No. A11-1222

State of Minnesota
In Supreme Court

State Senator Warren Limmer, et al.,

Petitioners,

vs.

Lori Swanson in her official capacity as Attorney General, et al.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF QUO WARRANTO BY GOVERNOR MARK DAYTON

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TO: The Supreme Court of the State of Minnesota:

Respondent Governor Mark Dayton respectfully submits this response to the Petition for Writ of Quo Warranto.[1]

BACKGROUND

I. THE IMPASSES OF 2001 AND 2005.

In 2001, after it appeared that no agreement regarding key appropriations bills would be reached between the Legislature and the Governor, the Attorney General, with the concurrence of the Governor, filed in the Ramsey County District Court what was styled a "petition" with the caption *In re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota*. Petitioners Appendix ("PA") 43. The petition was served on many public officials but did not identify, or seek particular relief against, any specific defendants or respondents.

On June 29, 2001, Chief Judge Lawrence Cohen granted the petition, PA 51, and ordered "Minnesota State agencies and officials, county and municipal entities, and school districts" to "perform the core functions of government . . . ." He directed each agency and entity to determine its own core functions. He further directed the Commissioner of Finance to "timely issue checks and process such funds as necessary to pay for such obligations so that the core functions of government can be discharged." PA 51. He also appointed a Special Master "to mediate and, if necessary, hear and make

[1] Although Special Counsel to the Office of the Governor does not represent Commissioner Jim Schowalter in this proceeding, Special Counsel is authorized to state that Commissioner Schowalter adopts and asserts the positions stated herein.

recommendations to the Court with respect to any issues which may arise regarding compliance within the terms of this Order." *Id.*

The District Court's order was not implemented. The Governor and the Legislature reached an agreement, and appropriations bills were passed and signed.

In 2005, another impasse between the Governor and the Legislature occurred regarding key appropriations bills. The Departments of Agriculture, Education, Commerce, Employment and Economic Development, Health, Human Services, Labor and Industry, Natural Resources, and Transportation, among others, were not funded. The Attorney General again filed a "petition" in the Ramsey County District Court with a caption similar to the 2001 petition. Again, the petition did not identify or seek particular relief against any specified defendants or respondents. On the same day the Governor moved to intervene and filed a separate petition requesting similar relief. PA 88.

On June 23, 2005, Chief Judge Gregg Johnson granted the Attorney General's and the Governor's petitions and issued an order almost identical to the one issued four years earlier. PA 88. Again, a Special Master was appointed. The Special Master heard a number of requests to have certain government activities considered "core functions." Chief Judge Johnson received the Special Master's recommendations and issued orders. PA 112-21.

The 2005 impasse ended on July 8, when the Legislature appropriated funding retroactive to July 1. The appropriations bills were signed into law the next day. The District Court orders expired on July 14.

Thereafter, a group of legislators petitioned the Minnesota Supreme Court for a writ of quo warranto, seeking a declaration that funds disbursed under the District Court's orders were without legislative appropriation and therefore unconstitutional. This Court dismissed the petition without prejudice. A larger, bipartisan group of legislators filed a petition in the District Court. The District Court denied the petition. The legislators, supported by the Senate,[2] appealed to the Court of Appeals.

On May 22, 2007, the Court of Appeals decided not to reach the legislators' argument that the spending questions addressed by the District Court were nonjusticiable. It concluded that the petition itself was nonjusticiable because the issues had been conclusively resolved by legislative determination. *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 322-23 (Minn. Ct. App. 2007). The Court of Appeals held: "The legislature has exercised its fundamental constitutional power to appropriate the public funds and to provide that the appropriations are retroactive to the beginning of the biennium and supersede the court-approved disbursement by the commissioner." *Id.* at 323. It was the duty of the legislature, and not the judiciary, "to devise a prospective plan for resolving future political impasses," and so the court declined to address "the legislators' compelling argument that the commissioner's court-approved disbursements interfered with their appropriations power and improperly affected the dynamics of the

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[2] On August 1, 2006, the Eighty-Fourth Minnesota Senate submitted a Brief of Amicus Curiae in support of the legislator-appellants. The Senate asserted that the power of the purse is reserved for the legislature, and that the spending questions addressed by the District Court were nonjusticiable. The Senate amicus brief may be found at http://www.leg.state.mn.us/webcontent/lrl/pdf/archive/amicusWattson.pdf.

legislative process . . . ." *Id.* "If the events of 2005 repeat themselves, the legislators can raise a timely challenge to seek a judicial remedy for their asserted injury." *Id.*

In the aftermath of the *Sviggum* decision, the Legislature did not enact any prospective plan for resolving future political impasses.

II. THE IMPASSE OF 2011.

As in 2001 and 2005, the 2011 legislative session ended with many appropriations bills not enacted into law. To prepare for a possible shutdown, the Governor formed the Statewide Contingency Response Team ("SCRT") headed by the Commissioner of the Department of Management and Budget ("Commissioner"). The purpose of the SCRT was to identify and plan for the critical services that the Governor and the executive agencies would be required to continue to protect public health and safety.

On June 15, 2011, the SCRT completed the "Recommended Statewide Objectives 2011 Potential Minnesota Government Shutdown" which identified four levels of priority critical services provided by the State. PA 157. The SCRT recommended that state agencies should plan to continue only priority one and priority two critical services in the event of a shutdown, and established five statewide objectives that must be met during a government shutdown. The statewide objectives, in order, were:

- Provision of basic custodial care for residents of state correctional facilities, regional treatment centers, nursing homes, veterans' homes and residential academies and other state operated services;
- Maintenance of public safety and immediate public health concerns;
- Provision of benefit payments to individuals;

- Preservation of the essential elements of the financial system of government;
- Provision of necessary administrative and support services to meet these objectives.

The Governor planned to implement SCRT recommendations by executive order to be issued on June 30. However, two and a half weeks before the end of the biennium, on June 13, 2011, the Attorney General filed a "petition" in the Ramsey County District Court, captioned *In re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota*, Court File No. 62-cv-11-5203. PA 34. The petition sought, among other things, an order from the District Court:

1. That "the executive branch of state government, including its constitutional officers, must undertake such core functions as required" by law;
2. That the Commissioner "shall issue checks and process such funds as necessary to pay for such obligations of the State of Minnesota";
3. That each Government Entity (defined to include counties, cities, and school districts) must "determine what core functions are required to be performed by it," perform the functions, and be paid by the state treasury; and
4. That a Special Master be appointed "to hear and make recommendations to the Court with respect to any issues which may arise regarding the terms of this Order . . . ."

PA 34-42.

On June 15, 2011, the Governor submitted a Response. PA 143. The Governor did not join in the Attorney General's request for judicial control of the executive agencies and the state treasury. Instead, he noted that the "power of the purse" was shared by the legislative and the executive departments, but not by the judicial

department, except as required to protect its own inherent power. PA 146-47. Therefore, he asserted that the Attorney General's requested relief exceeded the judicial department's authority under the Minnesota Constitution and that the petition was nonjusticiable.

The Governor requested that the judicial department forego any order that would infringe on the appropriations process, the executive agencies, or the treasury. PA 151-53. He asserted that he had both constitutional and statutory powers that he intended to invoke in the event appropriations bills were not enacted. Accordingly, the Governor asked only that the District Court appoint a respected mediator to help the Governor and the Legislature reach a compromise.[3]

The House and the Senate appeared in the proceeding commenced by the Attorney General. Each made limited constitutional arguments.

The House opposed the Governor's request for mediation on the ground it would violate separation of powers principles. It argued that there is no role for the judicial branch in the constitutional process for enacting a budget. The only relief sought by the House was an order to the Commissioner to issue checks and process payments of previously appropriated funds for the Legislature itself. PA 433-38.

The Senate, too, opposed mediation, arguing that the District Court did not have authority under the Minnesota Constitution to order the executive and legislative

[3] The Governor proposed as mediators former Chief Justice Kathleen Blatz and former Justice James Gilbert. PA 144-45.

branches to mediate. The Senate also suggested that the Governor did not have inherent power to direct funding for critical services. PA 428-29.

At oral argument on June 23, the District Court denied the Governor's request for mediation. In an undated order issued on June 27, PA 606, the District Court held that such relief would violate separation of powers principles. Citing *State ex rel. Birkeland v. Christianson*, 179 Minn. 337, 339-40, 229 N.W. 313, 314 (1930), the District Court stated that it should not "control, coerce, or restrain" the other two departments of government.

III. THE JUNE 29 ORDER AND ITS AFTERMATH.

By Findings of Fact, Conclusions of Law, and Order Granting Motion for Temporary Funding, issued June 29, 2011 ("the June 29 Order"), PA 1, the District Court issued an order specifying which executive services would continue and directing that they be funded by the state treasury. The District Court ruled that the executive department was authorized to spend money only for what it called "critical core functions of government."[4] PA 16. The District Court ordered the Commissioner to issue checks and process funds as necessary to pay for such "critical core functions." *Id.* The District

[4] The Attorney General had requested an order to fund "core functions." PA 41. The Governor advised the District Court that he planned to issue an Executive Order funding "critical services." PA 155. It appears that the term the Court adopted, "critical core functions," is a combination of the two phrases. With the exception of two cases with unrelated subject matters, it does not appear that any court, nationwide, has used the term "critical core function" for any purpose. *See Lormand v. US Unwired, Inc.*, 565 F.3d 228 (5th Cir. 2009) (describing the services of a telecommunications company); *S. Tex. Mortg. Corp. v. U.S. Dep't of Hous. & Urban Dev.*, 163 Fed. App'x 321 (5th Cir. 2006) (describing the duties of a loan officer). Certainly, no court has used the term to designate those government services that must continue and be funded from the state treasury without an appropriation.

Court also ordered the Commissioner "to fund programs where funding is mandated by the Supremacy Clause of the U.S. Government and make payments such as LGA payments that have already been appropriated." PA 17-18.

The District Court decided that most of the "critical services" identified in the Governor's SCRT plan were "critical core functions." PA 8-10. However, the District Court went further and appointed a Special Master to hear and make recommendations to the District Court "regarding any issue raised by Petitioner or others relating to the application of this Order," including petitions for the continuation of additional services. PA 18. The District Court allowed the Commissioner to pay money "to respond to an unforeseen emergency that would place the public or property in immediate danger," but directed that "the need for continuation of such emergency funding will be reviewed by the Special Master." PA 18-19.

On July 1, 2011, the Special Master convened hearings authorized by the June 29 Order. Counsel for both the Governor and the Attorney General attended the hearings, but counsel for the House and the Senate did not. Special Counsel for the Governor preserved for the record the position that the Attorney General's and other petitions were nonjusticiable.

Over eight days of proceedings, more than seventy petitions from non-profits, businesses, trade associations, government agencies, and individuals were heard by the Special Master. Governor's Appendix ("GA") 1-22. Most requested that additional services and grants not ordered to be continued by the District Court should be added to the list of "critical core functions" and thus paid for with unappropriated funds.

The hearings before the Special Master were informal. The petitioners presented sworn oral testimony and, when lawyers were present, they would make argument. Unsworn written petitions, statements, and fact sheets were received. The Rules of Evidence were not applied and exhibits were not marked.

The Special Master recommended that some petitions be granted because the government services at issue were deemed to be "critical core functions," but the Special Master recommended that other petitions be denied on the ground that the services were not "core functions" or were not "critical." PA 622-37; GA 25-142. Most of the Special Master's recommendations were adopted by the District Court. *Id.* By and large, the Governor supported the Special Master's recommendations.[5]

However, there were disagreements between and among the Attorney General, the Governor, the Special Master, and the District Court on the application of the phrase "critical core function." As one example, the Minnesota Association of Community Rehabilitation Organizations ("MACRO") petitioned for the continuation of the Minnesota Extended Employment ("EE") program, through which more than 5,000 severely disabled people receive "ongoing employment support services." GA 17-24. MACRO presented evidence that, as a result of the shutdown, employers were furloughing these workers. *Id.*

[5] Despite their informality, the Special Master proceedings were conducted with dignity, and sensitivity, and the Special Master's recommendations were thoughtful and well written. The Governor appreciates the Special Master's public service during a difficult time in Minnesota's history.

On July 8, with the support of the Governor, the Special Master recommended that the EE program be considered a critical core function of government. GA 46-48. However, on July 11, 2011, the District Court rejected the recommendation, concluding that "[n]ot every admirable social program is so essential that it reaches the level required to overcome the requirements of the Minnesota Constitution." GA 34-35.

As of the date of this Response, the Legislature and the Governor have announced a budget "framework," but a special session has yet to be called.

ARGUMENT

I. NEITHER THE GOVERNOR NOR THE COMMISSIONER HAS ACTED UNLAWFULLY.

The "writ of quo warranto -- the modern information in the nature of a quo warranto -- may be defined as a proceeding to correct the usurpation, misuser, or nonuser of a public office or corporate franchise." *State ex rel. Danielson v. Village of Mound*, 234 Minn. 531, 542, 48 N.W.2d 855, 863 (1951). The writ properly may be issued where a public official has *no authority* to take the action that is planned.

The instant Petition for Writ of Quo Warranto alleges that, under the Minnesota Constitution, no money may be spent from the state treasury except in pursuance of an appropriation by law. To the extent that it alleges that the Governor and the Commissioner have exceeded their authority, the Petition should be denied.

All unappropriated money spent from the state treasury since July 1 has been disbursed pursuant to, and, in fact, *as required by*, the June 29 Order. The Governor did not seek the June 29 Order, but he and his subordinates, including the Commissioner,

have abided by it. Therefore, no one can contend that either the Governor or the Commissioner had "no authority" to disburse unappropriated funds.

II. THE PETITION FOR WRIT OF QUO WARRANTO SHOULD BE DENIED TO THE EXTENT IT SEEKS TO RESTRAIN A FUTURE EXERCISE OF THE GOVERNOR'S INHERENT AUTHORITY.

Among other things, the prayer for relief in the Petition for Writ of Quo Warranto seeks an order preventing the Governor from, at some future date, exercising his inherent authority to authorize the executive department to fund critical services. This portion of the Petition should be denied.

A. The Governor Has A Proper Respect For The Separation Of Powers.

Pursuant to the Minnesota Constitution, Article III, § 1, the executive department may not exercise any of the powers properly belonging to either the legislative or the judicial departments, except as expressly provided in the Constitution. *See Bloom v. Am. Express Co.*, 222 Minn. 249, 256, 23 N.W.2d 570, 575 (1946) ("A constitutional grant of power to one of the three departments of government . . . is a denial to the others" (quotations omitted)). Separation of powers is premised on the belief that excessive power vested in one branch promotes "corruption and tyranny." *State v. Baxter*, 686 N.W.2d 846, 851 (Minn. Ct. App. 2004); *see also* The Federalist Nos. 47, 48, and 51 (Terence Ball ed., 2003).

The command in the second sentence of Article III, § 1, that no branch may exercise the powers of the another, is not found in the United States Constitution. That provision, found in many state constitutions, is an "'unusually forceful command' . . . [which] has no counterpart in the United States Constitution." *Fletcher v.*

Commonwealth, 163 S.W.3d 852, 860-61 (Ky. 2005) (construing similar provision in Kentucky Constitution "reputed to have been penned by Thomas Jefferson.")

As this Court summarized in *State ex rel. Birkeland v. Christianson*, 179 Minn. 337, 339-40, 229 N.W. 313, 314 (1930):

> The three departments of state government, the legislative, executive, and judicial are independent of each other. Neither department can control, coerce, or restrain the action or nonaction of either of the others in the exercise of any official power or duty conferred by the Constitution, or by valid law, involving the exercise of discretion. The Legislature cannot change our constitutional form of government by enacting laws which would destroy the independence of either department or permit one of the departments to coerce or control another department in the exercise of its constitutional powers.

B. The Power Of The Purse Is Shared By The Legislative And Executive Departments.

As a former United States Senator, the Governor appreciates that the "power of the purse" through the enactment of appropriation laws belongs primarily to the legislative department. *See Brayton v. Pawlenty*, 781 N.W.2d 357, 364-66 (Minn. 2010); *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 323 (Minn. Ct. App. 2007) ("The legislature has exercised its fundamental constitutional power to appropriate the public funds . . . .").

However, the executive department shares the power of the purse by virtue of the governor's right to approve or veto a bill, including the right to veto one or more of items of appropriation of money. *See* Minn. Const., Art. IV, § 23; *Johnson v. Carlson*, 507 N.W.2d 232, 235 (Minn. 1993). The legislature has the power to override a veto by a two-thirds vote of each house. *Id.* The authority to call a special session is exclusively the governor's. *See* Minn. Const., Art. IV, § 12.

The Governor also respects the command of Article XI, § 1 of the Minnesota Constitution, which states: "No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law." *See State ex rel. Nelson v. Iverson*, 125 Minn. 67, 71, 145 N.W. 607, 608 (1914) (purpose is "to prevent the expenditure of the people's money without their consent first had and given.")

Forty-seven other states have a similar provision.[6] Minnesota's Article XI is based on a similar provision in the United States Constitution, Article I, § 9, cl. 7: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ." *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 427-28 (1990) (purpose of clause "is to assure that public funds will be spent, according to the letter of the difficult judgments reached by Congress as to the common good, and not according to the individual favor of Government agents or the individual pleas of litigants.")

The federal Antideficiency Act, 31 U.S.C. § 1341 *et seq.*, expressly allows federal officials to spend in advance of appropriations in the event of "emergencies involving the safety of human life or the protection of property." *See* 31 U.S.C. § 1342. However, there is no similar provision in Minnesota law. To the contrary, Minnesota Statutes § 16A.57 provides: "Unless otherwise expressly provided by law, state money

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[6] The list of states with constitutional citations may be found at: P. Wattson, *Power of the Purse in Minnesota* (July 17, 2007), available on the Minnesota Legislature's website. The informative Wattson monograph explores the history of the "power of the purse" back to the *Magna Carta.*

may not be spent or applied without an appropriation . . . ." Minnesota Statutes § 16A.138 prohibits all state boards and officials from incurring indebtedness before an appropriation, upon pain of criminal penalty.

C. The Governor Retains Inherent Authority In The Absence Of Lawful Appropriations For The Executive Department.

While the command of Article XI, § 1 is undeniably clear and straightforward, it is not absolute. When the legislative department has not passed appropriations bills signed by the governor or that have the support of two-thirds of each house, the executive department must continue to exist and serve the people of Minnesota. Otherwise, Article XI, § 1 would nullify other provisions of the Minnesota and United States Constitutions.

Under Minnesota Constitution Article V, § 3, the Governor, as the head of the executive department, possesses certain inherent powers, as the legislative and judicial departments similarly possess. *See In re Clerk of Lyon Cnty. Courts' Comp.,* 308 Minn. 172, 176-82, 241 N.W.2d 781, 784-87 (1976).[7] The executive department is part of the government "instituted for the security, benefit and protection of the people" under Article I, § 1. Under Article V, the governor has the power and the obligation to take care that all of the laws -- not just the biennial appropriations laws -- be faithfully executed. The Minnesota Constitution further imposes on the governor the obligation to observe and protect the individual rights set out in Article I, the Bill of Rights.

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[7] "Inherent judicial power governs that which is essential to the existence, dignity, and function of a court because it is a court. . . . Obviously, the legislature could seriously hamper the court's power to hear and decide cases or even effectively abolish the court itself through its exercise of financial and regulatory authority. If the court has no means of protecting itself from unreasonable and intrusive assertions of such authority, the separation of powers becomes a myth."

The Minnesota Constitution and the Supremacy Clause of the United States Constitution further impose on the governor the obligation to support the United States Constitution and the rights protected thereby. When the Governor took his oath of office, in accordance with the Minnesota Constitution, Article V, § 6, he swore "to support the constitution of the United States." This includes not depriving any person of "life, liberty, or property, without due process of law," or denying any person "the equal protection of the laws." U.S. Const. amend. XIV.

Minnesota statutes further assign the governor power not contingent on specific biennial appropriations. For example, the governor is designated the "custodian of all property of the state not especially entrusted by law to other officers," Minn. Stat. § 4.01. The legislature has directed that the governor may "adopt such measures for its safekeeping as the governor deems proper."

The governor's constitutional powers and obligations are not made contingent on specific biennial appropriations. Petitioners concede that fact, as they must. *See, e.g.,* Petition at 41 ("Here, the Executive branch may have the constitutional authority to disburse funds absent an annual legislative appropriation"); *id.* at 43 ("the legislature cannot prevent the implementation of constitutional mandates simply by withholding appropriations"); *id.* at 43 ("in the absence of appropriations by laws, the Commissioner *must* fund constitutional mandates at no more than existing levels until the legislature provides otherwise") (emphasis added).

Further, the governor has powers -- both constitutional and statutory -- regarding the expenditure of federal funds. The legislature has enacted a continuing appropriation,

Minnesota Statutes § 4.07, that authorizes the governor to spend federal funds received by the State. Subdivision 3 requires that the governor "shall comply with any and all requirements of federal law and any rules and regulations promulgated thereunder to enable the application for, the receipt of, and the acceptance of such federal funds." Such funds must be "available for expenditure in accordance with the requirements of federal law." *See* Minn. Stat. § 4.07.

Had the June 29 Order not restrained his inherent authority, on or before July 1, 2011, the Governor would have invoked the inherent powers of his office by Executive Order. Such invocation would have been circumspect in light of his respect for Article XI, § 1, and his understanding that the power to make laws is primarily the legislative department's "alone in both good and bad times," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952). *See id.* at 650 (Jackson, J., concurring) (emergencies "afford a ready pretext for usurpation" and "tend to kindle emergencies"). Nevertheless, the Governor would have taken executive action to protect the lives and safety of the people of Minnesota by promulgating the SCRT plan that the District Court, in large part, adopted as its own.

Had the Governor issued an Executive Order, undoubtedly legal challenges would have followed by those who thought that he had exercised his inherent powers too robustly, and by those who thought he had not exercised them sufficiently. Only then, assuming a justiciable case or controversy, would it have been "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

III. THE ATTORNEY GENERAL'S BROAD INVITATION TO THE DISTRICT COURT – WHICH THE DISTRICT COURT ACCEPTED IN PART – WAS INCONSISTENT WITH THE SEPARATION OF POWERS.

Article III, § 1, of the Minnesota Constitution does not foreclose the use of each department's inherent powers even when doing so may intrude on the general powers of another department, as this Court recognized in *In re Clerk of Lyon Cnty. Courts' Comp.*, 308 Minn. 172, 176-82, 241 N.W.2d 781, 784-87 (1976). However, the judicial department's inherent powers only extend to "that which is essential to the existence, dignity, and function of a court because it is a court." *Id.* at 176, 784. The Attorney General's Petition invited the District Court to go beyond the judicial department's inherent powers and exercise the inherent powers of the other two departments of government. While the June 29 Order was well-intentioned and sought a practical result, it and the Special Master proceedings that followed exceeded the judicial department's powers.

The Attorney General's Petition, by its very unusual nature, invited a wide-ranging and unconstitutional exercise of judicial power. The Attorney General did not commence the proceeding in the usual way by filing an action asserting specific claims against one or more adverse parties. Here, the matter was commenced by a "petition" that did not seek any of the ancient writs.

Nor did the petition, as a civil action, comply with the Minnesota Rules of Civil Procedure. There was no summons and there were no defendants or adverse parties

named in the caption of the petition or even in the petition itself.[8] Instead, the Attorney General sought and obtained an *ex parte* "order to show cause," PA 169, served on hundreds of government officials, PA 173.

Tellingly, the Attorney General's petition contained no "claim" asserted against any of those hundreds of officials. PA 34-42.[9] As a result, the Attorney General's petition was not the type of adversarial proceeding to resolve disputed facts or disputed points of law between parties with adverse interests – the type of disputes that the courts are designed and suited to handle.

The Attorney General's petition also invited the District Court to take and delegate to each and every "Government Entity," including all counties, cities, and school districts, the power to determine which services would be continued. PA 41. Then, the Commissioner would be required to pay from the state treasury all bills for such services performed.[10]

Also, although the Attorney General sought, and the District Court ordered, what amounted to extraordinary equitable relief, the Attorney General's petition and the June 29 Order did not state or discuss the standards for injunctive relief required by *Dahlberg Bros., Inc. v. Ford Motor Co.*, 272 Minn. 264, 137 N.W.2d 314 (1965).

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[8] *See* Minn. R. Civ. P. 3, 4.

[9] *See* Minn. R. Civ. P. 10.02 (requiring that a case be about a "claim"); Minn. R. Civ. P. 12.02(e) (requiring a case to be dismissed if the complaint fails to state a claim).

[10] Fortunately, the District Court did not accept that portion of the Attorney General's invitation.

Instead of grounding her petition on the Rules and on *Dahlberg*, the Attorney General assured the District Court that it had power to grant wide-ranging judicial relief based on the case of *State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777 (Minn. 1986) ("*Mattson*"). PA 133-37. To the contrary, *Mattson* supports the constitutional position of the Governor and counsels against the intrusion of one department on another.

The *Mattson* case arose out of the statutory transfer to a commissioner of the inherent responsibilities of the elected state treasurer, a constitutional officer. The statute transferred both functions and employee positions, and abolished employee positions that had been assigned to the treasurer's office. 391 N.W.2d at 778-79. This Court determined that the transfer of functions and positions was unconstitutional as infringing on the inherent power of the treasurer as an executive office established by the Constitution. The Court ordered that the functions and the positions, and the related appropriations, be restored to the treasurer. *Id.* at 782-83.

Mattson supports the Governor's position that the legislative department, by a failure to enact appropriations, may not strangle the executive department. However, *Mattson* does not stand for the proposition that the judicial department may take control of all executive agencies and their funding. In *Mattson*, this Court waited until the legislation was enacted before saying what the law was, and then carefully limited the relief granted. This Court restored functions, positions, and dollars already appropriated. It did not intrude on the legislative department by restoring the positions in the office of the treasurer the legislature had abolished or by ordering the appropriation of new funds.

391 N.W.2d at 783. Thus, *Mattson* is not solid precedent for the District Court to take control of the executive agencies' services and the state treasury.

The June 29 Order did, indeed, take from the legislative and executive departments the shared power of the purse. It also took from the executive department a significant part of its powers to protect itself and to execute the laws. *See State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 322 (Minn. Ct. App. 2007) ("We start from the fundamental principle that we cannot exercise powers that belong to the legislative branch.") Each order of the District Court after July 1 took more power from the executive department.

Because the June 29 order accepted in part the Attorney General's unconstitutional invitation, the subsequent Special Master proceedings often resembled legislative or administrative hearings. While some of the testimony was sworn, the informal proceedings were not governed by the Rules of Civil Procedure or the Rules of Evidence. Exhibits were not marked, and a variety of written submissions were received. The House and the Senate were not ordered to attend and never appeared. The petitioners -- all well-meaning and many sympathetic -- presented the reasons why the services they provided or needed should continue. *See, e.g.*, GA 17-24. Then, the Special Master recommended, and the District Court decided, which government services should continue (using unappropriated funds) and at what level. PA 622-37; GA 25-142.

The District Court's decision to assume such broad and deep power over the executive department is especially puzzling given that the District Court denied the Governor's request for a mediator. PA 606. Citing *State ex rel. Birkeland v.*

Christianson, 179 Minn. 337, 339-40, 229 N.W. 313, 314 (1930), the District Court held that to appoint a mediator would coerce or control another department in the exercise of its constitutional powers. One must ask: if the District Court could not, by its own analysis, appoint a mediator without violating the separation of powers, how could the District Court then constitutionally take control of all executive services and the state treasury, appoint a Special Master, and issue further orders expanding its control?

The roots of the June 29 Order, and the erroneous idea that, when the legislative and executive departments reach impasse, the judicial department should put its imprimatur on spending unappropriated funds, trace to the 2001 "petition." That petition was completely unmoored from the ancient writs, the Rules of Civil Procedure, and the Rules of Evidence. The error was repeated in 2005, when the "petition" process expanded with Special Master proceedings. The orders granting the 2001 and 2005 petitions never reached this Court. The Attorney General's 2011 petition, the June 29 Order, and the Special Master proceedings have once again pulled the judicial department away from deciding concrete cases or controversies and pushed it into the legislative and executive arenas.

There may be procedural rules and prudential doctrines that this Court could invoke to avoid reaching the important constitutional questions in the Petition for Writ of Quo Warranto. However, if this Court decides not to decide, there are two likely results: (1) the judicial department will be dragged into the next budgetary impasse because the Attorney General, the District Court, and all who receive state money will assume that the Attorney General "petition" and Special Master processes remain available to

disburse unappropriated funds; and (2) there will be less incentive for the legislative department to accept the wise suggestion to "devise a prospective plan for resolving future political impasses," *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 323 (Minn. Ct. App. 2007).

CONCLUSION

The Petition for Writ of Quo Warranto should be denied as to the Governor and the Commissioner. Should the Court reach the constitutional issue of whether the Attorney General's petition invited the District Court to exceed its authority, and whether the District Court did so, the Court should hold that the Attorney General's petition was nonjusticiable and that the June 29 Order and subsequent proceedings were inconsistent with the constitutional separation of powers.

Respectfully submitted,

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Special Counsel to the
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[11] The Governor retained Special Counsel solely on the matter of the potential government shutdown. Special Counsel represents only the Office of the Governor, and does not represent the State of Minnesota generally, the Attorney General, or the State's other constitutional officers, departments, entities, or subdivisions, whether executive, regulatory, legislative, or judicial.