A10-64

State of Minnesota
In Supreme Court

Deanna Brayton, *et al.*,

Respondents,

vs.

Tim Pawlenty, Governor of the State of Minnesota, *et al.*,

Appellants.

BRIEF OF AMICI CURIAE LEAGUE OF MINNESOTA CITIES, CITY OF MINNEAPOLIS, CITY OF SAINT PAUL, COALITION OF GREATER MINNESOTA CITIES, METRO CITIES AND MINNESOTA ASSOCIATION OF SMALL CITIES

LEAGUE OF MINNESOTA CITIES
Thomas L. Grundhoefer (#150320)
Susan L. Naughton (#259743)
145 University Avenue West
St. Paul, Minnesota 55103-2044
(651) 281-1232

Attorneys for Amici Curiae

[Counsel for the parties appear on inside cover]

LORI SWANSON
Attorney General
State of Minnesota
ALAN I. GILBERT (#0034678)
Solicitor General
JOHN S. GARRY (#0208899)
Assistant Attorney General
JEFFREY J. HARRINGTON (#0327980)
Assistant Attorney General
445 Minnesota Street, Suite 1100
Saint Paul, Minnesota 55101-2128
(651) 757-1450

Attorneys for Appellants

MID-MINNESOTA LEGAL ASSISTANCE
Galen Robinson (#165980)
David Gassoway (#389526)
430 First Avenue North, Suite 300
Minneapolis, Minnesota 55401
(612) 332-1441

Rolonda J. Mason (#194487)
830 West St. Germain, Suite 300
P.O. Box 886
St. Cloud, Minnesota 56302
(320) 253-0121

Attorneys for Respondents

PATRICK D. ROBBEN (#0284166)
General Counsel to
Governor Tim Pawlenty
Office of Governor
130 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
Saint Paul, Minnesota 55155
(651) 282-3705

Attorney for Appellant
Governor Tim Pawlenty

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LEGAL ISSUE

Did the governor's June 2009 unallotment of unexpended appropriations violate the plain language and legislative intent of Minn. Stat. § 16A.152 ("the unallotment statute") when the unallotment decision was announced before the biennium began and after the appropriations had been enacted into law by the governor and the legislature in May of 2009 with full knowledge of a projected deficit?

The district court held that the governor's unallotment action did not comply with the unallotment statute and violated constitutional separation of powers.

STATEMENT OF IDENTITY OF AMICI

The League of Minnesota Cities ("LMC") has a voluntary membership of 830 out of 854 Minnesota cities.[1] The LMC represents the interests of Minnesota cities before courts and other governmental bodies and provides a variety of services to its members including information, education, training, policy-development, risk-management and advocacy services. The LMC's mission is to promote excellence in local government through effective advocacy, expert analysis and trusted guidance for all Minnesota cities.

The cities of Minneapolis and Saint Paul are home rule charter cities incorporated in 1867 and 1854 respectively. The combined populations of these two cities represent 13 percent of the population of the state as a whole, and 29 of the 201 state legislators are elected by citizens of these two cities.

The Coalition of Greater Minnesota Cities ("CGMC") is a non-partisan association of 76 cities throughout greater Minnesota. For more than 30 years, the CGMC has united greater Minnesota cities with similar concerns. Its mission is to develop viable, progressive communities for businesses and families through strong economic growth and good local government. The CGMC supports fair property taxes, good land use planning, sensible environmental regulation, a balanced transportation system, and effective economic development tools to meet that goal.

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[1] Pursuant to Minn. R. Civ. App. P. 129.03, City Amici certify that this brief was not authored in whole or in part by counsel for either party to this appeal and that no other person or entity besides the LMC made a monetary contribution to its preparation or submission.

Metro Cities has a voluntary membership of 80 cities. Metro Cities was created in 1974 as the Association of Metropolitan Municipalities. Its primary objective is to be an effective voice for metropolitan cities at the Legislature and the Metropolitan Council, so as to influence state legislation affecting metro area cities, and regional policies that accommodate the needs of metro area cities.

The Minnesota Association of Small Cities has a voluntary membership of over 300 cities with a population of 5,000 people or less. Its purpose is to stimulate communication among small cities and to facilitate an interchange of ideas among those communities.

STATEMENT OF INTEREST OF AMICI

City Amici have a public interest in ensuring that Minn. Stat. § 16A.152 ("the unallotment statute") is not misinterpreted – contrary to its plain language and legislative intent – to vest broad authority in the executive branch of government to bypass constructive negotiation with the legislature to address a budget deficit that affects all Minnesotans. City Amici believe that the integrity of our state's budgeting process, of which cities and other local governments are direct beneficiaries, is vitally dependent on a constructive dialogue between the executive and legislative branches of government. City Amici believe that, except in cases of true fiscal emergencies, the process for addressing fundamental decisions about how the state and local governments are to be funded should not exclude the legislature which affords the broadest base of representation to Minnesota citizens. City Amici are committed to maintaining a governmental system that remains true to the principles of good governance that have

guided our state through difficult times in the past. These principles are so important to Minnesota cities that the six City Amici have joined in this brief even though not all Minnesota cities were directly impacted by the unallotments at issue in this appeal.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Minnesota citizens elected 201 state legislators to make difficult policy decisions about how best to appropriate state funds in the context of a $2.7 billion deficit that was forecasted before the current biennium began. The governor, in an unprecedented manner, usurped legislative authority by using the unallotment statute to unilaterally reorder appropriation priorities without input from the legislature.[3] As soon as the governor signed the appropriation bills (but before the legislature passed the tax bill that created a balanced budget) the governor announced that he would not sign any bill containing a tax increase and would use his unallotment authority to make up the deficit. *See* Minn. Session Laws 2009, chs. 36, 37, 78, 79, 83, 93-96, 101, 126, 143, 172 (appropriation bills); House File 885, ch. 77 (tax bill).

The governor justified his unallotment decision based on a claim that receipts would be "less than anticipated" even though the exact same estimate of receipts (the

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[2] Of the 854 Minnesota cities, 399 cities lost aid and/or credits during 2009, and 400 cities will lose aid and/or credits during 2010 under the unallotments at issue in this appeal. *See Proposed City Unallotments 2009 & 2010,* League of Minnesota Cities (revised June 17, 2009) http:www.lmc.org/media/document/1/cityunallot2009_2010.pdf.

[3] This application of the unallotment statute was unprecedented in its timing and size. The governor announced his intent to use the unallotment statute before the start of the fiscal biennium, and the unallotments, which are nearly ten times larger than any previous unallotments, were made at the first available opportunity in the biennium. *See* Peter S. Wattson, Senate Counsel, *Legislative History of Unallotment Power* (June 29, 2009).

February 2009 forecast) was used by the governor as the basis to propose his budget and as the basis to execute the unallotments. *See* June 4, 2009 letter from the Commissioner of the Minnesota Management & Budget ("MMB") to Governor Pawlenty. Appellants' Add. at Add. 5; Appellants' App. at A67. The governor also claimed that the amount available for the remainder of the biennium would be "less than needed" even though the biennium had not yet begun and there was still time for the legislature to be involved in a process to address the deficit created by the governor's veto of the tax bill. The governor's calculated and expansive use of the unallotment statute to bypass constructive negotiations with the legislature eviscerated the legislature's constitutional power of appropriation and creates a dangerous precedent for future use of the unallotment statute as a political weapon.

This City Amici brief focuses on the statewide significance of this appeal for Minnesota cities and on why the unallotment statute should be narrowly construed to require that any determination that the statutory criteria have been met must be objectively reasonable and not based on purely subjective standards. The unallotment statute should be narrowly construed because it provides an exception to the legislative power of appropriation under the Minnesota Constitution and because a narrow construction is good public policy. Under a narrow construction of the unallotment statute, the same estimate of receipts that is used as the basis for making budgeting decisions must also serve as the basis for determining what receipts have reasonably been "anticipated." In addition, under a narrow construction of the unallotment statute, it is clear (at a minimum) that it cannot reasonably be determined that the criteria of the

unallotment statute have been satisfied before the biennium has begun or at the beginning of the biennium.

It is important to point out that City Amici are not challenging the constitutionality of the unallotment statute. City Amici believe that within proper parameters, it is reasonable for the executive branch to have the ability to respond to unanticipated fiscal emergencies. City Amici are, however, challenging the particular application of the unallotment statute in this case because it is contrary to the plain language and legislative intent of the unallotment statute and because it establishes bad public policy. City Amici urge this Court to affirm the district court's decision and hold that the unallotments were not authorized by the unallotment statute.

STATEMENT OF THE CASE AND THE FACTS

City Amici concur with Respondents' statement of the case and facts.

LEGAL ARGUMENT

I. The resolution of this appeal will have a significant, statewide impact on Minnesota cities.

All Minnesota cities will be affected by the resolution of this appeal in which this Court will interpret the parameters of the unallotment statute for the first time. The particular unallotments at issue were part of a larger set of unallotments made by the executive branch to address a $2.7 billion deficit in the state's biennial budget. These unallotments included approximately $192 million of cuts to city aids and credits. Of the $192 million, $64.2 million of cuts ($44.6 million from Local Government Aid and $19.6 million from Market Value Homestead Credits) were implemented through reductions in

the July, October and December payments in 2009. *See 2009/2010 LGA and MVHC Unallotment FAQ,* League of Minnesota Cities (updated Dec. 22, 2009) http:www.lmc.org/media/document/1/unallotment_faq.pdf. The remaining $128 million ($102.3 million from Local Government Aid and an estimated $25.9 million from Market Value Homestead Credits) was effectuated on February 1, 2010, and is scheduled to be withheld from the July, October and December payments in 2010. *Id.* These cuts to city aid and credits were made unilaterally by the governor without input from the 201 state legislators elected to represent the people of Minnesota.

These cuts have had drastic ramifications for city budgets across the state. For example, in Minneapolis, the 2009 unallotments resulted in a cut of funding of $8.5 million in 2009, and are anticipated to result in an additional $21.3 million of cuts in 2010. This cut in funding caused the elimination of numerous positions including 25 sworn police officer positions (15 of which were hired back through the use of temporary federal funding) and 30 non-sworn civilian administrative positions in the Minneapolis Police Department. The unallotments also resulted in a $3 million reduction in the City's Public Works general operating budget, which directly impacts the City's ability to perform basic street maintenance and repair, including pothole repair. This cut is the equivalent of one third of the City's annual budget for street maintenance and repair. Examples of other cuts caused by the unallotments include cuts to the City's public health department, the closing of the public health lab, which performed drug analysis for the Minneapolis Police Department, and reductions in the City's 311 public information services.

Likewise in Saint Paul, the unallotments resulted in a cut of funding of $5 million in 2009, and are anticipated to result in an additional $11.6 million of cuts in 2010. The unallotments in Saint Paul caused a reduction in force of 127 employees. This reduction in force in turn created a significant loss of city services for the citizens of Saint Paul, including the loss of 22 police officer positions, the closure or reduction in programming for eight recreation centers, and a reduction in library hours.

The unallotments have also had a drastic impact on smaller cities that tend to have limited means of generating revenue and rely heavily on state aids and credits to balance their budgets. For example, the City of Madelia, in south central Minnesota, has a population of 2,252, and state aids and credits account for approximately 44% of the City's general fund revenue. In Madelia, the unallotments resulted in a cut of funding of $47,216 in 2009, and are anticipated to result in an additional $108,945 of cuts in 2010. In response to the unallotments, Madelia chose not to replace two full-time positions lost through attrition. This loss of a police officer and utilities commissioner represents a 13.33% reduction in the city's full-time workforce. Madelia was also forced to cancel street sealing and road repair scheduled for 2010, and the city has no funding left for replacing municipal equipment.

And finally, the resolution of this appeal will affect the state's future budgeting process, and therefore, will have additional repercussions for cities. Cities receive many forms of state aids and credits, including local government aid, agricultural and non-agricultural market value homestead credits, police and firefighter pension aids, Public Employees Retirement Association pension aid, wetlands reimbursement credits, disaster

credits, border city disparity credits, supplemental homestead property tax relief, and senior property tax deferral reimbursements. As a result, cities have a vital interest in protecting the integrity of the constitutional process relating to the appropriation of state funds.

II. The unallotment statute must be narrowly construed when ascertaining its legislative intent because it is an exception to the legislature's constitutional power of appropriation.

City Amici concur with the arguments of Respondents and their other supporting amici regarding why the unallotments in this case violated the plain language of the unallotment statute. As articulated in those briefs and as set forth in Ramsey County District Court Judge Gearin's decision, City Amici believe that there is no way in which the events that led up to the governor's unallotment decision can reasonably be construed as "unanticipated" under the plain language of the unallotment statute. City Amici will not repeat the plain-language arguments here. Instead, this brief focuses on why the unallotments were invalid even if this Court were to find ambiguity in the unallotment statute.

When interpreting the unallotment statute, it is important to remember that the "object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16. The unallotment statute provides in relevant part:

> (a) 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.

(b) An additional deficit shall, with the approval of the governor, and after consulting the legislative advisory commission, be made up by reducing unexpended allotments of any prior appropriation or transfer. 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.

Minn. Stat. § 16A.152, subd. 4.

The obvious question is whether the governor's unallotment decision was authorized under the plain language and legislative intent of the unallotment statute. Again, City Amici believe that the governor's unallotment decision was not authorized under the plain language of the unallotment statute. However, even if this Court were to find ambiguity in the unallotment statute, the governor's unallotment decision was still invalid because it was contrary to unallotment statute's obvious legislative intent.

A. A narrow construction of the unallotment statute is consistent with this Court's precedent.

The appropriation of state funds is the responsibility of the legislature under Minn. Const. art. XI, § 1 (providing that an "appropriation" must be made "by law"). The unallotment statute provides an exception to the legislature's power of appropriation and delegates limited legislative authority to the executive branch to reduce unexpended appropriations. Because the unallotment statute provides an exception to the legislature's constitutional power of appropriation, it should be narrowly construed to avoid usurpation by the executive branch of the legislature's constitutional power of appropriation.

This Court previously adopted a narrow-construction rule when discerning the scope of the governor's line-item veto authority under Minn. Cost. art. IV, § 23 – a constitutional provision containing a similar exception to the legislature's constitutional power of appropriation. *Inter Faculty Org. v. Carlson,* 478 N.W.2d 192 (Minn. 1991). This Court reasoned that the governor's line-item veto authority must be narrowly construed to prevent unwarranted usurpation by the executive branch of powers granted to the legislature by the Minnesota Constitution.

> When interpreting a constitutional provision, we, of course, look first to the specific language of that provision. In doing so with regard to this line item veto authority, two observations are necessary. First, the power is located in Article 4, the Legislative Department Article, demonstrating that the authority is not an executive function in the traditional or affirmative sense, but rather an exception to the authority granted the legislature. As an exception, the power must be narrowly construed to prevent an unwarranted usurpation by the executive of powers granted the legislature in the first instance.

Id. at 194 (citation omitted).[4] Based on this narrow-construction rule, this Court held that the governor's line-item veto of an estimated sum for noninstructional expenditures was invalid because the bill itself did not identify any specific amount. *Id.* at 197.

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[4] Similar narrow-construction rules have been adopted by the Supreme Court and courts in other jurisdictions. *See, e.g., Nat'l Cable Television Ass'n, Inc. v. United States,* 94 S. Ct. 1146, 1149 (1974) (adopting a narrow interpretation of a federal statute authorizing a federal agency to impose subscriber fees in order to avoid constitutional issues regarding the improper delegation of the legislature's power of taxation); *Rants v. Vilsack,* 684 N.W.2d 193, 202 (Iowa 2004) (governor's veto authority must be "construed narrowly, and any doubt over the extent of the power should be resolved in favor of the traditional separation of governmental powers ") (internal quotations omitted); *Riley v. Joint Fiscal Comm. of the Alabama Legislature,* 2009 WL 1716905, __ So.3d __ (Ala. 2009) (governor's line-item veto authority must be "narrowly or strictly construed so as not to thwart the lawmaking powers of the legislative department") (citation omitted).

City Amici urge this Court (in a case of first impression) to adopt a narrow-construction rule for the unallotment statute because it would be good public policy and because it would be consistent with this Court's precedent. The unallotment statute should be narrowly construed because it provides an exception to the legislature's constitutional power of appropriation, and a narrow-construction of the statute will prevent the usurpation of legislative power by the executive branch.

Appellants will undoubtedly argue against the adoption of a narrow-construction rule by attempting to distinguish the unallotment statute as implicating only the executive's power of spending and not the legislature's power of appropriation.[5] The Supreme Court of Florida specifically rejected an argument that its unallotment statute did not implicate the legislative power of appropriation.

> The Commission nevertheless argues the ability to balance the budget through the reduction process of chapter 216 does not encompass a delegation of legislative power. Rather, it contends that reducing the budget is not the same as "appropriating."
>
> We construe the power granted in section 216.221(2) as precisely the power to appropriate. The legislative responsibility to set fiscal priorities through appropriations is totally abandoned when the power to reduce, nullify, or change those priorities is given over to the total discretion of another branch of government.

Chiles v. Children A, B, C, D, E, and F, etc., 589 So.2d 260, 265 (Fla. 1991). In fact, this Court's narrow-construction of the governor's line-item veto authority in *Inter Faculty*

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[5] It is important to note that Appellants and their supporting amici have advanced their arguments about the executive spending power in order to support their position that the unallotment statute is constitutional because it does not delegate purely legislative power. However, City Amici are urging this Court to adopt a narrow-construction rule simply as a method of statutory construction and not as a basis for overturning the unallotment statute on constitutional grounds.

Org. is particularly relevant in this case because under the governor's expansive interpretation of the unallotment statute, unallotment authority effectively acts the same as veto authority. For example, under the governor's interpretation of the unallotment statute, a governor could hypothetically choose to unallot an appropriation even after the governor's veto of that same appropriation has been overridden by the legislature.

Further, even if this Court were to conclude that the unallotment statute implicates the executive's spending power to some degree, it must surely conclude that the legislature's appropriation power is also implicated and that the unallotment statute involves an overlap of legislative and executive power. For example, a review of the governor's unallotment decision demonstrates that that governor's alleged decision "not to spend" also clearly involved the governor's decision to reorder the legislature's appropriation priorities by eliminating or reducing funding to some programs while sparing others without input from the legislature. City Amici believe that a narrow-construction rule should be used to interpret the terms of any delegation of legislative authority to another branch of government in order to avoid the usurpation of legislative powers.

In 2004, the court of appeals rejected a proposed "narrow reading" of a particular provision of the unallotment statute as inconsistent with a contextual reading of the statute as a whole. *Rukavina v. Pawlenty,* 684 N.W.2d 525, 534 (Minn. Ct. App. 2004). It is clear, however, that the court of appeals did not directly address the broader, more important issue of whether the terms of the unallotment statute as a whole should be narrowly construed to prevent usurpation by the executive branch of the legislature's

constitutional power of appropriation. In addition, the facts in *Rukavina* are dramatically different from those in this case.

In *Rukavina*, the governor unallotted unexpended appropriations to avoid an admitted and imminent fiscal emergency created by unanticipated revenue shortfall that occurred in the last months of the biennium. In contrast, in this case, the governor committed himself to using his unallotment authority before the biennium had even begun announcing his clear intent to avoid the robust debate on appropriations and spending that the separation of powers requires. The governor then proceeded to execute the unallotments even though the deficit was anticipated before the biennium began, the unallotments were implemented at the first available opportunity in the biennium, the governor signed the legislature's appropriation bills, and it was the governor's own veto of the tax bill that created the deficit.

B. Under a narrow construction of the unallotment statute, any determination that the statute's criteria have been satisfied must be objectively reasonable and not based on purely subjective standards.

When interpreting the unallotment statute (under either its plain language or a narrow-construction rule), there simply must be some objective criteria for determining when "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." Unallotment authority should not be triggered based on a purely subjective determination that the statute's criteria have been met.

1. **A reasonable determination of what receipts have been "anticipated" must be based on the receipts that were used as the basis for budgeting decisions.**

City Amici suggest that under a narrow construction of the unallotment statute, a reasonable determination of what receipts have been "anticipated" must be based on the receipts that were the basis for the proposed budget – in this case the February 2009 forecast of state revenue and expenditures required under Minn. Stat. § 16A.103, subd. 1 and not the monthly revenue collection reports required under Minn. Stat. § 16A.103, subd. 1d. Because the February 2009 forecast was clearly anticipated before the biennium began and the budget was proposed, Appellants cannot plausibly argue that subsequent monthly revenue collection reports justified the unallotments by providing evidence of a reduction in receipts that was not anticipated. This argument is disingenuous at best because (as pointed out by the amicus curiae brief submitted by the Minnesota House of Representatives in the district court) the governor used the February 2009 forecast to prepare his budget proposals and then later to calculate the unallotments. Amicus Curiae Brief from the Minnesota House of Representatives at 5-7.

In addition, there are several reasons why the monthly revenue collection reports should not be used to trigger the extraordinary power of unallotment. First, the monthly revenue collection reports are subject to periodic fluctuations in contrast with the forecasts of state revenue and expenditures, which provide a longer-range projection.[6]

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[6] Monthly reports from the MMB contain a disclaimer similar to the one dated March 10, 2009 that states "[m]onthly revenue variances should be interpreted with great caution. Wide swings in variances may be caused by variations in the rate at which receipts are

Second, the monthly revenue collection reports only contain information on revenue and do not provide information on expenditures. The unallotment statute requires that two conditions be met: first that "receipts for the general fund will be less than anticipated," and second, that "the amount available for the remainder of the biennium will be less than needed." This second condition requires projections of both receipts and expenditures, and the monthly revenue collection reports only contain information on receipts. And finally, the monthly revenue collection reports that were available to the governor before he took unallotment action in 2009 related to revenue collections for the 2008-2009 biennium and not the 2010-2011 biennium for which the unallotments were implemented.

2. It cannot reasonably be determined that the criteria of the unallotment statute have been satisfied before the biennium has begun or at the beginning of the biennium.

The timing of any determination that the criteria of the unallotment statute have been satisfied must also be objectively reasonable. At a minimum, City Amici urge this Court to conclude that such a determination cannot reasonably be made before the biennium has even begun or at the beginning of the biennium. For example, when the governor announced his intent to unallot (before the biennium had even begun), he could not have reasonably determined that "the amount available for the remainder of the biennium will be less than needed" given the fact that there was still time for the legislature to address the deficit created by the governor's own veto of the tax bill. Likewise, the governor could not have reasonably determined at the beginning of the

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received and processed or differences in the rate at which refunds are issued. All numbers are preliminary and subject to revision."

biennium that "receipts from the general fund will be less than anticipated" when both the governor and the legislature were aware of the February 2009 forecast before the biennium began, and it was the February 2009 forecast that was the governor's basis for proposing the budget and for executing the unallotments.

C. A narrow construction of the unallotment statute is consistent with its legislative intent.

Minn. Stat. § 645.16 provides in relevant part:

> [w]hen the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters:
>
> (1) the occasion and necessity for the law;
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> (2) the circumstances under which it was enacted;
>
> (3) the mischief to be remedied;
>
> (4) the object to be attained;
>
> (5) the former law, if any, including other laws upon the same or similar subjects;
>
> (6) the consequences of a particular interpretation;
>
> (7) the contemporaneous legislative history; and
>
> (8) legislative and administrative interpretations of the statute.

A narrow construction of the unallotment statute fulfills its legislative intent because it is consistent with the occasion and necessity for the law, the circumstances under which it was enacted, the mischief to be remedied, the object to be attained and its contemporaneous legislative history.

The unallotment statute was enacted in 1939 in the context of the Great Depression at Governor Harold Stassen's recommendation. *See* Minn. Session Laws 1939, ch. 431, art. II, § 16; *Budget Message of Governor Harold E. Stassen Delivered to*

a Joint Session of the Senate and House of Representatives (Feb. 1, 1939) (visited Feb. 18, 2009) http://archive.leg.state.mn.us/docs/2008/other/080624.pdf. When Governor Stassen took office, the budget was in substantial deficit because revenues had fallen short of expectations.

> I [Governor Stassen] meet with you [state legislators] personally, because this problem of our budget, our expenditures, and our tax program is the most vital problem that is before us and affects to a major extent every citizen of our state and every business and activity of our people.

Id.

The legislature adopted the unallotment statute to allow Governor Stassen to address a true fiscal emergency due to deficits that occurred during the end of the biennium because of unexpected drops in revenue – not to address reduced revenues that were anticipated at the beginning of the biennium. In short, the unallotment statute was adopted in a spirit of cooperation between the legislative and executive branches to provide a mechanism to address true fiscal emergencies – not to provide governors with a trump card to avoid constructive negotiation with the legislature.

Further, the unallotment statute has historically been used sparingly and all of the previous unallotments were undertaken toward the end of the fiscal biennium to address shortfalls that were not effectively addressed during the course of that biennium. *See* Peter S. Wattson, Senate Counsel, *Legislative History of Unallotment Power,* 4-13 (June 29, 2009). In over 70 years, no other governor (regardless of party) has used, or has even suggested using, the unallotment statute the way it was used in this case. There simply has been no precedent for the governor's calculated use of the unallotment statute in

which he unilaterally triggered the conditions in the unallotment statute at the beginning of the biennium and then used unallotments to reorder the legislature's appropriation priorities by eliminating or reducing aid to some programs while sparing others.

D. The Commissioner's interpretation of the unallotment statute is not entitled to deference when ascertaining legislative intent.

The interpretation of a statute is a question of law subject to de novo review. *Brookfield Trade Ctr., Inc. v. County of Ramsey,* 584 N.W.2d 390, 393 (Minn. 1998). Appellants agree that the unallotment statute is subject to de novo review, but erroneously claim that the Commissioner's interpretation of the unallotment statute is entitled to deference if this Court finds it ambiguous. Appellants' Br. at 11, 21-22. City Amici agree that an agency's interpretation of an ambiguous statute may be entitled to deference under certain conditions. But the conditions necessary to trigger deference have definitely not been satisfied in this case. As a result, the Commissioner's interpretation of the unallotment statute is not entitled to deference and should not be considered by this Court when attempting to ascertain the legislative intent of the unallotment statute. *See* Minn. Stat. § 645.16(8).

This Court has consistently held that an agency's interpretation of a statute is entitled to deference when the agency has "expertise" or "special knowledge" in a particular field of technical training, education or experience relevant to a regulation's enforcement or administration. *See, e.g., Reserve Mining Co. v. Herbst,* 256 N.W.2d 808, 824 (Minn. 1977); *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency,* 644 N.W.2d 457, 464 (Minn. 2002). In 2007, this Court clarified the test for determining

when an agency's interpretation of a regulation that was not promulgated by the agency is entitled to deference. This Court held that an agency charged with "day-to-day" responsibility for enforcing and administering a regulation is entitled to deference when interpreting that regulation if its terms are ambiguous and the agency's interpretation is reasonable. *In re Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater,* 731 N.W.2d 502, 513, 516 (Minn. 2007). This Court also noted, however, that in order to determine whether an agency's interpretation is reasonable, courts should consider whether the agency has an "expertise" or "special knowledge" and whether the "regulation's language is so technical in nature that the agency's field of technical training, education, and experience is necessary to understand the regulation." *Id.* at 516.

The MMB dramatically fails to meet this test. First, the MMB does not have responsibility for "day to day" enforcement or administration of the unallotment statute such that it can be considered its own regulation. Indeed, the unallotment statute has only been implemented five times since 1939, and the MMB does not have traditional agency responsibilities for its "day-to-day" enforcement or administration. *See* Peter S. Wattson, Senate Counsel, *Legislative History of Unallotment Power* (June 29, 2009). Further, the MMB's interpretation of the unallotment statute in this case was unprecedented. The unallotment statute has never before been used by a governor at the beginning of a biennium in response to a breakdown in budget negotiations between the legislative and executive branches. And finally, interpretation of the unallotment statute does not call for any particular expertise or special knowledge in contrast, for example, with the

complex federal regulations governing water quality standards at issue in the *Annandale and Maple Lake* decision which required the scientific and technical expertise of the Minnesota Pollution Control Agency when enforcing and administering wastewater permits.

E. A narrow construction of the unallotment statute is supported by other established canons of statutory construction.

1. Public interest over private interest – Minn. Stat. § 645.17(5).

Several established canons of statutory construction also support a narrow construction of the unallotment statute. For example, when determining legislative intent, courts may presume that the legislature intends to favor the public interest as against any private interest. Minn. Stat. § 645.17(5); *Knopp v. Gutterman,* 102 N.W.2d 689, 695 (Minn. 1960) (noting that government questions must not be determined along technical lines but that broad and practical considerations should control).

The framers of the Minnesota Constitution have already determined that it is in the public interest to have appropriation decisions made by the legislature and not by the executive branch. *See* Minn. Const. art. XI, § 1; Minn. Const. art. III, § 1. It is in the public interest to have the legislature make appropriation decisions because the legislature is the body of government that provides the largest base of representation for Minnesota citizens.

> We must not forget that the voice of the legislature is the voice of the sovereign people, and that, subject only to such limitations as the people have seen fit to incorporate in their Constitution, the Legislature is vested with the sovereign power of the people themselves.

Leighton v. Abell, 31 N.W.2d 646, 655 (Minn. 1948); *See also, Chiles v. Children A, B, C, D, E, and F, etc.,* 589 So.2d 260, 267 (Fla. 1991) (noting the importance of the legislative power of appropriation because "only the legislature, as the voice of the people, may determine and weigh the multitude of needs and fiscal priorities of the State").

It is also in the public interest to interpret the unallotment statute in a way that prevents the governor from using the unallotment statute as a trump card to bypass constructive negotiation with the legislature. The context of the adoption of the unallotment statute and its historical use confirm that it was not intended to serve as a political weapon. In short, a narrow interpretation of the unallotment statute is in the public interest because it protects the integrity of our governmental system.

Appellants claim that their interpretation of the unallotment statute favors the public interest essentially because it prevented a government shut-down. Appellants' Br. at 18-21. The fatal flaw with this argument is that it presents the false dichotomy of either unallotment or a government shut-down and ignores the other options available. The governor had a variety of other tools to avoid a government shut-down. For example, he could have chosen to use his veto authority (Minn. Const. art. IV, § 23) or to call the legislature into special session (Minn. Const. art IV, § 12). The governor also could have chosen to delay various payments to ensure that the government had sufficient funds to continue operating. *See, e.g.,* Minn. Stat. § 127A.46 (authorizing the delay of payments of aids and credits to school districts). And finally, it is important to emphasize again that the governor prematurely declared a fiscal emergency and unalloted at the

beginning of the biennium when there was still time for the legislature and the governor to engage in a constructive dialogue to reach an agreement about how to address the deficit without the need for either unallotment or a government shut-down.

2. The legislature does not intend a result that is absurd or unreasonable – Minn. Stat. § 645.17(1).

When determining legislative intent, courts may also presume that the legislature does not intend a result that is absurd or unreasonable. Minn. Stat. § 645.17(1); *American Tower, L.P. v. City of Grant,* 636 N.W.2d 309 (Minn. 2001) (courts should not construe a statute to lead to an absurd result if the language will reasonably permit another construction). If the unallotment statute is not narrowly construed to require unallotment determinations to be objective reasonable, it could result in illogical and absurd results. As mentioned previously, if unallotment authority can be triggered based on purely subjective standards, a governor could hypothetically choose to unallot an appropriation that he first rejected using his line-item veto even after the legislature has voted to override that veto. Or a governor could hypothetically choose to unallot and reorder appropriation priorities based on any type of report demonstrating a decline in receipts by as little as $1. Finally, it is truly absurd to think that the legislature would have ever intended to relinquish its constitutional power of appropriation to the executive branch at the beginning of the biennium when there has simply been a breakdown in budget negotiations.

3. The legislature does not intend a result that violates the Minnesota Constitution – Minn. Stat. § 645.17(3).

When interpreting statutes, courts may presume that the legislature does not intend to violate the Minnesota Constitution. Minn. Stat. § 645.17(3); *Hutchinson Technology, Inc. v. Comm'r of Revenue,* 698 N.W.2d 1, 14 (Minn. 2005) (courts should interpret a statute to preserve its constitutionality). A narrow construction of the unallotment statute is necessary to avoid constitutional issues because, by requiring unallotment determinations to be objectively reasonable, it ensures that there will be "a reasonably clear policy or standard of action" to determine when unallotment action can be taken and to prevent unallotment authority from being triggered at the subjective "whim or caprice" of the executive branch. *See Lee v. Delmont,* 36 N.W.2d 530, 538 (Minn. 1949) (holding that statutes that delegate legislative authority must have a reasonably clear policy or standard of action to guide the use of that authority).

Indeed, it is these reasonably clear standards that protect Minnesota's unallotment statute from being overturned on constitutional grounds. *See, e.g., State v. Fairbanks North Star Borough,* 736 P.2d 1140 (Alaska 1987) (section of Executive Budget Act that allowed the governor to withhold or reduce appropriations in view of anticipated revenue shortfalls was an unconstitutional delegation of legislative power because it did not contain adequate guidance or limitation); *Chiles v. Children A, B, C, D, E, and F, etc.,* 589 So.2d 260 (Fla. 1991) (statute authorizing executive branch commission to take steps to reduce state agency budgets to prevent a deficit was an unconstitutional delegation of legislative power because it did not contain adequate standards).

In summary, even if this Court concludes that the unallotment statute is a constitutional delegation of legislative authority, it must still determine how the language of that delegation should be interpreted. City Amici urge this Court to hold that the terms of the unallotment statute must be narrowly construed because the unallotment statute is an exception to the legislature's constitutional power of appropriation. A narrow construction of the unallotment statute that requires unallotment determinations to be objectively reasonable is consistent with its legislative intent, and it is good public policy.

CONCLUSION

The resolution of this appeal will have a significant, statewide impact on cities. Cities, as recipients of a wide variety of state aids and credits, have a vital interest in protecting the integrity of the constitutional process relating to the appropriation of state funds. Cities serve as representatives for their citizens who have experienced a significant loss of services based on the governor's unilateral decision to reorder the legislature's appropriation priorities and cut city aids and credits. Given the current state budget crises and continuing acrimony between the executive and legislative branches of government, there is reason to suspect that this will not be the last time the parameters of the governor's unallotment authority will be tested. It is City Amici's firm position that the unallotment statute should not be misinterpreted – contrary to its plain language and legislative intent – to allow the governor to bypass constructive negotiation with the legislature to address a budget deficit that affects all Minnesotans.

The unallotments at issue in this appeal violated the plain language and the legislative intent of the unallotment statute. The unallotment statute must be narrowly

construed because it is an exception to the legislature's constitutional power of appropriation. A narrow construction of the unallotment statute that requires unallotment determinations to be objectively reasonable is consistent with its legislative intent, and it is good public policy. For all of these reasons, City Amici respectfully request that this Court affirm the district court's decision.

Dated: February 23, 2010

Respectfully submitted,

LEAGUE OF MINNESOTA CITIES
CITY OF MINNEAPOLIS
CITY OF SAINT PAUL
COALITION OF GREATER MINNESOTA CITIES
METRO CITIES
MINNESOTA ASSOCIATION OF SMALL CITIES

By: 

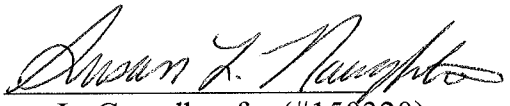
Thomas L. Grundhoefer (#150320)
Susan L. Naughton (#259743)
145 University Avenue West
St. Paul, Minnesota 55103-2044
Attorneys for *Amici Curiae*

CERTIFICATE OF BRIEF LENGTH

I certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. By automatic word count, the length of this brief is 6,359 words. This brief was prepared using Microsoft Word 2003.

Respectfully submitted,

Dated February 23, 2010

By: 

Thomas L. Grundhoefer (#150320)
Susan L. Naughton (#259743)
145 University Avenue West
St. Paul, Minnesota 55103-2044
Attorneys for *Amici Curiae*