

# State of Minnesota In Supreme Court

Case No. A11-1222

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State Senator Warren Limmer, State Senator Scott J. Newman,  
State Senator Sean R. Nienow, State Senator Roger C. Chamberlain,  
State Representative Glenn H. Gruenhagen, and State Representative Ernest  
G. Leidiger,

Petitioners,

vs.

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

Respondents.

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## PETITIONERS' PRINCIPAL MEMORANDUM RESPONDING TO THE COURT'S ISSUE ON MOOTNESS

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Dated: September 28, 2011

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## ISSUE PRESENTED

There is only one issue for this Court to consider having requested memoranda from the parties concerning mootness:<sup>1</sup>

Minnesota faced three budgetary impasses within six budgetary cycles. The Attorney General obtained district court jurisdiction and the judiciary accepted, making legislative and executive decisions resulting in appropriations without enacted law. After the impasse, the legislature covered the court's mandated appropriations. As an exception to the mootness doctrine, are the Petitioners presenting constitutional and jurisdictional issues of such public importance for this Court to clarify the future legalities of the court's injection into governmental gridlock?

## STATEMENT OF FACTS

A full recitation of facts is not necessary. However, there are some critical factors that bear briefly repeating as it should be applied to the law.

### **1. The budgetary impasses are reoccurring and short-lived.**

- The first budgetary impasse occurred in 2001, the second in 2005, and the third in 2011.<sup>2</sup>
- The budgetary impasses lasted between 1 and 20 days after the issuance of court orders granting filed Attorney General petitions for court intervention.<sup>3</sup>

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<sup>1</sup> Sup. Ct. Or. Aug. 30, 2011.

<sup>2</sup> Limmer Pet. for Writ of Quo Warranto, 15 (July 8, 2011).

<sup>3</sup> See, Limmer Pet. 15-16; 18; 1. Sup. Ct. Ord. 2 (Aug. 30, 2011).

**2. In 2001, the district court agreed to intervene in the legislative and executive functions of government.**

- In June 2001, the Minnesota Attorney General filed a petition and memorandum for an order to show cause with the Ramsey County District Court “to represent the State and its interests in all matters before the Court ...[and to] represent the people in a *parens patriae* capacity.”<sup>4</sup> The Governor filed an amicus curie brief essentially joining the Attorney General’s petition.<sup>5</sup>
- The court granted the Attorney General’s 2001 petition, appointed a Special Master preside over and make recommendations on any issue in determining core functions of state government and mandated that the Commissioner of Finance and the State Treasurer “shall pay for such services.”<sup>6</sup>
- The budgetary impasse ended on June 29, 2001,<sup>7</sup> the same day the court granted the Attorney General’s Petition.<sup>8</sup>

**3. In 2005, the district court agreed to intervene in the legislative and executive functions of government and issued orders mandating expenditures without appropriations by law.**

- In June 2005, the Attorney General filed a petition and memorandum similar to that filed in 2001 with the Ramsey

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<sup>4</sup> *Id.* 15.

<sup>5</sup> *Id.*

<sup>6</sup> *In Re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota*, Ct. File. No. C9-01-5725, Ramsey Dist. Ct. (June 29, 2001)(signed by Chief Judge Lawrence D. Cohen). Limmer Pet. 17.

<sup>7</sup> Limmer Pet. 16.

<sup>8</sup> Limmer Pet. 15.

County District Court “to represent the State and its interests in all matters before the Court ... [and to] represent the people in a *parens patriae* capacity.”<sup>9</sup> The Governor intervened with the Attorney General.<sup>10</sup>

- The district court granted the Attorney General’s 2005 petition.<sup>11</sup> The court appointed a Special Master preside over and make recommendations on any issue in determining core functions of state government and mandated that the Commissioner of Finance “timely issue checks and process such funds as necessary to pay for such obligations so that the core functions of government can be discharged.”<sup>12</sup>
- The district court further issued orders adopting the Special Master recommendations mandating funding of certain determined core functions of government.<sup>13</sup>
- The budgetary impasse ended on July 14, 2005,<sup>14</sup> 15 days after the court granted the Attorney General’s petition.<sup>15</sup>

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<sup>9</sup> Limmer Pet. for Writ of Quo Warranto, 16.

<sup>10</sup> *Id.*

<sup>11</sup> *In Re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota*, Ct. File. No. C0-05-5928, Ramsey Dist. Ct. (June 23, 2005)(signed by Chief Judge Gregg E. Johnson). Limmer Pet. 17-18.

<sup>12</sup> *Id.*

<sup>13</sup> *See Id* Or. of June 30, 2005; Ords. of July 7, 2005.

<sup>14</sup> Limmer Pet. 18.

<sup>15</sup> Limmer Pet. 16 (granted on June 29, 2005).

**4. In 2011, the district court again agrees to intervene in the legislative and executive functions of government and issued orders mandating expenditures without appropriations by law.**

- In June 2011, the Attorney General filed a petition and memorandum similar to those filed in 2001 and 2005 for an order to show cause for the funding of core government functions. The Attorney General made the motion in order “to represent the State and its interests in all matters before the Court ... [and to] represent the people in a *parens patriae* capacity.”<sup>16</sup>
- The Governor responded to the Attorney General’s Petition seeking a court appointed mediator,<sup>17</sup> asking the court to avoid “any infringement by the judicial department on the constitutional powers of the legislative and executive departments,”<sup>18</sup> tacitly referencing the Governor’s inherent and statutory powers to effect the continuation of priority critical services through that office’s “inherent and statutory powers.”<sup>19</sup>
- The district court granted the Attorney General’s 2011 Petition.<sup>20</sup> Like previous 2001 and 2005 orders, the court ordered and mandated the Commissioner of the Department of Management and Budget to “timely issue checks and process such funds as necessary to pay for the performance of the critical core functions of government.”<sup>21</sup> The court appointed a Special Master to make

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<sup>16</sup> Limmer Pet. App. 34.

<sup>17</sup> Govr. Resp. to Atty Gen. Pet. (June 15, 2011); Limmer Pet. App. 143.

<sup>18</sup> Govr. Resp. to Atty. Gen. Pet. 14; Limmer Pet. App. 156.

<sup>19</sup> Govr. Resp. to Atty. Gen. Pet. 13; Pet. App. 155.

<sup>20</sup>*In Re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota*, Ct. File. No. 62-CV-11-5203, Ramsey Dist. Ct. (June 29, 2011)(signed by Chief Judge Kathleen R. Gearin). Limmer Pet. App. 1.

<sup>21</sup> Gearin Ord. 16; Limmer Pet. App. 16.

recommendations concerning any issues related to the issued order.<sup>22</sup>

- The district court would further issue additional orders mandating the payment of governmental funds for core functions of government.<sup>23</sup>
- On July 19, 2011, the budgetary impasse ended and appropriation bills signed into law on July 20, 2011,<sup>24</sup> 20 days after the court granted the Attorney General's petition.<sup>25</sup>
- As this Court recognized "[e]ach appropriations bill passed on July 19 is retroactive to July 1, 2011, 'and supercedes and replaces funding authorized by' the Ramsey County District Court."<sup>26</sup>

**5. Even though the 2011 impasse is resolved, the political and economic issues were merely "kicked down the road."**

- Reports after the end of the 2011 budget impasse found analysts who concluded that the budget plan "which relies on borrowing about \$1.4 billion, merely kicks the state's political and economic problems down the road. "This deal is only about surviving to have a debate tomorrow."<sup>27</sup> The next state budgetary biennium is in 2013.

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<sup>22</sup> *Id.* at 18.

<sup>23</sup> *See, e.g.*, Gearin Ords. of July 7, 2011; Pet. App. 622-23; 629-32.

<sup>24</sup> *See*, Sup. Ct. Ord. 2 (Aug. 30, 2011).

<sup>25</sup> Limmer Pet. 1(granted June 29, 2011).

<sup>26</sup> Sup. Ct. Ord. 2.

<sup>27</sup> "Minnesota Ends Its Budget Crisis, at Heavy Cost," Justin Horwarth, *Time*, July 15, 2011 (<http://www.time.com/time/nation/>).

## SUMMARY OF ARGUMENT

The Limmer Petition is ripe for review. Considering the constitutional issues and questioning the jurisdiction of the district court during repeated, short-lived governmental gridlocks, the case falls within the exceptions of mootness through the “capable of repetition, yet evading review doctrine” and the “functionally justiciable” and “important public issue of statewide significance” doctrine.

Each governmental budgetary impasse during Minnesota’s recent history has lasted between 1 and 20 days. It is hardly sufficient time for the Petitioners or this Court to resolve the repeated intervention of the district court at the Attorney General’s bequest to invade the powers and make decisions for the legislative and executive branches of government — an apparent violation of the separation of powers doctrine of the Minnesota Constitution among other constitutional issues presented.

The legal questions are of public and statewide significance since it evidences the willingness of the judiciary to interject itself into the political process mandating appropriations where the State’s Constitution prohibits the appropriation of state moneys without an enacted law.

Likewise, the constitutional issues are also functionally justiciable. The raw materials are complete for this Court to address and resolve the conflicts between the judiciary, legislative, and executive branches of government. The

specific delineation of power in the time of governmental gridlock requires immediate adjudication since the government in 2011 solved nothing of its budgetary problems but merely “kicked the can down the road.” The past history of three budgetary impasses are the foundation of a described politically dysfunctional government with future identical repercussions for the future. More importantly, it is necessary to adjudicate the parameters of judicial jurisdiction on matters relating to fundamental governmental functions and constitutional responsibilities of the legislative and executive branches in times of political crisis created of their own doing.

## ARGUMENT

**The constitutional issues presented in Limmer’s Petition for Quo Warranto are of such great public importance and statewide significance that it meets the exception to the mootness doctrine to allow this Court to exercise its discretionary review.**

This Court has long considered mootness as “a flexible discretionary doctrine, not a mechanical rule that is invoked automatically.”<sup>28</sup> While the Court will generally dismiss an action as moot if it cannot grant effectual

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<sup>28</sup> *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005), quoting *Jasper v. Comm’r of Pub. Safety*, 642 N.W.2d 435, 439 (Minn. 2002) (citing *State v. Rud*, 359 N.W.2d 573, 576 (Minn. 1984).

relief,<sup>29</sup> it will not deem a case moot if “capable of repetition, yet likely to evade review.”<sup>30</sup> There are limitations to this doctrine relating to duration for adjudication and that the same parties would be subjected to the same litigation:

The “capable of repetition, yet likely to evade review” doctrine is ‘limited to the situation where two elements are combined: (1) the challenged action was in a duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subject to the same action again.’<sup>31</sup>

Importantly, this Court has an additional exception to the mootness doctrine to retain jurisdiction regarding issues of public importance:

[W]e will not deem a case moot, and thus will retain jurisdiction, if the case is ‘functionally justiciable’ and is an important public issue “of statewide significance that should be decided immediately.”<sup>32</sup>

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<sup>29</sup> *Kahn*, 701 N.W.2d at 821, citing *In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989).

<sup>30</sup> *Id.* citing *Elzie v. Comm’r of Pub. Safety*, 298 N.W.2d 29, 32 (Minn. 1980).

<sup>31</sup> *Id.*, citing *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). The doctrine is available absent a class action, which the instant case is not. *Id.*

<sup>32</sup> *Kahn*, 701 N.W.2d at 821-22, citing and quoting *State v. Brooks*, 604 N.W.2d 345, 347-48 (Minn. 2000).

**A. The Petitioners meet the criteria under the “capable of repetition, yet evade review” doctrine for this Court to adjudicate the constitutional issues before it.**

The Limmer Petitioners timely filed their Petition for *quo warranto* during the budget impasse period to expedite the constitutional and legal issues before this Court. The Petition cited three Minnesota constitutional issues for adjudication: (1) under Article III – that one branch of government – the judiciary – may not exercise any of the powers of the other (separation of powers and political question doctrines); (2) under Article IV, requiring the governor’s actions on bills passed by the legislature as a prerequisite for an appropriation by law; and (3) under Article XI, asserting that moneys cannot be paid out of the State’s treasury without an appropriation by law.<sup>33</sup>

Under either doctrine governing “capable of repetition, yet evade review” or “functionally justiciable” and “publically important issue,” the Petitioners meet both tests to allow this Court to exercise its discretion to adjudicate the issues presently before it, regardless of the legislative action that retroactively covered the district court’s mandated appropriations without enacted law.

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<sup>33</sup> Limmer Pet. 20-21.

First, under the “capable of repetition, yet likely to evade review” doctrine, the initial inquiry is whether or not the duration of the controversy was too short to fully litigate the matter.<sup>34</sup> In 2011, the budgetary impasse lasted 20 days. The Petitioners filed their Petition on July 8, 2011. This Court granted the Petition on July 11<sup>th</sup> requesting Respondents to file responses by July 18<sup>th</sup>. The Court gave the Petitioners until July 22<sup>nd</sup> to file a reply. The budgetary impasse ended on July 20, 2011. Thus, even with this Court’s expedited scheduling effort, the duration of the impasse was too short for the Court to adjudicate the merits placed before it. In other words, what the most recent procedural events suggest is that despite this Court’s demonstration in the past to decide public issues shorter than 30 days, it didn’t happen here.<sup>35</sup>

A comparable case is found in *Fletcher v. Commonwealth of Kentucky*.<sup>36</sup> The Kentucky Supreme Court applied the “capable of repetition yet evading review” doctrine in a case with remarkably similar facts – a perennially deadlocked budgeting process case:

On three occasions within a ten-year period, the General Assembly convolved itself into a partisan deadlock and adjourned *sine die* without enacting an executive department budget bill...

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<sup>34</sup> *Id.* at 821.

<sup>35</sup> See, e.g., *Erlanson v. Kiffmeyer*, 659 N.W.2d 724, 726 (Minn. 2003); *Clark v. Grove*, 461 N.W.2d 385 (Minn. 1990).

<sup>36</sup> *Fletcher v. Commonwealth of Kentucky*, 163 S.W.3d 852 (Ky. 2005).

On each occasion, lawsuits were filed to test the constitutionality of those actions ... On each occasion, the General Assembly enacted an executive department budget bill and ratified the governor's actions before the issue could be finally resolved by the Court of Justice. *Having no assurance that similar partisan brinkmanship will not recur in the General Assembly, resulting in future gubernatorially promulgated budgets, we conclude that this issue is capable of repetition, yet evading review, and will address its merits.*<sup>37</sup>

Although in *Fletcher*, the governor took actions to expend funding, in the instant case, Governor Dayton disagreed with the Attorney General's legal position and sought, among other things, to convince the district court that he had "inherent and statutory powers" to effect the continuation of priority critical issues as his office determined.<sup>38</sup> As in *Fletcher*, Minnesota has a history of partisan brinkmanship, governmental gridlock, that can be fairly projected into the future:

Resolution of the [2011] impasse came, at last, not as a pure victory for either Republicans [who control both chambers of the State Legislature] (who wanted more cuts to solve the state's \$5 billion deficit) or for Democrats (like Mr. Dayton, who wanted to raise taxes on the wealthiest residents) ... [B]oth parties, derided the compromise as merely pushing the state's financial problems further into the future.<sup>39</sup>

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<sup>37</sup> *Fletcher*, 163 S.W.3d at 859 (emphasis added).

<sup>38</sup> Limmer Pet. 155.

<sup>39</sup> "With Signing of Budget, Impasse Ends in Minnesota," Monica Davey, July 20, 2011, The Dispatch.com, [www.the-dispatch.com/article/20110720](http://www.the-dispatch.com/article/20110720).

The budget was widely panned for setting up a new problem down the road ...[as] Minnesota became a national example of political dysfunction....<sup>40</sup>

Second, under the same doctrine, the next inquiry is whether there is a reasonable expectation that the complaining party will be subjected to the same action again. This is met. The Petitioners are both State Senators and State House Representatives. In 2005, State Senators and State House Representatives were parties to the *quo warranto* petition. All State legislators individually are affected by the Attorney General's actions to invite the district court to invade the prerogatives of the legislative branch of government. In fact, Petitioner-Senators Newman and Nienow were also complaining parties in 2005. The State of House of Representatives also responded and intervened but, in the District Court action.<sup>41</sup> Thus, in light of the 2011 procedural events, there is nothing in the record that detracts from the proposition that it is "a reasonable expectation that the same complaining parties [senators and representatives] would be subjected to the same action again."<sup>42</sup>

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<sup>40</sup> "Minn. governor signs budget, ends 20-day state shutdown after impasse over taxes, spending," Martiga Lohn, The Associated Press, July 20, 2011, <http://ca.news.yahoo.com>.

<sup>41</sup> Pet. App. 433.

<sup>42</sup> The exception of mootness relating to "functionally justiciable" and "important public issues" does not involve the same plaintiffs, or as here,

**B. The Petitioners meet the criteria under the “functionally justiciable” and an “important public issue of statewide significance” for this Court to adjudicate the constitutional issues before it.**

The statewide significance of the Limmer Petitioners’ constitutional issues can hardly be denied. The governmental gridlock affected thousands of citizens and cost the State millions of dollars.<sup>43</sup> In addition, numerous other interests with apparent state-wide reach looked to the district court for mandated funding through intervention. These included, as examples and not meant to represent an exhaustive list: the Minnesota Association of Treatment Programs,<sup>44</sup> Care Providers of Minnesota, Inc. and Aging Services of Minnesota,<sup>45</sup> the Association of Residential Resources in Minnesota,<sup>46</sup> and the Minnesota Hospital Association.<sup>47</sup> How this Court resolves the presented legal issues will have an immediate impact on political, economic, and legal strategies, all of which are important public issues of statewide significance.

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petitioners, unlike the “capable of repetition, yet evade review” doctrine. *See, e.g., Taylor v. Gill Street Investments*, 743 P.2d 345 (Alaska 1987).

<sup>43</sup> *See, supra*, “Minnesota Ends Its Budget Crisis, at Heavy Cost.”

<sup>44</sup> Pet. App. 203.

<sup>45</sup> Pet. App. 236.

<sup>46</sup> Pet. App. 254.

<sup>47</sup> Pet. App. 319.

Certainly the legislative gridlock of 2011, experienced in 2005, and faced in 2001, with the “kicking it down the road” concern of Minnesota’s future, it is reasonable that budget impasses will continue in the future.

And, with the Attorney General’s history as exhibited in 2001, 2005, and 2011 and no indication to abandon its apparent authority to seek district court jurisdiction under its’ principle “to represent the State and its interests in all matters before the Court ...[and to] represent the people in a *parens patriae* capacity,”<sup>48</sup> knowing the limitations of the judiciary’s jurisdiction and the Attorney General’s is of paramount importance.

This instant matter is also “functionally justiciable.” “A case is functionally justiciable if the record contains the raw materials (including effective presentation of both sides of the issues raised) traditionally associated with effective judicial decision making.”<sup>49</sup> All parties have completed their respective briefing having submitted to this Court hundreds of pages of legal arguments and records.<sup>50</sup> There are no other necessary raw

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<sup>48</sup> Limmer Pet. App. 34.

<sup>49</sup> *Citizens for the Rule of Law v. Senate Comm. on Rules & Admin.*, 770 N.W.2d 169, 176 (Minn. App. 2009), *review denied* (Minn. Oct. 20, 2009).

<sup>50</sup> In fact, the Limmer Petitioners culled their record for the convenience of this Court from their initial Petition for Quo Warranto filed prematurely on June 22, 2011 (That appendix included records covering the period 2001-2005, another 320 pages of material). This Court dismissed the matter without prejudice which caused the filing of July 8<sup>th</sup> after the lower court’s

materials to extract from either the Petitioners or the Respondents (with the exception of oral argument).

Importantly, the Limmer Petition specifically challenges the jurisdiction of the judiciary as applied to the separation of powers doctrine<sup>51</sup> and the political question doctrine.<sup>52</sup> This is significant since during the 2001 and 2005 governmental gridlock, the governors at that time, called the Legislature into special session. In 2011, Governor Dayton did not, and did not have to.<sup>53</sup> Thus, the Governor's office subsequently participated in the district court proceedings allowing the court to issue mandated expenditures of state moneys superceding his own authority and that of the Legislature to operate the government — the judiciary became a political pawn.

Regardless, the Limmer Petition seeks adjudication of disputes involving public entities that have engaged in conduct or established policies in violation of Minnesota's Constitution. Furthermore, there is nothing in the record to dispel any notion that the Attorney General or the district court will

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actions with the initial order effective July 1 (but issued on June 29<sup>th</sup>) and subsequent orders issued on July 7, 2011. With those July 7<sup>th</sup> orders, the record was as complete a needed to substantiate the Petitioners constitutional claims.

<sup>51</sup> Limmer Pet. 34.

<sup>52</sup> *Id.* 35.

<sup>53</sup> *Id.* 40.

not continue their respective practices in the future. In short, it is imperative that a rule be established for future conduct.

## CONCLUSION

The issues before the Court are not moot. Regardless of the Legislature's retroactive appropriation of moneys to cover the district court's appropriations, the legal issues are of important public and statewide significance. The conduct of the judiciary, that will necessarily guide the conduct of the legislative and executive branches of government is necessary before the next gridlock.

**MOHRMAN & KAARDAL, P.A.**

Dated: September 28, 2011.



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# State of Minnesota In Supreme Court

Case No. A11-1222

State Senator Warren Limmer, et al., Petitioners,  
v.  
Lori Swanson, et al., Respondents.

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## AFFIDAVIT OF SERVICE

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Mary Gynild, of the City of Minneapolis, County of Hennepin, State of Minnesota, being duly sworn, says: that on the 28th day of September, 2011, she served the following:

1. Petitioners' Principal Memorandum Responding to the Court's Issue on Mootness;

on the following parties in this action, through their respective attorneys, by U.S. Mail, a true and correct copy thereof, enclosed in an envelope postage pre-paid, and directed to the following at their last known address:

Attorney General Lori Swanson  
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Subscribed and affirmed to before me  
this 28th day of September, 2011.



Notary Public



  
Mary Gynild