STATE OF MINNESOTA
IN SUPREME COURT
Case No.

---

State Senator Warren Limmer, State Senator Scott J. Newman, State Senator Sean R. Nienow, State Senator Roger C. Chamberlain,

Petitioners,

vs.

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

Respondents.

---

# PETITION FOR WRIT OF QUO WARRANTO

---

Erick G. Kaardal, Atty. No.229647
William F. Mohrman, Atty. No.168816
Mohrman & Kaardal, P.A.
33 South Sixth Street
Suite 4100
Minneapolis, Minnesota 55402
(612) 341-1074
Dated: June 20, 2011
*Counsel for Petitioners Warren Limmer*
*State Senator Scott J. Newman*
*State Senator Sean R. Nienow,*
*State Senator Roger C. Chamberlain*

## TABLE OF CONTENTS

Page

PURPOSE OF PETTION……………………………………..5

INTRODUCTION…………………………………………..6

JURISDICTION……………………………………………8

The State Constitution provides the Supreme

ISSUES PRESENTED……………………………………..8

CONSTITUTIONAL PROVISIONS…………………………9

STATEMENT OF FACTS…………………………………..11

Minnesota has had two budgetary impasses that have temporally shutdown government and have gone to court for reprieve for emergency funding without resolution of constitutional issues presented again in 2011…….11

In 2001 an impasse between the Executive and Legislative branches of government led to petitioning the court………………………………12

Within five years, in 2005 another Executive-Legislative budgetary impasse leads to the Attorney General and Governor filing Petitions with the District Court to fund state programs and agencies……………………………………………14

As result of the District Court proceedings in 2005, State Legislators petitioned the Supreme Court for a writ of quo warranto, but because

the crisis had passed this Court relinquished its original jurisdiction and remanded to District Court....................................................17

The District Court ruled against an amended-Petition in 2005, later appealed resulting in a Court of Appeals decision limiting the quo warranto application and determining the issues moot because the legislature ratified the petitioned disbursements complained about..........19

With the 2011 budget impasse and an impending government shutdown, the Attorney General seeks judicial intervention and approval of expenditures without an appropriation, as the Governor seeks the court for an appointed mediator....................................................20

LEGAL ARGUMENT....................................................21

Introduction.................................................... 21

I. The Petitioners have standing to bring their constitutional claims as legislators and as taxpayers.................................................... 25

A. Legislative standing is a recognized principle of law necessarily invoked when vote nullification and usurpation of legislative authority occurs as here, with the Attorney General's request for court-approved disbursements of state moneys..........................25

B. .Because the central issue involves the unlawful disbursement of public moneys, the Petitioners have standing as taxpayers.............. 31

II. The Supreme Court has original jurisdiction

over the Petition for quo warranto as
constitutionally and statutorily prescribed……………34

III. Historic events in the last decade of two budget impasses and a third pending proceeding provides the basis that the issues presented cannot be deemed moot because they are capable of repetition, but evade review……………………………………………39

IV. The judiciary has no role between the executive and legislative branches of government when political questions are involved as the Attorney General's June 13, 2011 Petition and Governor's June 15, 2011 response based on court-ordered funding of "core functions" seek………………………….. 43

A. The political question doctrine applies to the question of court-ordered spending absent legislative appropriations………………………………45

B. Three exceptions exist to the requirement for an annual legislative appropriation: Minnesota Constitutional mandate; Minnesota statutes requiring perennial funding; and federal mandates…………………………………………………. 48

C. The Attorney General's "core functions" approach is not limited to the three exceptions to the annual legislative appropriations requirement – thereby violating the Minnesota Constitution, statutes and the political question Doctrine………………………………………………….. 52

V. The Petitioners should prevail because allowing the district court to proceed to disburse moneys without an appropriation by law will undermine the fundamental foundation of and interpretation of Minnesota's Constitution……………………………… 57

PRAYER FOR RELIEF ......................................................64

## PURPOSE OF PETTION

The Petitioners respectfully petition the Supreme Court of the State of Minnesota to issue a writ of quo warranto to the Respondents requiring them (1) to show by what specific constitutional or statutory provision would the Ramsey County District Court have the authority, in the absence of legislatively-enacted appropriations, to order "that the Commissioner of the Department of Management and Budget ("Commissioner") shall issue checks and process such funds as necessary"[1] to continue state governmental operations after the end of the fiscal biennium on June 30, 2011; and (2) to show by what specific constitutional or statutory provision would the Ramsey County District Court have the authority to order the Governor and State Legislature to "mediate"[2] to resolve the purported budgetary impasse between the Governor and State Legislature which may occur after the end of the fiscal biennium on June 30, 2011. Additionally, this Court's order should inform the Respondents in the absence of the demanded showings

---

[1] Atty Gen. Pet. 8 (June 13, 2011). Petitioners App. 13.

[2] Resp. of Gov. to Atty. Gen. Pet. 14 (June 15, 2011). Pet. App. 121, 134.

the Court will enjoin the Respondents from holding any further Ramsey County District Court proceedings in this regard.

## INTRODUCTION

With the impending 2011 budgetary impasse, this will be the third time in recent history (the last two occurring in 2001 and 2005) that Minnesota's executive branch of government has turned to the courts to obtain authority to distribute taxpayer moneys without an appropriation by law to fund certain state programs or agencies because the legislative and executive branches failed to timely pass a state-budget. The current fiscal biennium ends on June 30, 2011, and without a budget will cause a government shutdown.

The Petitioners assert claims under the Minnesota Constitution: Article III - one branch of government may not exercise any of the powers of the other; Article IV-requires governor's action on bills passed by the legislature as a prerequisite for an appropriation by law; and Article XI – moneys cannot be paid out of the treasury without an appropriation by law. The need for a writ of quo warranto is to correct the unauthorized assumption or exer-

cise of power by public officials as presented in the Petitioners filings with the Ramsey County District Court.

Respondents Lori Swanson and Mark Dayton filed court documents on June 13th and June 15th, respectively, seeking the Ramsey County District Court to issue orders requiring for the distribution of taxpayer moneys to fund certain state programs and state agencies.[3]

The Petitioners are state senators with interests in taxpayer issues. They claim that the Petitioners  actions injure them because the Respondents' planned actions in 2011 — as demonstrated in fact in 2005.[4] A writ is necessary to prevent the named public officials from the unconstitutional use of its authority to usurp the state legislative prerogative to appropriate state funds.

---

[3] Petitioners App. 13, 121.

[4] The 2001 budget impasse ended before the district court had an opportunity to issue an order such as those issued in 2005, and sought in 2011 after June 30, 2011.*E.g.,* Pet. App. 316-41 (Recommendations of Special Master to District Court Chief Judge); 343 (District Court Order granting motions for funding (per Special Master recommendations); 13, 121.

## JURISDICTION

**The State Constitution provides the Supreme Court can issue a writ of quo warranto.**

The Minnesota Supreme Court has "original jurisdiction in such remedial cases as are prescribed by law" to issue a writ of quo warranto under Minn. Const. art. VI, § 2. Minn. Stat. § 480.04 provides:

> The [supreme] court shall have power to issue to all courts of inferior jurisdiction and to all corporations and individuals, writs of error, certiorari, mandamus, prohibition, quo warranto and all other writs and processes, whether especially provided for by statute or not, that are necessary to the execution of the laws and the furtherance of justice. It shall be always open for the issuance and return of such writs and processes and for the hearing and determination of all matters involved therein. . . .

Therefore, the instant Petition is properly before this Court.

## ISSUES PRESENTED

**I.** Article XI requires an appropriation by law before money can be paid out of the state treasury. If the legislature did not pass a bill for the governor's approval under Article IV to fund certain state programs or agencies, can a district court order the Commissioner to disburse state moneys without violating Article III that prohibits the exercise of powers properly belonging to either of the other branches of government?

**II.** Article III prohibits one branch of government from exercising the authority of the others. Article XI states

> how bills are passed and enacted into law. Finally, under Article IV, § 12, the governor has the authority to call a special session of the legislature. Does the District Court have the authority to force mediation between the legislative and executive branches of government to resolve a budgetary impasse that will cause a government shutdown?

## CONSTITUTIONAL PROVISIONS

1. Article IV of the Minnesota Constitution expressly allocates certain powers of government to the Legislative Department. In addition, only the governor may call a special legislative session after a biennial session has ended.

2. Article III, § 1, describes the distribution of state government powers. It prohibits the Executive Department and Judiciary from exercising the power of the Legislative Department without an express constitutional provision allowing it to do so:

> The 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.

3. Likewise, Article III prevents the Judiciary from exercising the authority of the Executive.

4. Article XI, § 1 of the Minnesota Constitution provides that state funds may only be disbursed pursuant to an "appropriation by law":

> No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law.

5. Article IV of the Minnesota Constitution provides a list of requirements for an "appropriation by law" to occur. Among other powers, Article IV, § 23 requires the state legislature to approve an appropriation bill, present it to the Governor. The Governor can either sign the bill into law or vetoes it (including line item vetoes) and, if a veto occurs, and the state legislature is in session, it can override the veto:

> Every bill passed in conformity to the rules of each house and the joint rules of the two houses shall be presented to the governor. If he approves a bill, he shall sign it … If he vetoes a bill, he shall return it with his objections to the house in which it originated. His objections shall be entered in the journal. If, after reconsideration, two-thirds of that house agree to pass the bill, it shall be sent, together with the governor's objections, to the other house, which shall likewise reconsider it.
>
> If a bill presented to the governor contains several items of appropriation of money, he may veto one or more of the items while approving the bill. At the time he signs the

> bill the governor shall append to it a statement of the items he vetoes and the vetoed items shall not take effect. If the legislature is in session, he shall transmit to the house in which the bill originated a copy of the statement, and the items vetoed shall be separately reconsidered. If on reconsideration any item is approved by two-thirds of the members elected to each house, it is a part of the law notwithstanding the objections of the governor.[5]

Satisfying Article IV's requirements are a prerequisite for an "appropriation by law." An "appropriation by law" is an Article XI prerequisite to the disbursement of state funds.

## STATEMENT OF FACTS

**Minnesota has had two budgetary impasses that have temporally shutdown government and have gone to court for reprieve for emergency funding without resolution of constitutional issues presented again in 2011.**

1. The state legislature, as an elected body, appropriates money for the funding of state agencies and programs on a biennial basis.

2. The fiscal year for the State of Minnesota is July 1 to June 30.

[5] Art. IV, § 23 is titled, Approval of Bills by Governor; Action of Veto.

**In 2001 an impasse between the Executive and Legislative branches of government led to petitioning the court.**

3.The present anticipated government shutdown because of a budgetary impasse is now a common occurrence in Minnesota's recent history. Two have occurred in the last decade; the first in 2001.

4.On May 21, 2001, the Minnesota legislature ended its regular session and 21 days later, on June 11, 2001, Governor Jesse Ventura convened the Minnesota legislature into a special session.

5. On June 21, 2001, Mike Hatch, Attorney General for the State of Minnesota filed a petition and memorandum for an order to show cause with the Ramsey County District Court.[6] The matter was entitled "*In Re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota*," Court File No. C9-01-5725.[7] Governor Jesse Ventura filed an amicus curiae brief essentially joining the Attorney General's Petition.[8]

[6] Pet. App. 151-58; 159-69.
[7] Pet. App. 151.
[8] Pet. App. 170-75.

6.The lower court granted Attorney Mike Hatch's petition on June 29, 2001.[9] The court ordered, among other things, that core functions of state government be performed, that each state agency, official, county and municipal entity, and school district determine those core functions and verify the performance of such for payment to the Commissioner of Finance and the State Treasurer, and appointed a Special Master.[10]

1. The Special Master was to mediate, hear, and make recommendations to the District Court with regard to any issues arising from the terms or compliance of the court's order.[11]

2. The 2001 Ramsey County Court proceeding, for all intents and purposes, ended on June 29, 2001 when the state legislature enacted additional appropriations – completing its biennial appropriations for the funding of all state agencies and programs.

---

9

10 Pet. App. 176-85.

11 Pet. App. 184.

**Within five years, in 2005 another Executive-Legislative budgetary impasse leads to the Attorney General and Governor filing Petitions with the District Court to fund state programs and agencies.**

3. On May 23, 2005, the Minnesota legislature ended its regular session after passing ten bills for the appropriation by law of state funds to various state agencies and programs that Governor Tim Pawlenty signed into law except for one appropriation bill he vetoed. But, all the necessary state appropriations had not been enacted.

4. On May 24, 2005 Governor Tim Pawlenty convened the Minnesota legislature into a special session.

5. Like in 2001, 22 days later, on June 15, 2005. Attorney General Mike Hatch filed a petition and memorandum for an order to show cause with the Ramsey County District Court, *"In Re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota,"* Court File No. C0-05-5928.[12] Governor

[12] Pet. App. 186-93; 194-234.

Tim Pawlenty also joined in the litigation by filing a petition and motion.[13]

6. The Petitions were granted on June 29, 2005 by Chief Judge Gregg E. Johnson.[14]

7. The court ordered, among other things, that core functions of state government be performed, that each state agency, official, county and municipal entity, and school district determine those core functions and verify the performance of such to the Special Master.[15]

8. The Special Master was to determine whether the Commissioner of Finance should pay for the performance of certain core functions.[16]

9. The court further ordered the appointment of a Special Master (referee) to mediate, hear, and make recommendations to the Court with regard to any issues arising from the terms or compliance of the court's order.[17]

---

[13] Pet. App. 236-45; 246-78.
[14] Pet. App. 304-15.
[15] Pet. App. 312-13.
[16] Pet. App. 312.
[17] Pet. App. 312.

10. From time to time thereafter, during the period of about June 30, 2005 to July 7, 2005, various agencies, programs, and individuals, including individual legislators, filed petitions with the court, such as the Minnesota Council of Airports[18]: the Department of Natural Resources,[19] Metro Transit,[20] the Ramsey County Board of Commissioners,[21] the Greater Twin Cities United Way,[22] the Minnesota Housing Partnership,[23] the Minnesota Council of Nonprofits,[24] the Minnesota Trucking Association and Minnesota Manufactures Homes Association,[25] Joe Pazandak[26] and State Senator W. Skoglund.[27] The Special Master made determinations as recommendations to the Ramsey County Chief Judge on what constituted core functions and therefore what should be funded through the Commissioner.

---

[18] *Id.* 377-78.
[19] *Id.* 339-40.
[20] *Id.* 329-30.
[21] *Id.* 369-70.
[22] *Id.* 349-50.
[23] *Id.* 375-76.
[24] *Id.* 325-26.
[25] *Id.* 355-56.
[26] *Id.* 331-32.
[27] *Id.* 372-74.

11. Soon after the Special Master Recommendations were made, Chief Judge Gregg E. Johnson issued orders affirming the recommendations.[28]

12. After the issuance of Chief Johnson's orders, the Commissioner of Finance issued checks from on or about June 30, 2005 through July 14, 2005 disbursing state funds pursuant to the Court's Orders – but without an "appropriation by law."

13. Meanwhile, by July 14, 2005, the Minnesota legislature had passed seven bills for the appropriation by law of state funds all of which the Governor signed -- completing its biennial approations for the funding of all state agencies and programs..

**As a result of the District Court proceedings in 2005, State Legislators petitioned the Supreme Court for a writ of quo, but because the crisis had passed this Court relinquished its original jurisdiction and remanded to District Court.**

20. On August 13, 2005, 13 state legislators including the Speaker of the House Steve Sviggum and the Majority Leader, filed a petition for a writ of quo warranto in the Supreme Court against respondent Peggy Ingison, in her official capacity as Commissioner of Finance. The petitioners challenged the constitu-

[28] Pet. App. 343-45; 346-48; 365-66; and 367-68.

tionality of expenditures from the state treasury made by the Commissioner at the beginning of the fiscal biennium pursuant to court orders issued in *In Re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota,* No. C0-05-5928 (Ramsey County District Court), in the absence of a legislative appropriation.

21. In an order issued by the Minnesota Supreme Court on September 9, 2005, the Court dismissed the petition without prejudice on the grounds that the petitioners had failed to show "the most exigent of circumstances" existing to justify the Supreme Court exercising its original jurisdiction.[29] The Court pointed out that the end of the next fiscal biennium was almost two years away and that timely District Court relief was possible.[30]

---

[29] Minn. St. Sup. Op. 4 (Sept. 9, 2005). Pet. App. 150.
[30] *Id.* 149-50.

**The District Court ruled against an amended-Petition in 2005, later appealed resulting in a Court of Appeals decision limiting the quo warranto application and determining the issues moot because the legislature ratified the petitioned disbursements complained about.**

22. On or about December 2, 2005, thirty-two state legislators, of both political parties, filed an amended petition for writ of quo warranto in the Ramsey County District Court.[31]

23. The Ramsey County District Court denied the state legislators' petition for quo warranto. The court held that quo warranto as a remedy, was not an appropriate remedy for *past* official conduct but instead for a continuing course of unauthorized usurpation of authority. The lower court also found the case moot, and not capable of repetition yet likely to evade review, Finally, the district court concluded the state constitution did not bar judicial action to preserve core government functions *pending* necessary appropriations by the legislature.[32]

24. On appeal to the Court of Appeals, the appellate court determined in a decision dated May 22, 2007, affirming in part and reversing in part the district court's order holding that: (1)

---

[31] Pet. App. 433.
[32] Pet. App. 490-97.

the doctrine of laches did not preclude the legislators' action; (2) quo warranto could not be used to challenge the constitutionality of completed disbursement of funds; (3) the controversy that was resolved by the legislature by ratification of the District Court-ordered spending was not longer justiciable.

**With the 2011 budget impasse and an impending government shutdown, the Attorney General seeks judicial intervention and approval for expenditures without an appropriation, as the Governor petitions the court for an appointed mediator.**

25. On June 13th and June 15th, respectively, Respondents Attorney General Lori Swanson filed a petition with the district court requesting the same course of action as in 2001 and 2005 regarding the appointment of a special master and court approval to disburse state funds for "core functions" of state government. But, Governor Mark Dayton, responding to the Attorney General's Petition filed a response seeking the court to force mediation upon the legislative and executive branches to facilitate discussions to

resolve the budget impasse. This approach had not been tried by either Governor Ventura nor Pawlenty in 2001 or 2005.[33]

## LEGAL ARUGMENT

### Introduction

26. As this Court is aware, the writ of quo warranto is a special proceeding designed to correct the unauthorized assumption or exercise of power by a public official or corporate officer. *State ex rel. Danielson v. Village of Mound,* 234 Minn. 531, 542, 48 N.W.2d 855, 863 (1951) (defining quo warranto as remedy to correct "usurpation, misuser, or nonuser of a public office or corporate franchise"). Hence, the writ requires the Respondent officials in this case to show this Court under what authority the officials may exercise the challenged constitutional rights and privileges of office. *State ex rel. Burnquist v. Village of North Pole,* 213 Minn. 297, 303, 6 N.W.2d 458, 461 (1942). The Petitioners have standing to bring this action before the Supreme Court. Likewise, this

[33] Pet. App. 13, 121.

Court has original jurisdiction and should grant the Writ of Quo Warranto to the Respondents.

27.The Petitioners who are state senators have standing as state legislators to bring their claim. All Petitioners have taxpayer standing. The Petitioners who are state senators assert that the anticipated actions, as experienced in 2005, will injure them as state legislators because any Respondent expenditures will usurp the state legislative prerogative to appropriate state funds. The actions will nullify their "no" votes and/or inaction on appropriation bills not enacted prior to the Respondents' unconstitutional disbursements.

28. As taxpayers, the Petitioners are or will be damaged by the Respondents' unconstitutional expenditures and illegal actions.

29. Petitioners' claims are functionally justiciable and of statewide importance. Even if a resolution to the budget impasse occurs prior to the first issued order of the district court or a week later, because the Attorney General and the Governor have engaged the judiciary the Respondents' actions are capable of repeti-

tion, yet evading review, because of the short-time frame involved. Past history has confirmed this pattern. Hence, it would further nullify any argument regarding mootness, since at the moment, the Respondents have not yet completed their unconstitutional expenditures and illegal actions.

30. The instant Petition is not about a statutory scheme designed to enable the Commissioner, with the governor's approval and after legislative consultation to compensate for deficits in the general fund.[34] The fundamental issue is how to either cut state agency and program spending or raise revenues to compensate for anticipated deficits in the state budget. What the Respondents seek to do, is not authorized under Articles III, IV, or XI of the Minnesota Constitution. The Respondents are using an alternative means to bypass the political difficulties (embodied in our republican form of government) and hardships the impasse will bring to the electorate using the courts either temporarily or theoretically *indefinitely* to determine what state programs shall be funded and what programs shall not. The court actions would dis-

---

[34] *See, Rukavina v. Pawlenty,* 684 N.W.2d 525, 533 (Minn. App. 2004).

rupt the checks and balances inherent within the Constitution. The compromises of legislative debate between the legislators themselves or between the legislature and the executive — his powers to veto including line item vetoes — the legislature's right to override vetoes if in session— is lost because the judiciary would usurp powers of both branches that it did does not possess under the circumstances presented.

31. On the other hand, the court has no authority to force the legislature or the executive branches into mediation. The governor and the legislative leadership have shown a capability of meeting to iron out their political differences. Whether they choose to do so or not is immaterial. But, there is no constitutional or statutory authority that suggests or otherwise dictates mediation when two branches of government disagree on state-wide issues. The state constitution does, however, allow for the executive to call a special session, but it is his sole constitutional prerogative to do so. For the court to require mediation is akin to calling a special session requiring lawmakers to Saint Paul to work on a political solution that neither branch at this stage seeks to resolve.

32. Therefore individually and jointly, the Respondents are violating Article XI of the Constitution by petitioning for, ordering the or providing for the disbursement of money from the state treasury pursuant to Ramsey County District Court orders rather than an appropriation by law.

33. The Respondents seek to unconstitutionally usurp the state legislative prerogative to appropriate state funds by disbursing money out of the treasury without an "appropriation by law" enacted pursuant to Article IV of the Minnesota Constitution.

## I. The Petitioners have standing to bring their constitutional claims as legislators and as taxpayers.

### A. Legislative standing is a recognized principle of law necessarily invoked when vote nullification and usurpation of legislative authority occurs as here, with the Attorney General's request for court-approved disbursements of state moneys.

34. Minnesota courts have acknowledged that state legislators may bring claims for vote nullification and usurpation of legislative powers*. See Rukavina v. Pawlenty*, 684 N.W.2d 525, 532 (Minn.App. 2004), *review denied* (Oct 19, 2004); *Conant v. Robins, Kaplan, Miller & Ciresi*, L.L.P., 603 N.W.2d 143, 149-150

(Minn.App.1999), *review denied* (Mar 14, 2000). For legislators to have standing, they must show that their claimed injury is "personal, particularized, concrete, and otherwise judicially cognizable." *Conant,* 603 N.W.2d at 150 (citing *Raines v. Byrd,* 521 U.S. 811, 820 (1997)). "Cases considering legislator standing generally fall into one of three categories: lost political battles, nullification of votes and usurpation of power." *Silver v. Pataki*, 96 N.Y.2d 532, 539, 755 N.E.2d 842, 730 N.Y.S.2d 482, 2001 N.Y. Slip Op. 06138 (N.Y. Jul 10, 2001) (vote nullification). "Only circumstances presented by the latter two categories confer legislator standing." *Id.* at 539*, citing Coleman v. Miller,* 307 U.S. 433, (vote nullification); *Dodak v. State Admin. Bd.,* 441 Mich. 547, 495 N.W.2d 539 (usurpation of power belonging to legislative body).

35. The U.S. Supreme Court in *Coleman* found standing for individual legislators who claimed that their "no" votes were nullified by the legislative act being given effect anyway. There, the Court held that Kansas state legislators who had been locked in a tie vote that would have defeated the State's ratification of a proposed federal constitutional amendment, and who alleged that

their votes were nullified when the Lieutenant Governor broke the tie by casting his vote for ratification, had "a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id.,* at 438 (emphasis added).[35] The U.S. Supreme Court in *Raines v. Byrd,* 521 U.S. 811, 822 (1997) restated the *Coleman* holding and further explained that individual legislator standing existed when legislators' no votes were nullified by the legislative act being given effect anyway.

36. The New York Court of Appeals in *Silver v. Pataki*, 96 N.Y.2d 532, 755 N.E.2d 842, 730 N.Y.S.2d 482, 2001 N.Y. Slip Op. 06138 (N.Y. 2001) held that the Speaker of New York's General Assembly had capacity and standing as a legislator to bring suit

[35] The U.S. Supreme Court in *Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 544-545, n. 7 (1986)(dicta), also recognized legislative standing based on vote nullification. The Court stated, "It might be an entirely different case if, for example, state law authorized School Board action solely by unanimous consent, in which event Mr. Youngman might claim that he was legally entitled to protect "the effectiveness of [his] vot[e]." *Coleman v. Miller,* 307 U.S. 433, 438 (1939). . . But in that event Mr. Youngman would have to allege that his vote was diluted or rendered nugatory under state law and even then he would have a mandamus or like remedy against the Secretary of the School Board . . ." 475 U.S. at 544, 545, n. 7 (citations omitted).

seeking to vindicate his rights as a legislator. The Speaker's successful challenge was based on the Governor using the line item veto on non-appropriation bills. The Court stated that a single legislator had standing on a vote nullification claim:

> Nor is a controlling bloc of legislators (a number sufficient to enact or defeat legislation) a prerequisite to plaintiff's standing as a Member of the Assembly. The *Coleman* Court did not rely on the fact that all Senators casting votes against the amendment were plaintiffs in the action (*see, Kennedy v. Sampson, supra,* 511 F.2d, at 435 ["In light of the purpose of the standing requirement * * * we think the better reasoned view * * * is that an individual legislator has standing to protect the effectiveness of his vote with or without the concurrence of other members of the majority"] ). Moreover, plaintiff's injury in the nullification of his personal vote continues to exist whether or not other legislators who have suffered the same injury decide to join in the suit.

*Id.* at 848-49.

37. Similarly, the Michigan Supreme Court in *Dodak v. State Admin. Bd.,* 441 Mich. 547, 495 N.W.2d 539 (1993) held that a single member of the state house appropriations committee had standing to bring an action alleging that the state administrative board's transfer of appropriated funds from one program to another within a department of state government was unauthorized.

38. According to these precedents, the Petitioners have legislator standing under two categories. First, the Petitioners have standing because of vote nullification. Vote nullification exists under *Coleman* and its progeny because the Petitioners through their "no" votes or legislative inaction did not enact approprias-tate legislature, the Respondents are seeking that the state funds be disbursed anyway. Any such action by the Commissioner -- even pursuant to Ramsey County District Court orders[36] -- violates the Petitioner's exclusive legislative prerogative to appropriate state funds.

39. Second, the state legislators have standing because the Respondents and Ramsey County District Court are usurping the exclusive-legislative prerogative to appropriate state funds. Since the Ramsey County District Court orders in 2001 and 2005 were not an "appropriation by law" – not valid appropriations -- the Constitution directs the Commissioner not to expend the state

[36] The Commissioner should not follow such an unconstitutional court order. For example, the Commissioner of Finance routinely waits to honor state court judgments against the state until the state legislature enacts appropriations to pay the judgment creditors. Pet. App. 408.

funds. When the Commissioner did, she usurped a power allocated to the state legislature under Articles III, IV and XI.

40. Additionally, the Petitioners also allege injury because the Ramsey County District Court proceedings unconstitutionally tip the balance of powers in favor of the executive and judiciary branch at the expense of the legislative branch – at a critical juncture in budget negotiations. The legislature's power to appropriate funds is its paramount power and its leverage in budget negotiations. When the executive and judiciary branches usurp the power of legislative appropriation, they unconstitutionally deprive the legislature of its power and leverage at the negotiating table.

41. For these reasons, the Petitioners who are state senators have standing as legislators to bring their claims of unconstitutional actions against the Respondents.

**B. Because the central issue involves the unlawful disbursement of public moneys, the Petitioners have standing as taxpayers.**

42. "[I]t is well settled that a taxpayer may, when the situation warrants, maintain an action to restrain unlawful disbursements of public moneys; to recover for the use of the public subdivision entitled thereto money that has been illegally disbursed, as well as to restrain illegal action on the part of public officials." *McKee v. Likins*, 261 N.W.2d 566, 571 (Minn. 1977) (citation omitted). "[I]t has been generally recognized that a taxpayer has sufficient interest to enjoin illegal expenditures of both municipal *and* state funds." *Arens v. Village of Rogers*, 240 Minn. 386, 392, 61 N.W.2d 508, 513 (1953). [T]axpayers have the right "to maintain an action in the courts to restrain the unlawful use of public funds." *Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.,* 603 N.W.2d 143, 146 (Minn. App. 1999).

43. The Court in *McKee v. Likins*, 261 N.W.2d 566 (Minn. 1977) recognized the well-settled doctrine that taxpayer standing existed to challenge illegal expenditures. The issue in *McKee* was whether taxpayer standing -- "injury in fact" -- existed where the

expenditure of tax monies was made under a rule which the plaintiff taxpayer alleged was adopted by a state official without compliance with the statutory rule-making procedures. The Court held that taxpayer standing existed and that the expenditures were illegal for lack of following statutory procedure:

> An important political issue like public financing of abortions ought to, ideally, be decided by the legislature where everyone can have his say. If the legislature has placed the issue in the hands of an administrative official that official's decision ought to be based on a careful expression of all interested viewpoints . . .Therefore, it logically follows that if the legislature delegates authority to an administrative agency and if the administrative agency elects to adopt rules pursuant to that authority, the procedure outlined in the Administrative Procedure Act should be followed in promulgating those rules.

261W.2d at 578.

44. The Minnesota Court of Appeals in *State of Minnesota ex rel. v. Hanson,*[37] from the appeal of Chief Johnsons 2006 court order affirmed in part and reversed in part the Ramsey County District Court decision regarding the 2005 quo warranto Petition.[38]

---

[37] *State of Minnesota ex rel. v. Hanson,* 732 N.W.2d 312 (Minn. App. 2007).
[38] Pet. App.1-12.

45. The Court of Appeals held in relevant part that: (1) the doctrine of laches did not preclude the legislators' action; (2) quo warranto could not be used to challenge the constitutionality of completed disbursement of funds; (3) the controversy , resolved through the legislature's ratification of the District Court-ordered spending was no longer justiciable. The appellate court declined to reach the merits, but left open for individual legislators and taxpayers to bring petitions for quo warranto on similar facts in the future. *Id.* at 323.[39]

46. Thus, the Petitioners have standing because they are challenging expenditures made by Respondents without following constitutional procedures. This Petition specifically alleges that the Respondents are violating Articles III, IV and XI of the Minnesota Constitution by making expenditures without an appropriation by law. These allegations satisfy the *McKee* requirements for taxpayer standing. For these reasons, the Petitioners have

[39] *Id.* at 11-12.

standing as taxpayers to bring their claims of unconstitutional actions against the Respondents. [40]

## II. The Supreme Court has original jurisdiction over the Petition for a writ of quo warranto as constitutionally and statutorily prescribed.

47. The Minnesota Constitution provides the Minnesota Supreme Court with "original jurisdiction in such remedial cases as are prescribed by law." Minn. Const. art. VI, § 2. Likewise, Minnesota statutes provide the Supreme Court specific authority regarding writs for quo warranto over lower courts and all other individuals:

> The [supreme] court shall have power to issue to all courts of inferior jurisdiction and to all corporations and individuals, writs of error, certiorari, mandamus, prohibition, quo warranto and all other writs and processes, whether especially provided for by statute or not, that are necessary to the execution of the laws and the furtherance of justice. It shall be always open for the issuance and return of such writs and

[40] Neither is Petitioners' standing negated by the doctrine of laches or waiver by failure to somehow undo the state funds unconstitutionally expended by the Respondent. *See Pataki v. New York State Assembly*, 7 A.D.3d 74, 774 N.Y.S.2d 891, 2004 N.Y. Slip Op. 02980 (N.Y.A.D. 3 Dept. Apr 22, 2004) (NO. 91757) (Governor's failure to exercise veto power did not deprive him of standing or effect waiver of his right to challenge constitutionality of defendants' actions).

> processes and for the hearing and determination of all matters involved therein. . .

Minn. Stat. § 480.04. And this Court has traditionally used that authority. For instance, this Court has exercised its original jurisdiction in quo warranto proceedings to determine the right to an office which turned on the scope of a constitutional officer's constitutionly-granted power or the constitutionality of certain legislative acts. *See, e.g., State v. ex rel. Palmer v. Perpich*, 182 N.W.2d 182 (1971); *State ex rel. Douglas v. Westfall*, 89 N.W. 175 (1902); *State ex rel. Getchell v. O'Conner*, 83 N.W. 498 (1900); *State ex rel. Douglas v. Ritt*, 79 N.W. 535 (1899).

48. Historically, a writ could only be issued upon the petition of the attorney general *ex officio. See, e.g., State ex rel. Danielson v. Village of Mound,* 48 N.W.2d 855, 860 (1951). But as the law involving writs of quo warranto evolved, private persons were also permitted, at the discretion of the Court, to file a petition for the writ. *State ex rel. Simpson v. Dowlan*, 24 N.W. 188, 189 (1885). While the consent of the attorney general was initially required in cases initiated by private persons, the Minnesota Supreme Court has held that a writ could be issued, in its discretion, even though

the attorney general had not consented to the writ. *See Rice v. Connolly*, 88 N.W.2d 241 (Minn. 1992); *Town of Burnsville v. City of Bloomington,* 117 N.W.2d 746 (1962); *State ex rel. Town of Stuntz v. City of Chisholm,* 264 N.W. 798 (1936). Consequently, private individuals and entities may seek a writ of quo warranto with or without the consent of the attorney general – as the petitioners are here.[41]

49. The public interest factors which compel this Court to exercise original jurisdiction in quo warranto proceedings brought by the attorney general in his *ex officio* capacity are present in this proceeding. This case involves the constitutional division of powers between the legislative, executive and judicial branches. With the budgetary impasse as the background, the traditional check and balances of government are undermined with the executive and judicial branches usurping powers reserved for the legislative branch – preventing the state legislature from doing its constitutional duties.

[41] In 2005, Counsel for Petitioners sought an attorney general appointment as special counsel, but it was denied on August 24, 2005. Pet. App. 403-04. Counsel and Petitioners have not made a similar effort in 2011 – based on appearance of futility.

50. Importantly, the issues in this proceeding are suitable for this Court to resolve because they are purely legal, constitutional questions with no known disputed facts, requiring immediate resolution. *See Matter of Johnson*, 358 N.W.2d 469 (Minn. App. 1984); *State ex rel. Law v. District Court of Ramsey County*, 150 N.W.2d 18, 19 (1967) (writ of prohibition will normally issue only where all essential facts are undisputed); *Minneapolis Star & Tribune Co. v. Schmidt*, 360 N.W.2d 433, 434 (Minn. App. 1985) (where constitutional issues may be involved, a writ of prohibition is proper).

51. Time is of the essence. The Respondents have created a political and constitutional crisis. Yet, the political crisis must not be allowed to cross the constitutional boundaries imposed by the electorate who adopted Minnesota's Constitution. The issues presented demand immediate resolution so that the Respondents know how they can legally act under the law.

52. Remand to the District Court would be ineffective. Asking the lower court to find proceedings it approved twice in the last ten years as unconstitutional -- that has yet to have appellate

review on the merits – will not work in the existing deadline of June 30, 2011. Although the District Court has scheduled a hearing on June 23, 2011, there is no need for developing a factual record because of the nature of the legal issues and no known genuinely disputed issues of material fact. The historical record previously developed in 2005 for instance, is part of this Petition's Appendix. Likewise, the Attorney General's Petition mimics the 2005 Petition. The Governor's Response to the Petition includes an innovative but questionable constitutional alternative — court-ordered mediation. But that issue is also purely legal.

53. Further, the time required for trial court review and appellate review of the trial court decision, along with the possibility of the issue becoming moot, shows that the normal appellate procedure is inadequate. See *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1065-66 (3rd Cir. 1984).

54. For these reasons, the Court should exercise its original jurisdiction over the Petition for Writ of Quo Warranto.

### III. Historic events in the last decade of two budget impasses and a third pending provides the basis that the issues presented cannot be deemed moot because they are capable of repetition.

55. Like in 2001 and 2005, it is possible, perhaps even likely, that the legislative impasse will be resolved prior to the conclusion of the above-captioned litigation. Petitioners request that in considering those circumstances the instant case not be rendered moot, but rather be found to be under the "capable of repetition, but evade review" exception to mootness.

56. Mootness is "a flexible discretionary doctrine, not a mechanical rule that is invoked automatically." *Jasper v. Comm'r of Pub. Safety,* 642 N.W.2d 435, 439 (Minn.2002) (*citing State v. Rud,* 359 N.W.2d 573, 576 (Minn.1984)). The court will dismiss a case as moot if the court is unable to grant effectual relief. *Kahn v. Griffin*, 701 N.W.2d 815(Minn. App. 2005), *citing In re Schmidt,* 443 N.W.2d 824, 826 (Minn.1989). The court will deem a case not moot if it implicates issues that are capable of repetition, yet likely to evade review. *Kahn,* 701 N.W.2d 815*, citing Elzie v. Comm'r of Pub. Safety,* 298 N.W.2d 29, 32 (Minn.1980).

57. The U.S. Supreme Court has determined that the "capable of repetition yet evading review" doctrine is "limited to the situation where two elements are combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975).

58. The Kentucky Supreme Court in *Fletcher v. Commonwealth of Kentucky,* 163 S.W.3d 852 (Ky. 2005) applied the "capable of repetition yet evading review" doctrine in a case with remarkably similar facts – a perennially deadlocked budgeting process case. The Kentucky Supreme Court held that mootness did not apply where two branches of government drew-up their own budgets, ordered appropriations on their own, and filed a lawsuit to test the constitutionality of their respective actions:

> On three occasions within a ten-year period, the General Assembly convolved itself into a partisan deadlock and adjourned *sine die* without enacting an executive department budget bill. After the two most recent such occasions, the respective governors promulgated their own budgets and ordered appropriations drawn from the treasury in accordance therewith. On each occasion, lawsuits were filed to test the constitutionality of those actions. On each occasion, the Gen-

> eral Assembly enacted an executive department budget bill and ratified the governor's actions before the issue could be finally resolved by the Court of Justice. *Having no assurance that similar partisan brinkmanship will not recur in the General Assembly, resulting in future gubernatorially promulgated budgets, we conclude that this issue is capable of repetition, yet evading review, and will address its merits. See Burlington Northern R. Co. v. Bhd. of Maint. of Way Employees,* 481 U.S. 429, 436 n. 4, 107 S.Ct. 1841, 1846 n. 4, 95 L.Ed.2d 381 (1987) ("Because these same parties are reasonably likely to find themselves again in dispute over the issues raised in this petition, and because such disputes typically are resolved quickly by ... legislative action, this controversy is one that is capable of repetition yet evading review.").

*Fletchter,* 163 S.W.3d at 859 (emphasis added). Similarly, the Petitioners' claims satisfy the two requirements for application of "capable of repetition, yet evade review" doctrine.

59. The first requirement that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" is satisfied. Both the 2001 and 2005 Ramsey County District Court proceedings were too short to allow for full litigation of the constitutional issues involved. The 2001 Ramsey County District Court proceeding lasted less than ten days before legislative appropriations were made. The 2005 Ramsey County District Court proceeding lasted approximately thirty days before leg-

islative appropriations were made. Thirty days is a blink in the eye of a litigator – certainly not enough time for serious briefing and court analysis of the constitutional claims (including appellate review) present in this case.

60. The second requirement that “there was a reasonable expectation that the same complaining party would be subjected to the same action again” is also satisfied. This is the third budgetary impasse in ten years. The Court should conclude – as the Kentucky Supreme Court in *Fletcher v. Commonwealth of Kentucky,* did – that there is a reasonable expectation that the state legislature, the Commissioner and the Ramsey County District Court will find themselves in the same position on June 30, 2013 – the end of the next fiscal biennium.

61. Additionally, the Minnesota Supreme Court has stated that it will not deem a case moot and will retain jurisdiction if the case is "functionally justiciable" and is an important public issue "of statewide significance that should be decided immediately." *State v. Brooks,* 604 N.W.2d 345, 347-48 (Minn.2000). The facts of this case satisfy the requirements of *Brooks.* The case is function-

ally justiciable because the Court has original jurisdiction over this proceeding and the parties and has an available remedy -- the writ of quo warranto. The case is of statewide significance because it addresses the allocation of powers of the state government between the legislative, executive and judicial branches.

62. For these reasons, alternatively, the Court should find that the Petitioners' claims are not moot because they are capable of repetition, but evade review.

## IV. The judiciary has no role between the executive and legislative branches of government when political questions are involved as the Attorney General's June 13, 2011 Petition and Governor's June 15, 2011 Response based on court-ordered funding of "core functions" seek.

63. The "political question" doctrine is grounded primarily in the separation of powers. *Baker v. Carr,* 369 U.S. 186, 210(1962). Under this doctrine, the judicial department should not interfere in the exercise by another department of a discretion that is committed by a textually demonstrable provision of the Constitution to the other department, *Powell v. McCormack,* 395 U.S. 486, 518 (1969), or seek to resolve an issue for which it lacks judicially dis-

coverable and manageable standards, *Vieth v. Jubelirer,* 541 U.S. 267, 276 (2004).

64. The Attorney General seeks for the lower court to determine what is and what is not a "core function" and if so, command the Commissioner to disburse state treasury moneys to fund that state program. But what constitutes an essential service or "core function" depends largely on political, social and economic considerations, not legal ones. Whether the public weal demands monetary support, even temporarily support, are political questions which address themselves to the legislative department of the government. In acting on what would otherwise be biennial budget requests, the district court judge would, *per se,* be injected into the political side of the legislative and executive branches of government. The wisdom of fiscal policy and appropriation of revenue is outside the purview of judicial authority.

65. The issues presented in the instant Petition are constitutional issues. But the underlying cause is — the Attorney General's Petition for the court to disburse moneys for state programs or

agencies without an appropriation by law and thereby injecting the court into political questions that are not justiciable.

66. Both the Attorney General and Governor in their June 2011 court documents are seeking Court-ordered funding of "Core Functions." The problem with the 2001, 2005 and now 2011 proceedings is that the concept of "core functions" is foreign to the Minnesota Constitution and does not exist in statute. Thus, the Attorney General's and Governor's court documents impermissibly draw the Ramsey County District Court into political questions where no court jurisdiction exists because no law authorizing the funding exists. In fact, the legal consequence of the 2005 Ramsey County District Court Order was that the Commissioner was ordered by the Court to violate the law – not follow it.

**A. The political question doctrine applies to the question of court-ordered spending absent legislative appropriations.**

67. The leading U.S. Supreme Court case in the area of political question doctrine is undoubtedly *Baker v. Carr*. The Court outlined six elements of the political question doctrine:

- A "textually demonstrable constitutional commitment of the issue to a coordinate political branch."

- A "lack of judicially discoverable standards."
- The "impossibility for a court independent resolution without expressing a lack of respect for a coordinate branch of the government."
- The "impossibility of deciding the issue without an initial policy decision, which is beyond the discretion of the court."
- An "unusual need for unquestioning adherence to a political decision.
- The "potential embarrassment of various departments" of the government.

*Baker,* 369 U.S. 186, 217-19.

68. All six elements apply here. First, the Minnesota Constitution has text which demonstrably commits spending to be a prerogative of the legislative branch. Second, there are no judicially discoverable legal standards to determine what a core function of the government is. Third, it is impossible for the district court to define a "core function" and fund it without showing a lack of respect for the legislature. Fourth, it is impossible for the district court to define core function without making an initial policy decision – which is left to the sole discretion of the legislature. Fifth, there is an unusual need in this setting to ensure the Minnesota constitution regarding appropriations is followed. Sixth, the district court does not have expertise in appropriations – so there is danger of potential embarrassment for several agencies of gov-

ernment and for beneficiaries of certain government programs if they are not deemed by the Court as "core functions."

69. Likewise, the Governor's Response to the Attorney General's Petition seeks the court to force the parties to mediation. There is no authority, constitutionally or statutorily — and the Governor cites none — that allows the court to mediate or to cause mediation to resolve a political question. In fact, only the Governor under Article IV, § 12 has the authority to call a special session of the legislature essentially commanding the legislators to convene, but even so, it does not cure nor force the resolution of the issue.

70. In 2001 and 2005 Governors Ventura and Pawlenty convened a special session, and when no resolution occurred commenced a state court action. Yet the choice not to reach an accord was that of both the executive and legislative branches. In both cases, it is evident the courts were used as pawns in a political chess game until public outrage brought the politicians to reason. Their inability to reach an accord allowed the court in 2005 to run government through the power of the purse. The republican form

of government became the despotic government Thomas Jefferson feared:

> All the powers of government, legislative, executive, and judicial, result to the legislative body. The concentrating these in the same hands is the precise definition of a despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands and not a single one. Jefferson, Notes on Virginia, p. 195; Story, Const. Law, vol. 1, § 525.

111 N.W. at 640-41. The lower court has no role in the budget dispute between the legislative and executive branches of Minnesota's government.

### B.Three Exceptions Exist to the Requirement for an Annual Legislative Appropriation: Minnesota Constitutional Mandate; Minnesota Statutes Requiring Perennial Funding; and Federal Mandates.

71. The Petitioners are not arguing in this brief that annual appropriations are required to disburse all state funds. In fact, three exceptions exist: Minnesota constitutional mandates, Minnesota statutes requiring perennial funding and federal mandates.

72. First, there are provisions within the Minnesota Constitution which likely require state funds to be disbursed even in the absence of annual legislative appropriations. These might include

Article 5, § 4, funding salaries of executive officers (the governor, lieutenant governor, secretary of state, auditor, and attorney general); Article 6,§ 5, funding compensation for judges; Article 11, § 7, funding state bonds and debt payments on bonds; Article II, § 8, funding of a permanent school fund; and Article 11, § 14, requiring funding of a environmental and natural resources fund. Here, the Executive branch may have the constitutional authority to disburse funds absent an annual legislative appropriation.

73. Second, Minnesota statutes can be a basis for continued state funding absent an annual legislative appropriation. Educational expenditures present an example of a specific continuing monetary funding statute that requires no annual legislative appropriation. Minnesota Statute §. 126C.20 and Minn. Stat. §. 126C.l0 specifically directs how money is to be disbursed to the state's school districts annually without a further appropriation by law. For instance,under Minn. Stat. § 126C.20:

> There is annually appropriated from the general fund to the department the amount necessary for general education aid. This amount must be reduced by the amount of any money specifically appropriated for the same purpose in any year from any state fund.

Likewise, the specific legislative mandated formula, the "general education aid," for the disbursement of funds for education is enumerated under Minn. Stat. § 126C.10.

74. Similarly, Minn. Stat. § 16A.641 governing general state obligation bonds for highway projects, provides for the Commissioner to sell the bonds as authorized by law. The statute also specifically proclaims how to appropriate the proceeds of the bonds without any further appropriation by law or by court order. As Minn. Stat. § 16A.641, subd. 8 provides "(a) [t]he proceeds of bonds issued under each law are appropriated for the purposes described in the law and in this subdivision. This appropriation may never be canceled."

75. Minnesota Statute § 16A.125 governing state trust lands further reflects how the legislature specifically mandates the ability of the Commissioner to disburse state funds without a further appropriation by law or need of a court order. Here, the Commissioner is to credit revenue from the forest trust fund lands, to a suspense account. Minn. Stat. § 16A.125, subd. 5(b). After the fiscal year, the receipts credited to the suspense account during that

fiscal year are specifically distributed in accordance with the enumerated statutory provisions. *Id.* Subd. 5 (d)(l) - (3). Finally, the statute delineates how money accruing and credited to a state development account is to be appropriated to the department of natural resources division of forestry. *Id.* Subd. 5a. The statute provides one further limitation is placed on the Commissioner:

> "[a]n obligation to spend money may not be made unless there is an available balance not otherwise encumbered in the appropriation." *Id.*

76. Third, under certain circumstances federal mandates may require the Commissioner to disburse state funds provided that the United States Constitution Supremacy Clause applies. However, there is some doubt governing the constitutionality of the federal government mandating states to expend State funds 925 (1997).

77. In summary, there are certain circumstances that the Commissioner may disburse state funds without an annual appropriation by law. In all these instances, a court order is not required. Issuing such an order is an improper advisory opinion. *See Izaak Walton League of America Endowment, Inc.* v. *State Dep't*

*of Natural Res.,* 252 N.W.2d 852, 854 (Minn.1977). Courts only have jurisdiction over justiciable controversies involving definite and concrete assertions of rights on established facts. *St. Paul Area Chamber ofCommerce* v.*Marzitelli,* 258 N.W.2d 585,587-88 (Minn. 1977).

78. The only time the Court would have jurisdiction at the end of the 2011 fiscal biennium is if the Commissioner failed to disburse state funds in the categories mentioned above. Absence of an annual legislative appropriation, alone, is insufficient to confer subject matter jurisdiction to the Court.

**C. The Attorney General's "core functions" approach is not limited to the three exceptions to the annual legislative appropriations requirement – thereby violating the Minnesota Constitution, statutes and the political question doctrine.**

79. The fatal flaw in the 2011 Ramsey County District Court proceeding – a repeat of the 2005 Ramsey County District Court proceeding -- is that the Attorney General's and Governor's "core functions" approach is not limited to the exceptions noted to the annual legislative appropriation requirement explained above: Minnesota Constitutional requirements; statutes making perennial appropriations; and federal mandates.

80. Instead, the Attorney General and Governor proceed on a theory that the Minnesota Constitution requires that every "core function" have an annual legislative appropriation or the Court needs to issue an order disbursing the funds anyway. There is no constitutional authority for this position. The Attorney General's memorandum lists what she identifies as "core functions" which are constitutionally required to be funded even absent an annual legislative appropriation:

- Caring for mentally ill patients
- Securing 9,000 criminal offenders held in prisons
- Supervising 20,000 criminal offenders on supervised release
- Securing 616 sex offenders who are civilly committed
- Caring for 754 veterans in the care of the State's five veterans' homes
- No State Troopers available to patrol and keep safe Minnesota highways
- State of Minnesota Bureau of Criminal Apprehension would not investigate crimes
- State of Minnesota Division of Homeland Security and Emergency Management would not operate

- Over 600,000 low income senior citizens, individuals with disabilities, pregnant women and children and their parents would not receive Medical Assistance

- State Department of Minnesota Department of Employment and Economic Development would not distribute unemployment benefits

- State of Minnesota would be unable to respond to public health crises

- The Child in Need of Protection Services ("CHIPS") program would no longer function.

81. The Attorney General also requested that the Ramsey County District Court order each "Government Entity" (defined in Paragraphs 2 through 9 of the Petition) to determine its own "core functions" for funding.

82. Yet, the Attorney General's petition and memorandum fail to identify any specific Constitutional provisions, Minnesota statutory provisions or federal mandates requiring the state funding of "core functions" absent an annual legislative appropriation.

83. In fact, the Attorney General's petition is asking the Court to order the Commissioner to violate state law. Importantly, the Commissioner is not an elected State Treasurer with constitutional powers. *See Mattson v. Kiedrowski,* 391 N.W.2d 777 (Minn.

1986). The Commissioner is not a constitutional officer, is not elected and has no powers allocated by the Minnesota Constitution. Minnesota's Constitution -- specifically Article XI, § 1 on Appropriations and Finance - restricts, but does not empower the Commissioner regarding disbursement of State funds:

> No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law.

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

84. Thus, all of the powers of the Commissioner are of a statutory creation –enacted by the state legislature. Minn. Stat. § 16A.0l. The most important and mandatory responsibility of the Commissioner is to "receive and record all money paid into the state treasury and safely keep it until lawfully paid out." Minn. Stat. § 16A.055, Subd. 1(1) (emphasis added).

85. Minnesota statutes direct the Commissioner that "[u]nless otherwise expressly provided by law, state money may

not be spent or applied without an *appropriation, an* allotment, *and* issuance of a warrant or electronic fund transfer." Minn. Stat. § 16A.57. *See also* Minn. Const. Art. XI, § 1 (emphasis added). "Appropriation" means an authorization by law to expend or encumber an amount in the treasury." Minn. Stat. § 16A.011, Subd. 4.

86. State statutes are explicit in restricting the Commissioner's authority to acting only when there has been a legislative appropriation. For instance, the Commissioner may not exceed appropriations or cause the state to incur debt. Minnesota statutes make it a criminal misdemeanor and grounds for removal from office to do so:

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

Minn. Stat. § 16A.138.

87. The above-quoted constitutional and statutory provisions unquestionably restrict the ability of the Commissioner to disburse state funds without an appropriation by law with only the three aforementioned exceptions: Minnesota Constitutional requirements, statutes making perennial appropriations and federal mandates. Since the Attorney General's and Governor's "core functions" approach goes beyond these legally-principled exceptions, the Attorney General and Governor are impermissibly inviting the Ramsey County District Court to order the Commissioner to violate the Minnesota Constitution and Minnesota statutes -- while at the same time violating the political question doctrine.

**V. The Petitioners should prevail because allowing the district court to proceed to disburse moneys without an appropriation by law will undermine the fundamental foundation of and interpretation of Minnesota's Constitution.**

88. When considering constitutional provisions, the Minnesota Supreme Court has "repeatedly observed that it is [its] task to give effect to the clear, explicit, unambiguous and ordinary meaning of the language" of the Constitution. *Rice v. Connolly*, 488 N.W.2d 241 (Minn. 1992), *citing State ex rel. Gardner v. Holm*, 62 N.W.2d 52, 55 (1954). If the language of the provision is

unambiguous, it must be given its literal meaning--there is neither the opportunity nor the responsibility to engage in creative construction. *See, e.g., Village of McKinley v. Waldor*, 170 N.W.2d 430, 433 (1969) (citations omitted). The Court has stated its canons for interpretation of constitutional provisions:

> The rules governing the courts in construing articles of the State Constitution are well settled. The primary purpose of the courts is to ascertain and give effect to the intention of the Legislature and people in adopting the article in question. If the language used is unambiguous, it must be taken as it reads, and in that case there is no room for construction. The entire article is to be construed as a whole, and receive a practical, common sense construction. It should be construed in the light of the social, economic, and political situation of the people at the time of its adoption, as well as subsequent changes in such conditions.

*State ex rel. Chase v. Babcock*, 220 N.W. 408, 410 (1928).

89. The Petitioners assert that Articles III, IV and XI of the Minnesota Constitution are unambiguous regarding the exclusive legislative prerogative to appropriate state funds. Because these provisions are unambiguous, the Court should give them their literal meaning and find that the Commissioner acts unconstitutionally by expending money without an appropriation by law enacted by the state legislature.

90. First, the Commissioner's expenditures will violate Article III. Article III is unambiguous. Article III's literal meaning prohibits the Executive Department and Judiciary from exercising the power of the Legislative Department without an express constitutional provision allowing it to do so:

> The 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.

91. The Commissioner acting pursuant to a district court order usurps a legislative prerogative in violation of Article III by making expenditures without an appropriation by law enacted by the state legislature.

92. Throughout its history, the Minnesota Supreme Court has jealously guarded the constitutional division of powers. In *State v. Brill,* 111 N.W. 639, 640-41 (1907), Justice Elliott described at length the history of the doctrine of separation of powers with its limits on the executive and judiciary branches as well as the legislative branch:

> The tendency to sacrifice established principles of constitutional government in order to secure centralized control and high efficiency in administration may easily be carried so far as to endanger the very foundations upon which our system of government rests. That system, devised and elaborated with infinite care and wide knowledge of history and political theory, rests upon certain conceded fundamental principles.
>
> * * *
>
> [T] here is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subjects would be exposed to arbitrary control, for the judge would be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end to everything were the same man or body * * * to exercise these powers, that of executing the public resolutions and that of trying the causes of individuals.
>
> * * *
>
> In speaking of the old Constitution of Virginia, Jefferson said: 'All the powers of government, legislative, executive, and judicial, result to the legislative body. The concentrating these in the same hands is the precise definition of a despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands and not a single one.' Jefferson, Notes on Virginia, p. 195; Story, Const. Law, vol. 1, § 525.

111 N.W. at 640-41.

93. The concerns about potential abuse of governmental power[42] led to the division of powers among the three, co-equal branches of government under the Constitution. The Framers thought that the separation of powers were so important that they expressly defined and defended the separation of powers in Article III. It is in this same spirit of the Framers, that the Court should interpret Article III to define and defend the separation of powers to protect the legislative branch from the executive branch and judicial branch encroachments in this case.

94. Second, the Commissioner's expenditures would violate Article XI of the Minnesota Constitution. Article XI, § 1is unambiguous. Article XI literally means that state funds can only expended in pursuance of an "appropriation by law:"

> No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law.

The phrase "appropriation by law" is unambiguous. The phrase literally means appropriation by "law" enacted under Article IV of

---

[42] An example of a potential abuse of power to be avoided in this case is the Ramsey County District Court establishing the statewide judiciary budget – including the trial judge's own salary – and then ordering the Commissioner to pay it.

the Constitution. The phrase "appropriation by law" does not include court orders. Since the Commissioner of Finance in 2005 was paying money from the state treasury pursuant to a Ramsey County District Court order – not an appropriation by law -- she was violating Article XI's ban on such payments from the state treasury.

95. Third, the Commissioner's expenditures also violate Article IV of the Minnesota Constitution. Article IV is unambiguous. Article IV literally provides a list of requirements for an "appropriation by law" to occur. Article IV,§ 23"s literal requirements include the state legislature approving the appropriation bill, then presenting the appropriation bill to the Governor who then signs it into law or vetoes the bill (including appropriation line item veto) and, if a veto occurs, the state legislature voting to override the veto:

> Every bill passed in conformity to the rules of each house and the joint rules of the two houses shall be presented to the governor. If he approves a bill, he shall sign It … If he vetoes a bill, he shall return it with his objections to the house in which it originated …. If, after reconsideration, two-thirds of that house agree to pass the bill, it shall be sent, together with the governor's objections, to the other house,

> which shall likewise reconsider it. If approved by two-thirds of that house it becomes a law …
>
> If a bill presented to the governor contains several items of appropriation of money, he may veto one or more of the items while approving the bill. At the time he signs the bill the governor shall append to it a statement of the items he vetoes and the vetoed items shall not take effect. If the legislature is in session, he shall transmit to the house in which the bill originated a copy of the statement, and the items vetoed shall be separately reconsidered. If on reconsideration any item is approved by two-thirds of the members elected to each house, it is a part of the law notwithstanding the objections of the governor.

95. The actions of the Commissioner paying money out of the state treasury pursuant to a Ramsey County District Court order violates Article IV because the state legislature did not pass the appropriation bill, the appropriations bill was not presented to the Governor and no appropriation bill was enacted. For a lawful expenditure to occur, the appropriation bill must be passed by the state legislature, presented to the Governor and enacted as law by the Governor signing it or by a legislative veto override.

96. The Commissioner is constitutionally required to wait until an appropriation by law is enacted prior to paying money out of the state treasury. Since the Respondents have failed to recog-

nize this fact, the Respondents are violating Articles III, IV and XI of the Constitution.

## PRAYER FOR RELIEF

For the foregoing reasons, the Petitioners request that the Court:

1. Grant the Petition for Writ of Quo Warranto;
2. Issue an Order for the Respondents to respond to the Petition by June 23, 2011;
3. Issue an Order allowing the Petitioners to reply by June 26, 2011;
4. Issue an Order for a hearing on this Petition for June 30, 2011;
5. After the hearing, issue an order enjoining the Respondents from further Court proceedings seeking court orders which violate the state legislature's exclusive prerogatives to appropriate funds and enjoining the Respondents from any other executive or judicial actions which violate the state legislature's exclusive prerogatives to appropriate funds; and

6. To award to Petitioners statutorily-allowed attorney's fees and costs.

Dated: June 20, 2011.

s/Erick G. Kaardal

Erick G. Kaardal, Atty. No.229647
William F. Mohrman, Atty. No.168816
Mohrman & Kaardal, P.A.
33 South Sixth Street
Suite 4100
Minneapolis, Minnesota 55402
(612) 341-1074
(612) 341-1076 Facsimile

*Attorneys for Petitioners State Senator Warren Limmer, State Senator Scott J. Newman, State Senator Sean R. Nienow, State Senator Roger C. Chamberlain*