STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

Deanna Brayton, Darlene Bullock, Forough Mahabady, Debra Branley, Marlene Griffin and Evelyn Bernhagen, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

Tim Pawlenty, Governor of the State of Minnesota, Thomas Hanson, Commissioner, Minnesota Department of Management and Budget, Cal Ludeman, Minnesota Department of Human Services, and Ward Einess, Commissioner, Minnesota Department of Revenue

Defendants.

Case Type: Civil

Court File No. 62-CV-09-11693
Chief Judge Kathleen R. Gearin

AMICUS CURIAE BRIEF FROM THE MINNESOTA HOUSE OF REPRESENTATIVES IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

INTEREST OF _AMICUS CURIAE_[1]

Under Article IV of the Minnesota Constitution, the Minnesota House of Representatives (the "House") is part of the legislative department of state government and, along with the Minnesota Senate, is granted the legislative powers of state government by Article III of the Constitution. Under Article III, the legislature is invested with the exclusive exercise of legislative powers, unless expressly provided otherwise in the Constitution.

[1] No counsel for any party authored this brief in whole or in part. Only the Minnesota House of Representatives made any monetary contribution to the preparation or submission of this brief.

Under the Constitution, the legislature enacts the laws of the state of Minnesota, including all appropriations and the biennial budgets of the state. The House, as part of the legislative department, has an important constitutional interest in seeing that the laws are faithfully executed and that purported executive power is not used to usurp its legislative powers.

Minnesota Statutes Section 16A.152, subdivision 4 (the "unallotment law" or the "unallotment statute") grants authority to the executive branch to reduce allotments of appropriations to respond to an unanticipated reduction in state revenues and a resulting state budget deficit. This extraordinary authority is intended to address financial emergencies in the state budget. Because the unallotment law grants crucial budget powers to the executive, the House has a strong interest in ensuring that the unallotment law not be used (1) in circumstances where it does not apply or (2) to rewrite, modify or subvert the budget priorities that have been enacted into law pursuant to Article IV of the Constitution. Moreover, if the unallotment law authorizes the executive to take the actions it has in this case, the House's legislative powers related to enacting the state budget may be substantially impaired or subverted.

STATEMENT OF THE CASE

I. Defendants' Own Actions Led to the Budget Shortfall That They Have Used to Justify Their Unallotment Actions.

During its 2009 regular session, the Minnesota legislature passed and presented to Governor Tim Pawlenty appropriations bills for the state budget for the fiscal 2010-2011 biennium and bills raising revenues sufficient to support those appropriations bills. Governor Pawlenty signed all of the appropriations bills for the state budget for the 2010 – 2011 fiscal

biennium. See 2009 Minn. Laws, ch. 36, 37, 78, 79, 83, 93 – 96, 101, 126, 143, and 172. These bills included H.F. No. 1362, the Health and Human Services bill, which included the appropriation for the Minnesota Supplement Aid (MSA) special diet program.[2] 2009 Minn. Laws 690 – 1021, ch. 79. Without appropriations bills, state government has no authority to spend state funds after the beginning of the next biennium on July 1. Thus, a budget deficit does not exist for a biennium until appropriations bills become law. As soon as the governor signed the appropriations bills, but before the legislature passed the tax bill that created a balanced budget, Governor Pawlenty announced again that he would not sign any bill containing a tax increase and would use the unallotment power to makeup the shortfall that the enacted appropriations bills had created.

After the legislature adjourned, Governor Pawlenty vetoed H.F. No. 2323 (Chapter 179), a bill that increased taxes and delayed some expenditures by approximately $2.7 billion. *Journal of the House 2009 Supplement*, p. 7481, available at: http://www.house.leg.state.mn.us/cco/journals/2009-10/Jsupp2009.htm#7481. This action created a shortfall between enacted appropriations and projected state revenues of approximately that amount ($2.7 billion). Fiscal Analysis Department, Minnesota House of Representatives, *Chapter 179 (HF 2323/SF 2074) Conference Committee Report May 18, 2009 - - Vetoed* (showing a $2.7 billion deficit under the enacted budget bills and a $3,625 balance if H.F. 2323 had been enacted into law, rather than vetoed), available at:

[2] The Governor did exercise his item veto authority to veto the fiscal year 2011 appropriation for General Assistance Medical Care, but the appropriation for MSA was not item vetoed. Journal of the House, 57th day, p. 6561 (May 17, 2009) (item veto message for H.F. 1362), available at: http://www.house.leg.state.mn.us/cco/journals/2009-10/J0517057.htm#6561.

http://www.house.leg.state.mn.us/fiscal/files/tax09.pdf. All of these events occurred in May and June 2009, before the beginning of the fiscal 2010 – 2011 biennium. The underlying revenue estimates were based on estimates prepared by the Department of Management and Budget ("MMB") in February 2009.

II. Defendants Unallotted State Spending Using Projections from the February Forecast.

In June and July 2009, the commissioner of MMB purported to exercise his powers under the unallotment law to reduce allotments to help close the $2.7 billion gap created when Governor Pawlenty signed the appropriations bill and vetoed the tax bill. In a June 4, 2009 letter to Governor Pawlenty, Commissioner Hanson indicated he had "determined, as defined in Minnesota Statutes 16A.152, that 'probable receipts for the general fund will be less than anticipated * * *.'" Letter from Commissioner Tom Hanson to Governor Tim Pawlenty, dated June 4, 2009 (Defendants' Exh. 4 to Robben Affidavit). As the basis for this determination, the Commissioner cited the drop in revenues between the November 2008 and the February 2009 forecasts: "Projected revenues for the biennium were $30.7 billion - $1.2 billion less than anticipated in the November 2008 forecast * * *." *Id.* As a possible alternative basis for the justification, the letter also states: "Our state's revenue collections reflect this weakened economy and are not matching expectations. Year to date receipts for FY 2009 are down $70.3 million compared to the February forecast." *Id.*

The commissioner subsequently notified the governor of the unallotment and other actions he was proposing. *See* Letter from Commissioner Tom Hanson to Governor Tim

Pawlenty, June 16, 2009 (Defendants' Exh. 5 to Robben Affidavit).[3] Included in these reductions were (1) elimination of the MSA special diet program, effective November 1, 2009; and (2) modification of the Property Tax Refund ("PTR") for renters by reducing the statutory definition of rent constituting property taxes from 19 percent of rent to 15 percent of rent.

Governor Pawlenty and the legislature were both fully aware of the estimated revenues upon which the enacted budget and unallotment were based. These revenue estimates were published by MMB in its February forecast. MMB, *February Forecast* (February 2009). Defendants' Exh. 2 to Robben Affidavit. The estimates were used as the basis for the legislative budget deliberations and for the executive branch's unallotment and administrative actions to balance the budget, which was unbalanced by Governor Pawlenty's veto of H.F. No. 2323.

The February forecast showed $30,700 million in "current resources." MMB, *General Fund, Fund Balance Analysis, February 2009 Forecast* (March 3, 2009), p. 1, Row titled "Subtotal current resources" and column titled "2-09 Fcst FY 2010-11". Exh. 1 to Marx Affidavit.[4] This is the same number cited by Commissioner Hanson in his June 4th letter to Governor Pawlenty. Defendants' Exh. 4 to Robben Affidavit. Following the end of the 2009 legislative session, MMB recomputed the amount of general fund revenues to reflect the effects of the various budget enactments during the legislative session. These tallies showed current resources of $30,925 million or a $225 million increase in revenues over the February forecast amount. MMB, *General Fund, Fund Balance Analysis, End of 2009 Legislative Session*, p. 1,

[3] Additional MMB unallotment documents are available at: http://www.finance.state.mn.us/budget/805-unallotment-current.

[4] Note that all of these cited MMB documents state their number in thousands of dollars. The text of the brief rounds these to millions of dollars.

row title "Subtotal current resources" and Column titled "5-09 Enacted FY 2010-11" (June 11, 2009). Exh. 2 to Marx Affidavit. This document also shows the $2.7 billion deficit that is the basis for the unallotment. *Id.* at p. 1, bottom row titled "Budgetary Balance" and column titled "5-09 Enacted FY 2010-11". MMB's detailed account of the unallotment and related administrative and executive actions also shows this same dollar amount of revenue – i.e., $30,925 million, the amount from the February 2009 forecast, adjusted for the effects of legislative enactments during the 2009 regular session. MMB, *General Fund, Fund Balance Analysis, July 2009 Executive Actions*, p. 1, row titled "Subtotal Current Resources" and column titled "5-09 Enacted, FY2010-11" (July 17, 2009) (showing $30,925 million of general fund revenues). Exh. 3 to Marx Affidavit.

Following the February 2009 forecast, the state collected less revenue in February through the end of fiscal year 2009 than was projected in the February forecast. MMB, *April 2009 Economic Update* (April 2009) (Defendants' Exh. 3 to Robben Affidavit); MMB, *July 2009 Economic Update* (July 2009) (Defendants' Exh. 14 to Robben Affidavit) (showing a cumulative negative variance of $150.3 million through the end of FY 2009). Of this, $70.3 million reflected reduced collections from February through May, as reflected in Commissioner Hanson's June 4th letter. Defendents' Exh. 4 to Robben Affidavit. However, under a longstanding Minnesota budget practice, these monthly deviations in collections from the forecast were not used in making budget decisions, since they may reflect "noise" or month-to-month fluctuations that are not an accurate reflection of likely revenues for the full biennium. Marx Affidavit. As a result, Defendants' unallotment action, as described above, used the

February 2009 forecast revenue, as adjusted for changes in law enacted in the 2009 legislative session, but not adjusted for the reduced collections. These revenues and the appropriations enacted into law yielded the $2.7 billion budget gap that was the basis for the unallotment. MMB, *General Fund, Fund Balance Analysis, July 2009 Executive Actions*, p. 1, rows titled "Subtotal Current Resource" and "Budgetary Balance" in the column titled "5-09 Enacted, FY2010-11" (July 17, 2009) (showing $30,925 million of general fund revenues and a budgetary balance of a negative $2,676 million). Exh. 3 to Marx Affidavit.

The revenue numbers, as outlined above, are summarized in the table below.

State General Fund Revenues	
Source Estimate or Forecast	**Amount** (millions)
February 2009 forecast	$30,700
End of 2009 session, including effect of legislation[1]	$30,925
Amount used in the Unallotment[2]	$30,925
Collections relative to February 2009 forecast as of 6/4/2009[3]	($70.3)

[1] This is February forecast amount, plus the $225 million increase from enacted legislation.
[2] This is also the end of session amount (previous row).
[3] Amount reported in Commissioner Hanson's June 4th letter, which is not reflected in the revenue amount used in the unallotment.

III. Defendants' Unallotment has no Precedent in Minnesota History.

Minnesota governors have only exercised the unallotment power five times since its initial enactment in 1939. The largest previous unallotment was $278 million, undertaken by Governor Pawlenty in 2003. The table summarizes the four previous unallotments; unallotment

has never been used at the outset of a biennium to close a budget deficit anticipated by forecasts and created by enacted appropriations bills. All of the previous unallotments related to the second year of the biennium, when revenues fell short of the forecasts used to enact or modify the budgets.

Unallotments Prior to 2009		
Governor	**Fiscal Year**	**Amount**
Al Quie	1981	$195 million
Rudy Perpich	1987	$109 million
Tim Pawlenty	2003	$278 million
Tim Pawlenty	2009	$269 million
Source: Peter S. Wattson, *Legislative History of Unallotment Power* Senate Counsel (June 24, 2009), available at: http://www.senate.leg.state.mn.us/departments/scr/treatise/unallotment/Unallotment.pdf		

The unallotment law was enacted during the Great Depression and has been in place in every economic downturn since. Yet, the unallotments undertaken by Defendants are nearly ten times larger and are broader in scope than any of the previous unallotments. MMB's listing of the dollar amounts of the unallotments with short descriptions is 15 pages long.[5] In addition to these unallotments, the executive branch took other unilateral administrative actions to reduce spending by about $500 million.

Finally, in carrying out these unallotments, Defendants unilaterally changed program

[5] Approved unallotments, dated July 7, 2009, available at: http://www.mmb.state.mn.us/doc/budget/unallotment/6-09.pdf; Second Notice of Allotment Reductions, dated July 17, 2009, available at: http://www.mmb.state.mn.us/doc/budget/unallotment/7-28-09.pdf; and Third Notice of Allotment Reductions, dated August 14, 2009, available at http://www.mmb.state.mn.us/doc/budget/unallotment/notice-committees.pdf.

formula definitions and other provisions written in statute. Some of these changes include reducing the statutory percentage of "rent constituting property taxes" under the property tax refund program from 19 percent to 15 percent, capping all payments under the Sustainable Forest Program at $100,000 per recipient, and lowering the statutory cap on the number of hours a personal care attendant can work per month. Defendants' Exh. 9 to Robben Affidavit.

Plaintiffs are individuals who receive MSA special diet program benefits and property tax refunds for renters. Their benefits or refunds under these programs will be reduced or eliminated as a result of the unallotment. Plaintiffs filed suit on their own behalf and on behalf of others similarly situated, claiming that the defendants' actions in eliminating the MSA special diet program and modifying the property tax refund for renters were not authorized by the unallotment law and if the unallotment law does authorize either of the actions, it violates the constitutional separation of powers.

Plaintiffs seek a declaratory judgment and injunctive relief that would prevent reduction in the allotments for the current and next fiscal year for the MSA special diet program and for the property tax refund program. Plaintiffs have made a motion for a temporary restraining order to require Defendants to continue making payments under the MSA special diet program, notwithstanding the unallotment.

SUMMARY OF THE ARGUMENT

In determining whether Defendants had authority to take the actions challenged by the Plaintiffs' suit, the Court should follow the ordinary meaning of the language of the unallotment statute, given the underlying purpose and rationale for the statute. The language of the statute

requires the commissioner to determine that probable receipts will be "less than anticipated" before the unallotment power is triggered. This plainly has not occurred, since Defendants and the legislature have used exactly the same estimate of probable receipts – the February 2009 MMB revenue forecast – in preparing and enacting the state budget *and in imposing Defendants' unallotment*. Nor can Defendants' apparent approach of using forecasts of earlier reductions (i.e., the forecast drop in revenues between the November 2008 and February 2009 forecasts) be used to satisfy the statute; the baseline or reference to measure when revenues are "less than anticipated" must mean the numbers used to write the budget, not some earlier forecast. Under any reasonable construction of the language, probable receipts cannot be less than anticipated if the same amount of receipts was used to write the budget and to make the unallotments. To interpret the law otherwise would require the Court to grant the executive unfettered discretion to determine when unallotment may be used. Doing so is not legally justified or consistent with constitutional principles.

If the unallotment statute authorizes the executive to reduce allotments as it has done in this case, the law unconstitutionally delegates legislative power to the executive. Under the standards set out by the Supreme Court in *Lee v. Delmont,* 36 N.W.2d 530 (Minn. 1949), the executive actions in this case have the characteristics of making a complete law and cannot be justified as making a law operative based on the executive's finding of facts or applying standards, set out in the legislation. The facts that were the basis for the unallotment (i.e., the level of available revenues) were the same facts that the legislature used to enact its budget, whereas the *Lee v. Delmont* test is premised on the executive finding facts that the legislature

does not know or that are not convenient for the legislature to find.

Defendants have exceeded their authority under Minnesota Statutes and under the Minnesota Constitution, and Plaintiffs are therefore highly likely to succeed on the merits of their Complaint under the standard set forth in *Dahlberg Brothers, Inc., v. Ford Motor Co., Inc.*, 137 N.W.2d 314, 321-22 (Minn. 1965).

ARGUMENT

I. THE NECESSARY CONDITIONS TO REDUCE ALLOTMENTS UNDER THE UNALLOTMENT STATUTE HAVE NOT BEEN MET FOR THE 2010 – 2011 FISCAL BIENNIUM.

Because the unallotment statute grants broad budget powers to the executive to respond to unanticipated emergencies – powers to reduce spending below the level intended by the legislature and to potentially reorder budget priorities – the House as part of the legislative department has a strong interest in ensuring that the statute is applied only in situations that could not be addressed by the usual budget process. The House also has an interest that the statute be interpreted in a manner consistent with its purpose and language. To apply or construe the law more broadly than it was originally intended creates the risk of the executive usurping the legislature's role in enacting the state budget. Because of these legislative interests and concerns regarding application and construction of the unallotment statute, the first section of the brief addresses matters of statutory construction.

A. Defendants Have Not made the Required Statutory Determination that "probable receipts * * * will be less than anticipated" as required by § 16A.152.

The unallotment statute, in relevant part, provides:

> If the commissioner determines that probable receipts for the general fund will be less than anticipated, and that the amount available for the remainder of the biennium will be less than needed, the commissioner shall, with the approval of the governor, and after consulting the Legislative Advisory Commission, reduce the amount in the budget reserve account as needed to balance expenditures with revenue. Minn. Stat. § 16A.152, subd. 4(a) (2008).

Thus, the statutory language imposes two pre-conditions to trigger the authority to drawn down the budget reserve and reduce allotments:

1. A determination by the commissioner that "probable receipts for the general fund will be less than anticipated"; and
2. "That the amount available for the remainder of the biennium will be less than needed[.]" Minn. Stat. § 16A.152, subd. 4(a).

There is no dispute about the second element; both Plaintiffs and Defendants agree that the amount of revenue available for the biennium is about $2.7 billion less than the appropriations enacted into law. The dispute between the parties focuses on the meaning of the first element and whether the Defendants actions have satisfied the requirements of the law. Both parties entreat the Court to rely on the plain meaning of the law on the obvious assumption that doing so will validate their (opposing) positions.

Although their arguments do not frame the issue precisely in this manner, the two parties disagree about the meaning of the term "anticipated" receipts in the statute. Making a determination that receipts will be "less" requires a comparison with a reference point or a baseline amount: Are revenues more or less than that reference or baseline? Plaintiffs and Defendants have different views of what that reference point or baseline is under the statute – i.e., what the statute means when it refers to "anticipated" receipts.

Defendants appear to advance two different bases as their reference point (i.e.,

"anticipated" receipts in the statute's terms) against which a reduction is to be measured. Commissioner Hanson's June 4th letter to Governor Pawlenty contains the purported designation to comply with the statutory requirement. First of all, it compares the February 2009 and the November 2008 forecasts: "Projected revenues for the biennium were $30.7 billion [according to the February forecast] - $1.2 billion less than *anticipated in the November forecast* * * *." Defendants' Exh. 4 to Robben Affidavit [emphasis added]. This approach appears to treat the November 2008 forecast as the "anticipated" receipts under § 16A.152. Later in the letter, Commissioner Hanson states "Our state's revenue collections reflect this weakened economy and are not matching expectations. Year to date receipts for FY 2009 are down $70.3 million *compared to the February forecast*." *Id* [emphasis added]. That appears to adopt the February forecast as the "anticipated" receipts under the statute and the reduction is the decline in actual collections that has occurred in the months after the forecast.

The revenues Defendants actually used to make the unallotment are the February forecast revenues, as adjusted for legislation enacted in 2009. MMB, *General Fund, Fund Balance Analysis, July 2009 Executive Actions*, p. 1, row titled "Subtotal Current Resources" and column titled "5-09 Enacted, FY2010-11" (July 17, 2009) (showing $30,925 million of general fund revenues). Exh. 2 to Marx Affidavit. These revenues do not take into account the $70.3 million decline in actual collections after the February forecast (at the time of the June 4th determination). The revenues used were $225 million higher than February forecast because enacted legislation raised fees and similar nontax revenues. (Revenues from enacted legislation are obviously "anticipated.") Defendants did not take into account the $70.3 million decline in actual

collections after the February forecast in making their unallotment.

Neither of Defendants' baselines meets the requirements of the law (the "anticipated" receipts in the statute's terms) and their determination, as a result, does not satisfy the law's requirement. This is so for several reasons.

First, the only reasonable interpretation of the meaning of "anticipated" receipts under the statute are the receipts that the legislature and executive branches used to write the budget. The statute does not explicitly define or state how to determine "anticipated" receipts (e.g., by reference to a mandated revenue forecast or something similarly specific) or say who did the anticipating or when it was done. This likely was simply because the 1939 legislature thought it was obvious – i.e., it must be the amount that the legislature (and governor) used to enact the budget or appropriations, which can no long be funded because revenues are now expected to drop. Certainly neither the legislature nor defendants were anticipating the level of receipts in the November 2008 forecast by March (when the Governor's supplemental budget was submitted) or in May when the legislative budget bills were enacted. Both of those actions were based on the February forecast. Earlier forecasts of revenues are not relevant to budget-setting.

Defendants' position does not follow the literal or plain language of the law. Rather, their interpretation reads a great deal of content into the word "anticipated" – e.g., it implicitly reads the statute to mean what the *executive* anticipated (the legislature never enacts a biennial budget based on the November forecast) *at some prior point in time* that the executive chooses. In effect, Defendants are arguing for granting vast discretion to the executive branch in deciding when it can use the unallotment power. The statute should not be read in such an expansive

manner, given the sweeping nature of the power (no standards or restrictions as to which spending may be cut or by how much and, according to Defendants, the ability to rewrite the terms of statutory programs in effectuating those reductions). The Court should carefully consider whether it wants to grant the executive branch such sweeping budget powers.

Moreover, Defendants' citation in the June 4th letter to the $70.3 million drop in actual collections, relative to the February forecast, also does not qualify as a determination that satisfies the statutory requirement. This is so because they did not use this drop in making the unallotment. *See* the Statement of the Case above, which documents that the dollar amount of revenues in both the End of Session and the Executive Action Fund Balances are identical. By longstanding budget conventions used by both the legislative and executive departments, these month-to-month fluctuations in revenues are not considered in making budget decisions. Marx Affidavit. Defendants appear to want it both ways – they want these month-to-month fluctuations to be used as the basis for triggering the statute, but they do not actually use them to make additional spending cuts through unallotment. It is incongruous to interpret the law to allow the triggering event to be irrelevant to the amount of the unallotment.

Second, the interpretation that "anticipated" receipts is the amount used to enact the budget is further supported by the basic rationale for the unallotment law – that is, the reason for its enactment and the mischief that was designed to be remedied. Minn. Stat. § 645.16. The unallotment law was enacted in 1939 on the recommendation of then Governor Stassen. When Governor Stassen took office, the budget was in substantial deficit (about 10 percent of

spending), because revenues had fallen short of expectations.[6] He recommended enactment of the unallotment law to prevent this situation from occurring again.[7] The obvious problem was deficits that occurred during the biennium because of unexpected drops in revenue – not reduced revenues that were known when the budget was enacted.

Given this rationale for the law, there is no reason to think earlier estimates of receipts (here, the November 2008 forecast which was never used by the governor or the legislature in enacting the budget) as being the "anticipated" receipts within the meaning of the statute. Since the revenues forecast in November were not used in preparing or enacting the final budget, a reduction in these revenues cannot trigger the unallotment power.

Third, using the February forecast (as adjusted for enacted legislation) as the baseline for anticipated receipts is consistent with all of the past uses of the unallotment power. All of these related to the second year of the biennium, when revenues declined compared to the assumptions built into the enacted budget. This history lends further support to the sensible interpretation that "anticipated" receipts are, in fact, those that were anticipated when the budget was written and enacted.

Finally, a standard rule of construction is to construe statutes in a manner that avoids violation of the constitution. See, e.g., *McLane Minnesota, Inc., v. Commissioner of Revenue*,

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[6] Peter S. Wattson, *Legislative History of Unallotment Power* 2 -3 (June 24, 2009), available at: http://www.senate.leg.state.mn.us/departments/scr/treatise/unallotment/Unallotment.pdf.

[7] Budget Message of Governor Harold E. Stassen Delivered to a Joint Session of the Senate and House of Representatives at 12:00 o'clock noon on February 1, 1939, p. 6, available at: http://archive.leg.state.mn.us/docs/2008/other/080624.pdf (indicating the allotment system and mandatory reductions were intended to address "recurring deficits which we have experienced" because revenues decreased).

2009 WL 2959230 (Minn. 2009) ("We are guided by the presumption that the legislature does not intend to violate the U.S. Constitution; therefore, we must place a construction on the statute that will make it constitutional if at all possible."). Defendants' actions and the position advocated by them in this case raise grave issues under the separation of powers doctrine. Stripped to its essentials, Defendants' view of the statute would allow the legislature to pass a state budget that spends well in excess of projected revenues ($2.7 billion in this case) and delegate to the executive branch the immediate responsibility, before the budget enacted by the legislature had taken effect, for cutting back spending to match those revenues. This authority/responsibility could reorder budget priorities, by eliminating some programs (such as MSA special diet program), while sparing others. As described in part II of this brief, such an expansive delegation of authority violates the separation of powers. As a result, the court should construe the statute in a manner that is consistent with its purpose and all of its provisions – i.e., to apply to reductions in revenues that are determined by a forecast made after the budget has been enacted and to exclude reductions that were already known when the budget was enacted – since that will avoid serious constitutional issues.

In conclusion, Defendants' recitation of the words of the law in making their determination is not enough to satisfy the law's requirement. In one instance, their determination used exactly the same revenues that the legislature used to write the budget and that Defendants used to make the unallotment. Thus, it was not in reality a determination that probable receipts would be less than anticipated. Defendants' other possible basis for a determination – the $70.3 million reduction in collections compared to the February forecast – was not used to make the

unallotment. As a result, Defendants failed to make the required statutory determination that probable receipts would be less than anticipated.

B. The Unallotment Statute may only be used after the Biennium has begun.

The statute limits use of the unallotment power (after the necessary determination that probable receipts will be less than anticipated) to reducing allotments only to the extent "that the amount available for the *remainder* of the biennium will be less than needed * **." Minn. Stat. § 16A.152, subd. 4(a) [emphasis added]. Use of the term "remainder" strongly implies that the determination is to be made after the biennium has begun. A dictionary definition of "remainder" is "a remaining group, part, or trace."[8] Since this refers to something less than the whole, this supports the interpretation that the power only applies to unanticipated reductions that occur after the biennium has begun. Otherwise, the comparison would be made to the entire biennium, not a part. This is, of course, consistent with the problem that the unallotment statute was intended to address – i.e., unexpected drops in collections that occur after the budget is in place (in 1939 when the law was enacted, the legislature only met for a few months every other year). As an alternative or supporting basis for holding Defendants' unallotment was not authorized by the statute, the Court should hold that the power does not apply until after the biennium has begun. This is the clear implication of the statute's use of the term "remainder." Contrary to Defendants' assertions, this would not read something new into the statute but would simply give the ordinary meaning to the term "remainder."

C. Conclusion

[8]Merriam Webster's Online Dictionary, available at: http://www.merriam-webster.com/dictionary/Remainder

Considering the ordinary meaning of "anticipated" revenues, the purpose of the unallotment statute, its legislative history and its past uses, the only justifiable conclusion is that the anticipated receipts were those contained in the February forecast, as adjusted for 2009 legislative enactments. These were the amounts all parties to the legislative and executive budget processes used in preparing their final budgets. Moreover, this was the same estimate of revenues that was used to make the unallotment order. The July 2009 unallotment simply was not based on a determination that probable receipts will be less than anticipated. As a result, the statute has not been triggered and Defendants actions were not authorized by the law. Additionally, the unallotment statute does not apply until the biennium has begun.

II. IF THE UNALLOTMENT LAW ALLOWS NEGATING OR REDUCING APPROPRIATIONS BASED ON CIRCUMSTANCES KNOWN WHEN THEY WERE ENACTED INTO LAW, IT UNCONSTITUTIONALLY DELEGATES LEGISLATIVE POWER TO THE EXECUTIVE.

A. The Minnesota Constitution Provides Means for Resolving Disputes between the Legislature and the Governor in Order to Adhere to a Balanced Budget.

Article III of the Minnesota Constitution provides:

> 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.

The power to make laws is fundamentally a legislative power. Appropriations (and thereby state spending) must be made by law. Minn. Const. art. XI § 1. Because of this, state budgets are inherently a matter for the legislature. The limited role of the executive in enacting laws, including appropriations, is set forth in article IV, sections 23 and 24, of the Constitution.

The provisions are specific with regard to the governor's role over appropriations, providing for the power to sign or veto entire bills, and to veto items, but not to reduce appropriations. In fact, a proposed amendment to the constitution to grant the authority to reduce appropriations, as part of the item veto power, was submitted to the voters in 1916, but was not ratified. Laws 1915, ch. 383, § 1 (text of proposed amendment); Secretary of State, *Minnesota Legislative Manual Compiled for the Legislature of 2009-10*, 82 (documenting the rejection of the amendment).

If the legislature and governor are unable to resolve disagreements and enact a budget before the end of one of the annual legislative sessions, the governor can call the legislature into special session to complete the budget. Minn. Const. art. IV § 12. Governors have, in many instances, called special sessions to resolve budget issues, including the inability of the governor and legislature to agree on a budget for the biennium. *See, e.g.,* the governor's proclamation calling the 2005 first special session for an example, *House Journal* p. 1 (2005 First Special Session), available at: http://www.house.leg.state.mn.us/cco/journals/2005-06/J0524001.pdf.

Thus, the situation leading to Defendants' invocation of the unallotment statute is anticipated by the Minnesota Constitution. Disagreement between the executive and the legislative departments is part of the inherent tension in a system of separated powers. For this reason, the constitution provides for annual legislative sessions, gives the governor authority to call special sessions, and requires the governor to faithfully execute laws duly enacted.

One mechanism for resolving disputes between the executive and legislative departments is not permitted by the Minnesota Constitution: Delegating purely legislative power to another department or entity. The Minnesota Supreme Court has characterized purely legislative power

as "the authority to make a complete law – complete as to the time it shall take effect and as to whom it shall apply[.]" *Lee v. Delmont*, 36 N.W.2d 530, 538 (1949). For example, the Supreme Court has held that a law that adopts future changes in the income tax base by reference to federal law was an unconstitutional delegation of legislative power to Congress. *Wallace v. Commissioner of Taxation*, 184 N.W.2d 588 (Minn. 1971) (extending the state income tax to sick pay). But the court has upheld laws that authorize the executive to determine facts and circumstances under which the law goes into operation, if there is a reasonably clear policy or standard for doing so. *Lee v. Delmont, supra.*

The *Lee v. Delmont* court made the classic and oft cited statement of this distinction:

> Pure legislative power, which can never be delegated, is the authority to make a complete law-complete as to the time it shall take effect and as to whom it shall apply-and to determine the expediency of its enactment. Although discretion to determine when and upon whom a law shall take effect may not be delegated, the legislature may confer upon a board or commission a discretionary power to ascertain * * * some fact or circumstance upon which the law by its own terms makes, or intends to make, its own action depend. *The power to ascertain facts*, which automatically brings a law into operation by virtue of its own terms, *is not the power to pass, modify, or annul a law. If the law furnishes a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts* to which the law applies, so that the law takes effect upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers, the discretionary power delegated to the board or commission is not legislative. *Lee v. Delmont*, 36 N.W.2d at 538 - 39 [emphasis added and footnote omitted].

The Minnesota Constitution provides legal means for resolving the deadlock that can result when two branches of government are unable to enact a budget that is balanced by the end of the fiscal biennium. But the constitution preserves the separation of powers, even where the governor and the legislature are at a budget impasse. The constitution does not permit the Minnesota legislature to delegate the authority that Defendants have attempted to arrogate to the

executive department through their misuse of the unallotment statute.

B. If the Unallotment Law Authorizes the Executive Action Taken in This Case, Then the Unallotment Law is Unconstitutional.

The unallotment statute may fall under the rule in *Lee v. Delmont* that "the legislature may authorize others to do things * * * which it might properly, but cannot conveniently or advantageously, do itself" if it is interpreted to be limited to unanticipated financial emergencies that occur after the budget has been enacted. The financial and economic realities of (1) fluctuating state revenue sources, such as income, sales, and corporate taxes, (2) the inability of the state to spend money it does not have (or to borrow to provide the necessary funds), and (3) the fact that legislature is in session for no more than five months each calendar year may practically dictate that the legislature authorize the executive branch to make "mid-course corrections" in the budget when unexpected emergencies arise. With proper standards of action to control and guide executive action, the law would not delegate pure legislative power. But that is not what is at issue here.

The actions of the executive and its apparent interpretation of the unallotment law usurp purely legislative powers. If these actions are authorized by the unallotment law, the law unconstitutionally delegates legislative power.

First, these actions were not based on the executive's determination of future facts, as contemplated by *Lee v. Delmont*, or to respond to an unexpected financial emergency. The operative facts were all well known during the legislative session and were the basis for all of the budget proposals during the legislative session – i.e., they were not the type of facts that the legislature itself did not know or could not conveniently act upon. Rather, they were exactly the

type of facts that the legislature regularly bases its budget enactments on. In addition, the only financial emergency was occasioned by the governor's veto of the revenue bill and/or the inability of the legislature and the governor to reach a budget agreement. Granting authority under the unallotment law to modify or amend an enacted budget at the time of its enactment and based on the very facts that were the premise for its enactment is the same as allowing the executive to make a "complete law" as contemplated by the court in *Lee v. Delmont*. Governor Pawlenty signed the appropriations into law and nearly simultaneously announced that he would use unallotment to cut them back according to his own budget priorities. This has all of the hallmarks of lawmaking, not taking administrative or executive action based on an executive's finding of facts or by following standards specified in the law.

Second, this process is contrary to the constitutional processes for enacting laws. The constitution authorizes the governor to item veto individual items of appropriations, while signing the rest of the bill into law. In this case, the governor chose not to use this constitutional process (or used it only in a few instances) and instead exercised his statutory unallotment power to cancel or cut back individual appropriations. As argued above, this is not a reasonable construction of the unallotment statute. If the legislature had attempted to give the governor (or another executive officer) that power explicitly, it would have violated separation of powers and the presentment clause. See, e.g., *Clinton v. City of New York*, 524 U.S. 417 (1998) (holding a statutory grant of line item veto power to the president violated the presentment clause). The interpretation and application of the unallotment law used by Defendants in this case has precisely this effect and, thus, violates the constitution.

Third, if the law authorizes defendants' actions, it would even permit the executive to effectively overturn a duly enacted appropriation that was re-passed over an item veto by the governor. Constitutional exercise of executive authority suggested by *Lee v. Delmont*'s rule (as opposed to unconstitutional delegation of pure legislative power) requires the executive action be consistent with legislative policy and the purpose of the law. The reading suggested by defendants' action allows the executive to reverse policies enacted into law.

Finally, beyond the need to find an unanticipated reduction in revenues, the law does not contain standards or guidance for executive action. Perhaps this can be justified to grant the executive flexibility to deal with an unexpected emergency or changes in circumstances occurring after the biennium has begun. But it is a fatal flaw if the law grants the executive the power to cut back appropriations at the beginning of the budget period before changes in circumstances have occurred or new facts or a new emergency has occurred.

C. Rukavina v. Pawlenty Has Limited Application to This Case.

In a 2004 decision, the Court of Appeals held with little explanation that the unallotment law did not unconstitutionally delegate legislative power, but "only enables the executive to protect the state from financial crisis in a manner designated by the legislature." *Rukavina v. Pawlenty*, 684 N.W.2d 525, 535 (Minn. 2004). The facts in *Rukavina* were very different from those here. The Minnesota Court of Appeals did not address any of the issues raised by Defendants' use of the unallotment statute here.

In *Rukavina*, the governor unallotted unexpended funds to offset an unanticipated revenue shortfall that occurred in the last months of the biennium. The *Rukavina* court did not address

use of the unallotment statute where the revenue shortfall was anticipated, where the unallotment was undertaken at the start of the fiscal biennium, and where the governor's own veto of legislation created the budget shortfall. None of these facts have been directly addressed by any court in Minnesota.

Given this, the court should not rely on *Rukavina* as validating the use of the law to address a budget gap that was known when the budget was enacted or to rewrite or modify existing program parameters. The circumstances and application of the law in *Rukavina v. Pawlenty* are simply not comparable and do not raise the constitutional considerations that are present here. Given the Court of Appeals' cursory discussion of separation of powers in *Rukavina,* the Court should not conclude that the case validates the constitutionality of the governor using the unallotment statute to resolve a budget deadlock with the legislature over budget priorities at the start of the biennium.

D. Invalidating the Executive Action in this Case is Consistent with the Case Law in Other States

Courts in other states have considered the constitutionality of unallotment statutes and have reached varying conclusions, in some cases upholding the statutes, while in others striking them down. Other states' unallotment statutes and their separation of powers doctrines may vary from Minnesota's and, as such, do not provide direct insight or authority. But the general pattern of these decisions supports the position taken by Plaintiffs. Unallotment statutes with restrictions (e.g., mandating across-the-board reductions) or percentage limitations, or guidance on executive action in their unallotment statutes have been upheld under separation of powers challenges. See *University of Connecticut Chapter AAUP v. Governor,* 512 A.2d 152 (Conn. 1986) (upholding

an unallotment law with a 5% limit on reductions in each appropriation and a 3% limit on reduction of a fund); *North Dakota Council of School Administrators v. Sinner*, 458 N.W.2d 280 (N.D.1990) (upholding an unallotment law that required uniform reductions for all departments and agencies receiving moneys from the fund whose revenues were insufficient); *Hunter v. Vermont*, 865 A.2d 381 (Vt. 2004) (upholding an unallotment law that contained multiple limits, including that the authority was triggered by a deficit that exceeded 2%; that specified alternative methods of effecting reductions; that the plan must reflect legislative priorities in the appropriation act; and that the plan be designed to minimize negative effects on delivery of services).

States whose unallotment statutes have few restrictions on executive action, as contemplated by Defendants' action here, have been struck down. See *State v. Fairbanks North Star Borough*, 736 P.2d 1140 (Alaska 1987); *Chiles v. Children A, B, C, D, E, and F*, 589 So.2d 260 (Fla. 1991).

Only Massachusetts had a law similar to Minnesota's that survived a facial challenge, but that case was under circumstances dramatically different from those here. In upholding the law, the Massachusetts Supreme Court characterized it as an expression of "the Legislature's confidence that [the reductions] would be made in a manner that will not compromise the achievement of underlying legislative purposes and goals." *New England Division of the American Cancer Society, v. Commissioner of Administration*, 769 N.E.2d 1248, 1257 (Mass. 2002). In this decision, the Massachusetts Supreme Court was implicitly reading the standard into the statute that the court had earlier set out in a widely cited impoundment case (relating to

the executive authority to withhold spending of appropriations), which stated "the Governor is bound * * * to ensure that the intended goals of legislation are effectuated." *Id.* citing *Opinion of the Justices*, 376 N.E.2d 1217 (Mass. 1978). The situation in this case is not remotely comparable to the Massachusetts standards. Here, the Defendants at the beginning of the biennium have completely eliminated the funding for one of the programs (the MSA special diet program) that the legislature funded and have implemented a governor's budget proposal that the legislature specifically rejected (the reduction in the PTR program's definition of rent constituting property taxes). The Defendants have essentially reordered the state budget in the face of legislative objections according to their own purposes and goals.

CONCLUSION

For the foregoing reasons, the Minnesota House of Representatives respectfully requests that the Court grant the Plaintiffs' Motion for a Temporary Restraining Order. Under the factors set forth in *Dahlberg Brothers, Inc., v. Ford Motor Co., Inc.*, 137 N.W.2d 314, 321-22 (Minn. 1965), Plaintiffs are highly likely to succeed on the merits of their Complaint, and are entitled to emergency and permanent injunctive relief and declarative relief.

ADDENDUM

Defendants have moved the court to dismiss Plaintiffs' complaint. This motion was not briefed by either party, but at oral argument Defendants urged the Court to grant their motion based on the briefs and arguments that they made in opposing Plaintiffs' motion for a Temporary Restraining Order. The Court should deny this motion based on the arguments outlined in parts I and II of this brief. However, the motion to dismiss raises an additional issue regarding the

unallotment of property tax refunds. Because of the very serious and unique issues raised by this unallotment and the concerns it raises for the House, this Addendum to the House's brief addresses those issues. The House respectively requests the Court to consider this argument in considering Defendants' Motion to Dismiss.

THE UNALLOTMENT STATUTE DOES NOT AUTHORIZE THE EXECUTIVE TO MODIFY THE PROPERTY TAX REFUND FORMULA BY REDUCING THE STATUTORY PERCENTAGE OF RENT CONSTITUTING PROPERTY TAXES.

A. The Unallotment Statute Permits the Commissioner to "suspend" or "defer" Statutory Obligations to Effect Unallotments.

In order to permit implementing reductions of allotments of appropriations for programs that mandate specific payments by statute, the unallotment law authorizes the commissioner of MMB to "defer or suspend" these obligations. The statute provides, in relevant part:

> Notwithstanding any other law to the contrary, the commissioner is empowered to defer or suspend prior statutorily created obligations which would prevent effecting such reductions [in allotments]. Minn. Stat. § 16A.152, subd. 4(b).

In addition, the law gives the commissioner authority to take other sources of revenue into account in reducing allotments:

> In reducing allotments, the commissioner may consider other sources of revenue available to recipients of state appropriations and may apply allotment reductions based on all sources of revenue available. Minn. Stat. § 16A.152, subd. 4(d).

The Property Tax Refund program for renters (sometimes called the "rent credit") pays state refunds to renters whose rent payments ("rent constituting property taxes") are high relative to their incomes. "Rent constituting property taxes" is defined by statute as 19 percent of rent paid. Minn. Stat. § 290A.03, subd. 11. If the claimant's rent constituting property tax exceeds a threshold percentage of income, the refund equals a percentage of the tax over the threshold, up

to a maximum amount. Under the statutory formula, as income increases the threshold percentage increases; the share of tax over the threshold that the taxpayer must pay increases; and the maximum refund decreases. Minn. Stat. § 290A.04, subd. 2a (establishing the formula). Thus, the amount of a claimant's refund is a varying function of (1) rent paid and (2) household income. However, because of the thresholds and maximum limits under the formula, increases or decreases in rent payments by the claimant do not always change the refund amounts.[9]

B. The Commissioner's Unallotment Rewrites the Qualifying Criteria under the PTR for Renters.

The commissioner of MMB's unallotment order provides for modifying the property tax refund as follows:

> The portion of rent used to calculate the refund would be reduced from 19% of rent paid to 15% to more accurately reflect actual property taxes paid. This would impact refunds received by 300,000 renters in 2010 calendar year only. Dept. of Management and Budget, *Approved Unallotments & Administrative Actions*, p. 2 (7/10/200), available at: http://www.mmb.state.mn.us/doc/budget/unallotment/6-09.pdf.

Because of the operation of the property tax refund formula, this change will affect claimants differently, depending upon the rent the claimant pays relative to his or her income. Most claimants will suffer partial reductions in the dollar amounts of their refunds. However, some claimants who would have received refunds will no longer qualify for refunds, and a small number of claimants may suffer no reduction in their refunds at all.[10] According to Department of Revenue estimates, 6 percent of recipients will become ineligible for refunds as a result of the

[9] A more complete description of the calculation of the property tax refund for renters is available in House Research, *Renter's Property Tax Refund Program* (November 2009), available here: http://www.house.leg.state.mn.us/hrd/pubs/ss/ssrptrp.pdf.

[10] This occurs when the rent paid is sufficiently high to qualify the claimant for the maximum refund, even using the lower percentage of rent.

unallotment, 92 percent will receive reduced refunds, and 2 percent will suffer no reduction.[11] As a result, the reduction in the statutory percentage of rent differs materially from a reduction in all claims by an equal percentage or by a fixed dollar amount.

C. The Authority to "Suspend Or Defer" Does Not Authorize Modifying Statutory Formulas.

The authority to "suspend or defer" statutory obligations was added to the statute in 1987 and was intended to clarify that the commissioner could reduce allotments for programs even though a statute mandated a specific amount be paid to a recipient. 1987 Minn. Laws 1404, ch. 268, art. 18 § 1. For example, this allows cutting the allotment for a program, such as the property tax refund for renters, even though the statutory formula mandates payment of a specific dollar refund to a claimant.

Use of the terms "suspend or defer," however, does not imply the ability to amend, rewrite, or restructure the formulas that calculate the refund entitlements of claimants. The dictionary definition of "suspend" is to "to cause to stop temporarily" or "to set aside temporarily or make inoperative."[12] Similarly, the dictionary definition of "defer" is to "put off or delay."[13] The plain meaning of these terms does not encompass rewriting or modifying definitions or formulas. Had the legislature intended to confer such broad authority on the commissioner it would surely have used terms that more clearly implied that intent, such as "modify, alter, revise,

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[11] Estimate published in Fiscal Analysis Dept., *Governor's FY 2010-11 Unallotment and Other Administrative Actions* , Table 2, p. 17 (Sept. 2009), available at http://www.house.leg.state.mn.us/fiscal/files/09unallotsum.pdf.

[12] Merriam Webster Online Dictionary, available at http://www.merriam-webster.com/dictionary/suspend.

[13] Merriam Webster Online Dictionary, available at http://www.merriam-webster.com/dictionary/DEFER.

or adjust." Although the statute does not specify how a reduction in an allotment for a program, such as the PTR, is to be distributed among recipients, the natural or logical approach would be to reduce all benefits ratably or proportionately. This maintains the distribution of benefits provided by the statute. The same recipients continue to receive refunds, except everyone receives a proportionately smaller amount.[14]

Moreover, the unallotment statute does provide modestly more expansive authority in paragraph (d) that allows the commissioner to consider "other sources of revenue available to recipients of state appropriations" in reducing allotments.[15] This authority could, perhaps, be used to distribute cuts under a formula based on "other sources of revenue" defined broadly to include the recipient's income. But it cannot be used as a justification for cutting benefits based on the amount of rent paid. The amount of rent paid cannot be construed to be other income (revenue) of the recipient (the renter who receives the PTR); it's an expense or an outlay, not revenue or income.

If "suspend or defer" are read broadly to allow modifying or revising the rules for paying money under statutory payment obligations, this would raise serious separation of powers concerns. In effect, such broad authority would allow the executive department to unilaterally

[14] This is precisely how the legislature has provided for temporary reductions in the PTR in response to fiscal crises in the past. *See, e.g.,* 1987 Minn. Laws 1182, ch.268, art. 3 § 12(a) (directing commissioner of revenue to pay 67% of PTR claims for 1987).

[15] This language was added to the statute in 1983. 1983 Minn. Laws 2335, ch. 342, art. 19 § 1. It was commonly thought to permit reduction in state aid payments (which had been done in a 1980 unallotment on that basis) by taking into account the property tax revenues of the recipient governmental units. This is the standard way state aids are reduced by legislation or by unallotment in the few times that the unallotment authority has been used to reduce aid payments to local units of government.

change program rules so that the policy may materially differ from that which was enacted into law. For example, benefits to certain recipients could be cut and others exempted from cuts, even though all of the benefits were paid under one allotment of an appropriation. One category of service could be dropped from funding under a program, while others are continued at the original levels, and so forth. The only requirement apparently would be that the changes reduce spending and that the requirements to use the unallotment power have been met.

These program and eligibility requirements are specified by statute and are often the subject of extensive and vigorous debate in the legislature. Allowing the executive to amend or modify these statutory rules (even if only for one or two fiscal years), in effect, is the equivalent of giving the executive the authority to rewrite the statutes and change policies. This goes beyond the need to respond to a fiscal emergency and to prevent spending money that the state does not have, since reductions could be made proportionately in a manner consistent with the enacted statute and existing policy. For example, property tax refunds could be proportionately reduced, rather than totally eliminating some recipients from the program and cutting other recipients by small amounts or not at all.

Furthermore, it can result in imposition of *de facto* laws or policies that have never received the consent of the legislature. The PTR for renters at issue in this case illustrates that point. Governor Pawlenty's budget proposed statutory change to the PTR law that would have reduced the statutory percentage of rent constituting property taxes from 19 percent to 15 percent.[16] The legislature considered this recommendation and determined not to include it in its

[16] Governor's Budget Recommendation, Fiscal Years 2010 – 2011, Tax Policy, Aid and Credits, p. 17, available at: http://www.finance.state.mn.us/gov-bud-10.

budget bills. Using the unallotment power, however, the executive branch has essentially re-written PTR formula rules for one fiscal year to be consistent with its budget proposal, which never passed the legislature.

Since the legislature must enact changes in statutes and since the constitutional procedures under Article IV must be followed in doing so, interpreting the unallotment statute to grant such expansive powers to the executive raises grave constitutional concerns and questions under the separation of powers doctrine. A standard rule of construction is to construe statutes in a manner that avoids violation of the constitution. See, e.g., *McLane Minnesota, Inc., v. Commissioner of Revenue,* 2009 WL 2959230 (Minn. 2009) ("We are guided by the presumption that the legislature does not intend to violate the U.S. Constitution; therefore, we must place a construction on the statute that will make it constitutional if at all possible."). Given the potential violations of separation of powers that would result from an expansive reading of the statutory authority, the Court should follow the plain meaning of "suspend and defer" and not read this as authorizing the executive to change the percentage of rent constituting property taxes under section 290A.03, subdivision 11.

D. If the Unallotment Statute allows the Executive to Rewrite the PTR Program Parameters, it violates the Separation of Powers.

For the reasons stated in part II of this brief, if the unallotment statute authorizes Defendants to modify the statutory definition of separation of powers it violates the separation of powers. Given the legislature's explicit rejection of the administration's budget proposal to do this and the fact that it makes a significant policy change that goes beyond a straightforward spending reduction, this provides a compelling case that Defendants' action are the equivalent of

making a complete law, as outlined in *Lee v. Delmont*.

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