalf of the board, the official, or the state in excess of the appropriation made for such purpose.**

It is hereby made unlawful for any state board or official to incur any indebtedness in behalf of the board, the official, or the state of any nature until after an appropriation therefore has been made by the legislature. Any official violating these provisions shall be guilty of a misdemeanor and the governor is hereby authorized and empowered to remove any such official from office.

Minn. Stat. § 16A.138 (emphasis added).

Sixth, the Minnesota Constitution clearly prohibits the District Court from enjoining the state legislature to appropriate funds. Similarly, the Court should hold that a District Court can not circumvent this prohibition by enforcing an order against the Commissioner of Finance to expend money without a legislative appropriation because it is in violation of the same Minnesota Constitution.

Seventh, the Attorney General's Office – in advising state officials including the State Legislature, the Courts and the Commissioner of Finance in the *Temporary Funding* case - should have known and promoted the elementary rule of law that only the legislature can appropriate state funds. If it had, the constitutional and statutory violations would not have occurred and would not continue. Nonetheless, the Respondents' brief promotes a certain lawlessness where a state official can continue to violate the Minnesota Constitution and statutes as long as a District Court goes along with it.

Eighth, despite the District Court's and Respondents' assertions, this case is not about judicial power. For the case to be about judicial power, the District Court in the *Temporary Funding* case would have had to direct the State Legislature to appropriate the funds. That, of course, would be a different case with different parties. In this case, the District Court instead chose to order the Commissioner of Finance to disburse funds without a legislative appropriation – something by law the Commissioner of Finance could not do. So, the Petitioners' dispute is directly with the Commissioner of Finance who violated the constitutional and statutory limitations on her office – only indirectly with the District Court.

Ninth, if the Respondents are right - that the judicial power is actually threatened by this case – then, why hasn't the District Court intervened pursuant to Minn. R. Civ. P 24 to protect its purported Constitutional prerogative to appropriate funds in cases of “necessity” or “emergency”? The District Court’s lack of interest as an intervenor undermines Respondents’ arguments that the District Court as a whole believes it has a Constitutional prerogative to distribute funds in case of “necessity” or “emergency.”

Tenth, it is the state legislature’s prerogative to appropriate money and to have the Commissioner of Finance disburse the money pursuant to the state legislature’s – and no one else’s - direction. If the Court grants Petitioner’s petition, it clarifies and defines the rule of law between the legislative and executive branches of government.

In conclusion, this Court should interpret the constitutional and statutory limitations on the Office of the Commissioner of Finance and apply them to the Commissioner of Finance, so that the continuing circumvention of the Minnesota Constitution and statutes will be stopped.

**B. THE RESPONDENTS’ RELIANCE ON INAPPOSITE CASE LAW AND A DISSENTING OPINION IS LAWLESS.**

Respondents’ brief fails to address Petitioners’ constitutional and statutory arguments, disregarding fundamental legal precedents to advance their arguments.

Respondents rely on inapposite state cases involving the following unrelated subject areas: lawsuit involving Tax Court of Appeals (Resp. Brief<sup>1</sup> at 43); federal district court Congressional reapportionment (Resp. Brief at 44); case preserving core functions of Treasurer’s office (Resp. Brief at 44); distribution of lawyer registration fees

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<sup>1</sup> “Resp. Brief” refers to Respondents’ Brief.

(Resp. Brief at 44-45); and allocation of powers regarding court administration (Resp. Brief at 45).

Respondents then spend four pages discussing the Kentucky Supreme Court's opinion – the dissenting opinion no less - in *Fletcher v. Commonwealth*, 163 S.W.3d 852 (Ky. 2005). The important thing for the Court to be reminded about *Fletcher*, as the Respondents put it, “a majority of the court decided that the Kentucky Governor’s spending plan imposed after a legislative deadlock violated the prohibition against unappropriated expenditures in the Kentucky Constitution.” Resp. Brief at 47. Then, the Respondents proceed to rely heavily on a dissenting opinion which has no precedential value at all -- even in Kentucky where the case was decided. Resp. Brief at 48-49.

The Respondents attempt to distinguish *Fletcher* on the grounds that the “Court authorized funds necessary to fulfill statutory, constitutional and federal mandates.” However, the Respondents fail to explain how the Commissioner of Finance by violating all the above-quoted constitutional and statutory limitations on her office is fulfilling statutory, constitutional and federal mandates. The Commissioner fails because she can not explain her conduct in a way that complies with the legal limitations on the Office of the Commissioner of Finance.

Simply put, instead of responding to the Petitioners’ constitutional and statutory arguments, the Respondents choose to use broad, ambiguous language to describe the powers of the Court when “necessity” or “emergency” arises because of inadequate legislative appropriations. This case is not about the judicial branch of government and its powers. The Commissioner of Finance has no authority – constitutional or statutorily

– to distribute state funds without a legislative appropriation regardless of whether a court interjects itself into the political process during a budgetary impasse. The legislature, through individual legislators authoring, debating, compromising and voting, have the power to resolve political disputes involving the disbursement of state funds – subject only to the Governor’s veto power.<sup>2</sup>

Here are a few examples of where the Commissioner of Finance fails to ground her arguments in particular constitutional or statutory text:

When, as in this case, the Legislature fails to do its job in establishing a budget, it is incumbent on the courts to protect Minnesota citizens adversely affected by the threatened discontinuance of vital State programs. (Resp. Brief at 23)

[C]ourts in Minnesota and other states have long recognized that, as with all constitutional provisions, legislative power to control expenditures is not exclusive or absolute. (Resp. Brief at 43)

Consistent with these principles, the courts, on extraordinary occasions, will and must take necessary action to ameliorate the effects of legislative overreaching or failure to perform its duties (Resp. Brief at 44)

A similar analysis must certainly apply to the preservation of other “essential” governmental functions outside the judiciary. (Resp. Brief at 45)

In light of the budget impasse, the Court authorized funds necessary to fulfill statutory, constitutional and federal mandates. (Resp. Brief at 48)

In this case, on the other hand, the [budget] proposals of the Governor and the Attorney General to fund certain core government functions were considered and expressly approved by a court. (Resp. Brief at 48)

Article IX, Sec. 1 is not the only constitutional provision implicated in this case and it should not, as Appellants and Amicus advocate, be read in an “absolute trump-all-other-sections-of-the-constitution fashion.” (Resp. Brief at 49)

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<sup>2</sup> As part of the political process, the Governor’s participation in the budgetary process can be passive or active to achieve a political resolution whether to support, diminish, or expand governmental funding of services. In 2005, for instance the Governor vetoed one of the three appropriation bills that had not been enacted before the end of the legislature’s regular session.

The executive and judicial branches must always retain the general right, and the duty, to respond to emergencies that may be occasioned by a Legislature that does not fulfill its constitutional duties. (Resp. Brief at 50)

Contrary to the Respondents' position, the Minnesota Constitution and Minnesota statutes are unambiguous — the Commissioner of Finance must wait for a legislative appropriation before appropriating state funds regardless of any perceived “necessity” or “emergency.”

## **II. RESPONDENTS' PROCEDURAL DEFENSES DO NOT APPLY TO THE CLAIMS OF THIS CASE.**

The bipartisan Appellants have stated throughout this litigation their desire to have the Court resolve their separation-of-powers claims prior to the end of the fiscal biennium on June 30, 2007.

Appellants want to know before June 30, 2007, whether the “Temporary Funding” process followed in 2001 and 2005 is now a permanent feature of Minnesota government. A decision prior to June 30, 2007 will allow the Appellants in this next legislative session to plan and act accordingly, since the implication of the “process” will change the political playing field of our republican form of government — and not in a positive way.

The Minnesota Supreme Court recognized the importance and urgency to resolve the Appellants' constitutional claims. First, the Minnesota Supreme Court stated that it understood petitioners' desire for a final decision by June 30, 2007:

Additionally, petitioners' desire for a **final decision** by June 30, 2007, almost two years from now, does not present “the most exigent of circumstances.” Resolution of purely legal issues in the district court should not be a particularly time-consuming process. To the extent that the passage of time becomes a problem either in district court or in the event of an appeal, procedural mechanisms are

available to address that issue, such as a motion to expedite proceedings or a petition for accelerated review under Minn. R. Civ. App. P. 118.

App. at 270, Order at 3<sup>3</sup> (emphasis added). Second, the Minnesota Supreme Court stated that the “petitioners have several procedural alternatives to effectively raise their claims in district court. In accordance with *Rice v Connelly*,<sup>4</sup> they can file an information in the nature of quo warranto raising the issues they raised here....” App. at 271, Order at 4.

The Appellants followed the Minnesota Supreme Court’s roadmap filing in District Court, and as the Court seemingly predicted, appealing the District Court’s decision.

The Appellants briefly respond to Respondents’ arguments based on five procedural defenses.

First, the Respondents’ quo warranto arguments are unpersuasive.

Appellants’ petition for writ of quo warranto is, as the Minnesota Supreme Court has indicated, one of “several procedural alternatives to effectively raise their claims in district court.” App. at 271, Order at 4. The Respondents’ brief, while inexplicably denying the appropriateness of Appellants’ petition, contradictorily admits that quo warranto proceedings are appropriate for claims based on a “continuing course of unauthorized usurpation of authority.” Resp. Brief at 25.

The Respondents’ actions in 2001, 2005 and currently are a “continuing course of unauthorized usurpation of authority.” The unauthorized usurpations of 2001 and 2005, have previously been documented in the initial Brief of Appellants. Additionally, in 2005

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<sup>3</sup> “App.” refers to Appellants Appendix, Vols. 1 and 2.

<sup>4</sup> 488 N.W.2d 241 (Minn. 1992)

and 2006, the Commissioner of Finance's filed legal briefs in Ramsey County District Court and in the Court of Appeals demonstrate continued efforts to usurp legislative power. For example, the Commissioner of Finance's Response Brief clearly advocates an interpretation of the Minnesota Constitution and statutes which provides her a process of disbursement of funds without a legislative appropriation. Therefore, the constitutional and statutory dispute continues.

In fact, can there be any doubt from her briefs that the Commissioner of Finance will again disburse funds without a legislative appropriation if a legislative impasse occurs on June 30, 2007 or thereafter?

Additionally, the Petitioners encourage the Court to borrow the mootness exception of "capable of repetition, but evades review" and apply it to its analysis of the petition for writ of quo warranto. Petitioners argue that the "capable of repetition, but evades review" exception would be complementary to, not in contradiction of, Respondents' admitted "continuing course of unauthorized usurpation of authority" rule.

The Petitioners have met the requirements of the "capable of repetition, but evades review" exception. The Court should apply this exception to the petition for writ of quo warranto finding that the Petitioners have met the two requirements. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (the "capable of repetition yet evading review" doctrine is "limited to the situation where two elements are combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.")

The first requirement that “the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration” is satisfied. Both the 2001 and 2005 Ramsey County District Court proceedings (about 10 days and 30 days respectively) were too short to allow for full litigation of the legal issues involved. Besides, it was legislative action that quickly resolved the budgetary impasse - thus leaving the unresolved legal controversy a remaining and lingering problem. As the United States Supreme Court observed, “Because these same parties are reasonably likely to find themselves again in dispute over the issues raised in this petition, and because such disputes typically are resolved quickly by . . . legislative action, this controversy is one that is capable of repetition yet evading review.” *See Burlington R. Co. v Bhd. of Maint. of Way Employees*, 481 U.S. 429, 436 n. 4 (1987).

The second requirement that “there was a reasonable expectation that the same complaining party would be subjected to the same action again” is also satisfied. Rightly or wrongly, the state legislature in two of the last four years has adjourned without enacting certain necessary appropriation bills. Since the Court can not be assured that there won't be more adjournments without enacting certain necessary appropriation bills in the future, the Court should conclude that there is a reasonable expectation that the Commissioner of Finance and the elected state legislators will find themselves in the same position on June 30, 2007 – the end of the next biennium, - or on June 30, 2009 – the end of the next biennium and so on.

Second, the Respondents' mootness arguments fail.

The Respondents erroneously argue at pages 27 and 28 of their brief that due to the subsequent legislative ratification of the court-ordered spending that “there was no

form of relief the district court could possibly have granted under *any* form of action.” To the contrary, the Court has the authority to issue a Writ of Quo Warranto, *see Rice v Connolly*, 488 N.W.2d 241 (Minn. 1992), because the individual legislator petitioners’ procedural rights and exclusive prerogatives to author appropriation bills, debate and vote on them were usurped by the Commissioner of Finance’s actions. Furthermore, there was no subsequent retroactive legislative ratification of the Commissioner’s constitutional and statutory misdeeds. The bills addressing the Commissioner’s misdeeds specifically state:

Appropriations in this act are effective retroactively from July 1, 2005, and **supersede and replace** funding authorized by order of the Ramsey County District Court in Case No. C9-05-5928, as well as by Laws 2005 1<sup>st</sup> Special Session chapter 2, which provided temporary funding through July 14, 2005.<sup>5</sup> (Emphasis added).

The action of the legislature did not erase the individualized, particularized and concrete violations to the individual legislator petitioner’s rights.

The Respondents at pages 28 and 29 of their brief fails to appropriately apply the “capable of repetition, yet likely to evade judicial review” exception to mootness. Again, the Respondents erroneously pretend – despite Respondents’ written arguments to the contrary on pages 41 through 51 of her brief - that there is not an ongoing dispute among the three branches about allocation of powers under the Minnesota Constitution. Obviously, there is a continuing dispute when the Commissioner of Finance spends nine pages of her brief arguing she has the power to distribute state funds without a legislative appropriation. There can be no doubt from her briefs that the Commissioner of Finance

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<sup>5</sup> Resp. Brief at p. 19.

will again be involved in disbursements of state funds without legislative appropriations the next time a “necessity” or “emergency” occurs.

The Respondents err on page 30 of her brief that mootness applies because future legislative impasses may involve different types of court-authorized spending. Respondents’ error here is failing to understand that the dispute is about who authorizes the spending. The dispute is not about what the spending is.

The Respondents also erroneously argue at pages 30-31 that the claims do not satisfy the requirement that “the claims will likely evade judicial review.” The Respondents point to the 2001 and 2005 judicial proceedings as evidence of due process. However, neither of those proceedings included the same parties or the same claims as involved here. Recall that the individual state legislators are specifically claiming that the Commissioner of Finance violated the constitutional and statutory limitations on her office. Those claims have never been raised in any previous proceedings and so need to be resolved here.

Humorously, the Respondents in footnote 18 of their brief argue that the “reasoning” of the Minnesota Supreme Court’s opinion supports that future claims will not evade judicial review. However, the Minnesota Supreme Court expressly agreed with the Appellants that the Court’s final decision should be made prior to June 30, 2007 — even offering citations to appellate rules for expedited appeals. App. at 273, Order at 3. In fact, it seems the Respondents simply want to “evade review” of their unconstitutional usurpation prior to June 30, 2007 and see what happens. That is not what the Appellants want and, fortunately, not what the Minnesota Supreme Court recommended.

Perhaps the weakest of Respondents' arguments is the treatment of the *State v Brooks*, 604 N.W.2d 345 (Minn. 2000) at pages 32 and 33 of her brief. The Minnesota Supreme Court in *Brooks* stated that it will not deem a case moot and will retain jurisdiction if the case is "functionally justiciable" and is an important public issue "of statewide significance that should be decided immediately." 604 N.W.2d at 347-48. The Respondents appear to concede "statewide significance", but then states the case is not "functionally justiciable" because different factual circumstances may arise. However, the case is functionally justiciable because, as the Minnesota Supreme Court has previously indicated, the case involves the "resolution of purely legal issues." App at 273, Order at 3. Therefore, this Court - as a court of law - is ideally suited to resolve whether the Commissioner of Finance has the Constitutional powers she purports in her Brief to disburse state funds without a legislative appropriation in perceived cases of "necessity" or "emergency."

Third, the Respondents' Brief contradicts their own ripeness arguments. Respondents are wrong because Appellants are not requesting an "advisory judicial opinion regarding a potentially unknown set of facts." Resp. Brief at 33. To the contrary, Respondents have expressly stated that they acknowledge the Commissioner of Finance's authority to disburse funds without a legislative appropriation based on the following known set of facts: "threatened (dis)continuance of vital State programs" (Resp. Brief at 23); "on extraordinary occasions" (Resp. Brief at 44); "to ameliorate the effects of "legislative overreaching or failure to perform its duties" (Resp. Brief at 44); and "to respond to emergencies that may be occasioned by a Legislature that does not fulfill its constitutional duties" (Resp. Brief at 50). Respondents' brief is replete with

admissions of a “continuing course of unauthorized usurpation of authority ” Based on the Respondents’ own words, the legal issues in the case are ripe for adjudication

Fourth, Respondents’ laches argument includes an argument that fails to straightforwardly apply Minn. Stat. Sec. 3.16 and contradicts the Rules of Civil Procedure. The statute states in relevant part that:

No cause or proceeding, civil or criminal, in court or before a commission or an officer or referee of a court or commission or a motion or hearing on the cause or proceeding, in which a member or officer of, or an attorney employed by, the legislature is a party, attorney, or witness shall be tried or heard during a session of the legislature or while the member, officer, or attorney is attending a meeting of a legislative committee or commission when the legislature is not in session.

Respondents inexplicably argue that “Appellants were not compelled to become parties or witnesses in the *Temporary Funding* case. They or others on their behalf, could have simply attended the hearing to voice their objections, or submitted written materials expressing their views.” The Respondents’ “party” distinction contradicts Rule 17.01 of the Rules of Civil Procedure which requires, “Every action shall be prosecuted in the name of the real party in interest.” If the legislators were going to participate in the *Temporary Funding* case, they would have been “parties” under Rule 17 01; but, under Minn. Stat. Sec. 3.16, the legislators could not be required to be “parties” to the *Temporary Funding* case because they were in special session resolving the political budgetary issues while the case was being adjudicated. Under these circumstances, Minn. Stat. Sec. 3.16 prevents application of the doctrine of laches

Fifth, Respondents’ standing arguments are unpersuasive. Respondents admit on pages 38 and 39 of their brief that Minnesota courts have acknowledged that individual state legislators may bring claims for vote nullification and usurpation of legislative powers, but individual legislator standing requires that the claimed injury is “personal,

particularized, concrete, and otherwise judicially cognizable” See *Rukavina v Pawlenty*, 684 N.W.2d 525, 532 (Minn. Ct. App. 2004), *review denied* (Oct 19, 2004); *Conant v Robins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143, 149-150 (Minn Ct App 1999), *review denied* (Mar 14, 2000

Contrary to Respondents’ statements on page 37 of her brief that Petitioners do not assert individual legislator powers separate and apart from their institutions and granted by the Constitution, the Petitioners expressly argue that their individual legislator’s standing is grounded in rights granted by the Minnesota Constitution. The constitutional powers and rights of individual state legislators are expressed throughout Article IV of the Minnesota Constitution. Significantly, Section 22 states:

Section 22. Majority vote of all members required to pass a law. ... No vote shall be passed unless voted for by a majority of **all the members** elected to each house of representatives, and the **vote entered in the journal of each house.**

(Emphasis added.) Read in conjunction with Article IV, Section 23 addressing “appropriations” wherein “[e]very bill passed in conformity to the rules of each house and the joint rules of the two houses shall be presented to the governor,” each legislator has a right to vote on each appropriation and to have the vote recorded in the House or Senate Journal for accountability. Other individual legislator powers – also not held by citizens - are presumed to be in this bundle of individual legislator rights including the exclusive right to author legislation and to persuade other legislators to join in the author’s legislation.

Further, the Respondents fail to address the U.S. Supreme Court decision in *Coleman v. Miller*, 307 U.S. 433 (1932) and other state cases supporting individual legislator standing. In *Coleman*, the U.S. Supreme Court held that individual Kansas

state legislators. had "a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id.* at 438.<sup>6</sup> As recently as 1997, the U.S. Supreme Court restated the *Coleman* holding and further explained that individual legislator standing existed when legislative "no" votes were nullified by the legislative act being given effect anyway. *Raines v. Byrd*, 521 U.S. 811, 822 (1997). Further, in *Silver v. Pataki*, 96 N.Y.2d 532, 755 N.E.2d 842, 730 N.Y.S.2d 482, 2001 N.Y. Slip Op. 06138 (N.Y. July 10, 2001), the Speaker of New York's General Assembly successfully challenged the Governor's use of a line item veto on non-appropriation bills. *Id.* at 848-49. Similarly, the Michigan Supreme Court held that a single member of the state house appropriations committee had standing to bring an action alleging that the state administrative board's transfer of appropriated funds from one program to another within a department of state government was unauthorized. *Dodak v. State Admin. Bd.*, 441 Mich. 547, 495 N.W.2d 539 (1993).

Contrary to Respondents' arguments, vote nullification exists under *Coleman* and its progeny because the Petitioners through their "no" votes and/or legislative inaction did not enact appropriations by law. Despite the lack of appropriations enacted by the state legislature, the Commissioner of Finance expended the state funds anyway. The Commissioner of Finance's actions violated the Appellants' exclusive legislative prerogative to author, debate and vote on appropriation bills.

Additionally, state legislators have standing because the Commissioner of Finance usurped the exclusive legislative prerogative to appropriate state funds. Because the Ramsey County District Court orders were not an "appropriation by law" – not valid

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<sup>6</sup> In *Coleman*, the legislators were locked in a tie vote that would have defeated the State's ratification of a proposed federal constitutional amendment, and subsequently alleged that their votes were nullified when the Lieutenant Governor broke the tie by casting his vote for ratification. *Coleman*, 307 U.S. at 438.

appropriations -- the Commissioner of Finance was required constitutionally and statutorily not to expend state funds. She did -- usurping a power allocated to the state legislature under Articles III, IV and XI of the Constitution.

**III. APPELLANTS ARE ENTITLED TO ATTORNEY FEES AND COSTS IN RESPONDING TO AN IMPROPER MOTION FOR RULE 11 SANCTIONS**

Appellants have appealed from the District Court's denial of Appellants' motion for attorney fees based on the District Court's refusal to grant denial of Respondents' motion for sanctions. Appellants argue that the District Court abused its discretion in not awarding Appellants' attorney fees *solely* for responding to Respondents' motion for sanctions because (i) Respondents served their Rule 11 and Minn. Stat. §549.211 motion for sanctions less than 21 days prior to filing the motion in violation of both Rule 11 and §549.211 and, more importantly, (ii) Respondents' failed to provide *any argument* supporting the proposition that Appellants violated Rule 11 and §549.211. The serious nature of a sanctions motion required the Appellants to appeal the District Court's denial for Appellants' attorney fees.

The threat of sanctions under Rule 11 or §549.211 is a potent and versatile weapon in the hands of an adversary and thus, very serious business. First, rather than having the Court focus on the merits of each side's arguments, an adversary's mere filing of a sanctions motion not only casts a shadow over the opposing party's arguments but also paints the opposing party and its attorneys as mendacious in the eyes of the Court – a position no attorney wants to be found in. Second, not only is the party alleged to have filed a frivolous pleading; but it is subject to potential monetary sanctions and significant damage to his reputation.

The damage to an attorney's reputation and sanctions levied for filing papers with the Court in "bad faith," could cause judges to view the sanctioned attorney in the future with a jaundiced eye. *FDIC v Tefken Constr. & Installation Co*, 847 F 2d 440, 444 (7<sup>th</sup> Cir. 1988) ("Even where, as here, the monetary penalty is low, a Rule 11 violation carries intangible cost for the punished lawyer or firm ") The mere service of a sanctions motion requires large expenditures of time, effort, and client's money to defend if for no other reason than to protect their reputation of the party's and attorney's interests.

The toxicity of a Rule 11 or §549.211 motion is not lost on unscrupulous litigants and their attorneys. With one fell swoop of a sanctions motion, an unscrupulous attorney can damage the reputation of an attorney and his client, and force the redirection of limited resources from meritorious legal arguments to defend unfounded accusations of "bad faith." Even if the movant loses on the sanction motion, he wins by causing his opponent to devote precious limited litigation resources on meritless claims.

As result of the use of such aggressive tactics by attorneys, Rule 11 and §549.211 were significantly amended in 2000 erecting significant procedural hurdles a party asserting such a motion must *strictly* follow. Most notably, the moving party must first prepare a *separate* motion for sanctions and in the motion "***describe the specific conduct alleged to violate***" either Rule 11 or §549.211 In addition, the moving party must first serve the motion on the opposing party and give the party 21 days within which to withdraw the legal position alleged to have violated Rule 11 or §549.211 before filing the motion with the Court.

The strict compliance of Rule 11 and Minn. Stat. § 549.211 serves two purposes: first, a separate motion, detailing the conduct alleged to have violated Rule 11 or §549.211 provides the allegedly offending party with precise *notice* of the nature of his violation. The party can then either withdraw his position in Court or prepare a response. Second, the moving party must serve the motion 21 days in advance of filing — the “safe harbor” period — to allow for an opportunity to withdraw his legal position without damaging his “public” reputation through a “voluntary” withdrawal.

Failure to follow either of these requirements is fatal to a Rule 11 or §549.211 motion. Appellants argue that Respondents should be sanctioned for (a) serving its Rule 11 and §549.211 motion violating the strict procedural safe harbor requirements, and (b) because the Respondents failed to describe the specific conduct Appellants allegedly violated.

Respondent’s callous disregard for the strict requirements of Rule 11 and Minn Stat. § 549.211 fully corroborates Appellants’ argument that Respondent filed its Rule 11 Motion for political purposes unrelated to the litigation. Simply put, the Attorney General, whose eyes are on higher office, used Rule 11 as a sword to threaten the Appellants as state legislators to back off their legal position in this case because of the political damage to the Attorney General’s gubernatorial campaign if the legislators won this case.

Appellants should have been awarded their attorney fees in responding to Respondents baseless Rule 11 and §549.211 motion.

First, it is important to bear in mind the central issue in this case. In this case, the issue is between legislators and the Executive branch regarding the separation of powers

embodied within the State's Constitution over the disbursement of state funds without an appropriation by law. The Attorney General involved the judiciary through the District Court to order the Commissioner of Finance to disburse state funds for various state projects because the state legislature had not completed the political budgetary process during the legislature's regular session. Under Minnesota's Constitution, the Appellants' legal, constitutional argument, is that the power to appropriate state funds rests *solely and exclusively* within the State Legislature. Thus, the presumption, as explicitly expressed in the Constitution, creates a very real legal barrier preventing any argument that state legislators do not have a "good faith" argument to challenge any other state authority exercising the appropriation authority. This analysis alone should have given the Attorney General great pause in filing a Rule 11 Motion against the Appellant state legislators.

Second, it is also important to bear in mind who the Appellants are: elected State law makers, members of Minnesota's third branch of government. One would think as a matter of comity between the branches of our government that Respondents would not have pulled out the Rule 11 sword to these state legislators on a matter as serious as appropriation of state funding.

Third, Respondents' original memorandum in support of their motion for sanctions failed to provide any analysis explaining exactly why Appellants did not have a good faith basis to argue that the power to appropriate money rests solely and exclusively with the state legislature. This failure is unequivocally demonstrated by the fact that the Respondents filed a three page memorandum of law supporting the sanction motion. Of

the entire three pages of “argument” the *only* “reference,” much less analysis,

Respondents provide, in its entirety, is the following:

the Petitioners improperly seeks *quo warranto* review of past conduct. It is also moot. It is also not ripe. It is also barred by the doctrines of laches and estoppel. The Petitioners also lacked standing. Finally, the Petition is also defective on the merits and Petitioners do not cite any authority in support of the untimely and unprecedented per se attack on the authority of the Court to preserve the central government functions in the absence of legislative action.

AA – p. 321.

That's it! All Respondents' memorandum did was identify its substantive legal defenses in this case. The Respondents' memorandum failed to identify the precise issues supporting its claim under Rule 11. No argument was offered to support any allegation that the Appellants had no good faith basis to file their Petition. Respondents failed to provide any analysis “*describe[ing] the specific conduct alleged to violate*” under either Rule 11 or §549.211. On the other hand, Appellants filed a 15 page memorandum in opposition to the motion detailing the Respondents glaring procedural and substantive deficiencies. The Respondents failed to file a reply memorandum, failed to make any oral argument in support of their sanction motion, or otherwise withdraw their motion. Transcript p 76.

The issue in Respondents' Rule 11 Motion is not whether the Appellants' Petition is “moot, not ripe or barred by standing, laches or estoppel.” The issue is whether Appellants' challenges to those defenses have any “good-faith basis under the law.” Respondents' memorandum not only failed to analyze why Appellants' Petition should be dismissed on grounds of “mootness, ripeness, standing, laches and estoppel,” but also failed to provide any analysis why Appellants' assertion of the Petition has “no good-faith basis under the law.”

Respondents, failure to comply with Rule 11's requirement that their motion “*describe the specific conduct alleged to violate*” either Rule 11 or §549.211 -- particularly Respondents’ failure to provide any support for its motion to the Court other than an 80 word paragraph -- fully corroborates Appellants’ argument that Respondents filed their Rule 11 Motion in bad faith in an effort to coerce the Appellant State legislators to withdraw their quo warranto Petition.

Fourth, the Attorney General failed to follow the unambiguous rules of the Court.<sup>7</sup> It is uncontroverted that the Respondents served on the Appellants and filed with the court their motion for Rule 11 sanctions on the same day.<sup>8</sup> Minn. R. Civ. P. 11.03(a)(1) is specific and unambiguous: “A motion for sanctions under this rule ... **shall be served** as provided in Rule 5, **but shall not be filed** with or presented to the court unless, within 21 days **after service of the motion** the challenged paper ... is not withdrawn ....” (Emphasis added).

The Respondents seek to distance themselves from the strict Rule 11 procedural language through the misinterpretation of the published case of *Gibson v. Coldwell Banker Burnet*<sup>9</sup> and rely upon opinions of foreign courts, *Muhammad v State*,<sup>10</sup> *Cardillo v Cardillo*,<sup>11</sup> and an unpublished Minnesota Court of Appeals opinion, *Olson v Babler*<sup>12</sup>

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<sup>7</sup> Interestingly, this is not the first time the Attorney General’s Office has sought sanctions against the Appellants attorneys for filing against the State on constitutional claims. In federal court, sanctions were sought for filing a bad faith action involving judicial elections. Ironically, the action became the law of the land through a United States Supreme Court decision on one claim, and the law of the Eighth Circuit on all other claims. Transcript at pp. 78-79.

<sup>8</sup> Respondents’ Brief at 52; App. Ex. F; at p. 321.

<sup>9</sup> 659 N.W.2d 782 (Minn. App. 2003)

<sup>10</sup> Nos. Civ. A.99-3742/99-2695. 2000 WL 18763350 (E.D. La. 2000)

<sup>11</sup> 360 F.Supp.2d 402 (D.R.I. 2005).

In so doing, the Respondents want the clock turned back to July 2000, a time prior to the adoption of current Minnesota Rule 11 procedure. The Respondents want the re-adoption of previous notions of Rule 11 practice requiring minimum procedural notice guidelines as found in State Supreme Court cases *Uselman v Uselman*<sup>13</sup> and *Kellar v Von Holtum*,<sup>14</sup> decisions rendered before July 2000.<sup>15</sup>

Returning to pre-July 2000 rationale, Respondents would claim their written advisement of seeking sanctions in response to a request for the appointment of special counsel, a letter to Appellants prior to the filing of the Petition, as sufficient “notice.” However such “notice” circumvents the strict procedural requirements of Rule 11 and is insufficient. See *Gibson*, 659 N.W.2d at 789 (quoting I David f. Herr & Roger S. Haydock, *Minnesota Practice* §11.6(4<sup>th</sup> ed. 2002) (Rule 11.03(a)(1) “imposes an additional requirement that should be enforced without regard to *Uselman’s* lesser requirement of mere notice.”).

Respondents have no excuse for not following the specific procedural safeguards embodied with Rule 11.03(a)(1).

Finally, this Court should not ignore the political implications of this case. The Attorney General filed this matter at a time when he was the endorsed gubernatorial candidate of a major political party. The Attorney General has highlighted his assertion of this case as part of his campaign for governor’s office to demonstrate that when the

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<sup>12</sup> No. A05-395, 2006 WL 851798 (Minn. App. Apr. 4, 2006). Contrary to the Attorney General’s arguments, in *Olson*, an unpublished decision, the Court of Appeals relied on its inherent authority to sanction *parties* for lying under oath. The case had nothing to do with a Rule 11 or §549.211 Motion.

<sup>13</sup> 464 N.W.2d 130, 143 (Minn. 1990)

<sup>14</sup> 605 N.W.2d 696, 702 (Minn. 2000).

<sup>15</sup> *Gibson*, 659 N.W.2d at 789.

state legislature failed to act in finalizing a state budget, the Attorney General stepped in to "protect the citizens on the state." If Appellants were able to convince the District Court to grant their *quo warranto* Petition, the Attorney General's gubernatorial campaign would have suffered. As a result, Attorney General filed its Rule 11 Motion in an effort to get the Appellant State legislators to back off this proceeding in order to avoid the risk of the District Court may in fact grant the *quo warranto* Petition.

The District Court abused its discretion in denying Appellants' Motion for Attorney Fees.

#### IV. CONCLUSION

The Petition for Quo Warranto establishes the proper avenue of attack to raise and resolve the Commissioner of Finance's usurpation of legislative powers to disburse state funds without an appropriation by law. Therefore, the district court's decision should be reversed. Furthermore, the constitutional conflict must be and should be resolved in accordance with the Appellants' arguments on the merits. Finally, the Respondents' attorneys should be sanctioned for their failure to follow Rule 11 mandates, awarding Appellants' attorneys fees and costs to defend against the motion, thereby reversing the district court's underlying decision.

Dated: September 11, 2006.



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