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In Supreme Court

The Ninetieth Minnesota State Senate and the Ninetieth Minnesota State House of Representatives,

Respondents,

vs.

Mark B. Dayton, in his official capacity as Governor of the State of Minnesota, and Myron Frans, in his official capacity as Commissioner of the Minnesota Department of Management and Budget,

Appellants.

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

This Reply addresses the arguments of both the Respondents Senate and House (collectively the "Legislature") and the Amicus Center of the American Experiment ("Amicus"). The Legislature takes issue with our Statement of the Facts. Appellants (the "Governor") stand on our Statement and will not address any differences because they are not material to the legal issues to be decided.

The Legislature's and Amicus' briefs draw the wrong narrative from the facts. Instead the following facts properly frame this case for decision:

At the close of the 2017 Special Session, the Legislature presented the Governor with 10 omnibus bills that included five issues that the Governor believed to be against the best interests of the citizens of Minnesota. The Governor had to make a choice of how best to express his disagreement and call the Legislature back to negotiate on these issues. The Minnesota Constitution provided him with tools that presented three alternative choices, perhaps none of them perfect:

1. The Governor could have vetoed the entire State Government Appropriations bill, similar to what was done in the 2011 government shutdown. The Governor realized that the 2011 veto led to temporary layoffs of 19,000 state employees.[1]

2. The Governor could have vetoed the Tax bill, which contained three of the five objectionable provisions (or each of the three bills that contained objectionable items). (Resp. Br. at 9, 26). But because of the poison pill inserted by the Legislature in

[1] *See* Minnesota Mgmt. and Budget, 2011 MINNESOTA STATE GOVERNMENT SHUTDOWN EXECUTIVE SUMMARY, at 2 (Oct. 2011).

the State Government Appropriations bill, the Governor knew that his veto of the Tax bill would effectively cancel the appropriations to the Revenue Department, which would adversely affect the 1,300 employees of that department. (Add. 41, 43).

3. The Constitution also provided the Governor with the tool of the line item veto, which he could use to veto the appropriations to the Senate and House. The Legislature has 638 state employees[2] and the Governor's disagreement was with those bodies, not with any other part of the government.

The Governor chose the alternative that would be the least disruptive of the government and the rights of Minnesota citizens, while also being the most directly focused on the disagreement at hand. He line item vetoed the appropriations to the Senate and House. His vetoes did not abolish the Senate or House. They were not meant to be permanent, but only a step in an ongoing negotiation process. During that process, the Senate and House have access to funding for their critical, core functions by petition to the district court. But for this litigation, the parties would likely have found a resolution through the political process by now.

The Governor's choice among alternatives involves a classic political question that is left to the Governor's discretion—which of the Governor's constitutional tools would provide the best outcome for Minnesota. His choice did not violate separation of powers because he used a tool that was expressly provided to him by the Minnesota Constitution. The Governor accomplished with a scalpel the same result that he admittedly could have

[2] Aff. of Cal Ludeman (Doc. 8369056), ¶¶ 3 and 17 (67 Senators and 205 staff); Aff. of James Reinholdz (Doc. 8369078), ¶¶ 4 and 13 (134 Representatives and 232 staff).

accomplished with a sledge hammer. The narrow choice actually promoted separation of powers because it served both primary purposes for the grant of veto power—to check the Legislature's encroachment on the Executive Branch by the poison pill and to check the Legislature's passage of unwise legislation that imperiled the state's future fiscal stability. The analysis should end right here.

ARGUMENT

I. SUMMARY OF ARGUMENT

Governor Dayton's vetoes are explicitly authorized by the Constitution. The Legislature attempts to revive the argument that the vetoes fail to satisfy the text of the Constitution because the Governor failed to "object to" the vetoed items of appropriation. (Resp. Br. at 30). But the Constitution's text only requires that the Governor veto "an item of appropriation" and then "append it to a statement of the items he vetoes." Minn. Const., art. IV, § 23. Section II A, below, discusses the Legislature's tortured reading of Section 23.

The vetoes did not "abolish" the Senate or House. The Legislature states repeatedly, and colorfully, that the vetoes had the intent or effect of "abolishing the Legislature." (*See e.g.*, Resp. Br. at 2, 8, 10, 19, 21 and 23). This is the basic premise of the Legislature's entire argument, and it is false. Section II B, below, demonstrates the fallacy of this premise—the Governor's vetoes of appropriations did not and could not abolish the Legislature because funding for critical, core functions is available for the very purpose of preventing any such abolition.

Because the veto power has been assigned exclusively to the Governor, inquiry into the Governor's motives is a violation of separation of powers. The Legislature misreads the clear precedent that judicial review of a veto is limited to whether it meets the requirements expressed in the Constitution and does not include an inquiry into the Governor's motives. (Resp. Br. at 26-27). Section II C, below, shows that the case law for this principle is founded on separation of powers.

The Governor's choice to veto the Senate and House appropriations is a political question left to the Governor's discretion. The Legislature ignores the context of the Governor's choice, and the fact that it was in part dictated by the Legislature's effort to erect barriers to a veto of the Tax bill. Section II D, below, demonstrates that the Legislature and the district court failed to articulate any judicially manageable standards to scrutinize the Governor's vetoes, confirming that this is a political question.

The Governor asks this Court to reverse the district court's judgment and remand the case with direction to dismiss with prejudice Count I of the Complaint (Declaratory Judgment) and to establish a core funding procedure under Counts II and III of the Complaint (Injunction and Mandamus).

II. THE GOVERNOR'S LINE ITEM VETOES WERE VALID

A. The executive and line item vetoes fortify rather than corrode the separation of powers between the branches.

The Legislature attempts to resurrect a textual argument by suggesting that the original word used in the Constitution, "object," somehow restricts the current word "veto." (Resp. Br. at 27-30) The Legislature suggests that Governor Dayton did not

"object" to the Senate and House appropriations because he did not disagree with the requested funding level. (*Id.* at 30). This argument is incorrect both legally and factually. Article IV, § 23 of the Minnesota Constitution uses the word "veto," not "object," and does not require the Governor to state the reasons why a line item veto has been made. It only requires a "statement of the item he vetoes." If objection were required, the assertion of a veto is, by its very nature, an objection to the bill or item being vetoed.

Further, the record shows that the Governor *in fact* objected to the appropriations to the Senate and the House because he believed they had further work to do before receiving their appropriations: "Your job has not been satisfactorily completed, so I am calling on you to finish your work." (Add. 43). He explained that he did not veto the Tax bill because he would not "risk a legal challenge to the Department of Revenue's budget and cause uncertainty for its over 1,300 employees." (*Id.*) If a subjective inquiry into the Governor's state of mind were permitted, this record shows "disagreement or disapproval," as a matter of law.

Amicus suggests that Governor Dayton's vetoes were for an improper purpose—"to coerce the Legislature in the exercise of its discretionary powers." (Amicus Br. at 4). But, the Legislature's "discretion" is not unlimited because it is expressly subject to the Governor's power to veto. And although a veto is intended to create leverage to seek concessions from the Legislature, it is only a negative power. *See, e.g.*, *Duxbury v. Donovan*, 272 Minn. 424. 429, 138 N.W.2d 692, 696 (1965). As such, a veto cannot either "coerce" or "force" repeal of policy legislation, as Amicus and the Legislature suggest. (Resp. Br. at 26).

The best discussion of the purposes of vetoes is contained in *Duxbury*, which highlights two main purposes—to defend Executive power against encroachment by the Legislature and to prevent unwise legislation:

> The primary purpose of the framers of the Federal Constitution in granting an executive veto power appears to have been a desire to maintain the separation of the branches of government. The belief then current was that there is a tendency in free governments for the legislative branch to absorb all governmental power. The veto power was considered to be an integral part of the system of checks and balances designed to prevent constitutional abuses by a legislative majority.
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> A second purpose for the veto power was discussed by the framers of the Constitution but was not recognized in practice until later. Alexander Hamilton favored the exercise of the veto power as a check upon hasty and unwise legislation, going beyond the question of constitutionality.

272 Minn. at 429, 138 N.W.2d at 696 (footnotes omitted).

Governor Dayton's veto letters mentioned both purposes:

> At the last minute, the Legislature snuck language into the State Government bill that would hold hostage the Department of Revenue appropriation in the bill to my signature on the Tax bill. I am unwilling to put the jobs of 1,300 Department of Revenue employees at risk. As a result, I am line-item vetoing the appropriations for the Senate and House of Representatives to bring the leaders back to the table to negotiate provisions in the Tax, Education and Public Safety bills that I cannot accept.

(Add. 41).

> I will not risk a legal challenge to the Department of Revenue's budget and cause uncertainty for its own 1,300 employees Because of your action, which attempts to restrict my executive power. I am left with only the following means to raise my strong objections to your tax bill, which favors wealthy individuals, large corporations, and moneyed special interests at the expense of the State of Minnesota's fiscal stability in the years ahead.

(Add. 43).

The cases cited by the Legislature, all from outside of Minnesota, are inapposite or readily distinguishable. The West Virginia and Kentucky constitutions differ from Minnesota's constitution, and their case law does not apply here. Those constitutions require that governors file objections, (West Virginia), *State ex rel. Browning v. Blankenship*, 154 W. Va. 253, 260, 175 S.E.2d 172, 177 and *Jones v. Rockefeller*, 172 W. Va. 30, 40, 303 S.E.2d 668, 678 (1983), or to state reasons and objections (Kentucky), *Arnett v. Meredith*, 275 Ky. 23, 121 S.W.2d 36, 38-40 (1938). Minnesota's Constitution requires only a "a statement of the items he vetoes." Minn. Const. art. IV, § 23.

The Legislature attempts to distinguish *State ex rel. Greive v. Martin*, the Washington case in which the court held that the governor could veto an item of appropriation for Washington's Legislative Council. (Resp. Br. at 14-16 (citing *State ex rel. Greive v. Martin*, 63 Wash. 2d 126, 385 P.2d 846 (1963)). But the distinctions the Legislature identifies were irrelevant to the court's holding. The court upheld that line item veto because it "strictly complied" with the provisions of the Washington Constitution. The court noted that the governor could not control that the legislature had adjourned and deprived itself of the right to override the veto, and, most importantly, that the Washington Constitution, contains "no exceptions restricting [the governor's] power to veto items appropriating funds for any legislative purpose." *See id.*, 385 P.2d at 850.

The Legislature suggests that the Governor seeks an expansive view of his line item veto authority. (Resp. Br. 9). The Legislature focuses not on the facts of this case but on an extreme hypothetical posed by the district court—could the line item veto be used to veto the funding for the courts unless a ruling favorable to the Governor is issued in

some pending procedure? (Add. 18). Amicus animates this hypothetical with a fictional veto. (Amicus Br. at 1-2).

It is often said that bad facts make bad law, and this Court should resist the call to decide this case on facts not presented. The Constitution creates a give and take relationship between the two political branches in budget negotiations and explicitly provides the Governor a role in influencing the Legislature's exercise of legislative power. Indeed, the veto power is itself an enumerated distribution of legislative power to the executive. In contrast, the line item veto is not intended to be an encroachment on the inherent independence of the judiciary, and it does not authorize the Governor to use the veto power to influence the judiciary's independent judgment. Similarly, the Constitution does not authorize the Legislature to use its appropriations power to influence the judiciary's independence. As a result, the Court would be justified in formulating a rule of law that would protect the judiciary from the two political branches.

The actions described in the hypothetical would likely be held to be both "unsavory" and an unconstitutional intrusion into the judicial power of the Court, which is dictated by the rule of law, not by political debate. *See State ex rel. Decker v. Montague*, 195 Minn. 278, 288-89, 262 N.W. 684, 689 (1935) (executive order was "a direct encroachment by the executive upon the functions of the judiciary and as such not constitutionally permissible").

The district court and the Legislature agreed that the Governor had clear authority to veto the Tax bill, which contained objectionable provisions. (Add. 2, ¶ 5; Resp. Br. at 9, 26.) Surely the Governor was acting within his executive authority when he made the

decision to sign the Tax bill, thereby avoiding the penalty to the Department of Revenue, but to veto the Senate and House appropriations to call them back into session to revisit five issues. That choice did not offend notions of separation of powers but actually restored the balance of powers that underlies those notions.

The Legislature cites to *Starkweather v. Blair*, 245 Minn. 371, 71 N.W.2d 869 (1955) for the proposition that a constitutional power cannot be used to accomplish an unconstitutional result (Resp. Br. at 24), but it fails to show that the Governor's line item vetoes produced an unconstitutional result. The Governor could have vetoed the entire State Government Appropriations bill. Indeed, this is exactly what happened in 2011—with the outcome that there was no appropriation for the Legislature. And yet, the Legislature contends that the very same outcome arrived at through use of the line item veto violated the separation of powers. Neither the district court nor the Legislature has been able to reconcile these inconsistent positions in a way that does not impose extra-constitutional requirements or simply invalidate the Governor's line item veto power. They have failed to articulate a coherent constitutional test with judicially manageable standards.

B. The Governor's vetoes did not "abolish" the Legislature.

1. This Court's precedent protects each branch of government from abolition by another branch.

The premise of the Legislature's arguments—that the vetoes "abolished the Legislature"—is simply false. And neither the number of times they repeat it, or the inflammatory terms used to describe it, make it true. The vetoes were not permanent, but

only a step in the ongoing negotiation process between the two political branches. During that process, the Senate and House were entitled to obtain funding for their critical, core functions.

Surprisingly, the Legislature questions the viability of the core funding orders issued in the 2001, 2005 and 2011 government shutdown cases. (Resp. Br. at 21-23).[3] Although these orders did not receive appellate review, the fundamental principles that underlie them are well established in Minnesota and federal jurisprudence. The analytical framework was set forth by this Court in *Lyon County*, which recognized that principles of separation of powers conferred inherent power on the judiciary to assure that each branch of government is provided with funding sufficient to perform its constitutionally distributed functions (in that case, judicial functions). *Clerk of Court's Comp. for Lyon Cty. v. Lyon Cty. Comm'rs*, 308 Minn. 172, 180-82, 241 N.W.2d 781, 786-87 (1976).

Support for the core funding orders is also provided in *Mattson*, where this Court's decision recognized that the judiciary had authority to require the continuance of the constitutional office of the Treasurer despite the failure to appropriate funds for all core functions of that office. *State ex rel. Mattson v. Kierdowski*, 391 N.W.2d 777 (Minn. 1986). This Court assured funding for the core functions by ordering that funds appropriated to the Department of Finance for those functions be transferred to the

[3] The Legislature sought core funding for itself in the 2011 case and in Counts II and III of its present Complaint, the Legislature alleges, alternatively, that "the Legislature must be allowed to exercise its official and constitutional powers and duties, and the State of Minnesota must fully fund such functions." (Complaint, p. 9, ¶ 38; p. 10, ¶ 43 and wherefore clause 3).

Treasurer to enable him to perform his constitutional duties. *Id.*, 391 N.W.2d at 778, n.1, and 783.

Additional support in federal jurisprudence for the core funding orders was highlighted in the 2011 core funding case. The Minnesota Attorney General, who petitioned for core funding, pointed out the well-settled federal law that states cannot ignore or deny the constitutional rights of their citizens simply because funding has not been appropriated to meet constitutional obligations. *See, e.g., Watson v. City of Memphis*, 373 U.S. 526 (1963) (requiring desegregation of public facilities and rejecting the defense that sufficient funds had not been appropriated); *Abbott ex rel. Abbott v. Burke*, 206 N.J. 332, 20 A.3d 1018 (2011) (requiring the state to fully fund the right of an education, despite the lack of an appropriation).

In the end, the Legislature's argument that core funding is not available and therefore the Legislature has been abolished, is hopelessly circular. In essence, the Legislature argues that core funding is not a remedy for an unconstitutional veto, and that the veto is unconstitutional because there is no core funding. (Resp. Br. at 21). The funding necessary to conduct its core functions is available. In addition, the Legislature has substantial carryover funding. And the Legislature can convene at its next regular session. In short, the Legislature has not been abolished.

If the Legislature were correct that core funding is not available, and that any government entity that is without an appropriation has been effectively abolished, then the Legislature's failure to appropriate funds for the Executive or Judicial branches in 2001 would have effectively "abolished" those branches, and the same for portions of the

Executive branch in 2005. Similarly, if the Legislature's analysis were correct, the Governor's veto of appropriations in 2011 would have "abolished" virtually all of the government. The Legislature's view is not correct because core funding is provided for the very purpose of preventing the abolition of each affected branch.

Amicus suggests that in the prior cases the core funding remedy based on the conclusion that failure to fund core functions would contravene separation of powers. (Amicus Br. at 8). The Governor agrees that the availability of core funding insures against certain violations of the separation of powers clause, but the analysis does not go deep enough. The prior core funding cases determined that core funding was necessary to enable each branch of government to perform the duties owed to the citizens imposed on it by the Constitution. In other words, those decisions were based on the distributive clause of Article III, § 1, the duties assigned—and not on the prohibitive clause—there was no suggestion that the failure to appropriate was an unconstitutional intrusion by the Legislature into the powers reserved to the other branches.

The Legislature relies heavily on a 1973 case from West Virginia involving a provision of the so-called Modern Budget Amendment adopted by referendum in 1968. *See State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 106, 207 S.E.2d 421, 426 (1973). This case is entirely distinguishable. The West Virginia Governor had attempted to use his power, first established in that 1968 amendment, to reduce three appropriations to the judiciary and two appropriations to the Constitutional offices of Secretary of State and Treasurer. *Id.* at 107, 116-21, 207 S.E.2d at 426,27, 431-34. Unlike the line item vetoes here, all reductions were meant to be permanent, and not just a step in an ongoing

negotiation process. For the reductions to the judiciary, the court held that other provisions of the 1968 amendment had to be read in *pari materia*, the result being that once the judiciary had proposed its budget, neither the legislature nor the governor could revise that budget, which meant also the governor could not reduce the judiciary's appropriation. *Id.* at 109-16, 207 S.E.2d at 427-31. In this respect, the decision turns on unique aspects of the West Virginia Constitution.

The court also struck down the governor's reduction of the budgets for the constitutional offices of Secretary of State and Treasurer. *Id.* at 116-21, 207 S.E.2d at 431-34. The court held that the governor could not use his authority to "eliminate the functions of the constitutional offices." *Id.* at 117, 207 S.E.2d at 432. In this respect, the decision does not add anything to the Minnesota jurisprudence established in *Mattson*—that the Court has authority to require continuation of the functions of constitutional offices. *See* 391 N.W.2d at 782-83; *see also Thirteenth Guam Legis. V. Bordallo*, 430 F.Supp. 405, 416 (D. Guam 1977).

2. This case mirrors prior government shutdowns.

The Legislature attempts to distinguish the facts of this case from the prior core function funding cases. It argues that all three prior cases came to court because the Legislature failed to enact necessary appropriations. (Resp. Br. 22). Actually, in the 2011 case, the appropriations failed because of the Governor's veto of the appropriations bills, including the State Government Appropriations bill, and all three branches of government sought core function funding pending a political solution to several budget issues.

The Legislature raises the specter of "persistent court-ordered funding" that "could have the effect of conscripting the Judiciary as a super-appropriator" and may "encourage stalemates in the budget process." (Resp. Br. at 21, n. 14). But this fearsome hypothetical bears no likeness to this case. The Governor does not seek persistent court-ordered legislative funding. In the entire history of this state, the district court has been asked on three occasions to provide temporary (typically, 30 days or less) core funding where there has been no appropriation. In one case, a political solution was reached before the temporary funding took effect and in the other two, political solutions were reached within 20 days or less .

Interestingly, the Legislature points out that there never was a claim in the previous core funding cases that the Legislature's failure to appropriate was unconstitutional (i.e., that it violated the prohibitive clause of Article III, § 1 of the Minnesota Constitution). (Resp. Br. 23). Exactly so. If the failure of appropriations caused by legislative inaction does not violate separation of powers or "abolish" the affected governmental bodies, the failure of appropriations caused by a line item veto cannot be any different.

Amicus suggests that it would be "intrusive" to require the Legislature to reveal which "items in the Legislature's budget are truly for critical, core functions." (Amicus Br. at 10, n.4). But in every prior core funding case, the Executive Branch (and sometimes the Judicial Branch) was required to do that very thing. There is nothing distinct about the Legislature's inherent powers that should make it less subject to any intrusion attendant to the core function funding process than its co-equal branches.

C. Judicial inquiry into the Governor's motives for a veto is a violation of separation of powers.

Amicus implies that the Governor's argument that the judiciary cannot consider the motives of a veto is based on a single sentence from *Johnson v. Carlson*, 507 N.W.2d 232, 235 (Minn. 1993). (Amicus Br. at 6). This is incorrect.

First, that sentence is clear and dispositive of the issue. In *Johnson*, the plaintiffs challenging the line item veto argued that the "effect of the veto in this case is to divert money from a purpose determined by the legislature to some other purpose desired by the governor" and that a "line item veto must result in a reduction in spending." *Id.* at 234. This Court rejected those arguments, noting, "It is not for this court to judge the wisdom of a veto, or the motives behind it, so long as the veto meets the constitutional test." *Id.* at 235.

Second, Amicus suggests that the "constitutional test" that *Johnson* set forth could include "some other constitutional provision," implying that it includes separation of powers challenges like those made here. (Amicus Br. 6). But *Johnson* clearly identified the constitutional test it was referring to—"our focus is simply on whether Governor Carlson has vetoed an 'item of appropriation.'" 507 N.W.2d at 235. The district court here recognized that Governor Dayton's line item vetoes met that test. (Add. 12).

Third, the recognition of this principle, that the judiciary will not inquire into the motives of the Governor, is more widely held than just *Johnson*. In *Inter Faculty Org. v. Carlson*, the Court said: "we are also keenly aware that it is not our role to comment on the wisdom of either the appropriations or the exercise of the item veto." 478 N.W.2d

192, 197 (Minn. 1991) (citing *Starkweather*). Similarly, in *In re McConaughy*, the Court said: "The Governor may exercise the powers delegated to him, free from judicial control, so long as he observes the law and acts within the limits of the power conferred. His discretionary acts cannot be controllable, not primarily because they are of a political nature, but because the Constitution and laws have placed the particular matter under his control." 106 Minn. 392, 415, 119 N.W. 408, 417 (1909). In *Starkweather*, referring to judicial review of the legislature's discretionary acts, the Court said: "We have frequently held that the motives of the legislative body in enacting any particular legislation are not the proper subject of judicial inquiry." 245 Minn. at 379-80, 71 N.W.2d at 875-76.[4]

Both the Legislature and Amicus emphasize that the Governor's veto message did explain his reason for the vetoes, even though the Minnesota Constitution does not require it. They each argue that this solves any evidentiary problem or the need to speculate about motive. (Resp. Br. at 25-26; Amicus Br. at 10-11). But this is irrelevant because judicial restraint from inquiring into Executive motives is not based on evidentiary concerns, but principles of separation of powers that preclude intrusion into the Executive's discretionary decision-making.

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[4] *See also State ex rel. Birkeland v. Christenson*, 179 Minn. 337, 341, 229 N.W. 313, 314 (1930). ("[C]ourts cannot, by injunction or mandamus, control or direct the head of an executive department in the discharge of any executive duty involving the exercise of discretion . . ."); *Duxbury*, 272 Minn. at 442, 138 N.W.2d at 704 ("Our decision here is not intended to be an evaluation of the merits of S.F. 102 or of the veto which nullified it. Deciding that the executive power to assert a qualified veto was put in the Constitution as a check upon the power of the Legislature to redistrict and apportion does not imply that the use of the veto in this particular case was or was not prudent. For us to intimate one way or another on this subject would be to exceed the clear limits of our judicial responsibility.").

Curiously, the Legislature acknowledges that Governor Dayton could have accomplished his purpose of seeking concessions in renegotiation of five issues by vetoing the Tax bill. (Resp. Br. at 26). But it does not explain how this same legitimate purpose somehow becomes illegitimate for a line item veto. The Legislature's criticism of the use of the line item vetoes is particularly hypocritical because they inserted the poison pill for the very purpose of preventing the Governor from choosing another option by vetoing the Tax bill.

After acknowledging that the Governor could have lawfully vetoed the entire bills, the Legislature strangely asserts that the Governor cannot use his line item veto to "accomplish indirectly what he could not do directly." (Resp. Br. at 15). But, the Governor could have raised his concerns directly by vetoing those bills. To the extent that Governor Dayton used his line item vetoes to object to issues in other bills, he did indirectly what he could also have done directly. No legal principle prevents this.

D. Under the political question doctrine, the right to veto items of appropriation is the Governor's, and there are no judicially manageable standards for limiting that right.

In his opening brief, the Governor set out how the political question doctrine applied to his use of his line item veto authority over the Senate and House appropriations. The Legislature does not, for it cannot, dispute that the Minnesota Constitution specifically grants the Governor line item veto authority. Minn. Const. art. IV § 23. The judiciary may interpret the express language of the grant of authority, and rule on whether the Governor used line item veto authority against an "item of appropriation," as it did in *Inter Faculty Org*. But there is no dispute that Governor

Dayton vetoed items of appropriation. Likewise, there is no dispute his line item vetoes were timely. The Legislature's challenge to the Governor's vetoes must therefore rest on *why* the Governor chose to do so. That challenge fails under the political question doctrine, which protects the motives of the Governor's constitutionally granted veto authority from judicial review.

The Legislature cites several cases for the proposition that this Court has decided separation of powers cases for well over 100 years. (Resp. Br. at 33). That may be true, but none of those cases presented the question here—can a facially proper veto be judicially overruled because the Governor used his veto authority for a mixture of policy and fiscal reasons? Only *Decker* was a separation of powers case, and it only addressed the Governor's authority to designate a judge from outside a judicial district to try a criminal case, when there were competent local judges within the district willing to try the case. 195 Minn. at 288-89, 262 N.W. at 689.

The Governor has an express, constitutionally granted line item veto authority. The Legislature concedes, as did the district court, that if the Governor disagrees with the level of the Legislature's appropriations, he can veto them. The Legislature's complaint here is the Governor's purpose in using his line item veto authority. But the Legislature proposes no judicially manageable standard for determining which purposes are permissible and which are not. Not one.[5]

[5] Amicus suggests that *Starkweather* provides guidance. But *Starkweather* was not a motive case; the issue there was whether a bill produced an unconstitutional result. As that Court made clear: "As long as the legislature does not transcend the limitations placed upon it by the constitution, its motives in passing legislation are not the subject of

The Legislature's position requires the Court to delve into the connection between the items of appropriation vetoed and the objectives of the Governor in exercising his power. It would be nearly impossible, however, to characterize the Governor's subjective assessments as incorrect or illegitimate. For instance, legislative funding may be a reasonable and appropriate place to find savings if the Legislature is intent on reducing State revenues through provisions in the Tax bill. Budget negotiations frequently take place at a global level, and while the subjects of disagreement may appear in different bills, the political branches are better suited to make the policy and political calculations necessary to assess the relationships between the various items. It is a fundamental principle of negotiation that there is rarely only one single path to reaching a mutually agreeable settlement. The Court should avoid decisions that limit options to resolve difficult negotiations or that second-guess the subjective judgments of the political branches (or worse yet, that second-guess the subjective judgments of just one branch).

The Legislature's motives are not open to judicial inquiry; the Governor's motives for use of veto authority, also part of the legislative process, are likewise not open to judicial inquiry.[6]

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proper judicial inquiry." 245 Minn. at 380, 71 N.W.2d at 876. *See also Johnson* 507 N.W.2d at 235 ("It is not for this court to judge the wisdom of a veto, or the motives behind it ….").

[6] The fact that the Minnesota Constitution does not require the Governor to provide a statement of reasons for his vetoes, including his line item vetoes (unlike other states referenced by Respondents), suggests that to the framers, a governor's rationale for using his veto power is irrelevant.

E. The district court misinterprets the relationship between the separation of powers clause and the line item veto – the line item veto may be used to object to policy legislation.

The Legislature mistakenly asserts that line item vetoes cannot be used for "policy" purposes. (*E.g.*, Resp. Br. p. 30.) Of course, the Governor did not veto "policy" provisions—he only vetoed items of appropriation. Nowhere in the text of Article IV, Section 23 is there a limitation on the use of a line item veto to negotiate with a legislature, or to try to cause policy change through the vetoing of items of appropriation.[7] Article IV, Section 23 does not support the intent-based inquiry that the Legislature advances. So long as one or more "items of appropriation of money" are struck, the use of the line item veto is valid. To hold that a Governor may not use a line item veto as a tool to initiate policy negotiations would permanently deprive the Governor of one of the few constitutional tools he has to negotiate with a co-equal, political branch. No Minnesota court has ever so held, and such a ruling would forever upend the delicate balance between these two branches that has existed since 1876.

CONCLUSION

The district court made a valiant effort to shelter its decision by suggesting it depended on the "unique and limited circumstances of this case." (Add. 16 and 22). That attempt was futile because the ramifications of its decision on the balance of powers between the Governor and Legislature are enormous. The district court's decision is the first in Minnesota's history to curb a veto power that is expressly authorized by the

[7] The word "policy" does not appear in Article IV, § 23 or anywhere in our Constitution.

Constitution. The legal rulings on which the district court attempted to support that result cannot be confined to the unique facts of this case. If accepted, they would severely limit the Governor's ability to use his veto authority as a tool to resist the Legislature's encroachment on Executive authority and to achieve a balance of powers.

The rule of law applicable to this case is as follows:

The Minnesota Constitution expressly authorizes the Governor to use the line item veto for "items of appropriation." The Governor's use of a line item veto is subject to judicial review only to the extent of determining whether it conformed to the procedural requirements of the Constitution. The Governor's reasons for or motives behind a line item veto are shielded from judicial scrutiny by the political question doctrine. Because the Governor's line item vetoes of appropriations for the Senate and House of Representatives did conform to the requirements of the Constitution and did not otherwise produce an unconstitutional result, they were valid and should stand.

The district court's judgment should be reversed. The case should be remanded with directions to dismiss Count I of the Complaint with prejudice and to consider Counts II and III to the extent that they request emergency funding for the critical, core functions of the Senate and House.

Respectfully submitted,

Dated: August 21, 2017

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellants certifies that this brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in 13-point, proportionately spaced typeface utilizing Microsoft Word 2010 and contains 5,998 words, including heading, footnotes and quotations.

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