STATE OF MINNESOTA
IN SUPREME COURT
Case No. A111107

State Senator Warren Limmer, State Senator Scott J. Newman, State Senator Sean R. Nienow, State Senator Roger C. Chamberlain,

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.

PETITIONERS RESPONSE TO THE RESPONDENT ATTORNEY GENERAL LORI SWANSON'S MOTION TO DISMISS THE PETITION FOR WRIT OF QUO WARRANTO

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ARGUMENT

I. Exigent circumstances exist to warrant Supreme Court jurisdiction to issue the writ of quo warranto.

The writ of quo warranto is an appropriate remedy under the circumstances of the instant case.[1] The Attorney General does not dispute the underlying constitutional issues presented to this Court are capable of repetition. The Attorney General does not dispute the issues presented are justiciable or ripe for review. And, the Attorney General does not dispute the distinguishing factual aspect of the instant case to those actions in 2001 and 2005 where her predecessors commenced the district court proceedings while the legislature was sitting in a special session. Here, the legislature is not in special session.

In 2001, the budgetary impasse crisis ended in 8 days after the Attorney General's filing; in 2005, it took 22 days. And although this Court indicated that a petition for quo warranto shall be filed in the district court in the first instance, the Court did state exceptions to the rule: "we today signal our future intention to exercise that discretion *in only the most exigent of circumstances.*[2] "Exigent" means "requiring immediate action or aid; urgent."[3]

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[1] The instant response memorandum to the Attorney General's motion to dismiss the Petition for a writ of quo warranto is offered as directed by this Court in its Order dated June 21, 2011.

[2] Sup. Ct. Or. Denying Pet. Quo Warranto, *State of Minnesota ex rel. v. Ingison* at 2 (A05-1742, Sept. 9, 2005), Pet. App. 148.

[3] *Black's Law Dictionary* 655 (Bryan A. Garner ed., 9th ed., Thomson Reuters 2009).

Back then, in 2005, this Court denied the petition for quo warranto on grounds that do not exist today: "[The] petitioners' desire for a final decision by June 30, 2007, almost two years from now, does not present "the most exigent circumstances."[4] There were two facts supporting the court's reasoning. First, because the 2005 quo warranto petition was filed after the budget impasse had ended, the Commissioner's questioned actions had ceased. Second, the legislature and the executive had enacted an appropriation by law retroactive to the beginning of the biennium, superceding the court ordered disbursements thereby voiding the commissioner's actions.[5] In other words, the budgetary impasse ended with an appropriation by law and any "ongoing usurpation of power" had ceased.[6]

The Court of Appeals in *State ex rel Sviggum v. Hanson* concluded that although the court had the power to issue "purely prospective rulings" under the special circumstances test, it could not under those facts: "[t]he special circumstances test, however, do not permit us to issue substantive decisions about injuries that we cannot redress ... For reasons that relate directly to the separation of powers and the explicit provisions of the legislature's retroactive and superceding appropriations bill, we conclude that the issue raised in this litigation is not redressable."[7] Thus, the central constitutional issues before this Court have *not*

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[4] Sup. Ct. Or. Denying Pet. Quo Warranto, *Ingison* at 3, Pet. App. 149.
[5] *State ex rel Sviggum v. Hanson,* 732 N.W.2d 312, 323 (2007).
[6] Atty. Gen. Mot. to Dismiss Pet. 3-4 (June 22, 2011).
[7] *Id.*322.

been reached and may never be reached if the instant Petition is dismissed and Petitioners are directed back to the district court.

Hence, the Attorney General's quo warranto jurisdictional argument fails. The usurpation of power is evident, and the need to determine the district court's lack of jurisdiction is immediate.

Unlike 2005, today, the extigent circumstances do exist. Not only have the constitutional issues neither been addressed nor resolved, the governor has not called a legislative special session (his lower court petition seeks court-ordered mediation), *and* critical to this Court exercising its quo warranto jurisdiction, the district court is venturing, at the Attorney General's request, into the very areas in which Petitioners assert the lower court has *no jurisdiction.*

The district court has consistently granted jurisdiction on the Attorney General's motions in 2001[8] and 2005.[9] However, the lower court has not yet been told whether it has subject matter jurisdiction in the first instance. If the district court has no jurisdiction, then the Attorney General's filing in that court is impermissible.

The central issue is whether the district court in the first instance, has the authority to issue orders that have no constitutional or statutory basis, demanding the Commissioner of Management and Budget to disburse state funds for state programs without an appropriation by law. If the court is allowed to do so,

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[8] Pet. App. 176-85.
[9] Pet. App. 304-315.

the court-approved disbursements and the threats thereof interfere with the legislature's appropriation powers and affect the dynamics of the legislative and executive process. In other words, the Attorney General's filing alone (as does the Governor's filing) has obligated the court to inject itself into non-justicable political questions. As the Petitioners stated, "[t]he wisdom of fiscal policy and appropriation of review is outside the purview of judicial authority" regardless of the present public weal demanding funding, even temporarily.[10]

II. There is no requirement for court review of perennial funding, and should a district court do so, it is issuing impermissible advisory opinions.

The Attorney General attempts to conflate mandatory obligations that require *no court order*, with funding that is within the sole discretion of the legislature and its policy decisions namely, unfunded statutes— creatures of the legislature — which may choose to fund them or not. The Attorney General misstated the Petitioners position by stating "Petitioners do not claim that the judiciary has no authority to order the requested disbursement of funds ...."[11] It is just the opposite: the Petitioners assert that under all circumstances the district court has no authority to issue orders for the disbursement of funds that are within the legal authority of the Commissioner to disburse in the first instance.

What the Petitioners suggest for instance, is that the legislature cannot prevent the implementation of constitutional mandates simply by withholding

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[10] Pet. Writ of Quo Warranto 45.
[11] Atty. Gen. Mot. to Dismiss 3.

appropriations.[12] In other words, in the absence of appropriations by law, the Commissioner must fund constitutional mandates at no more than existing levels until the legislature provides otherwise.[13] Therefore, neither a court order is necessary, nor court review necessary.

There are circumstances that the Commissioner may disburse state funds without an annual legislative appropriation. *In all these instances, a court order is not required.* Issuing such an order would be an improper advisory opinion.[14] Courts only have jurisdiction over justiciable controversies involving definite and concrete assertions of rights on established facts.[15]

As the Commissioner of Finance admitted in 2005:

> Based on court-ordered mandated services and programs, $569,623,962 of interim appropriation authority was established. *Of this total, $300,000,000 was established for the July 15 General Education aid payment for which open appropriation authority also exists.* Minn. Stat. § 126C.20 (2004).[16]

Thus, the district court on the Attorney General's 2005 petition issued an advisory opinion mandating $300,000,000 of already required spending.[17] This advisory opinion may have been great politics, but it was an improper plaintiff-

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[12] *See,* Pet. Writ of Quo Warranto 49-53 (June 20, 2011).
[13] Pet. Writ of Quo Warranto 49-50 (citing constitutional mandates).
[14] *See, Izaak Walton League of America Endowment, Inc. v. State Dep't of Natural Res.,* 252 N.W.2d 852, 854 (Minn. 1977).
[15] *St. Paul Area Chamber of Commerce v. Marzitelli,* 258 N.W.2d 585, 587-88 (Minn. 1977).
[16] Pet. App.477 (Ingison Aff. § 6) (emphasis added).
[17] *See* App. pp. 154- 165; Court Order dated June 23, 2005.

use of the district court to issue advisory opinions where no case or controversy exists. Only where in law the Commissioner must disburse funds does a court have jurisdiction to demand it —but only after the Commissioner has violated the mandate, by failing to disburse the funds in violation of the legal mandate.[18] Conversely, where there is no legal mandate the Commissioner may not disburse those funds. Further, the Ramsey District Court has no legal authority to order the Commissioner to disburse funds that are not required by law to be disbursed. The Attorney General has not presented to the lower court any facts nor legal arguments suggesting otherwise.[19]

Further examples exist, showing no court oversight is required. Some state statutes provide perennial funding (funded without the requirement of an annual legislative appropriation). Although argued in part in the Petitioners' Petition for quo warranto, the argument is expanded here. Educational expenditures present an example of a specific perennial monetary funding statute that requires no subsequent legislative action or court order. Minnesota Statute §126C.20 in conjunction with Minn. Stat. § 126C.10, specifically directs how money is to be disbursed to the state's school districts annually without a further appropriation by law:

> There is annually appropriated from the general fund to the department the amount necessary for general education aid. This amount must be reduced by the amount of any money

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[18] *Rukavina v. Pawlenty,* 684 N.W.2d 525, 535 (Minn. App. 2004) ("[T]he legislature may authorize others to do things (insofar as the doing involves powers that are not exclusively legislative.")

[19] Pet. App. 13-21.

specifically appropriated for the same purpose in any year from any state fund.

Thus, the specific legislatively mandated formula, the "general education aid" for the perennial disbursement of funds for education is enumerated under Minn. Stat. § 126C. 10.

Similarly, Minn. Stat. § 16A.641 governing general state obligation bonds for highway projects, provides for the Commissioner to sell the bonds as authorized by law.[20] The statute also specifically proclaims how to disburse the proceeds of the bonds without any further appropriation by law or by court order. Minn. Stat. § 16A.641, subd. 8, states that "(a) [t]he proceeds of bonds issued under each law are appropriated for the purposes described in the law and in this subdivision. This appropriation may never be canceled."

Minnesota Statute § 16A.125 governing state trust lands further reflects how the legislature specifically mandates the ability of the Commissioner to disburse state funds without an annual legislative appropriation or need of a court order. Here, the Commissioner is to credit revenue from the forest trust fund lands to a suspense account.[21] After the fiscal year, the receipts credited to the suspense account during that fiscal year are specifically distributed in accordance

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[20] The statute also reflects the control of the legislature over the ability to incurr debt on behalf of the state. No bond (debt) may be issued without authorization by law in accordance with Article XI, sections 5 and 7 of the Minnesota Constitution. See Minn. Stat. § 16A.641, subd. 1.

[21] Minn. Stat.§ 16A.125, subd. 5(b).

with the enumerated statutory provisions.[22] Finally, the statute delineates how money accruing and credited to a state development account is to be appropriated to the department of natural resources division of forestry.[23] And one further limitation is placed on the Commissioner. The statute concludes with the following: "[a]n obligation to spend money may not be made unless there is an available balance not otherwise encumbered in the appropriation."[24]

Likewise, to the extent the Supremacy Clause of the United States Constitution,[25] requires compliance with any valid federal mandate, it requires funding through the Commissioner. However, there is some doubt governing the constitutionality of the federal government mandating states to expend State funds pursuant to federal law.[26]

Certainly the state legislature is intimately interested in the federal programs and monies coming into the state that may affect state appropriations and commitments. Further, state engagement in a federal program does not preclude the necessity of an annual legislative appropriation.

Minnesota Statute § 3.3005, requires an opportunity for legislators to review federal monies received by the state and how they are expended:

> A state agency shall not expend money received by it under federal law for any purpose unless a request to spend federal money from that source for that purpose in that fiscal year

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[22] *Id.* Subd. 5 (d)(1) – (3).
[23] *Id.* Subd. 5a .
[24] *Id.*
[25] U.S. Const. art. VI, cl. 2.
[26] *See Printz v. United States,* 521 U.S. 898, 925 (1997).

> has been submitted by the governor to the legislature as a part of a budget request....[27]

Subdivision 5 also reflects the interest of legislators regarding how, when, and where federal monies coming into the state affect state appropriations:

> Federal money that becomes available under subdivision 3 [state matching money], 3a [change in how federal money is to be used], 3b [increase in the amount of federal money available], and 4 [interim procedures when legislature is not in session] may be allotted after the commissioner of finance has submitted the request to the members of the legislative advisory committee for their review and recommendation for further review.[28]

Such reviews become necessary in light of what impact state appropriations may have on how much federal money comes into the state especially if matching state funds are required. The fact that the state chooses to participate in a federal program does not necessitate a mandatory state obligation to continue participating with that program at previous state funding limits. These types of decisions are pure aspects of public policy directly tied to appropriations by law governed only through the legislators' votes of "yea" or "nay" within the legislative process. Unless the "federal mandate" via the Supremacy Clause is clear, the Commissioner is limited in disbursing state funds used to support or supplement federal programs.

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[27] Minn. Stat. Sec. 3.3005, Subd.2.
[28] Minn. Stat. Sec. 3.3005, Subd.5.

For example, the state is required under the Temporary Assistance to Needy Families Program ("TANF") to share in the cost of the program.[29] However, there remains a state annual legislative appropriation to be made to effect the provisions of Minn. Stat. Sec. 256J.02 that in turn implement TANF block grant money. Failure of the state to maintain a certain historic level of participation under TANF could result in a reduction in federal grant money.[30] Such a reduction may occur through how the state maintains the federal program via state appropriations. This type of control can only be the right of the legislators, again through votes of "yea" or "nay," and not that of a statutorily created figure such as the Commissioner.

As the Aging Services of Minnesota Care Providers of Minnesota, Inc. admits in its June 21 filing with this Court for leave to file an *amicus curie* brief, "Minnesota risks the suspension of its federal Medicaid match should it stop Medicaid payments to providers."[31] There is no federal mandate here – "the Medicaid program is dependent on the State of Minnesota *actually spending its matching state share.*"[32] Despite the expressed anticipated hardship, "[s]hould state financial support for Minnesota's nursing homes and assisted living facilities be cut off, providers will be forced into the choice of either evicting or involuntarily

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[29] 42 U.S.C. Sec. 601, *et. seq.*
[30] 42 U.S.C. Sec. 609 (7)(A).
[31] Aging Services of Minnesota Care Providers of Minnesota, Inc. Req. for Leave of Ct to File Amicus Curie Br. 5(June 21, 2011).
[32] *Id.* at 5 (emphasis added).

discharging residents for nonpayment..."[33] it is, nevertheless, *a policy decision for the legislature to make* – to fund in whole, or in part, or not at all. Here, the district court must not fill the present void and must play no part in interfering with the legislature's appropriation power.

To the extent the Supremacy Clause prevails in these circumstances the Commissioner is legally obligated to spend the funds, but narrowly construed within his own right and certainly without the necessity of any Ramsey District Court orders.

III. The Respondent Governor's joinder to dismiss the instant Petition is spurious since it suggests the Petitioners to engage in a "take it or leave it" approach and that filing in district court waives Supreme Court jurisdiction.

The Respondent Governor has joined in the Attorney General's motion to dismiss.[34] The Governor seeks the lower court's jurisdiction for mandatory mediation.[35] For the most part, Petitioners' previous arguments to this Court to grant a writ of quo warranto are applicable here. However, the Governor appears to accuse the Petitioners of misleading this Court: "[the] Petitioners failed to mention their simultaneous Notice of Intervention in District Court."[36] The issue before this Court is whether it has original jurisdiction to issue a writ of quo warranto. The Petitioners did *not* start the lower court action. The Petitioners are *potential*

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[33] *Id.* at3.
[34] Petitioners received service of the motion at 8:30 a.m. this morning, June 22, 2011.
[35] Mn. Gov. Joinder with Mot. to Dismiss 1 (June 22, 2011).
[36] *Id.* 3.

intervenors and, unlike here, *are not parties* to the lower court action. Furthermore, each action represents a different cause of action.

More importantly, the Petitioners have now filed an amended Petition that includes two different parties, Representative Glenn Gruenhagen and Representative Ernie Lediger. They *are not* parties to the lower court proceeding.

Nevertheless, since there are two *separate* court actions, started by different parties, the suggestion that the Petitioners have waived their right to the jurisdiction of the Supreme Court to prevent the lower court to invoke unconstitutional subject-matter jurisdiction is not supported any cognizable case precendent. Nor does the Governor cite any case law to support his position.

CONCLUSION

The district court has no jurisdiction and this quo warranto is the proper proceeding to immediately resolve the constitutional issues immediately.

Dated: June 22, 2011.

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