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State of Minnesota

In the Supreme Court

Mary Kiffmeyer, Scott J. Newman, Warren Limmer, Julianne Ortman, Mike Parry, Sean Nienow, David Brown, David Senjem, Bill Ingebrigtsen, Paul Gazelka, Roger Chamberlain, Ray Vandever, Claire Robling, all individuals, registered voters, and Members of the Minnesota Legislature; **Jeff Davis**, an individual and registered voter; **Dan McGrath**, an individual and a registered voter; **Minnesota Majority, Inc.**, a nonprofit corporation; and **ProtectMyVote.com**, an association of individuals and registered ballot committee,

Petitioners,

vs.

Mark Ritchie, in his official capacity as Secretary of State of the State of Minnesota, and **Lori Swanson**, in her official capacity as Attorney General of the State of Minnesota.

Respondents.

PETITIONERS' BRIEF AND APPENDIX

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ISSUES PRESENTED¹

Article III, section 1 of the Minnesota Constitution delineates the powers of the three branches of government and bars any branch from assuming or asserting any expressed or inherent powers that properly belong to the others. Article IX, section 1 gives the Legislature expressed authority to propose and refer to the people amendments to the Constitution. The Legislature passed the proposed Voter ID Amendment with a ballot question title. The Secretary of State unilaterally changed the ballot question title.

- (1) Whether the Secretary of State and the Attorney General exceeded their authority when the Secretary proposed, and the Attorney General approved, a substitution for the Legislature's duly passed and chosen ballot question title of the Voter ID Amendment to the Minnesota Constitution.

Apposite Constitution Provisions, Statutes and Cases:

Minn. Const. art. IX, § 1;
Minn. Const. art. III, § 1;
Minn. Stat. § 204B.44;
Irwin v. Surdyk's Liquor, 599 N.W.2d 132, 141 (Minn. 1999).

- (2) If the Secretary did have authority to adopt such a ballot title, whether the title proposed by the Secretary is an "appropriate" title for the Voter ID Amendment.

Apposite Constitution Provisions, Statutes and Cases:

Minn. Const. art. IX, § 1;
Minn. Const. art. III, § 1;
Minn. Stat. § 204B.44;
Minn. Stat. § 204D.15;
State ex rel. Marr v. Stearns, 72 Minn. 200, 75 N.W. 210
(Minn. 1898), *rev'd on other grounds*, 179 U.S. 223 (1900).

¹ Issue (1) presented in this matter is identical to the primary issue presented in *Limmer, et al., v. Ritchie, et al.*, No. A12-1149 (filed July 9, 2012), which is scheduled to be argued before this court on July 31, 2012.

STATEMENT OF THE CASE

Having become aware of voter fraud and deficiencies in the voter and polling systems in Minnesota and recognizing the importance of election integrity, the Minnesota Legislature passed a proposed constitutional amendment concerning voter identification and with it, a ballot title for that amendment: “Photo Identification Required for Voting.” The Legislature’s proposal follows years of polling showing that Minnesotans overwhelming support voter identification measures,² which have been upheld by the U.S. Supreme Court and U.S. Court of Appeals as constitutionally valid means to prevent voter fraud and protect election integrity. *See Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008); *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009).

Nearly 3 months after Governor Dayton’s symbolical “veto” of the Legislature’s act, Respondent Secretary of State Mark Ritchie (“Secretary”) rejected the Legislature’s ballot question title for the Voter ID Amendment by substituting his own version, changing the form and substance of the Legislature’s expressed will and right. Respondent Minnesota Attorney General Lori Swanson (“Attorney General”) agreed with the Secretary, claiming he was empowered to provide a ballot question title.

However, the bilateral action of the Secretary and Attorney General in substituting the Secretary’s own version of the ballot question title, has exceeded their constitutional authority and breached the wall of the separation of powers doctrine. These errors and omissions are the cause for the instant Petition under Minnesota Statute § 204B.44. The

² ProtectMyVote.com, Polling Results, http://www.protectmyvote.com/?page_id=288.

Petitioners³ seek reinstatement of the Legislature's original ballot question title to the proposed Voter ID Amendment and all other just and equitable relief necessary to ensure the proposed the Voter ID Amendment reaches the people to adopt or reject as the Legislature has provided under Article IX, section 1.

STATEMENT OF FACTS

Prior to the 2008 general election, Petitioner Minnesota Majority, Inc., reviewed Minnesota's voter records and discovered a number of apparent irregularities, including double voting, vacant and non-deliverable addresses used in voter registrations, deceased people remaining on voter registration lists, felons newly registered to vote, duplicate voter registration records, deficient voter registration records and other inconsistencies. *See, e.g.,* Dan McGrath, *Report on Fraudulent Votes Cast by Ineligible Felons in Minnesota's 2008 General Election*, (June 28, 2010), <http://www.minnesotamajority.org/Portals/0/documents/ReportOnFelonVoters.pdf>. In response to these discoveries and others, the Minnesota Legislature passed legislation in 2011 amending Minnesota voting law by adding various voter identification requirements. *See* S.F. 509, ch. 69, 87th Leg., Reg. Sess. (Minn. 2011). Governor Mark Dayton vetoed this legislation, and the Legislature did not override his veto. *See* Veto Details, Minnesota Legislature: 1939 –

³ "Petitioners" refers collectively to Mary Kiffmeyer, Scott J. Newman, Warren Limmer, Julianne Ortman, Mike Parry, Sean Nienow, David Brown, David Senjem, Bill Ingebrigtsen, Paul Gazelka, Roger Chamberlain, Ray Vandever, Claire Robling, all individuals, registered voters, and Members of the Minnesota Legislature; Jeff Davis, an individual and registered voter; Dan McGrath, an individual and a registered voter; Minnesota Majority, Inc., a nonprofit corporation; and ProtectMyVote.com, an association of individuals and registered ballot committee.

Present, <http://www.leg.state.mn.us/lrl/vetoes/vetodetails.aspx?years=2011> (last visited July 13, 2012).

The Minnesota Legislature responded to the Governor's veto by passing the proposed Voter ID Amendment under Article IX, section 1 of the Minnesota Constitution to be referred to the people to adopt or reject in the November 2012 general election. The entire text of the Voter ID Amendment reads as follows:

An act proposing an amendment to the Minnesota Constitution, article VII, section 1; requiring voters to present photographic identification; providing photographic identification to voters at no charge; requiring substantially equivalent verification standards for all voters; allowing provisional balloting for voters unable to present photographic identification.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. **CONSTITUTIONAL AMENDMENT PROPOSED.**

An amendment to the Minnesota Constitution is proposed to the people. If the amendment is adopted, article VII, section 1, will read:

Section 1. (a) Every person 18 years of age or more who has been a citizen of the United States for three months and who has resided in the precinct for 30 days next preceding an election shall be entitled to vote in that precinct. The place of voting by one otherwise qualified who has changed his residence within 30 days preceding the election shall be prescribed by law. The following persons shall not be entitled or permitted to vote at any election in this state: A person not meeting the above requirements; a person who has been convicted of treason or felony, unless restored to civil rights; a person under guardianship, or a person who is insane or not mentally competent.

(b) All voters voting in person must present valid government-issued photographic identification before receiving a ballot. The state must issue photographic identification at no charge to an eligible voter who does not have a form of identification meeting the requirements of this section. A voter unable to present government-issued photographic identification must be permitted to submit a provisional ballot. A provisional ballot must only be counted if the voter certifies the provisional ballot in the manner provided by law.

(c) All voters, including those not voting in person, must be subject to substantially equivalent identity and eligibility verification prior to a ballot being cast or counted.

Sec. 2. SUBMISSION TO VOTERS.

(a) The proposed amendment must be submitted to the people at the 2012 general election. If approved, the amendment is effective July 1, 2013, for all voting at elections scheduled to be conducted November 5, 2013, and thereafter. The question submitted must be:

"Shall the Minnesota Constitution be amended to require all voters to present valid photo identification to vote and to require the state to provide free identification to eligible voters, effective July 1, 2013?"

Yes
No"

(b) The title required under Minnesota Statutes, section 204D.15, subdivision 1, for the question submitted to the people under paragraph (a) shall be: "Photo Identification Required for Voting."

See H.F. 2738, ch. 167, §§ 1-2, 87th Leg., Reg. Sess. (Minn. 2012) ("Chapter 167, H.F. 2738") (Appendix at A-1). As seen in section (2)(b), the Legislature specified that the ballot question title "*shall be* 'Photo Identification Required for Voting.'" *Id.* (emphasis added).

Although constitutional amendment resolutions are not subject to the Governor's veto powers, Governor Mark Dayton nonetheless issued a symbolic "veto" of H.F. 2738 and urged voters to reject the amendment. (Letter of Governor Mark Dayton to Speaker of the House Kurt Zellers (April 9, 2012) ("Governor's Veto Letter") (Appendix at A-3).) None of the Governor's actions or words indicated any form of belief that his "veto" was anything other than symbolic. This "veto" cannot be found in the official record of Chapter 167, House File 2738. See Minnesota State Legislature, HF2738 Status in House

for Legislative Session 87, https://www.revisor.mn.gov/revisor/pages/search_status/status_detail.php?b=House&f=HF2738&ssn=0&y=2011. No legislator, public official, newspaper, or other Minnesotan ever spoke or indicated anything that reflected a belief that the Governor's symbolic "veto" carried any force of law. Indeed, the Governor explicitly stated he "[does] not have the power to prevent this... Constitutional Amendment from appearing on the Minnesota ballot in November." (Governor's Veto Letter (Appendix at A-3).)

Approximately 3 months later, on July 3, 2012, the Secretary sent a letter to the Attorney General requesting approval of his decision to omit the ballot title adopted by the Legislature and to substitute a new title for the Voter ID Amendment: "CHANGES TO IN-PERSON & ABSENTEE VOTING & VOTER REGISTRATION; PROVISIONAL BALLOTS." (Letter of Secretary of State Mark Ritchie to Attorney General Lori Swanson (July 3, 2012) ("SOS Letter") (Appendix at A-5).)

On July 6, 2012, the Attorney General responded via letter approving the Secretary's proposed new title, explaining: "Governor Mark Dayton specifically vetoed the title" contained in the Voter ID Amendment. (Letter of Attorney General Lori Swanson to Secretary of State Mark Ritchie (July 6, 2012) ("AG Letter") (Appendix at A-6).⁴

⁴ This is not the first time the Secretary has attempted to improperly change the title to a constitutional amendment duly enacted by the Legislature under Article IX, section 1 of the Minnesota Constitution. Just last month, the Secretary announced his intent to "substitute" the ballot title of a proposed amendment that if adopted, would amend the Minnesota Constitution to provide that "only a union of one man and one woman shall be valid or recognized as a marriage in Minnesota," S.F. 1308, ch. 88 §§ 1-2, 87th Leg.,

These Executive Officers of the State of Minnesota have acted in a manner outside the scope of their constitutional authority, and are attempting to unlawfully interfere with the power vested in the Minnesota legislature to adopt and refer to the people of Minnesota amendments to the Minnesota Constitution.

ARGUMENT

Introduction

In April of 2012, pursuant to Article IX, Section 1 of the Minnesota Constitution, the Minnesota Legislature approved a constitutional amendment to be referred to the voters of Minnesota at the 2012 General Election. If approved by the People, it would amend the Minnesota Constitution to require voters to present valid government-issued photographic identification before receiving a ballot; require the state to provide photographic identification to voters at no charge; require substantially equivalent verification standards for all voters; and allow provisional balloting for voters unable to present photographic identification. (“the Voter ID Amendment”). *See* H.F. 2738, ch. 167 §§ 1-2, 87th Leg., Reg. Sess. (Minn. 2012) (“Chapter 167, H.F. 2738”) (Appendix at A-1). Included in the Voter ID Amendment to be considered by the voters on November 6,

Reg. Sess. (Minn. 2011) (“the Marriage Amendment”), Letter of Secretary of State Mark Ritchie to Attorney General Lori Swanson (June 15, 2012) (“Marriage Veto Letter”) (Appendix at A-11).) As here, the Attorney General approved the Secretary’s proposed title for the Marriage Amendment. (Letter of Attorney General Lori Swanson to Secretary of State Mark Ritchie (June 19, 2012) (Appendix at A-7).

The Secretary’s illicit actions are undoubtedly politically motivated. He has publicly opposed both the Voter ID Amendment and the Marriage Amendment. His political meddling has forced individuals to petition the Court in order to ensure that the voters are presented with those amendments at the ballot box in the form approved and adopted by the Legislature.

2012, is the following ballot title as determined by the Legislature: “Photo Identification Required for Voting.” *Id.* § 2(b).

The Minnesota Constitution vests sole authority to amend the State’s constitution in the Legislature and the People, and *not* the Executive Branch. Nevertheless, the Secretary exceeded his authority as a member of the Executive Branch and attempted to impose a ballot title upon the Voter ID Amendment different in form and substance than that voted upon and passed by the Legislature. The Secretary unilaterally substituted the Legislature’s ballot question title with his own: “CHANGES TO IN-PERSON & ABSENTEE VOTING & VOTER REGISTRATION; PROVISIONAL BALLOTS.” The Minnesota Attorney General in turn, formally approved this change.

These Executive Officers have acted in a manner outside the scope of their constitutional authority and are attempting to unlawfully interfere with the power vested in the Minnesota Legislature to adopt and refer to the people amendments to the Minnesota Constitution. Because of the Secretary’s erroneous actions, the Petitioners seek reinstatement of the Legislature’s original ballot title to the Voter ID Amendment and an order from this Court directing the Secretary to ensure that the ballots accurately and completely reflect the original language provided by the Legislature in the Voter ID Amendment.

I. The Secretary Violated the Separation of Powers Doctrine under Minnesota Constitution, Article III, Section 1, by Attempting to Substitute His Ballot Title in Place of the Ballot Title Adopted by the Legislature.

Pursuant to Minn. Stat. § 204B.44, any individual may file a petition for the correction of errors, omissions, or wrongful acts which have occurred or are about to

occur including (a) an error or omission in the placement or printing of the name of any question on any official ballot, (b) any other error in preparing or printing any official ballot, or (c) any wrongful act, omission, or error of the secretary of state, or any other individual charged with any duty concerning an election.

Respondents erred in two respects. First, the Secretary has omitted the ballot title duly enacted by the Legislature and has erred in exercising power he does not possess in attempting to unilaterally substitute a title of his own. The Attorney General is complicit in the Secretary's theft of legislative power by approving the Secretary's actions. Second, even if the Secretary possessed the power to create a ballot title for the Voter ID Amendment, he erred by selecting a title that is misleading, inaccurate, and will confuse the voters. Again, the Attorney General has erred in approving the Secretary's misleading and confusing language.

The separation of powers doctrine is familiar with this Court, but bears repeating because of the significance of the doctrine's role in this controversy: "Under the Separation of Powers Clause, no branch may usurp or diminish the role of another branch." *Brayton v. Pawlenty*, 768 N.W.2d 357, 365 (Minn. 2010); *see also State ex rel. Birkeland v. Christianson*, 179 Minn. 337, 340, 229 N.W. 313 (Minn. 1930) ("Neither department can control, coerce or restrain the action or nonaction of either of the others in the exercise of any official power or duty conferred by the constitution, or by valid law, involving the exercise of discretion."). The Minnesota Constitution states in Article III, Section 1 that "[t]he powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or

constituting one of these departments shall exercise *any* of the powers properly belonging to either of the others except in the instances *expressly* provided in this constitution.”

(Emphasis added.) Article III bars any department from assuming or asserting any “inherent powers”—powers not “expressly” given—that properly belong to either of the others.

Because the separation of powers doctrine is the central principle of Minnesota’s state government, this Court has been steadfast in respecting that principle. *See e.g., Irwin v. Surdyk’s Liquor*, 599 N.W.2d 132, 141 (Minn. 1999). In *Sharood v. Hatfeld*, this Court struck down as unconstitutional a statute that required attorney registration fees be diverted to the state’s general fund based on the separation of powers doctrine: “if it is a judicial function that the legislative act purport to exercise, [this Court] must not hesitate to preserve what is essentially a judicial function.” 210 N.W.2d 275, 279 (Minn. 1973). Likewise, this Court should preserve what is exclusively a legislative function.

Passing a proposed constitutional amendment pursuant to Article IX, section 1 is exclusively a legislative function. Inclusive in the passage of the proposed Voter ID Amendment is the Legislature’s determination and command (note the word “shall”) of the ballot question *title*—“Photo Identification Required for Voting.” With the Secretary’s unilateral substitution of this ballot title for his own and the Attorney General’s approval of the same, they have erroneously injected themselves into the legislative process.

A. The Legislature Has the Exclusive Authority to Propose Constitutional Amendments.

The Legislature's exclusive authority to propose amendments to the Minnesota Constitution is set forth in Article IX, section 1: "A majority of the members elected to each house of the legislature may propose amendments to this constitution. Proposed amendments shall be published with the laws passed at the same session and submitted to the people for their approval or rejection at a general election."

Article IX, section 1 does not specify the form or manner in which such amendments are to be proposed and submitted, but this Court has long understood the power to establish such form and manner to be "left to the judgment and discretion of the legislature, subject only to the implied limitation that they must not be so unreasonable and misleading as to be a palpable evasion of the constitutional requirement to submit the law to a popular vote." *State ex rel. Marr v. Stearns*, 72 Minn. 200, 218, 75 N.W. 210, 214 (Minn. 1898), *rev'd on other grounds*, 179 U.S. 223 (1900). And the Legislature cannot propose and submit a constitutional amendment to the people without accompanying language on the ballot. Thus, the Legislature's power to author the ballot title is part of its constitutional power to "propose" and "submit." *See* Minn. Const. art. IX, section 1. Indeed, Legislatures controlled by both major political parties in Minnesota have understood their authority to include the power to mandate ballot question titles for proposed constitutional amendments. *See* H.F. 2285, ch. 151, §1(b), 85th Leg., Reg. Sess. (Minn. 2008) (Constitutional amendment proposed by Democratic-Farmer-Labor-

controlled Legislature that includes mandatory ballot question title) (Appendix at A-12)⁵; Chapter 167, H.F. 2738 (Voter ID Amendment proposed by Republican-controlled Legislatures that includes mandatory ballot question title).

In contrast, the Constitution gives no role to the Executive Branch in the constitutional amendment process. Instead, any authority held by the Executive Branch regarding the proposing of ballot questions is not constitutional, but purely by the permission of the Legislature in giving the Secretary of State the right to perform a *ministerial* role where the Legislature does not exercise this power itself.

For example, Minnesota Statute § 204D.15, provides that the “secretary of state shall provide an appropriate title for each question printed on the pink ballot.” The Secretary’s duty to provide a title is not without force; however, this Court must “ascertain and effectuate the intention of the legislature” when interpreting a statute. Minn. Stat. § 645.16 (2008). First, nothing in § 204D.15 suggests that the Legislature intended the Secretary’s power to provide titles to be exclusive. “If the legislature had intended that the [Secretary] have exclusive authority, it could have stated this explicitly.” *State v. American Family Mut. Ins. Co.*, 609 N.W.2d 1, 7 (Minn. App. 2000) (holding that statutory delegation of authority to commerce department to investigate unfair trade practices by insurance companies was not exclusive where it was not explicitly stated in statute and Attorney General had broad common law and statutory

⁵ The Secretary, who is a member of the Democratic-Farmer-Labor Party, did not substitute his own title for that approved by the Legislature when his own party proposed the 2008 constitutional amendment. Moreover, Petitioners cannot find any indication that the Secretary even submitted a title to the Attorney General for approval, prior to it being placed on the ballot.

authority to bring suits to protect the interests of Minnesota citizens), *review denied by State v. American Family Mut. Ins. Co.*, 2000 Minn. LEXIS 364 (Minn. June 13, 2000).

Second, the statute's language does not suggest that the Legislature intended that Secretary's power is meant to diminish, replace, or prohibit the constitutional authority of the Legislature to propose constitutional amendments to be referred to the people. *See id.* at 7-8 (holding that statute authorizing commerce department to investigate unfair trade practices of insurance company "[did] not prohibit attorney general[]" from investigating same where "legislature did not state that the commerce department's power was exclusive.")

Lastly, the statute contains no language permitting the Secretary to substitute his own title for one provided by the Legislature.

Thus, the Secretary's statutory authority to title amendment questions must yield to the Legislature's superior, constitutional authority to provide a title itself, as part of its broad power to "propose" and "submit" constitutional amendments to the people. In other words, the Secretary shall provide a title *only* where the Legislature has chosen not to provide one.

Recent amendment proposals reflect this practice. In 2005, the Legislature passed Chapter 88, H.F. 2461, which contained a proposed constitutional amendment concerning the use of motor vehicle sales tax revenue. H.F. 2461, ch. 88, art. 3, §§ 9-10, 84th Leg., Reg. Sess. (Minn. 2005) ("MVST Amendment") (Appendix at A-14). The MVST Amendment contained a mandated ballot question, but did not specify a ballot question title. *See id.* In the absence of a legislative directive as to the question's title, then-

Secretary of State, and Petitioner here, Mary Kiffmeyer exercised her § 204D.15 authority by proposing her own title and submitting it to the Attorney General for his approval, which was granted. (Letter of Secretary of State Mary Kiffmeyer to Attorney General Michael Hatch (July 12, 2006) (Appendix at A-15); Letter of Attorney General Michael Hatch to Secretary Kiffmeyer (July 20, 2006) (Appendix at 17).)

In 2008, the Legislature passed Chapter 151, H.F. 2285, a proposed constitutional amendment concerning a sales tax increase for environmental preservation. Chapter 151, H.F. 2285, ch. 151, 85th Leg., Reg. Sess. (Minn. 2008) (“Legacy Amendment”) (Appendix at A-12). Unlike the MVST Amendment, the Legacy Amendment contained a mandated ballot question title. *See id.* at § 2(b). Current Secretary of State Mark Ritchie left the Legislature’s title undisturbed; it appeared on the ballot exactly as proposed by the Legislature.⁶ *See* Unofficial Results for Constitutional Amendment (Transportation), Official Results General Election Nov. 4, 2008, <http://electionresults.sos.state.mn.us/20081104/RsltsConstAmendment.asp> (Appendix at A-18).

Consistent with its decision in 2008, here, the Legislature has exercised its Constitutional authority to provide a title for the Voter ID Amendment. By so doing, it left the Executive Branch with no role in the titling process. As the above amendment illustrates, the Secretary shall only provide a title where the Legislature has chosen not to provide one.

⁶ As noted earlier, Petitioners found no indication that the Secretary submitted the Legislature’s title to the Attorney General, and that the Attorney General approved it, prior to it being placed on the ballot.

This interpretation is further reinforced by basic canons of statutory construction. When the Legislature passes a provision specifically relating to how the ballot title should read, that action would supersede any role the Secretary may have absent the Legislature exercising its prerogative. Minnesota Statute § 645.26, subd. 1, provides that:

When a general provision in a law is in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both. *If the conflict between the two provisions be irreconcilable, the special provision shall prevail* and shall be construed as an exception to the general provision, unless the general provision shall be enacted at a later session and it shall be the manifest intention of the legislature that such general provision shall prevail.

Id. (Emphasis added.) See e.g., *Bonhiver v. Fugelso, Porter, Simich and Whiteman, Inc.*, 355 N.W.2d 138, 141 (Minn. 1984). Accordingly, the Legislature's act of titling the proposed amendment is a specific exercise of its constitutional authority, and if this exercise is somehow in conflict with § 204D.15, the provisions should be read together to give effect to both. The Legislature's title, therefore, must be given effect.

While the Secretary is authorized by statute to draft a title for amendments, the Minnesota Constitution has reserved the Legislature's right to exercise its own constitutional authority to determine the ballot title and description of proposed constitutional amendments, as it did in this instance. When the Legislature has given the proposed amendment a title and directed that the title appear on the ballot, there is no authority retained by or vested in the Executive Branch to dictate a different title for proposed constitutional amendments.

B. The Secretary's Ministerial Authority to Provide a Title Does Not Authorize Him to Substitute His Judgment for the Legislature's.

The Secretary cannot substitute his own ballot question title in place of the one provided for and passed by the Legislature. Any authority delegated to the Secretary through § 204D.15 cannot include the power to choose a title different from one which was adopted by the Legislature in the proposing legislation. As this Court has explained, “[w]hile the legislature cannot delegate legislative power it may delegate legislative functions which are merely administrative or executive.” *Hassler v. Engberg*, 233 Minn. 487, 515, 48 N.W.2d 343, 359 (Minn. 1951) (citations omitted). This Court has “long recognized that where the constitution commits a matter to one branch of government, the constitution prohibits the other branches from invading that sphere or interfering with the coordinate branch’s exercise of its authority.” *Commitment of Giem*, 742 N.W. 422, 429 (Minn. 2007).

Because the Secretary’s ballot title authority is legislatively granted, and not constitutional, the Secretary has only a ministerial authority to propose a ballot title where the Legislature has not exercised that power itself. Here, the Legislature *has* approved a ballot title, the Secretary has erred in attempting to substitute his own ballot title for the Legislature’s adopted title, and the Attorney General has erred in approving the Secretary’s proposed title. For the statute to authorize the Secretary to override the express designation by the Legislature would require an impermissible delegation of legislative power.

An analogous situation may be found in the relationship between the Legislature and the Court in the making of procedural rules. Since 1956, the power to enact court rules lies solely in the judiciary whereas such power was previously granted to the Legislature. *State v. Johnson*, 514 N.W.2d 551, 553-554 (Minn. 1994). But when the Legislature had constitutional authority, this Court still had an “inherent power to establish rules of procedure” which “was exercised where the legislature had not provided necessary procedures.” *Id.* at 554 n. 4. And since the amendment which transferred constitutional authority to the judiciary, this Court has still allowed statutory rules to stand “in an area not already governed by a rule.” *Id.* at 554 n.5. The relationship created by § 204D.15 must be the same. The Legislature must retain its constitutional powers to title ballot measures, and any authority granted to the Secretary to provide such a title must be limited to situations where the Legislature has not dictated its own title.

C. Any Authority Vested in the Secretary to Title an Amendment Was Superseded By the Legislature When It Titled the Voter ID Amendment.

The general power granted under Minnesota Statute § 204D.15 is necessarily superseded by the Legislature’s specific act in drafting and approving its own title for the Voter ID Amendment. As this Court has recognized, one Legislature cannot bind its successors in prescribing the form and substance of questions submitted to the populace. *State v. Duluth & Northern Minnesota Railway Co.*, 102 Minn. 26, 30, 112 N.W. 897, 898 (Minn. 1907). Such impermissible binding would occur if this Court were to read § 204D.15 as authorizing the Secretary to override and to deliberately omit from the ballot the title which the Legislature designated for the proposed amendment as the

Secretary is attempting to do here. Reading the statute in this manner would mean that the Legislature that enacted the statute has effectively restricted the ability of the present Legislature (and any subsequent Legislature) to prescribe the form of any proposed constitutional amendment, something this Court has previously rejected.

Because § 204D.15 would be constitutionally problematic if read to override the Legislature's continuing power to create the titles of its own choosing for proposed constitutional amendments, this Court should instead seek to construe the statute narrowly in order to avoid the constitutional question. *E.g. Matter of Welfare of RAV*, 464 N.W.2d 507 (Minn. 1991). Such questions can be avoided if the statute is read as retaining the Legislature's inherent authority to dictate a title to the Secretary and thereby removing any discretion the Secretary might otherwise have to draft his own title. It could also be accomplished by simply recognizing that when the Legislature dictates a title, that title is the only one which is "appropriate," and hence the only one which the Secretary can include on the ballot.

Minnesota Statute § 204D.15 must be read as providing the Secretary with no discretion but to use the title provided by the Legislature in the preparation of the pink ballot, where the Legislature has seen fit to exercise its authority and thereby vested its authority to dictate the ballot title of proposed constitutional amendments.

D. The Governor's Symbolic "Veto" Has No Legal Effect on a Proposed Constitutional Amendment and Does Not Transfer Power from the Legislature to Another Executive Branch Official.

In approving the Secretary's ballot title, the Attorney General's office indicated that rejecting the Legislature's title was permissible because Governor Dayton had

“specifically vetoed the title” contained in Chapter 167, H.F. 2738, the Voter ID Amendment. (AG Letter, Appendix at A-6.) Therefore, the Attorney General reasoned, the Secretary was empowered to provide a title pursuant to § 204D.15(1). (*Id.*)

But in fact, the Governor *did not veto* any part of the Legislature’s act. As a threshold matter, “proposed amendments to the constitution are not required, as a matter of law, to be presented to the governor[.]” Op. Atty. Gen. 213-C (March 9, 1994) (Appendix at A-21). Minnesota law requires that they be presented only to the “people.” Minn. Const., art. IX, section 1.

And while it has become customary practice to present amendments to the Governor, “the approval or disapproval of the governor...[has] no bearing upon submission of the amendments to the people.” Op. Atty. Gen. 213-C (Appendix at A-24). Despite the Governor’s acknowledgment that he has no veto authority over a proposed constitutional amendment, (Governor’s Letter (Appendix at A-3)), the Attorney General nonetheless claims, wrongly, that the purported “veto” had the legal effect of ‘vetoing’ the Legislature’s ballot title, (AG Letter (Appendix at A-6)).

Where a bill contains both a proposed constitutional amendment and matters of ordinary legislation, a Governor’s veto of that bill “[is] effective as to the legislation contained in the bill,” but “the veto [does] not affect the proposed constitutional amendment.” Op. Atty. Gen. 213-C (Appendix at A-22). This rule was illustrated in 2005, when then-Governor Tim Pawlenty vetoed Chapter 88, House File 2461, a bill that contained legislation concerning to transportation funding, as well as a proposed constitutional amendment concerning a motor vehicle sales tax. H.F. 2461, ch. 88, 84th

Leg., Reg. Sess. (Minn. 2005) (“Chapter 88, H.F. 2461) (Appendix at A-14). In a letter to then-Speaker of the House Steve Sviggum, Governor Pawlenty explained:

[T]he legislation contains a cornerstone of my transportation proposal—a constitutional amendment to dedicate 100% of the proceeds of the Motor Vehicle Sales Tax to transportation needs, phased-in over a five year period. This provision will go forward notwithstanding my veto because constitutional amendments are not subject to veto.

(Letter of Governor Tim Pawlenty to Speaker of the House Steve Sviggum (May 19, 2005) (“Pawlenty Letter”) (Appendix at A-25).)

The amendment contained in Chapter 88, H.F. 2461 included not just the amendment’s text, but also the amendment’s ballot question as proposed by the Legislature. *See* § 10 (Appendix at A-14). The entire bill was vetoed. Yet, the ballot question was *not* invalidated along with the accompanying transportation funding legislation. Rather, the ballot question was treated as part of the constitutional amendment, immunized from Governor Pawlenty’s veto. It appeared on the ballot exactly as it was proposed by the Legislature in Chapter 88, H.F. 2461. *Compare* Official Results for Constitutional Amendment (Transportation), Official Results General Election Nov. 7, 2006, <http://electionresults.sos.state.mn.us/20061107/RsltsTransportationAmendment.asp> (Appendix at A-28) *with* Chapter 88, H.F. 2461, § 10 (Appendix at A-14).

As he has done previously,⁷ the Secretary apparently treated the Voter ID Amendment’s ballot question title as “ordinary legislation,” subject to the Governor’s

⁷ The Secretary justified his decision to change the ballot question title to the Marriage Amendment by claiming that “[t]he governor’s veto of the legislation (Senate File 1308) invalidated the title designated by the legislature.” News Release, *Secretary of State Mark*

veto powers. But, like the ballot question itself, *see id.*, the Legislature’s approved title of a constitutional amendment ballot question is not “ordinary legislation,” but is part and parcel of the Legislature’s proposed ballot amendment itself. The Governor, therefore, has no authority to ‘veto’ any part of the proposed amendment. *See Op. Atty. Gen. 213-C* (March 9, 1994) (Appendix at A-19). The Governor himself understood that his veto was purely symbolic⁸ and would not prevent the Voter ID Amendment from being placed on the ballot. (Governor’s Veto Letter, Appendix at A-3.) As discussed herein, the constitutional authority to refer to the voters amendments to the constitution is vested solely in the Legislature without any role for the Governor or other officers of the Executive Branch. Minn. Const. Art. III, Sec. 1. That authority has long been interpreted as including the power to set the form and manner in which such amendments are submitted. *Stearns*, 72 Minn. at 218, 75 N.W. at 214. As this Court has observed, “a practical construction of the constitution, which has been adopted and followed in good faith by the legislature and people for many years, is always entitled to receive great consideration from the courts.” *Clark v. Pawlenty*, 755 N.W.2d 293, 306 (Minn. 2008).

Ritchie Announces Title for Constitutional Amendment on Marriage, (June 28, 2012), <http://www.sos.state.mn.us/index.aspx?recordid=635&page=10> (Appendix at A-29).

⁸ In his letter to Senate President Fischbach regarding the Marriage Amendment, the Governor refers to his “veto” of that Amendment as “symbolic.” (Letter of Secretary of State Mark Ritchie to Attorney General Lori Swanson (June 15, 2012) (Appendix at A-11).) While the word “symbolic” is not used in the letter in which the Governor “vetoed” the Voter ID Amendment, the Governor nonetheless recognizes he has no power to prevent the Voter ID Amendment from appearing on the ballot and thus his veto is only symbolic. (Governor’s Veto Letter (Appendix at A-3).)

While Minnesota courts have not directly confronted the impact of a gubernatorial veto of a proposed amendment, the Attorney General has stated that “the approval or disapproval of the governor would have no bearing upon submission of the amendments to the people.” Op. Atty. Gen. 213-C (Appendix at A-19) (citing Op. Atty. Gen. 86-a) (Nov. 12, 1946) (Appendix at A-31.) Moreover, this Court has explained that the power of the Legislature in “prescribing the form and substance of the question to be submitted” is vested in individual legislatures. *See Duluth & Northern Minnesota Railway*, 102 Minn. at 30, 112 N.W. at 898. The Legislature itself cannot bind its successors’ use of this authority, and even the courts cannot intervene unless “the question is so framed as to be a palpable evasion of the constitution.” *Id.* These limitations would be rendered meaningless if this constitutionally-mandated function could be voided by a gubernatorial veto.

There is no basis for treating the Legislature’s approved title for a ballot measure as “ordinary legislation” subject to gubernatorial veto. The title is simply a component of the ballot description which has long been held to be within the Legislature’s exclusive purview. There is no constitutional distinction between the title of a proposed constitutional amendment and the rest of the ballot description. Had § 204D.15 not been enacted, the Legislature would still be vested with the sole power to propose constitutional amendments, including the titles thereof.

Allowing a gubernatorial veto of ballot language to reverse a decision of the Legislature is tantamount to allowing a gubernatorial veto of the proposed amendment itself, in direct contravention of the constitutional construct of the State of Minnesota.

There is no authority whatsoever to support this new scheme attempted to be put in place by the Executive Branch officers to thwart the Legislature's authority to propose constitutional amendments and, in this case, the Voter ID Amendment. This Court has never articulated any such authority for a gubernatorial veto to trump the Legislature's ability to refer to the people a ballot measure constitutional amendment. To now allow such a veto would vest in the governor the power in the constitutional amendment process that simply does not exist in the state's constitution. Such an interpretation conflicts with the constitutional structure of ballot measures described in this Court's prior opinions, and has never before been recognized.

This Court should disregard the governor's veto as a purely symbolic gesture and must not allow the Secretary and the Attorney General to somehow give legal weight to this symbolic act. The Court should require the Secretary to correct his error and omission, and to reinstate the amendment title which was given to it by the Legislature.

II. The Secretary's Ballot Title Is Not Appropriate Because It Is Misleading, Inaccurate, and Will Confuse Voters.

Alternatively, whenever the Secretary may propose a ballot title, he has a statutory duty to propose an "appropriate" title. Minn. Stat. § 204D.15(1). Here, not only has the Secretary usurped the constitutional authority of the Legislature by omitting the Legislature's title and creating one of his own, but the title the Secretary has proposed to substitute is not appropriate. Whether the Secretary's chosen title is "appropriate" should

be weighed according to a preponderance of the evidence standard. *See Weiler v. Ritchie*, 788 N.W.2d 879, 883 (Minn. 2010).⁹

Comparing the Secretary’s title—“CHANGES TO IN-PERSON & ABSENTEE VOTING & VOTER REGISTRATION; PROVISIONAL BALLOTS”—with the title given by the Legislature—“Photo Identification Required for Voting—and the text of the Voter ID Amendment itself, highlights the inappropriateness of Secretary’s title. The core purpose and effect of the underlying Voter ID Amendment is to require voters to present photo identification. The Amendment provides that “[a]ll voters voting in person must present valid government-issued photographic identification” and that “[a]ll voters, including those not voting in person, must be subject to substantially equivalent identity and eligibility verification....” Chapter 167, H.F. 2738, § 1. Yet, the Secretary’s title is completely void of any reference to photo identification, the Amendment’s core purpose and effect. Rather, the Secretary’s title vaguely refers to “CHANGES TO IN-PERSON & ABSENTEE VOTING.”

The Secretary’s omission of the Voter ID Amendment’s core purpose and effect has real potential to mislead voters on Election Day. The debate surrounding the Voter ID Amendment has focused on its voter identification requirements. To those who oppose

⁹ While prior cases analyzing the propriety of ballot language have imposed a much higher burden for petitioners; *see, e.g., Breza v. Kiffmeyer*, 723 N.W.2d 633, 636 (Minn. 2006); this Court in those cases gave broad deference to the “judgment and discretion of the legislature,” because it holds the constitutional authority to determine “the form and manner of submitting the question of a constitutional amendment to the people.” *Breza*, 723 N.W.2d at 636 (*quoting Stearns*, 72 Minn. at 218, 75 N.W. at 214). Such deference is inapplicable to the Secretary’s actions as he has only statutory authority to provide an “appropriate” title.

the Amendment, these requirements are controversial. To those who support it, they are common sense and needed reforms. Both sides commonly refer to the Voter ID Amendment by its key element: voter identification. Therefore, on Election Day, voters on both sides of the issue will naturally be looking for a title that reflects the voter identification requirements that have spawned a vigorous election campaign and dominated political headlines. The Secretary's title will fail to provide voters with the guidance needed to identify the Voter ID Amendment.

Rather than cast a "YES" vote on an amendment they do not understand, some voters may simply leave their ballot blank, which is counted the same as a "NO" vote. Minn. Stat. 204D.15(1) ("a voter's failure to vote on a constitutional amendment has the effect of a negative vote"). This is significant because proposed amendments are added to the constitution only if "a majority of all the electors voting at the election vote to ratify an amendment." Minn. Const., art. IX, sec. 1. This needed majority is determined based on the total number of "electors voting at the election." *Id.* Those voters who leave their ballots blank are not excluded from this total number of voters. Rather, those voters are considered to have "vot[ed] at the election" because blank ballots count as "NO" votes. Therefore, the more blank ballots that are submitted, the more "YES" votes that are needed to constitute a majority of all votes cast.

Blank ballots can have a significant impact on election results. For example, in the 2008, it is estimated that over 143,000 voters (or approximate 5% of total voters) left their ballot blank when asked whether to approve or reject a proposed constitutional amendment. *See Unofficial Results for Constitutional Amendment (Transportation),*

Official Results General Election Nov. 4, 2008, <http://electionresults.sos.state.mn.us/20081104/RsltsConstAmendment.asp> (Appendix at A-18). Thus, it is imperative that ballot questions are appropriately titled, so as to avoid confusion and permit voters to affirmatively approve or reject a proposed amendment.

Moreover, the phrase “CHANGES TO IN-PERSON & ABSENTEE VOTING” incorrectly indicates that “changes” will be made to “*voting*.” The act of “voting” occurs *after* the voter has received his ballot. Thus, the Secretary’s title may mislead some voters into thinking the Amendment will make changes to in-person and absentee voting *procedure*, such as how votes are cast *after* ballots are acquired.

The Voter ID Amendment makes no changes to “voting.” Rather, the Amendment requires a *prerequisite* to in-person voting. Indeed, the substantive provision that will affect most voters (in-person voters) makes clear that identification must be presented “*before receiving a ballot*.” Chapter 167, H.F. 2738, § 1 (emphasis added).

In contrast, the Legislature’s title focuses narrowly on the Voter ID Amendment’s voter identification requirements—“Photo Identification Required for Voting”— and correctly communicates that the Voter ID Amendment will make the presentation of identification a prerequisite for voting, rather than make changes to voting itself. Thus, it accurately and appropriately describes the Amendment’s core purpose and effect and will instantly inform voters that they are voting on the Voter ID Amendment with which they are familiar.

The Secretary’s title is further inappropriate because it falsely indicates the Voter ID Amendment will make “CHANGES” to “VOTER REGISTRATION.” This portion of

his title likely reflects the Secretary's publicly-stated belief that the Voter ID Amendment, if approved, will end election-day registration in Minnesota. Secretary of State Mark Ritchie, Op-Ed., *Swift Action Needed to Save Same Day Registration*, Mar. 28, 2012, available at <http://www.sos.state.mn.us/index.aspx?recordid=607&page=10>). The Secretary's belief is, at best, mere speculation. In fact, the Voter ID Amendment could actually improve Minnesota's election-day registration system. Common technology could be brought into polling places to allow election judges to instantly compare a new voter's registration information to existing databases that are already in use for voters who register at least 20 days before an election. Regardless, the Secretary's title is inappropriate because it falsely indicates that changes will *unquestionably* be made to voter registration. In so doing, the Secretary is again preempting a legislative function, mainly, how the Voter ID Amendment, if passed, will be enabled.

But more fundamentally, the Secretary's title is misleading because the Amendment *itself* will make no changes to voter registration. Its text does not even mention voter registration. Any changes to voter registration that *may* occur if the Voter ID Amendment is approved will be made by the enacting legislation, subject to gubernatorial veto, and not by the Voter ID Amendment.

The Secretary's statement that the Voter ID Amendment will change voter registration in Minnesota reveals his political motivation in substituting his title for the Legislature's title as it is an obvious effort to elicit negative emotions and encourage voters to reject the Voter ID Amendment with which he disagrees. This is precisely the

intrusion of political power across the branches of government the Constitution expressly proscribes.

The Secretary's title is misleading, inaccurate and confusing. Therefore, it does not comply with the statutory requirement that all ballot titles be "appropriate." Minn. Stat. § 204D.15(1). Thus, the Secretary erred in proposing this title, and the Attorney General erred in approving it.

CONCLUSION

Petitioners respectfully request an entry of judgment in their favor and against Secretary of State Mark Ritchie in his official capacity as the chief election official of the State of Minnesota and Lori Swanson, the Attorney General of the State of Minnesota, finding that they erred in substituting and approving the proposed ballot title, respectively; Ordering the Secretary to print the ballot as specified in the Voter ID Amendment, Chapter 167, House File 2738, including the title "Photo Identification Required for Voting;" and any and all other such relief as may be just and equitable.

This 19th day of July, 2012.

Respectfully submitted,



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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 7,267 words. This brief was prepared using Microsoft Word 2010.

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