

Case No. A10-64

State of Minnesota
Supreme Court

Deanna Brayton, et al.,

Respondents,

v.

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

Appellants.

BRIEF OF *AMICUS CURIAE*
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INTRODUCTION¹

The Minnesota Legislature has a constitutional responsibility to make laws, including enacting the state budget. The Constitution requires that the budget be balanced at the end of a biennium. To protect the State from incurring debt due to an unanticipated reduction in revenue late in the biennium when the Legislature is not in session, in 1939 the Legislature enacted Minn. Stat. § 16A.152, subd. 4 (2008 & Supp. 2009) (“the unallotment statute”). Upon specified conditions, the unallotment statute allows the Executive to reduce the amount in the state’s budget reserve and then, if a deficit remains, reduce allotments of appropriations. Read properly, the statute does not, and was never intended to, grant the Executive the power to make or amend laws.

From 1939 through 2002, the statute was invoked only twice. Governor Tim Pawlenty used it twice more, both times well into the biennium.

But on the very first day of this biennium, July 1, 2009, the Executive unallotted about \$2.5 billion, almost ten times more, and ten months earlier, than any previous unallotment. These massive, untimely unallotments violated the statute. Moreover, in an unprecedented way, they revised statutes and eliminated entire programs, substantially undermining legislative priorities.

This case may be decided under the unallotment statute, without reaching any constitutional issues. In the event the Court accepts Appellants’ construction of the

¹ Pursuant to Minn. R. Civ. App. P. 129.03, the Minnesota House of Representatives (“the House”) states that it and its counsel authored this brief in its entirety. No person or entity other than the House made a monetary contribution to its preparation or submission.

statute, the Court must then determine whether the Executive exceeded his constitutional authority. The unallotment of the diet program at issue in this case is only one illustration of how the Executive's modification of laws and reordering of legislative priorities exceeded the power granted by the Minnesota Constitution.

SUPPLEMENTAL FACTUAL BACKGROUND

I. THE EXECUTIVE'S OWN ACTIONS LED TO THE BUDGET SHORTFALL USED TO JUSTIFY THE UNALLOTMENTS.

Appellants argue that the unallotments were authorized by statute and necessary to address a massive, unanticipated budget crisis. However, the undisputed facts show, and the District Court held, that the revenue shortfall was fully anticipated. The shortfall existed because the Executive decided to veto a revenue bill but not call back the Legislature.

A. The February 2009 Budget Forecast Projected a \$4.6 Billion Deficit for the 2010-2011 Biennium.

The law requires the Commissioner of Minnesota Management and Budget ("MMB Commissioner") to prepare "a forecast of state revenue and expenditures" and deliver it to the Legislature and the Governor in November and February. Minn. Stat. § 16A.103, subd. 1. These forecasts base the revenue calculations on current law and consider economic data and other information available at the time of the forecast. *Id.*, subd. 1a.

The MMB Commissioner's November 2008 Forecast predicted revenues of approximately \$31.8 billion for the 2010-2011 biennium. Respondents' Appendix ("App.") 39. The February 2009 forecast was released on March 3, 2009. The MMB

Commissioner revised downward his 2010-2011 revenue prediction to \$30.7 billion. The projected budget shortfall was about \$4.6 billion. App. 52-54.

B. The Governor Proposed a Budget for the 2010-2011 Biennium.

Minnesota operates on a biennial budget cycle. Minn. Stat. § 16A.11, subd. 6. The Minnesota Constitution requires a balanced budget at the *end of the biennium* by prohibiting general fund borrowing across biennia. Minn. Const. art. XI, § 6. To arrive at a budget for any particular biennium, the MMB Commissioner, under supervision of the Governor, prepares a biennial budget with projections of revenues and expenditures for the biennial budget and the following biennium. Minn. Stat. § 16A.04.

The Governor submitted his proposed budget for the 2010-2011 biennium in January, 2009, and later revised it to account for the February 2009 forecast.² His primary targets for spending reductions included aid to cities and counties, higher education, and health and welfare programs.

C. The Governor Approved the Legislature's Appropriations but Vetoed the Revenue Bill.

During its 2009 regular session, the Legislature passed and presented to the Governor appropriations bills (including expenditure reductions) for the fiscal 2010-2011 biennium. Between May 14 and May 22, 2009, the Governor signed all of the appropriations bills. *See* 2009 Minn. Laws, ch. 36, 37, 78, 79, 83, 93-96, 101, 126, 143, and 172. The Governor vetoed several line items in these bills, the largest of which was a

² March 2009 Governor's Revised Recommendations, available at <http://www.mmb.state.mn.us/doc/budget/bud-op/op10/table1.pdf>.

\$381 million cut that eliminated General Assistance Medical Care (GAMC) funding for fiscal year 2011.³

After the Governor's signatures and item vetoes, the projected deficit, without additional revenues, was approximately \$2.7 billion. The Legislature sought to close this shortfall by passing H.F. No. 2323 (Chapter 179), a bill that balanced the budget for the biennium by increasing taxes and delaying some expenditures.

After the legislature adjourned on May 18, the Governor vetoed H.F. No. 2323.⁴ By this veto, the shortfall between enacted appropriations and projected state revenues remained at about \$2.7 billion.⁵ The Governor publicly announced that he would not call a special session of the Legislature to balance the budget, but would instead invoke the unallotment statute.⁶

II. THE EXECUTIVE UNILATERALLY MODIFIED AND RESTRUCTURED THE STATE'S BUDGET PRIORITIES FOR THE 2010-2011 BIENNIUM.

By letter to the Governor dated June 4, 2009, the MMB Commissioner "determined, as defined in Minnesota Statutes 16A.152, that 'probable receipts for the general fund will be less than anticipated . . .'" App. 67. As the basis for this determination, the Commissioner cited the drop in revenues between the November 2008

³ See Veto Details, *Minnesota Legislature: 2009 Governor Timothy James Pawlenty*, available at <http://www.leg.state.mn.us/lrl/vetoes/vetodetails.asp>.

⁴ *Journal of the House 2009 Supplement*, p. 7481, available at <http://www.house.leg.state.mn.us/cco/journals/2009-10/Jsupp2009.htm#7481>.

⁵ Fiscal Analysis Department, Minnesota House of Representatives, *Chapter 179 (HF 2323/SF 2074) Conference Committee Report May 18, 2009 – Vetoed*, available at <http://www.house.leg.state.mn.us/fiscal/files/tax09.pdf>.

⁶ See Public Information Services, Session Daily (May 14, 2009), available at <http://www.house.leg.state.mn.us/hinfo/sessiondaily.asp?storyid=1888>.

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.* The Commissioner further stated: “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.*

On June 16, 2009, the Commissioner proposed approximately \$2.5 billion of unallotments and another \$200 million of administrative actions. App. 69-72, 79. The Governor approved these proposals on the first day of the biennium, July 1, 2009. App. 80-87, 91-98.

In carrying out these unallotments, the Executive unilaterally changed program formula definitions and other statutory provisions. For example, the Executive completely eliminated funding for both fiscal years 2010 and 2011 for the diet program at issue in this case. Following are only some of the many other instances where the Executive re-wrote duly enacted law.

A. The Executive Modified the Statutory Definition of “Rent Constituting Property Taxes.”

The statutory Property Tax Refund program pays refunds to renters whose rents 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. This percentage is applied to

a statutory formula that includes (1) rent paid; and (2) household income. Minn. Stat. § 290A.04, subd. 2a. (establishing the formula).⁷

The Executive's unallotment modified 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.

App. 93. Because the unallotment disregards the property tax refund formula as written in statute, 92 percent of renters who claim the refund will receive reduced refunds, and 6 percent will become completely ineligible.⁸

B. The Executive Changed the Statutory “Managed Care Withhold.”

The Commissioner of Human Services is authorized to contract with managed care organizations to deliver health care services to recipients of MinnesotaCare, Medical Assistance, and General Assistance Medical Care. Minn. Stat. § 256B.035. By statute, the Commissioner is directed to withhold five percent of managed care plan payments contingent on whether the plan meets certain performance criteria. Minn. Stat. § 256B.69 subd. 5a(c). Under law, an additional three percent of payments under prepaid Medical Assistance and GAMC plans for 2009 was withheld until July of the following year. Minn. Stat. § 256B.69 subd. 5a(d). This statute was amended in 2009 to increase the non-performance-based “withhold” by 0.5% per year beginning in 2010, up to 4.5% by

⁷ See House Research, Renter's Property Tax Refund Program (November 2009), available at <http://www.house.leg.state.mn.us/hrd/pubs/ss/ssrptrp.htm>.

⁸ See 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> [hereinafter, *Unallotment Summary*].

January 2012. 2009 Minn. Laws Ch. 79 § 46. The withhold was likewise amended in law to apply to county-based medical programs, but to exclude GAMC. *Id.*

The Executive's unallotment changed the law:

Implements an additional 1.5% managed care withhold starting on Jan. 1, 2010. The newly-enacted budget bill phases in an increased withhold over three years. This action has the effect of implementing the additional withhold percentage all at once, rather than phasing it in.

App. 97. In other words, the Executive unilaterally increased the statutory withhold immediately after the Legislature had passed a bill, that the Governor signed, on this very subject.

C. The Executive Altered the Statutory Fee-for-Service Medical Payment System.

Prepaid fee-for-service programs under Medical Assistance and General Assistance Medical Care may be used by beneficiaries to obtain a number of eligible medical services. *See* Minn. Stat. §§ 256D.03, subd. 4 and 256B.0625. The payments for both programs generally follow the same schedule set by the Commissioner of Health. *See* Minn. Stat. §§ 256D.01 subd. 1d, 256B.502-503. A statute passed by the 2009 Legislature reduced basic care and professional services rates by 3% and 5% respectively. 2009 Minn. Laws Ch. 79 sec. 51-53.

The Executive's unallotment changed the rates set by statute:

Temporarily reduces, by an additional 1.5%, fee-for-service rates paid to providers and vendors of basic care services under MA and GAMC in FY 2010 and 2011.

Temporarily reduces, by an additional 1.5%, fee-for-service rates paid for physician and professional services in FY 2010 and 2011.

App. 96. In other words, the Executive unilaterally modified a statutory formula that had just been enacted by the Legislature.

D. The Executive Changed the Statutory Requirements for Parental Participation in the Medical Assistance Program.

Medical Assistance is a program for needy persons whose resources are not adequate to meet the cost of health care. Minn. Stat. § 256B.01. Eligibility for MA is set by statute. For parents to be eligible, a household of two or more persons must not own more than \$20,000 in total net assets, and a household of one person must not own more than \$10,000 in total net assets. Minn. Stat. § 256B.056, subd. 3c.

By unallotment, the Executive reduced the statutory asset limits for parents on MA, effective January 1, 2011.⁹ The limit was reduced from \$10,000 to \$3,000 for a single person, and from \$20,000 to \$6,000 for a family of two or more. Thus, compared to statute, fewer parents will qualify, and others will have to spend down their assets to participate.

E. The Executive Modified Statutorily-Enacted Limits for Coverage of PCAs.

The personal care assistance (“PCA”) program helps MA recipients who are dependent in an activity of daily living. Minn. Stat. § 256B.0659, subd. 4. The 2009 Legislature placed a statutory cap on coverage of PCA services at 310 hours per month. *See* Minn. Stat. § 256B.0659, subd. 11(a)(10). Shortly after the Legislature made law on this statutory cap, the Executive, by unallotment, unilaterally reduced the cap to 275 hours. App. 96.

⁹ *Unallotment Summary* pp. 9-10.

F. The Executive Modified, and Even Eliminated, Other Programs Created and Funded By Statute.

Like his proposed budget, the Governor's unallotments primarily targeted education, health care, and local/county aid. For example, the reductions to Local Government Aid ("LGA"), were similar to the Governor's January 2009 budget proposal, except that the unallotments modified statute by exempting 454 small cities and 629 townships. In addition, the Executive completely eliminated at least seven programs, including the political contribution refund, emergency assistance to low-income families, and the diet program at issue in this litigation. *Id.* Finally, by an unallotment captioned "End GAMC Effective March 1, 2010," the Executive ordered the complete elimination of the GAMC program for the last three months of fiscal year 2010, accomplishing what the line item veto of GAMC funds for fiscal year 2011 could not.

III. THE EXECUTIVE'S UNALLOTMENTS ARE UNPRECEDENTED IN SIZE, TIMING, AND REWRITING OF STATUTES.

The unallotment statute was enacted during the Great Depression and has been in place in every economic downturn since. This is only the fifth time a governor has triggered the statute, but it is the third time for this Governor.

The largest previous unallotment was \$278 million in 2003. Each of the previous four unallotments was made well into the biennium, after a balanced budget was enacted and after revenues unexpectedly fell short of the forecasts.¹⁰ Until now, unallotment has never been used at the outset of a biennium to close a budget deficit anticipated by

¹⁰ Peter S. Wattson, *Legislative History of Unallotment Power* (June 24, 2009), available at <http://www.senate.leg.state.mn.us/departments/scr/treatise/unallotment/Unallotment.pdf> [hereinafter, *History of Unallotment*].

forecasts and created by the signing of appropriations bills coupled with the veto of a revenue bill.

The table below summarizes the five unallotments.¹¹

| Governor | Fiscal Year | Amount (in millions) | Time Remaining in Biennium |
|-----------------|--------------------|---------------------------------|---------------------------------------|
| Al Quie | 1981 | \$195 | 11 months |
| Rudy Perpich | 1987 | \$109 | 14 months |
| Tim Pawlenty | 2003 | \$278 | 5 months |
| Tim Pawlenty | 2009 | \$269 | 6 months |
| Tim Pawlenty | 2010-2011 | \$2,506 | 24 months |

As the table shows, the unallotments undertaken by the Executive are nearly ten times larger -- and ten months earlier -- than any of the previous unallotments. The MMB Commissioner's list includes 40 unallotments and administrative actions. App. 92-98.

ARGUMENT

This Court's practice is to avoid a constitutional ruling if there is a statutory basis on which a case can be decided. *See Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 732 n.7 (Minn. 2003). Accordingly, the Court should first consider whether Appellants complied with the unallotment statute. If they did not, the Court need not reach constitutional issues.

I. THE EXECUTIVE VIOLATED THE UNALLOTMENT STATUTE.

When the Court analyzes a statutory claim, it looks first to the plain language of the statute. Only if the language is ambiguous is construction necessary. Minn. Stat.

¹¹ See *History of Unallotment* pp. 5-6 (1981), 9 (1987), 11 (2003), 13 (2009).

§ 645.16; *Hyatt v. Anoka Police Dep't*, 691 N.W.2d 824, 826-28 (Minn. 2005).

Appellants have violated the plain language of the unallotment statute in three ways.

A. The Executive's Determination that Revenues were "Less than Anticipated" was Erroneous.

The unallotment statute provides, in pertinent part:

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). Thus, the statute imposes two preconditions to trigger the authority to draw 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[.]"

Id.

A determination that receipts will be "less than anticipated" requires a reference point or a baseline amount, so that what was anticipated may be compared to the lesser amount.

While the MMB Commissioner's letter of June 4, 2009, to the Governor references both the November 2008 and the February 2009 forecasts, Appellants have now confirmed that the proper reference point is the February 2009 forecast. *See* Appellants' Brief at 13-14. The February 2009 forecast anticipated a shortfall of \$4.6 billion for the 2010-2011 biennium. So the Executive could not have unallotted \$2.5

billion on July 1, 2009, in response to an “unanticipated” shortfall. A shortfall of more than that amount was fully anticipated. Rather, the unallotment was in response to the fact that the Governor signed appropriations bills that reduced the anticipated deficit from \$4.6 billion to \$2.7 billion, but vetoed the revenue bill that would have balanced the budget.

It is true that, according to the most recent MMB forecast (November 2009), the state government’s financial condition deteriorated by another \$1.2 billion. The November 2009 forecast, though, does not justify *\$2.5 billion* in unallotments made four months *earlier*. At no point since the November 2009 forecast has the Executive invoked the unallotment statute. Whether it could have done so, and how, are issues not now before this Court.

Accordingly, the MMB Commissioner’s mere recitation of the words of the unallotment statute did not satisfy the law’s requirement. As a matter of law and undisputed facts, the first statutory condition for unallotment was not met.

B. The Executive Improperly Triggered the Unallotment Statute Prior to the Start of the Biennium.

Under the unallotment statute, the Executive can reduce 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]. The term “remainder” requires that the determination of the “probable receipts” and the “amount available” be made after the biennium has begun. The dictionary definition of

“remainder” is “a remaining group, part, or trace.”¹² Since “remainder” refers to something less than the whole, the unallotment can only be allowed when unanticipated reductions occur *after* the biennium has begun. This interpretation is consistent with both seventy years of history and with the intent of the unallotment statute: to address unexpected drops in revenue collections that occur after the budget is in place.

Here, the Governor announced his intent to use unallotment as early as May, 2009. The MMB Commissioner triggered the statute and made his unallotment recommendations in June, 2009, before the biennium began. App. 80-87. The Governor approved and ordered the unallotments on July 1, 2009, the very first day of the biennium. App. 91. Thus, the Executive’s actions violated the plain language of the statute.

C. The Executive Exceeded Its Authority to “Defer or Suspend” Statutory Obligations.

To reduce allotments for programs that mandate specific payments by law, the unallotment law statute authorizes the MMB Commissioner to “defer or suspend” these obligations. The statute provides:

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(d). The authority to “defer or suspend” statutory obligations was added in 1987 and was intended to clarify that the MMB Commissioner could reduce allotments for programs even though a statute mandated a specific amount

¹² All cited dictionary definitions are from Merriam Webster’s Online Dictionary, available at <http://www.merriam-webster.com/dictionary>.

be paid to a recipient. See 1987 Minn. Laws 1404, ch. 268, art. 18 § 1; *History of Unallotment* p. 10.

The phrase “defer or suspend statutorily created obligations,” however, does not grant the power to amend, rewrite, or restructure definitions and formulas within statutes, much less eliminate entire programs. The dictionary definition of “suspend” is to “to cause to stop temporarily” or “to set aside temporarily or make inoperative.” Similarly, the dictionary definition of “defer” is to “put off or delay.” Had the Legislature intended to confer broad authority on the MMB Commissioner to rewrite, modify, or abrogate statutes, surely it would have used terms such as “modify, alter, revise, or disregard.”

The Executive’s unallotments did far more than defer or suspend statutorily-created obligations; instead, many of them modified existing statutes. As discussed above, the Executive: (1) restructured how various programs operate; (2) changed statutory eligibility requirements; and (3) eliminated for the biennium entire programs. These Executive actions violated the plain language of the statute.

D. The Executive’s Current Interpretation of the Unallotment Statute is Inconsistent with Its Purpose.

Appellants argue that, even if the Court finds the statute ambiguous, the unallotments are valid because they are consistent with legislative intent. Appellants’ Brief at 16-17. But even if terms like “anticipated,” “remainder,” and “defer or suspend” are ambiguous, which they are not, Appellants’ construction is exactly contrary to legislative intent.

Minnesota law provides an eight-part test for ascertaining the intention of the Legislature when a law is ambiguous as written. *See* Minn. Stat. § 645.16. The factors are: (1) the occasion and necessity for the law; (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. *Id.*; *State v. Peck*, 773 N.W.2d 768, 773 (Minn. 2009). Appellants cite only a few of these prongs and argue they support Appellants' case. A full analysis shows otherwise.

With regard to factors (1) through (5) and (7), the history of the enactment and previous use of the unallotment statute are consistent. The statute was enacted in 1939 on the recommendation of then Governor Stassen. When he took office, the budget was in deficit because revenues during the biennium had fallen short of expectations.¹³ He recommended enactment of the unallotment law to prevent this situation from occurring again.¹⁴ The targeted problem was a budget deficit that occurred because of unexpected drops in revenue – not a shortfall because the Governor decided to veto a revenue bill. The four previous uses of the unallotment statute, including two by this Governor, support this construction.

Regarding factor (6), the consequences of interpretation, Appellants appear to blame Respondents and the District Court for increasing the potential of a government

¹³ *History of Unallotment* pp. 2-3.

¹⁴ Budget Message of Governor Harold E. Stassen Delivered to Joint Session, February 1, 1939, p. 6, available at <http://archive.leg.state.mn.us/docs/2008/other/080624.pdf>.

shutdown. But they are not the ones who vetoed the bill that would have balanced the budget, and they are not the ones who refused to call back the Legislature. The real consequences of Appellants' construction of the statute would be unprecedented, unchecked Executive power to make law and reorder legislative priorities: a genuine threat to basic democratic principles.

Finally, with regard to factor (8), no deference should be given to the MMB Commissioner's interpretation of the unallotment statute, for three reasons.

First, administrative agencies are creatures of statute and have only those powers given to them by the Legislature. *Great N. Ry. Co. v. Pub. Serv. Comm'n*, 169 N.W.2d 732, 735 (Minn. 1969); *see also In re Qwest's Wholesale Serv. Quality Standards*, 702 N.W.2d 246, 259 (Minn. 2005) (neither an agency nor the courts may enlarge an agency's powers beyond those contemplated by the Legislature (citation omitted)). When confronted with the threshold question of whether the Legislature granted an agency authority, no deference to the agency's interpretation is necessary. *See In the Matter of the Denial of the Certification of the Variance Granted to Robert W. Hubbard*, Nos. A07-1932, A07-2006 at *7 n.4 (Minn. filed Feb. 11, 2010); *Soo Line R. Co. v. Comm'r of Revenue*, 277 N.W.2d 7, 10 (Minn. 1979).

Second, the unallotment statute is not a highly complex regulatory scheme, such as comprehensive healthcare system or utility rate-setting. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (deference to administrator is appropriate when "a full understanding . . . has depended on more than ordinary knowledge"); *In re City of Redwood Falls*, 756 N.W.2d 133, 137 (Minn. Ct.

App. 2008) (deference to administrator may be appropriate when the statutory language is technical in nature). When interpreting a law passed by the Legislature regarding budgeting, the Commissioner has no greater expertise than the Legislature.

Third, the Commissioner's current interpretation is not entitled to deference because it is a radical departure from previous understanding and use of the statute. *See id.* at 137.

For all of these reasons, Appellants' suggested construction fails. The Executive violated the unallotment statute.

II. THE EXECUTIVE EXCEEDED ITS CONSTITUTIONAL AUTHORITY.

Article III of the Minnesota Constitution divides the State's powers into three departments: legislative, executive and judicial. These powers are exclusive. Minn. Const. art. III ("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."); *Bloom v. American Exp. Co.*, 23 N.W.2d 570, 575 (Minn. 1946) ("A constitutional grant of power to one of the three departments of government is a denial of such power to the other departments.") Such separation is premised on the belief that excessive power vested in one branch promotes "corruption and tyranny." *State v. Baxter*, 686 N.W.2d 846, 851 (Minn. Ct. App. 2004); *see also* The Federalist Nos. 47, 48, and 51 (Terence Ball ed., 2003).

Two prohibitions follow. First, no department can intrude on the power of another department. *See, e.g., In re Civil Commitment of Giem*, 742 N.W.2d 422, 429 (Minn.

2007). Second, the Legislature cannot delegate, and the Executive cannot exercise, purely legislative power. *Lee v. Delmont*, 36 N.W.2d 530, 538 (Minn. 1949).

A. The Executive Intruded Upon the Legislature's Constitutional Functions.

1. The Power to Make and Revise Laws is the Province of the Legislature.

The power to make laws is fundamentally a legislative power. *State v. Lemmer*, 736 N.W.2d 650, 657 (Minn. 2007) (“[T]he creation of substantive law is a legislative function.”). State spending is accomplished through passing appropriations laws. Minn. Const. art. XI § 1 (“No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law.”)

The limited role of the Executive in law-making, including appropriations, is set forth in article IV, sections 23 and 24, of the Constitution. Because the power to veto is located in article IV, the power is “an exception to the authority granted the legislature” and “must be narrowly construed to prevent an unwarranted usurpation by the executive of powers granted the legislature in the first instance.” *Inter Faculty Organization v. Carlson*, 478 N.W.2d 192, 194 (Minn. 1991). The Constitution grants the Executive 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 and was defeated. 1915 Minn. Laws 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).

Once laws are enacted, the Executive must execute them faithfully. Minn. Const. art. V, § 3. While the spending power is part of execution, the Executive must spend money appropriated by the Legislature consistent with legislative intent. *See* Minn. Stat. § 16A.14, subd. 3.

The spending power does not afford the Executive the power to revise laws or to reorganize legislative priorities. The Executive crosses the line when it uses the spending power to reduce or eliminate funding for enacted programs based on the Executive's "own ordering of social priorities," *New England Div. of the American Cancer Soc'y v. Comm'r of Admin.*, 769 N.E.2d 1248, 1257 (Mass. 2002). As the Florida Supreme Court explained in *Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260, 265 (Fla. 1991), the legislature has "responsibility to set fiscal priorities through appropriations," and the executive cannot have "the power to reduce, nullify, or change those priorities. . . ." *See Colo. Gen. Assembly v. Lamm*, 700 P.2d 508, 521 (Colo. 1985) (whatever inherent power a governor has over administering the state budget, it does not extend to contradicting major legislative determinations).

2. The Unallotments Intruded on Legislative Power.

The unallotments proposed in June, 2009, and ordered on July 1, 2009, were not mere reductions of allotments to get the State through the remainder of the biennium. Instead, as discussed above, the unallotments made and modified law. They changed statutory payment formulas, altered the criteria for receiving state aid, and even eliminated entire programs that the Legislature had enacted and funded with the agreement of the Executive. Our Constitution does not allow the Executive to amend or

modify statutes, even if for only one or two fiscal years, and fundamentally change legislative policies. Such power would go well beyond the need to respond to an unanticipated fiscal emergency.

Tellingly, the unallotments coincided with the Governor's budget priorities unveiled in January and March 2009, rather than the Legislature's priorities enacted in the appropriations bills which the Governor signed. For example, the Governor's proposed budget recommended that statutory percentage of rent constituting property taxes be reduced from 19 percent to 15 percent.¹⁵ The Legislature considered this recommendation and decided not to enact it. Shortly after the Legislature adjourned, and using unallotment, the Executive rewrote the renter's credit formula to accomplish what he could not otherwise achieve.

This unprecedented approach to unallotment is a dramatic expansion of Executive power. The Constitution authorizes the Governor to item veto individual appropriations, while signing the rest of the bill into law. Minn. Const. art. IV, § 23. In this case, the Executive signed the appropriations bills (with few exercises of the item veto) and then used unallotment to modify and even cancel the same appropriations he had just approved.

A similar situation was considered by the United States Supreme Court in *Clinton v. City of New York*, 524 U.S. 417 (1998). By statute, Congress gave the President the power to "cancel" portions of bills after they became law, including discretionary

¹⁵ 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>.

spending amounts, new items of spending, and certain tax benefits. The Court determined that the President's exercise of a cancellation power, even by statute, violated the presentment clause. As the Court put it, "whenever the President cancels an item of new direct spending or a limited tax benefit he is rejecting the policy judgment made by Congress and relying on his own policy judgment." *Id.* at 444.

Justice Anthony Kennedy's concurrence is apposite:

It follows that if a citizen who is taxed has the measure of the tax or the decision to spend determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened. Money is the instrument of policy and policy affects the lives of citizens. The individual loses liberty in a real sense if that instrument is not subject to traditional constitutional constraints.

The principal object of the statute, it is true, was not to enhance the President's power to reward one group and punish another, to help one set of taxpayers and hurt another, to favor one State and ignore another. Yet these are its undeniable effects. The law establishes a new mechanism which gives the President the sole ability to hurt a group that is a visible target, in order to disfavor the group or to extract further concessions from Congress. The law is the functional equivalent of a line item veto and enhances the President's powers beyond what the Framers would have endorsed.

Id. at 451.

So, too, although the Minnesota Constitution gives the Executive a line-item veto, it does not authorize what the Supreme Court called unilateral "action that either repeals or amends parts of duly enacted statutes," *id.* at 439. In substance, the Executive's interpretation and application of the unallotment law has that effect and, thus, violates the Minnesota Constitution.

That the economy is in recession and most state governments' budgets are under stress does not justify or excuse unprecedented Executive power. It is precisely in times

of stress—even crisis—that our constitutional system of checks and balances proves itself.¹⁶

Disagreement between the Executive and the Legislature is inherent in our system of separated powers. But the Minnesota Constitution also provides the tools to resolve budget disagreements by the end of the biennium. It provides for annual legislative sessions and gives the Governor authority to call special sessions. It requires the Governor to execute faithfully duly enacted appropriations laws. If the departments are at an impasse, they may appeal to the people during elections held sixteen months into the biennium. The Constitution presumes that the Legislature and the Executive will abide by their constitutional duty to reach agreement and balance the budget by the end of this biennium. The constitutional process must be allowed to work.

B. Under the Executive's Current Construction, the Unallotment Statute Would Impermissibly Delegate Legislative Power.

The Legislature can delegate certain legislative functions necessary to carry out general provisions and policies of legislative mandates, but cannot delegate purely legislative power. *Lee v. Delmont*, 36 N.W.2d 530, 538 (1949). Purely legislative power 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[.]” *Id.* at 538-39. For example, a law that adopts future changes in the income tax base by

¹⁶ As was said in another instance of the executive exceeding its authority in a time of crisis: “The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times.” *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952).

reference to federal law is an unconstitutional delegation of state legislative power to Congress. See *Wallace v. Comm'r of Taxation*, 184 N.W.2d 588, 593 (Minn. 1971).

This Court has upheld laws that authorize the Executive to determine facts and circumstances under which the law goes into operation, but only if there is a reasonably clear policy or standard for doing so. *Delmont*, 36 N.W.2d at 538. A proper delegation will “furnish 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.” *Id.* (citation omitted).

Stripped to its essentials, the Executive’s current construction of the unallotment statute is that the Legislature delegated to the Executive the power to reduce appropriations the Legislature had just enacted and the Governor had signed. This cannot be the case, as it would allow the Executive complete power -- well beyond the item veto -- to make or modify laws. See *City of Richfield v. Local No. 1215*, 276 N.W.2d 42, 45 (Minn. 1979) (“Purely legislative power cannot be delegated”); *Delmont*, 36 N.W.2d at 538-39 (describing what constitutes “complete” law-making power).

Moreover, the unallotments were not based on the Executive’s determination of future facts, as contemplated by *Delmont*, or to respond to an unexpected financial emergency. The operative facts were all well known to both the Executive and the Legislature during the legislative session and were the very basis for their budget proposals. They were not the type of facts that the Legislature itself did not know or could not conveniently act upon. To the contrary, they were exactly the type of facts that

the Legislature regularly uses to enact laws. Here, the Governor signed the appropriations bills into law and quickly announced that he would use unallotment to reduce them according to his own budget priorities. This has all of the hallmarks of making or modifying complete law, not administrative action based on fact-finding.

Further, the unallotment statute as now interpreted by the Executive lacks sufficient guidance for the Executive. While the statute (as previously and properly read) gives the Executive some flexibility to deal with an unexpected emergency or changes late in the biennium, the Executive's current interpretation that it can modify laws and eliminate programs even before the biennium starts does not contain sufficient standards or guidance. *See, e.g., State of Alaska v. Fairbanks North Star Borough*, 736 P.2d 1140, 1143 (Alaska 1987) (statute that gives the executive "total discretion as to which appropriations to cut and to what extent," and provides "no policy guidance as to how the cuts should be distributed," is an improper delegation; "the effect of an exercise of authority . . . [under the statute] is no more predictable than the identity and priorities" of the next governor); *Chiles*, 589 So. 2d at 265.

The breathtaking scope of the Executive's current interpretation stands in contrast to the limits on power in the unallotment statutes of other states. Some states place specific numerical constraints on the amount of unallotments. *See, e.g., Univ. of Conn. Chapter of AAUP v. Governor*, 512 A.2d 152, 154 (Conn. 1986) (5% limit on reductions in each appropriation and 3% limit on reduction of a fund); *N.D. Council of Sch. Adm'rs v. Sinner*, 458 N.W.2d 280, 284 (N.D. 1990) (uniform reductions for all departments receiving money from fund in deficit); *Judy v. Schaefer*, 627 A.2d 1039, 1052 (Md.

1993) (limiting reduction to 25%). Some states require the legislature to approve the unallotments before implementation. *See, e.g., Hunter v. State*, 865 A.2d 381, 390 (Vt. 2004); *Legislative Research Comm'n ex rel. Prather v. Brown*, 664 S.W.2d 907, 925-26 (Ky. 1984). Most of the states where unallotment statutes have been upheld against constitutional challenges contain *multiple* substantive limits on executive authority to unallot during unforeseen budget crises. *See, e.g., State ex rel. Schneider v. Bennett*, 564 P.2d 1281, 1290 (Kan. 1977) (listing seven substantive and procedural restraints on power to approve expenditures that differ from fixed statutory limitations).

The Minnesota Court of Appeals upheld the unallotment statute against a nondelegation challenge in *Rukavina v. Pawlenty*, 684 N.W.2d 525 (Minn. Ct. App. 2004), *rev. denied* (Minn. Oct. 19, 2004). *Rukavina*, though, dealt with a 2003 unallotment of unexpended funds to offset an unanticipated and relatively modest revenue shortfall toward the end of the biennium. *Id.* at 529. This situation is much different. The brief discussion of separation of powers doctrine in *Rukavina* should not be read to validate the use of the unallotment statute to address a known budget gap or to allow the Executive to rewrite and modify existing law.

The Court of Appeals in *Rukavina* relied, and Appellants rely, most heavily on *New England Div. of American Cancer Soc'y v. Comm'r of Admin.*, 769 N.E.2d 1248, 1256 (Mass. 2002). This case is distinguishable in numerous respects.

Massachusetts' budget process is quite different from Minnesota's. Massachusetts requires that, at the beginning of each fiscal year, the General Court (its legislature) "shall enact" and the governor "shall approve" a "general appropriation bill" for the fiscal year

which “shall constitute a balanced budget.” Mass. Gen. Laws ch. 29, § 6E (West 2009). Once the annual balanced budget is passed, the Executive allots funds for periods not greater than four months. Mass. Gen. Laws ch. 29, § 9B. Reductions of allotments may be undertaken only “during” the fiscal year, and then only after 15 days’ notice to the General Court. Mass. Gen. Laws ch. 29, § 9C. Unlike Minnesota, the General Court is in session, or may call itself into session, year-round. Mass. Const. Amendments, arts. X and LXIV, § 2.

In fiscal year 2002, Massachusetts started with a balanced budget. The World Trade Center attack caused a decline in revenues “well beyond expectations.” 769 N.E.2d at 1250. Seven months into the fiscal year, the Massachusetts governor unallotted \$155 million, *id.*, only 1% of a budget of more than \$15 billion.¹⁷

By contrast, Minnesota did not start with a balanced budget because the Governor vetoed the revenue bill; the Legislature could not reconvene except by call of the Governor, which he refused to issue; the unallotments were on the very first day of the biennium and covered one or two fiscal years; and the Governor unallotted \$2.5 billion from appropriations of approximately \$30 billion. The Massachusetts and Minnesota situations are starkly different.

In fact, Minnesota’s Executive has already done what the Supreme Judicial Court presumed its governor would not do. The Massachusetts Court presumed that the cuts to the allotments of four months or less would be “made in a manner that will not

¹⁷ Information Statement, The Commonwealth of Massachusetts, A-15 (May 3, 2007), available at <http://www.mass.gov/Ctre/docs/debt/disclosurearchive/2007/InfoStatement5-4-07.pdf>.

compromise the achievement of underlying legislative purposes and goals.” *Id.* at 1257. Indeed, predicted the Court, “[t]he probability the Governor might abuse her authority under § 9c, to reduce, or eliminate altogether, funding for certain programs based on her own ordering of social priorities, is minimal.” *Id.* This Court can make no such predictions: By these unallotments, Minnesota’s Executive has already compromised “legislative purposes and goals” by reducing—and even eliminating altogether—specific programs based on his “own ordering of social priorities.”

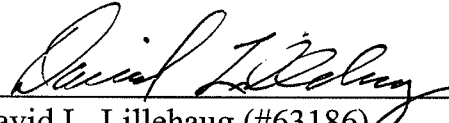
The unallotment statute, as now interpreted by the Executive, simply does not provide sufficient on limitations the Executive’s power. Such an interpretation intrudes on, and is an improper delegation of, legislative power.

CONCLUSION

The House requests that this Court hold that Appellants exceeded their authority under the unallotment statute.

Dated: February 23, 2010

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "David L. Lillehaug", written over a horizontal line.

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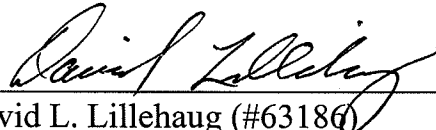
**ATTORNEYS FOR *AMICUS CURIAE*
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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of *Amicus Curiae* Minnesota House of Representatives conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and subd. 3(c)(1), for a brief produced with a proportional font. The font used in this brief is Times New Roman 13-point. The length of this brief is 6,943 words, exclusive of cover page, Table of Contents, and Table of Authorities. This brief was prepared using Microsoft Word 2003.

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