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State of Minnesota

**In the Supreme Court**

**FILED**

Warren Limmer, Steve Gottwalt, Dan Hall, Steve Drazkowski, Sean Nienow, Paul Gazelka, Julianne Ortman, Peggy Scott, Michelle Benson, Ernie Leidiger, Bob Dettmer, Glenn Gruenhagen, Bob Gunther, Joyce Peppin, and Mike Benson, all individuals, registered voters, and Members of the Minnesota Legislature; John Helmberger, an individual and a registered voter; and Minnesota for Marriage, 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.

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**Law Professors' Amicus Curiae Brief Supporting Respondents**

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## I. Introduction.<sup>1</sup>

The Petition does not present difficult questions of law. The title of any proposed constitutional amendment must conform to state law in issuance and appropriateness. As to issuance, a Minnesota statute with a lineage going back to 1919 requires the Secretary of State to provide, and the Attorney General to approve, an “appropriate title.” They have properly exercised that statutory authority. As to appropriateness, considerations of text, structure, history, and precedent insist on a great degree of judicial deference. The title chosen here easily meets the test of appropriateness.

First, the authority and the duty of the Respondents here to select and approve an appropriate ballot title are established by unambiguous state law. That state law has not been challenged constitutionally, or been amended, repealed, or superseded by any valid legislative act. The Governor vetoed the entirety of the bill presented to him, including the Legislature’s preferred ballot title.<sup>2</sup> The veto of the ballot title was not overridden and thus that portion of the bill containing ordinary legislation instructing two Executive Branch officers on how to exercise their exclusive and mandatory statutory authority did not become law. The Secretary of State’s duty to select a title for the proposed constitutional amendment—chosen by him and approved by the Attorney General—is undisturbed.

Second, neither the Secretary of State nor the Attorney General has exceeded their respective broad discretionary powers under the statute to choose and approve an appropriate ballot title. As the approved title is one among many potentially “appropriate” titles, the Court should decline to insert itself in this matter.

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<sup>1</sup> No party has had any part in the authorship of this brief. No persons, other than the amicus curiae or their counsel, made a contribution of any sort to the preparation or submission of this brief.

<sup>2</sup> S.F. 1308, ch. 88 §§ 1-2, 87th Leg., Reg. Sess. (Minn. 2011).

A few state legislators invite the Court to reach an extraordinary holding: that the Legislature (which has neither intervened nor filed an amicus brief) has retained unilateral control over every aspect of ballot titling even though Minnesota law long ago placed that responsibility in the hands of other constitutional actors. The relevant statutory and constitutional texts, history, and structural separation-of-powers principles confirm that the Court must decline that invitation and instead give due deference to the reasonable exercise of these executive officers' discretion.

## II. Identification of amici.

This brief is presented on behalf of nineteen law professors who teach, research, and write about state and federal constitutional law, statutory interpretation, the legislative process, election law, and legal history. Among them, they hold appointments at all four of Minnesota's law schools. While their scholarship and experience evince a wide range of viewpoints, and while they differ about who should have access to the status of marriage in Minnesota, they share a common opinion as to the present Petition. Here, they present information supporting the Respondents' authority to title and approve proposed constitutional amendments despite this novel effort to preemptively strip them of their traditional and clearly articulated power.

## III. As the chief elections and legal officers in Minnesota, the Secretary of State and the Attorney General, respectively, have election-related duties grounded in the Constitution and established by legislative acts.

The Minnesota Constitution establishes the Secretary of State and Attorney General as executive officers of the state.<sup>3</sup> It designates the Secretary of State as the state's chief elections officer and the Attorney General as the state's chief legal officer.<sup>4</sup> The Secretary of

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<sup>3</sup> MINN. CONST. art. V, § 1.

<sup>4</sup> MINN. CONST. art. VII, § 8; ; *Clark v. Pawlenty*, 755 N.W.2d 293, 299 (Minn. 2008) (“The Secretary of State . . . is the chief election official in the state”); *Humphrey on Behalf*

State also has powers set forth in state statutes at Chapters 200 through 212. These statutes—prescribing the Secretary’s powers, duties and obligations—were duly enacted through the ordinary legislative process mandated by the state constitution. The Attorney General also has statutorily mandated duties.<sup>5</sup>

There is nothing unusual or unconstitutional in statutorily granting an executive officer authority that might also have been exercised by the Legislature, provided that the delegated authority is not solely or exclusively the Legislature’s under the state constitution.<sup>6</sup> This is the rule in administrative law both at the federal and state levels.<sup>7</sup> Once such administrative duties are granted through the proper legislative process they cannot be repealed, amended, or superseded except by another properly adopted statute. The Legislature cannot silently retain a unilateral and preemptive “legislative veto” over the actions of executive officers operating within the scope of their legal duties.<sup>8</sup>

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... footnote continued from prior page

of *State v. McLaren*, 402 N.W.2d 535, 539 (Minn. 1987) (“As the chief law officer of the state, the attorney general possesses all of the powers inherent in that office at common law.”).

<sup>5</sup> See, e.g., Minn. Stat. §§ 8.01–8.36 (2011).

<sup>6</sup> *Lee v. Delmont*, 36 N.W.2d 530, 538 (Minn. 1949) (“Although purely legislative power cannot be delegated, the legislature may authorize others to do things (insofar as the doing involves powers which are not exclusively legislative) which it might properly, but cannot conveniently or advantageously, do itself.”)

<sup>7</sup> *Siewert v. N. States Power Co.*, 793 N.W.2d 272, 295 (Minn. 2011) (Anderson J., concurring) (recognizing that the legislature can delegate authority to administrative agencies); see *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 219 (1989) (reaffirming the “that so long as Congress provides an administrative agency with standards . . . no legislative authority trenching on the principle of separation of powers has occurred.”).

<sup>8</sup> MINN. CONST. art. III, § 1; art. IV, §§ 22-23; see also, e.g., *INS v. Chada*, 462 U.S. 919 (1983) (“Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.”).

**A. A brief history of Minn. Stat. § 204D.15, subd. 1. (the “titling law”)**

There is no question that longstanding Minnesota election law gives the Respondent executive officers broad authority over state elections, including the duty to choose and approve an appropriate ballot title. In 1903, the Legislature established a process for placing questions on the ballot: The Secretary of State was directed to prepare, print, and distribute pink ballots containing questions to be submitted to the voters, including constitutional amendments.<sup>9</sup> Minnesota election law was silent as to the titling of these questions until 1919, when the Legislature explicitly charged the Secretary of State with the mandatory and exclusive duty to provide titles. Specifically, the 1919 law provided:

In preparing said pink ballot the secretary of state shall apply an appropriate designation or title, to each such proposition and question, which designation or title shall be approved by the attorney general...<sup>10</sup>

In 1959, this language was amended to remove the “designation” concept.<sup>11</sup> In 1981, this statute was revised into its current form:

The secretary of state shall provide an appropriate title for each question printed on the pink ballot. The title shall be approved by the attorney general, and shall consist of not more than one printed line above the question to which it refers.<sup>12</sup>

This allocation of authority in the constitutional amendment process—which separates the drafting of the amendment by the Legislature from the titling of the amendment by executive officers—is far from unique to Minnesota. In fact, Minnesota’s system is common and uncontroversial: Twenty-three other states have statutory provisions that assign an executive officer some degree of responsibility in drafting ballot titles, summaries, captions,

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<sup>9</sup> See Compendium, at tab 4. A Compendium of relevant legal source material has been filed concurrently and is cited throughout.

<sup>10</sup> See Compendium, at tab 7.

<sup>11</sup> See Compendium, at tab 28.

<sup>12</sup> See Compendium, at tab 39.

or questions.<sup>13</sup> There is no Minnesota case law discussing the propriety of this structure but challenges to titles in other states have *not* questioned the executive officer's underlying authority. Rather, plaintiffs have claimed that the chosen title was inaccurate or misleading.<sup>14</sup>

**B. Minn. Stat. § 204D.15, subd. 1 has a plain meaning, already acknowledged by this Court and confirmed by the longstanding practices of the legislative and executive branches.**

This Court has long held that “[w]here the intention of the legislature is clearly manifested by plain and unambiguous language, no construction is necessary or permitted.”<sup>15</sup> That rule of statutory interpretation could hardly have found a better fit than this case; there is a commonsense reading of this plain and unambiguous titling law, consistent with the historic practices of the legislative and executive branches.

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<sup>13</sup> ALASKA STAT. § 15.45.180 (2011); ARIZ. REV. STAT. § 19-125 (2012); ARK. CODE. §§ 7-9-107, 7-9-114 (2012); CAL. ELEC. CODE § 9051(c) (2011); IDAHO CODE § 34-1809 (2012); IOWA CODE §§ 49.44, 52.25 (2012); MASS. GEN. LAWS CH. 54 § 53 (2012); MD. CONST. art. XVI, § 5(b); MICH. CONST. art. XVII, § 2; MISS. CODE § 23-17-9 (2011); MO. REV. STAT. § 114.160 (2012); MONT. CODE § 13-27-312 (2011); NEB. REV. STAT. § 32-1410 (2012); N.D. CENT. CODE § 16.1-06-09 (2012); OHIO REV. CODE § 3519.21 (2012); OKLA. STAT. tit. 34, § 9 (2012); OR. REV. STAT. § 250.065(3)-(4) (2011); 25 PA. CONS. STAT. §§ 2621.1, 2964(g) (2012); R.I. GEN. LAWS § 17-5-3 (2012); S.D. CODIFIED LAWS § 12-13-9 (2012); TENN. CODE § 2-5-208 (2012); WASH. REV. CODE § 29A.36.020 (2012); WYO. STAT. § 22-24-117 (2012).

<sup>14</sup> See e.g. *Zaremborg v. Superior Court of Sacramento County*, 115 Cal. App. 4th 111 (Cal. Ct. App. 2004); *Iman v. Bolin*, 404 P.2d 705, 710 (Ariz. 1965); *Burgess v. Alaska Lt. Gov. Terry Miller*, 654 P.2d 273, 275-276 (Alaska 1982); *In re: Second Initiated Constitutional Amendment*, 613 P.2d 867, 869 (Colo. 1980); *May v. Daniels*, 194 S.W.3d 771, 776 (Ark. 2004); *Anne Arundel Cnty. v. McDonough*, 354 A.2d 788, 805 (Md. 1976); *Jurcisin v. Cuyaboga Cnty. Bd. of Elections*, 519 N.E.2d 347, 352 (Ohio 1988); *Bailey v. Muskegon Cnty. Bd. of Comm'rs*, 333 N.W.2d 144, 150 (Mich. Ct. App. 1983); *Union Elec. Co. v. Kirkpatrick*, 678 S.W.2d 402, 405 (Mo. 1984); *Municipal Svcs. Corp. v. Kusler*, 490 N.W.2d 700, 703 (N.D. 1992); *In re Petition No. 360*, 879 P.2d 810 (Okla. 1994); *Mazzone v. Attorney General*, 736 N.E.2d 358, 372 (Mass. 2000).

<sup>15</sup> *Ed Herman & Sons v. Russell*, 535 N.W.2d 803, 806 (Minn. 1995).

**1. The text of the titling law plainly grants mandatory and exclusive titling authority to Respondents.**

The titling law is mandatory, not permissive; it is also exclusive, not open-ended.<sup>16</sup> Each version of the statute over the past ninety-three years has used the word “shall,” and nowhere else is a power relating to titling assigned to any other actor, including the Legislature.<sup>17</sup> The language is inescapable: The Secretary of State (not another executive officer and not the Legislature) must provide an appropriate title. The Attorney General (not another executive officer and not the Legislature) must approve the title chosen by the Secretary of State. The only statutory limitations on the Secretary’s authority are that the title needs to be “appropriate,” that it needs to fit on one line, and that it must be approved by the Attorney General.<sup>18</sup> The title chosen here meets all statutory requirements.

**2. This Court recently confirmed the plain meaning of the titling law.**

In 2006, this Court confirmed the plain meaning of the titling law: “[b]y statute, the secretary of state must provide an appropriate title for each question presented on the ballot for constitutional amendments, and the title must be approved by the attorney general. Minn. Stat. § 204D.15 (2004).”<sup>19</sup>

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<sup>16</sup> See e.g. *Howard Jarvis Taxpayers Ass’n v. Bowen*, 192 Cal. App. 4th 110, 122–23 (Cal. Ct. App. 2011) (finding, under similar circumstances, that the statutory language, “the Attorney General shall” was mandatory and exclusive authority under the plain meaning of these words).

<sup>17</sup> See, e.g., Compendium, at tabs 8, 10, 20, 26, 34, and 37.

<sup>18</sup> Minn. Stat. § 204D.15, subd. 1 (2012).

<sup>19</sup> *Brexa v. Kiffmeyer*, 723 N.W.2d 633, 635 n.3 (Minn. 2006); see also *Wass v. Anderson*, 252 N.W.2d 131, 136 n.2 (Minn. 1977) (confirming the same plain meaning of the predecessor statute, Minn. Stat. § 203A.31 (1975)).

3. The legislative and executive branches have acted cooperatively in recognizing the plain meaning of the titling law.

Similarly, the Legislature itself has taken the position, for more than 120 years, that ballot preparation (and as of 1919, titling) is a matter controlled by ordinary state lawmaking, subject to revision only through the amendment or repeal process of ordinary lawmaking (bicameralism and presentment). Since 1919, the Legislature has twice revisited this specific titling subsection of the code (in 1959 and 1981), and on neither occasion did it repeal, amend, or supersede the legal duty of the executive officers.

Since the Secretary of State first received the explicit mandate to set the ballot title ninety-three years ago, there have been 104 ballot questions approved for submission to the people of Minnesota. On twelve occasions the session law provided a ranked position for the proposal on the pink ballot. In 1925, 1927, 1929, 1931, 1933, 1941 and 1951, the session laws contained an instruction of this sort: “[T]he Secretary of State shall place this proposed amendment as No. 1 on the official ballot.”<sup>20</sup> In a 1931 proposal, the Legislature instructed that the amendment “shall have printed thereon the heading Amendment No. 1.”<sup>21</sup> A 1959 session law proposing an amendment for 1960 stated that it was to be “submitted to the people of the state for their approval or rejection... as Constitutional Amendment No. 1.”<sup>22</sup> The proposal was first on the ballot but also was given a title: “Legislative Session Length;

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<sup>20</sup> See Compendium, at tabs 9, 12, 13, 15, 16, 22, and 25. A second 1927 law with a second proposed amendment instructed the Secretary of State to “place this proposed amendment as No. 2 on the official ballot.” *Id.*, at tab 11. A 1933 session law with a proposed amendment noted that it was to be placed as “Amendment No.” followed by a blank space. *Id.*, at tab 18.

<sup>21</sup> See Compendium, at tab 14. The 1932 pink ballot did not contain that heading nor was this proposed amendment placed first on the ballot. *Id.*, at tab 52. This may be because a later amendment that year also had a primacy instruction. *Id.*, at tab 15.

<sup>22</sup> See Compendium, at tab 30.

Legislators' Candidacy for Other Offices.”<sup>23</sup> Another proposal for 1960 instructed that it was to be submitted as “Constitutional Amendment No. 2.”<sup>24</sup> The proposal was second on the ballot, but was also given a title: “Changed Basis For Reapportioning Legislature.”<sup>25</sup> In fact, even where the Legislature specified a numerical ordering, a separate ballot title was added later, presumably by the Secretary of State and the Attorney General.<sup>26</sup> Thus, all three branches of Minnesota’s government—the executive, judicial, and legislative—have historically accepted and acted upon the plain meaning of the titling law and the duties it imposes on the Secretary of State and the Attorney General.

**IV. Petitioners’ attempt to circumvent Minn. Stat. 204D.15 subd. 1 is improper and should be rejected.**

Given the plain meaning and consistent application of the titling law in Minnesota, Petitioners bear a heavy burden of explaining why the law should not be followed for the pending amendment. They have hardly explained—much less borne the heavy burden of persuading the Court—why the titling law does not govern here.

**A. Ballot titling is not a sole or exclusive constitutional power of the Legislature.**

Petitioners passingly assert that the specification of a ballot title is a necessary part of the “legislative act required to amend the Minnesota Constitution,” and that the Legislature’s constitutional authority to submit the question to the voters “include[s] the ballot title of referred amendments.”<sup>27</sup> This amounts to an extravagant claim of unilateral legislative control over what the Legislature itself has heretofore regarded as a matter of ordinary

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<sup>23</sup> See Compendium, at tab 55.

<sup>24</sup> See Compendium, at tab 29.

<sup>25</sup> See Compendium, at tab 55.

<sup>26</sup> See, e.g., Compendium, at tabs 52, 53, 54, 55.

<sup>27</sup> Petition, ¶¶ 27-28.

election law and procedure. Consider that, with just three exceptions (two of them this biennium), every single constitutional amendment since 1919 has been drafted by the Legislature for submission to the people without a specified substantive ballot title. This practice strongly suggests that there is, in fact, something materially different about the title, on the one hand, and the substance of the proposed amendment, on the other. Petitioners' claim of exclusive legislative control over all matters the Legislature deems related to a proposed constitutional amendment is inconsistent with more than a century of law and experience.

As this Court acknowledged in 1898 in *State ex rel. Marr v. Stearns*,

Neither the form nor the manner of submitting the question of the *amendment* to the people is prescribed by the constitution. They are 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.<sup>28</sup>

Under this and similar decisions, the Court has acknowledged legislative preeminence in submitting constitutional proposals to the people. But preeminence does not mean exclusivity; there are judicial limits on the form in which amendments are submitted. And the Legislature may, as *Stearns* noted, exercise its “judgment and discretion” about how to effectuate its constitutional powers. Twenty-one years after *Stearns*, the Legislature exercised its “judgment and discretion” by passing, through ordinary legislation, a statute delegating the titling of amendments to the Secretary of State, with approval by the Attorney General. That decision, confirmed again and again by the Legislature through subsequent amendments, is memorialized in what is now Minn. Stat. § 204D.15, subd. 1.

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<sup>28</sup> 75 N.W. 210, 218 (Minn. 1898) (emphasis added), *rev'd on other grounds sub nom. Stearns v. Minnesota*, 179 U.S. 223 (1900).

Indeed, Minnesota has treated the preparation of ballots in general as a matter for ordinary legislation since at least 1893.<sup>29</sup> In the thirty-four times the Legislature has passed bills amending its ballot-preparation laws, it has never claimed the right to do so unilaterally, but rather has always presented such bills to the Governor for approval.<sup>30</sup> Similarly, the three recent bills containing proposed constitutional amendments, which were accompanied by sections providing ballot titles, were all presented to the Governor.<sup>31</sup> (The 2012 amendments, unlike all but one other bill containing a proposed amendment since 1919, were vetoed.<sup>32</sup>)

The Court has long understood Minnesota's system of separation of powers to comport with this practice. In *Lee v. Delmont*, this Court recounted the basic framework for a workable and constitutional state government in which some powers are shared.<sup>33</sup> Under this framework, through validly enacted legislation, the legislature may delegate authority to the other branches of government without violating Article III, Section I: "Although *purely* legislative power cannot be delegated, the legislature may authorize others to do things (insofar as the doing involves powers which are not *exclusively* legislative) which it might properly, but cannot conveniently or advantageously, do itself."<sup>34</sup> The Court has previously

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<sup>29</sup> See Compendium, at tab 1.

<sup>30</sup> See Compendium, at tabs 1-11, 13-17, and 19-41.

<sup>31</sup> The proposed 2008 Legacy Amendment bill, along with a purported title, was presented to the Governor on February 15, 2008 and filed with the Secretary of State four days later. See Compendium, at tab 45; MINN. H.J., 85th Leg., Reg Sess. 7934 (2008). The instant bill was presented to the Governor on May 24, 2011, and was both vetoed and filed with the Secretary of State on May 25. See Compendium at tabs 46-49. The bill containing the proposed amendment related to, among other things, voter identification was presented to the Governor on April 5, 2012, vetoed on April 9, and filed with the Secretary of State on April 10. See Compendium, at tabs 50-51.

<sup>32</sup> See Compendium, at tabs 49, 51.

<sup>33</sup> 36 N.W.2d 530 (Minn. 1949).

<sup>34</sup> *Id.* at 538 (emphasis added); see also *City of Richfield v. Local No. 1215, Int'l Ass'n of Fire Fighters*, 276 N.W.2d 42, 45 (Minn. 1979) (discussing the nondelegation doctrine)).

defined legislative power as the power to make the law, as opposed to the “authority or discretion as to its execution, to be exercised under and in pursuance of the law.”<sup>35</sup>

Petitioners’ wrongly assert that Respondents have claimed that the power to “deny, interfere with or obstruct the power of the Legislature to propose constitutional amendments.”<sup>36</sup> Respondents have not prevented the Legislature’s constitutional proposal, including its ballot summary, from reaching the November ballot. In simply fulfilling their legal duty to choose and approve a ballot title that will never appear in the Constitution itself, Respondents have acted well within their proper constitutional and statutory spheres as the state’s chief election and legal officers. Given Minnesota’s long-standing practice of entrusting executive officers with the authority to title ballots, it strains the imagination to argue that this titling authority is a “purely” or “exclusively” legislative power that cannot be—and has not been—delegated to, and exercised by, executive officers.

**B. The titling law cannot be construed merely as a default rule.**

Petitioners also cannot persuasively argue that the longstanding titling law operates only as a default rule—effective only in cases where the Legislature has not decided to select a ballot title all on its own. The titling statute contains no clause reserving unilateral power over titling to the Legislature. And given its mandatory and exclusive charge to two executive officers, neither the text nor the history of the titling law admits any such construction.

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<sup>35</sup> *Williams v. Evans*, 165 N.W. 495, 497 (Minn. 1917); see also *West St. Paul Fed’n of Teachers v. Indep. Sch. Dist. No. 197, West St. Paul*, 713 N.W.2d 366, 376 (Minn. Ct. App. 2006) (citing *Remington Arms Co. v. G.E.M of St. Louis, Inc.*, 102 N.W.2d 528, 534 (Minn. 1960)).

<sup>36</sup> Petition at ¶ 31.

**C. Construing the titling law so as to abrogate the Respondents' legal duties is not justified by a canon of constitutional avoidance.**

Nor is such a creative and unprecedented construction of the titling statute justified by invoking the canon of constitutional avoidance.<sup>37</sup> There is no constitutional dilemma to avoid here as argued *supra* in Section IV.A. And if there were, the plain meaning of the statute would make an alternative “constitutional interpretation” unavailable. The only choice would be to constitutionally void the titling law on an *ad hoc* basis—only in those cases where the Legislature chose a title of its own. That would likely sound the death knell of the traditional practice of having two executive officers with special expertise choose and approve titles for proposed constitutional amendments. Newly emboldened legislatures in the future, armed with the Court’s constitutional ruling and secure in the knowledge that they alone could opt to select titles they prefer, would likely do so.

Fortunately, the Court need not reach that constitutional watershed. Neither the text, nor the history, nor the structure of the constitutional amendment process requires that the Legislature itself must retain unilateral and non-delegable control over a ballot title. Ballot titles are not any part of the constitutional amendment itself, as demonstrated in section E.1, *infra*. Nor do they purport to be a summary of the contents of the proposed amendment. (Note that in contrast to the duly-enacted titling law in this case, the Legislature has not chosen to delegate any constitutional authority to draft a ballot question.<sup>38</sup>) Ballot titles are simply a standard election-law mechanism to alert voters to the presence and general substance of a given constitutional proposal that appears on the ballot, which is itself prepared by the Secretary of State. There is no need to adopt an implausible “implied exception” to the titling law in order to avoid an imaginary constitutional confrontation.

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<sup>37</sup> Amicus Brief of Matt Dean and David S. Senjem, p. 6.

<sup>38</sup> Minn. Stat. § 200.01-212.70 (2011); see *Breza v. Kiffmeyer*, 723 N.W.2d 633, 634 (Minn. 2006).

**D. The titling law has not been repealed or amended.**

Repealing or amending an existing statute requires ordinary legislative activity (with presentment and signature, or veto and override). But there has been no statutory repeal or amendment of the titling law. There is not even a hint of intent to amend or repeal the existing statute in the amendment-proposal bill itself. And, of course, no part of the titling proposal became law through bicameralism and presentment. In fact, the Legislature itself recognized the titling law in the very titling proposal Petitioners want this Court to impose:

The title *required under Minnesota Statutes, section 204D.15, subdivision 1*, for the question submitted to the people under paragraph (a) shall be “Recognition of Marriage Solely Between One Man and One Woman.”<sup>39</sup>

Note that this titling proposal purports to act “under” the authority of the titling law, not to repeal, amend, or supersede it. There must have been a belief in the Legislature that § 204D.15 left it free to displace the Secretary of State and Attorney General. (That is a mistaken interpretation of the statute, as shown in Section III.B., *infra*.) Section 2(b) of the vetoed bill is not an attempted repeal or amendment of the statute but an acknowledgment, however misguided, of the controlling validity of the statute.

**E. The Governor’s veto of the Legislature’s titling proposal, and the Legislature’s failure to override that veto, independently fortifies the conclusion that the Legislature’s preferred title does not bind executive officers in choosing and approving an appropriate title.**

Petitioners and their *amici* ignore the implications of the Governor’s veto of the proposal to amend the constitution and to mandate a legislatively selected ballot title for it.

**1. When included in the same bill, titling proposals may be validly vetoed.**

The bill containing the proposed constitutional amendment actually included two substantively distinct sections. The first section stated the constitutional amendment

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<sup>39</sup> See Compendium, at tab 48 (emphasis added).

proposal.<sup>40</sup> The second section, in part (a), stated the ballot question<sup>41</sup> (which neither the Secretary of State nor the Attorney General is statutorily authorized to change) and, in part (b), purported to designate the ballot title.<sup>42</sup> The titling proposal is distinct from the proposed constitutional amendment, a conclusion confirmed by, among other things, the bill's very structure.<sup>43</sup> The distinction between the "amendment" and other related matters like "titles" also follows from the constitutional amendment process itself, which is written in terms of "amendments" and not "titles" or other matters of ballot preparation, election procedure and election oversight. The Minnesota Constitution states, in relevant part:

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.<sup>44</sup>

This constitutional language has been interpreted to exempt proposed constitutional amendments from veto by the Governor.<sup>45</sup>

But portions of a bill containing an amendment *are* subject to veto. The 2006 "Transportation Amendment" was presented to then-Governor Pawlenty in a bill that included both the constitutional amendment and related tax provisions.<sup>46</sup> He vetoed the entire bill, but noted his support for submitting the proposed amendment to the people.<sup>47</sup>

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<sup>40</sup> "Only a union of one man and one woman shall be valid or recognized as a marriage in Minnesota." 2011 Minn. Laws ch. 88 §1, Compendium, at tab 48.

<sup>41</sup> *Id.* § 2 (a).

<sup>42</sup> *Id.* § 2 (b).

<sup>43</sup> *See* Compendium, at tab 48.

<sup>44</sup> MINN. CONST. art. IX, § 1 (emphasis added).

<sup>45</sup> Op. Att'y Gen. No. 213-C at 3-5 (March 9, 1994).

<sup>46</sup> *See* Compendium, at tab 43.

<sup>47</sup> *See* Compendium, at tab 44.

His veto prevented the transportation-related tax provisions from becoming law but did not block the amendment itself from being submitted to the voters.

The lesson to be learned is this: The Legislature, when attempting to repeal, amend or supersede statutes, cannot evade the otherwise constitutionally mandated process for legislation. Further, the Governor's authority to approve or veto legislation cannot be defeated merely by passing the bill in a single package along with a proposed amendment. A contrary interpretation would significantly erode the separation of powers at the core of our system of government.

## **2. The Governor properly exercised his veto authority over the Legislature's titling bill**

Even if the Legislature's ballot title proposal could be construed as an attempted repeal or amendment or specific override of the titling law, that attempt expired when the Legislature failed to override the Governor's veto.<sup>48</sup> The Minnesota Constitution's process for lawmaking requires a majority approval in both the House and the Senate.<sup>49</sup> Each bill must contain a single subject and, when, passed by the Legislature, it shall be presented to the Governor.<sup>50</sup> The Governor then generally has three days to sign or veto the bill.<sup>51</sup> The Senate passed the titling provision, together with the proposed amendment, on May 11, 2011

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<sup>48</sup> This fact renders inapplicable the statutory construction under which a specific provision controls a general one. Amicus Brief for Petitioners at 6-7. Further, the very application of canons of statutory construction concedes that the titling law is a statute and presumes that the Legislature's titling preference is a later "statute" that controls the meaning of the earlier and more general one. But the Legislature's titling preference plainly is not a statute at all; and if it were, it would be subject to veto. It "controls" nothing.

<sup>49</sup> MINN. CONST. art IV, § 22.

<sup>50</sup> MINN. CONST. art IV, § 17, 23.

<sup>51</sup> *Id.*

and the House did so on May 21.<sup>52</sup> The bill was presented *in toto* to the Governor on May 24, and was vetoed May 25.<sup>53</sup> The titling portion of the bill is not law.

In his veto message addressed to the Senate, the Governor stated that he was vetoing the entire proposal presented to him as a bill:

I have vetoed and am returning Chapter 88, Senate File 1308, an act proposing an amendment to the Minnesota Constitution... I am exercising my legal responsibility to either sign it or veto it.<sup>54</sup>

While he expressed his view that he did not have the power to prevent the amendment itself from appearing on the Minnesota ballot—and that as a result his veto of it was “symbolic”—he expressed no such doubts about his power to veto the separate section proposing a ballot title.<sup>55</sup> Moreover, his veto of the titling proposal was valid regardless of whether he believed it would be upheld. There are no magic words that a Governor must use or not use in vetoing a bill subject to veto. It was enough that he explicitly vetoed the bill.

### **3. Petitioners’ assertion that the Legislature’s title proposal binds the Secretary of State and Attorney General is baseless.**

To conclude nearly 100 years late that ordinary legislation cannot provide a binding set of procedures for constitutional ballot preparation would mean that the state’s election laws are a “splendid bauble” (as Chief Justice Marshall might have put it<sup>56</sup>), fully manipulable and unilaterally changeable by a legislature bent on having its will in any given session. Every

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<sup>52</sup> See Journal of the Senate 53rd Day, p. 1977-78 (May 11, 2011); Journal of the House 62nd Day, p. 4916 (May 21, 2011) .

<sup>53</sup> See Compendium, at tab 49. There is no particular form required for the veto. MINN. CONST. art. IV, § 23 (“If he vetoes a bill, he shall return it with his objections to the house in which it originated.”) The Governor did so here in the very first sentence of his veto message. Petitioner’s Attachment A.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420-21, 4 L.Ed. 579 (1819) .

legislature, on an *ad hoc* basis, could decide for itself whether it wanted to follow the state statute embodying our historic election practice of titling ballots as deemed appropriate and approved by executive officers. The powers of the branches over this matter would rise or fall at the whim of any legislative majority. If that novel view prevailed, the process of amending the state constitution would lose predictability, uniformity, regularity, and to some extent, the legitimacy and trust that come with a system of checks and balances in which each branch of the government plays some role. Fortunately, that has never been the practice in Minnesota, as the history of the state's election laws amply demonstrate.

Of course, the titling proposal may be accorded respect as the Legislature's judgment that its preferred title is an appropriate one under the titling law. That is one way to make sense of the titling proposal, which explicitly relies upon the titling law. As interpreted by Petitioners, however, the titling proposal in Section 2(b) is either a failed attempt to change the titling law or an improper attempt to eliminate the Secretary of State's and Attorney General's statutory discretion to select and approve an appropriate title. That proposal was defeated at the very least by the Governor's veto, which was not overridden.<sup>57</sup>

**V. The title chosen by the Secretary of State and approved by the Attorney General is an appropriate title.**

The titling law requires that the Secretary of State choose an *appropriate* title. When interpreting statutes, "words and phrases are construed according to rules of grammar and according to their common and approved usage."<sup>58</sup> "Appropriate" is generally defined as

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<sup>57</sup> The bifurcated structure of the 2012 amendment proposals parallels the structure used to propose a title for what is now the Legacy Amendment. *See* Compendium, at tab 45. However, unlike the instant act, the 2008 act was not vetoed.

<sup>58</sup> Minn. Stat. § 645.08(1) (2011); *see also Hansen v. Robert Half Int'l, Inc.*, 813 N.W.2d 906, 915 (Minn. 2012).

“suitable or proper in the circumstances.”<sup>59</sup> This is a forgiving standard that numerous alternative titles might have met.

This Court approaches the executive branch’s exercise of its statutory and constitutional powers with significant deference.<sup>60</sup> A 2011 concurring opinion in this Court aptly observed that “[j]udicial restraint is a principle underlying our reluctance to wade into an issue that involves the opposition between the constitution, the law, the power of the judiciary, and the power of the other two branches of government.”<sup>61</sup>

Although this Court has never evaluated the appropriateness of an amendment title, other jurisdictions have. Where authority for crafting a title or summary is granted to an executive officer, courts in other states generally defer to that officer’s discretion in exercising that authority. Rather than determine whether the language chosen by the officer is the best possible formulation for adhering to the statutory and/or judicial guidelines, courts will generally reject challenges to such language as long as it reasonably adheres to the

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<sup>59</sup> See OXFORD DICTIONARIES,(2012) (<http://oxforddictionaries.com/definition/english/appropriate>) (last visited July 16, 2012)

<sup>60</sup> See e.g. *State v. S.L.H.*, 755 N.W.2d 271, 274 (Minn. 2008) (citing the deference that courts are to afford the executive branch); *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001) (noting that the agency decision-maker is presumed to have the expertise necessary to decide technical matters within its scope of authority, and that judicial deference applies to the interpretation of statutes the agency is charged with administering and enforcing).

<sup>61</sup> *Limmer v. Swanson*, 806 N.W.2d 838, 840–841 (Minn. 2011) (Anderson, J. concurring); see also *State v. S.L.H.*, 755 N.W.2d 271, 278 (Minn. 2008) (“The fact that under the constitution the responsibility of maintaining the separation in the powers of government rests ultimately with the judiciary should make a court, from whose decision there is no appeal, hesitate before assuming a power as to which there is any doubt, and resolve all reasonable doubts in favor of a co-ordinate branch of the government, unless such conclusion leads to a palpable wrong or absurdity.”) (quoting *Gollnik v. Mengel*, 128 N.W. 292, 292 (Minn. 1910)).

statutory requirements.<sup>62</sup> For example, courts are reluctant to “substitute their judgment as to the form and content of a summary” for that of the authorized executive officer unless the language clearly deviates from the state’s requirements.<sup>63</sup> Even in doubtful cases, courts will generally defer to the executive officer’s formulation so long as “reasonable minds may differ as to the sufficiency of the title.”<sup>64</sup> As one court wrote, the court’s function here “is a limited one. We merely determine if the [executive officer] has complied with his statutory obligations and we do not sit as some type of literary editorial board.”<sup>65</sup>

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<sup>62</sup> See, e.g., *Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1217 (Alaska 1993) (noting that a ballot summary will be upheld “unless we could not reasonably conclude that the summary was impartial and accurate”); *Kelby v. Vote Know Coal. of Md., Inc.*, 626 A.2d 959, 965 (Md. 1993) (limiting review to determining “whether the language certified conveys with reasonable clarity the actual scope and effect of the measure” (citation omitted); *Citizens Right to Recall v. State ex rel. McGrath*, 2006 MT 192, ¶ 10, 142 P.3d 764, 766 (“[W]e defer to the Attorney General’s rendition provided the statements meet the statutory requirements.”).

<sup>63</sup> See *First v. Attorney General*, 774 N.E.2d 1094, 1096 (Mass. 2002).

<sup>64</sup> *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 243 (Cal. 1978) ; see also *Burges v. Miller*, 654 P.2d 273, 276 (noting that Alaskan courts will not “invalidate the summary simply because they believe a better one could be written”); *Yes on 25, Citizens for an On-Time Budget v. Superior Court of Sacramento Cty.*, 189 Cal. App. 4th 1445, 1453 (Cal. Ct. App. 2010) (holding that “[o]nly in a clear case” should titles prepared by the attorney general pursuant to his statutory authority be rejected, and that “all legitimate presumptions should be indulged in favor of the propriety of the attorney-general’s actions”); *American Civil Liberties Union v. Echobawk*, 857 P.2d 626, 631 (Idaho 1993) (“Certainly, there may be other acceptable ways to write the title. However, it is not our judicial role to find another way or the best way, but to examine the Attorney General’s language and ask whether it expresses the purpose of the measure without being argumentative or prejudicial.” (internal quotation marks omitted)); *Mun. Servs. Corp. v. Kusler*, 490 N.W.2d 700, 703 (N.D. 1992) (“If the ballot title is neither misleading nor unfair, it is not our responsibility to draft a better one.” (citing *Manny v. Paulus*, 573 P.2d 1248 (Or. 1978)) .

<sup>65</sup> *Schulte v. Long*, 687 N.W.2d 495, 498 (S.D. 2004) ; see also *Citizens Right to Recall v. State ex rel. McGrath*, 142 P.3d 764, 766 (Mont. 2006) (noting that “[C]ourts in other jurisdictions almost universally apply the [Schulte] rule”).

With that deferential and broad standard in mind, the title chosen by the Secretary of State and approved by the Attorney General was certainly appropriate. That title is “Limiting The Status Of Marriage To Opposite Sex Couples.”<sup>66</sup> The plain meaning of “limiting” is “functioning as a limit.”<sup>67</sup> A “limit” is “*a*: something that bounds, restrains, or confines *b*: the utmost extent.”<sup>68</sup> The plain meaning of “status” is “the condition of a person or thing in the eyes of the law.”<sup>69</sup> The plain meaning of “opposite sex” is “women in relation to men or vice versa.”<sup>70</sup> Putting these plain meanings together demonstrates the appropriateness of the title. The proposed amendment constitutionally confines the availability of marriage, in the eyes of the law, to couples in which one spouse is a man and the other is a woman.

One could, of course, draft many other appropriate ways to express the same basic idea. Ardent supporters of the amendment might prefer a more generic and nondescriptive title than that chosen and approved by Respondents. Strong opponents of the amendment might prefer more vivid, prohibitory language. But it is not the institutional role of the Court to pick and choose among alternative appropriate titles. Provided that the title is reasonably appropriate, this Court should resist any call to set itself up as a perpetual censor over such choices.

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<sup>66</sup> Petitioners’ Attachments C and D.

<sup>67</sup> See Merriam-Webster Dictionaries, (2012) (<http://www.merriam-webster.com/dictionary/limiting>) (last visited July 15, 2012).

<sup>68</sup> See Merriam-Webster Dictionaries, (2012) (<http://www.merriam-webster.com/dictionary/limiting>) (last visited July 15, 2012).

<sup>69</sup> See Merriam-Webster Dictionaries, (2012) (<http://www2.merriam-webster.com/cgi-bin/mwdictfol?book=Dictionary&va=status>) (last visited July 15, 2012).

<sup>70</sup> See The Oxford American Dictionary of Current English (2012) (<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t21.e21444>) (last visited July 15, 2012).

## VI. Conclusion

The legal question here is not, of course, whether this particular amendment should be added to the state constitution. The question is also not whether the title preferred by Petitioners is an appropriate one. The question is whether the statutory, historic, and very limited role of two executive officers—chosen by the voters to represent them in their respective capacities as the top election and legal officials in Minnesota—and empowered by a duly enacted and constitutional statute, will continue to be respected and preserved as it has been for almost a century. The Executive Branch's role here cannot be diminished without a valid change in the statutory and constitutional structure. In this Petition, a small number of individual legislators assert that a vetoed bill—one that did not even purport to amend or repeal the relevant statute—altered the last ninety-three years of consistent statutory and constitutional practice. This Court, as a guardian of our legal traditions and history, should soundly reject such a radical and unfounded violation of our state constitution's separation of powers.

July 16, 2012

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## CERTIFICATE OF COMPLIANCE

The undersigned counsel for Law Professors certifies that this brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in 13 point Garamond; a proportionately spaced typeface, using Microsoft Word 2010 and contains 6,847 words, according to the Microsoft Word 2010 "Word Count" function, which was set to specifically include headings, footnotes, and quotations. It is also fewer than 20 pages; the written matter not does not exceeding 6½ by 9 ½ inches.

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