FILED
August 15, 2017
OFFICE OF APPELLATE COURTS

NO. A17-1142

State of Minnesota

In Supreme Court

The Ninetieth Minnesota State Senate, et al.,

Respondents,

vs.

Mark B. Dayton, et al.,

Appellants.

BRIEF OF *AMICUS CURIAE* CENTER OF THE AMERICAN EXPERIMENT IN SUPPORT OF RESPONDENTS

BRIGGS AND MORGAN, P.A.
Sam Hanson (#0041051)
Scott G. Knutson (#141987)
Scott M. Flaherty (#388354)
Emily M. Peterson (#395218)
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400

Counsel for Appellants

ROSS & ORENSTEIN LLC
Harry N. Niska (#0391325)
222 South Ninth Street
Suite 470
Minneapolis, MN 55402
(612) 436-9804

CENTER OF THE AMERICAN EXPERIMENT
Kimberly Reynolds Crockett (#0388309)
8421 Wayzata Boulevard, Suite 110
Golden Valley, MN 55426

Counsel for Amicus Curiae Center of the American Experiment

(Additional counsel listed on the following page)

2017 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

KELLEY, WOLTER & SCOTT, P.A.
Douglas A. Kelley (#54525)
Steven E. Wolter (#170707)
Kevin M. Magnuson (#306599)
Brett D. Kelley (#396526)
Centre Village Offices, Suite 2530
431 South Seventh Street
Minneapolis, MN 55415
(612) 339-8811

and

MASLON LLP
David F. Herr (#44441)
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 672-8200

Counsel for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions **Page**

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Center of the American Experiment (the "Center") is a nonprofit educational organization dedicated to the principles of free enterprise, limited government, personal responsibility, and government accountability. It conducts research and develops public policies that make Minnesota a freer, more prosperous and better-governed state. The Center regularly participates as *amicus curiae* in cases involving important legal questions likely to affect the public interest. Its interest here is public.

INTRODUCTION

May 7, 2010

Dear President Metzen:

I write to inform you of the following line-item vetoes to 2009 Chapter 83, Senate File 802:

• Art. 1, Sec. 3, Subd. 1	~~Supreme Court~~	~~$43,476,000~~	~~$43,475,00~~
• Art. 1, Sec. 4	~~Court of Appeals~~	~~$10,285,000~~	~~$10,285,000~~
• Art. 1, Sec. 5	~~Trial Courts~~	~~$250,116,000~~	~~$250,116,000~~

Earlier this week, four justices of the Minnesota Supreme Court issued a gravely mistaken ruling in *Brayton v. Pawlenty*, unlawfully restricting my executive authority (expressly granted by statute) to enforce Minnesota's constitutional prohibition on deficit spending.

As a result of this action, I am line-item vetoing the appropriations for the courts to persuade the Supreme Court to reconsider its decision that I simply cannot accept. Attached is my letter to Chief Justice Magnuson explaining my reasoning for line-item vetoing the judicial branch's appropriations based on my profound disagreement with the *Brayton* decision.

Sincerely,

Tim Pawlenty
Governor

[1] No counsel for any party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

The preceding letter is, of course, fictional. But aside from the timing[2], under the logic of Appellants' (collectively referred to as the "Governor") position, this veto letter would be a perfectly legal exercise of the Governor's "explicit authority under the Minnesota Constitution to veto any line item of appropriation" (Governor's Br. at 8), in order to "defend against the [judiciary's] encroachment upon Executive power" (*id.* at 17). In fact, under the Governor's view, these vetoes would have "actually *promoted* the balance of powers that fundamentally underlies . . . notions" of separation of powers. *Id.* (emphasis added).

In support of this boundless view of executive power, the Governor asks this Court to declare the Governor's line-item veto power is "not qualif[ied] or limit[ed]" (*id.* at 11) and is thus immune from judicial review as long as the "item vetoed is an 'item of appropriation'" (*id.* at 8). Minnesota law does not permit, much less require, such an unfettered view of *any* power granted to *any* single branch. Instead, all three branches are subject to the restraints expressed in the

[2] In additional to the constitutional defect raised in this case, these fictional line-item vetoes would have been untimely. *See* Minn. Const. art. IV, § 23 (providing limited windows of time for a Governor to sign, veto, or take no action on bills). But while these fictional line-item vetoes were untimely, it is not difficult to imagine scenarios in which the Governor could issue such a timely line-item veto targeting the judicial branch. For example, this year the Governor signed the omnibus bill containing judicial branch appropriations (Chapter 95, House File 470) on May 30, 2017, the same day he made the line-item vetoes challenged here.

Separation of Powers Clause found in Article 3, Section 1 of the Minnesota Constitution, which (as this Court has explained) prohibits any branch from using its powers to "control, coerce or restrain . . . the others in the exercise of any official power or duty . . . involving the exercise of discretion." *State ex rel. Birkeland v. Christenson*, 179 Minn. 337, 340, 229 N.W. 313, 314 (1930).

The Governor's line-item veto power is not exempt from the separation of powers principles that restrain every other exercise of every other power of every other branch, as the Governor asserts. The vetoes at issue here (or the hypothetical vetoes to coerce the judicial branch to reconsider *Brayton*) illustrate the dangers of such an approach. Yet, the Governor argues that this Court must reaffirm his authority because any judicial review of his openly-stated motives would itself overstep the bounds of the judiciary's power. *See* Governor's Br. at 23-24.

This Court has already suggested a framework for balancing these countervailing separation of powers concerns in *Starkweather v. Blair*, 245 Minn. 371, 71 N.W.2d 869 (1955). There, a legislative appropriation was challenged as a bill of attainder. The Court acknowledged that, in some circumstances, the motives of the legislature might be considered to determine whether the legislature was attempting to "use a constitutional power to accomplish an unconstitutional result, but, before it can be held that the latter has been done, it

must appear that the end result of the act accomplished some purpose proscribed by the constitution." *Id.*, 245 Minn. at 380, 71 N.W.2d at 876.

Here, the challenged vetoes indisputably (1) create an unconstitutional outcome demanding a judicial remedy, and (2) were driven by an unconstitutional motive: to coerce the Legislature in the exercise of its discretionary powers. Accordingly, under the two-pronged test laid out in *Starkweather*, the vetoes are an impermissible exercise of a constitutional power to achieve an unconstitutional result. *See id.*, 245 Minn. at 385, 71 N.W.2d at 879 ("It is also true that the legislature may not use a constitutional power to achieve an unconstitutional result."). The district court's ruling should be affirmed.

ARGUMENT

I. The challenged vetoes are unconstitutional.

A. The two-pronged *Starkweather* test balances the countervailing constitutional imperatives at issue here.

By its nature, every exercise of judicial review raises separation of powers concerns, especially when another branch's actions are challenged as a separation of powers violation. On the one hand, judicial review itself carries risks that the judicial branch will interfere with the proper discretionary acts of another branch. *See State ex rel. Decker v. Montague*, 195 Minn. 278, 288, 262 N.W. 684, 689 (1935) ("The constitutional separation of authority . . . forbids judicial interference with the exercise of the powers [of] the governor as the chief

executive of the state.") On the other hand, when the legislature enacts an unconstitutional law, or when an executive officer acts unconstitutionally, those actions are subject to judicial review in appropriate cases. *See, e.g., State ex rel. Birkeland*, 179 Minn. at 340, 229 N.W. at 314.

This conflict is particularly acute in the context of legislative appropriations. There are often intense negotiations between the executive and legislative branches. When those negotiations fail, there are constitutional implications to failure to fund certain branches or agencies. But the courts are rightly cautious to wade into budget negotiations unless absolutely necessary to remedy constitutional or legal violations.

The two-pronged *Starkweather* test followed by the district court offers the best method to balance these competing imperatives. Following the reasoning of *Starkweather*, the courts can consider whether an act—like the challenged vetoes here—was taken with the motive to "use a constitutional power to accomplish an unconstitutional result," but only if it is first established "that the end result of the act accomplished some purpose proscribed by the constitution." 245 Minn. 371, 71 N.W.2d 869.

By requiring both elements—(1) an unconstitutional end result and (2) the motive to accomplish an unconstitutional result—before invalidating a veto, the proper role of the veto is preserved without transforming it into a power to

engage in unconstitutional coercion or invasion of the separation of powers, as the Governor claims.

The Governor's response to the *Starkweather* test is to insist that the courts are required to avert their eyes to any unconstitutional motive, even when it is openly expressed in the public record, as here. Governor's Br. at 23-29. This is based almost entirely on a misreading of a single sentence from this Court's decision in *Johnson v. Carlson*, 507 N.W.2d 232, 235 (Minn. 1993), that "[i]t 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." *See* Governor's Br. at 24.

But this just begs the question of what "constitutional test" must be passed. The only relevant constitutional question raised in *Johnson* was whether the textual line-item veto requirements were satisfied. Of course, the Governor's motives were not relevant once those requirements were satisfied. The *Johnson* Court had no occasion to consider what test would be applied if the challenged veto runs afoul of some other constitutional provision.

The Governor also makes much of the fact that the *Starkweather* Court declined to inquire into the motives of the legislature when it determined that the first suggested element—an unconstitutional end result—was not satisfied. Governor's Br. at 28-29. This is true, as it is also true that *Starkweather* involved the review of a legislative bill, not a Governor's veto. *Starkweather* is not

controlling precedent here, and the district court did not suggest otherwise. But it does provide a persuasive and useful framework for weighing a challenge to an effort—like the challenged line-item vetoes here—to "use a constitutional power to accomplish an unconstitutional result." 245 Minn. at 380, 71 N.W.2d at 876.

B. The vetoes plainly violate both elements of the *Starkweather* test.

The challenged line-item vetoes plainly violate the separation of powers, as the district court correctly held. This is made clear by following the two-pronged framework set out in *Starkweather*. The Governor does not seriously dispute either element: the unconstitutional end result, or the intended motive to coerce the legislative branch.

1. The vetoes indisputably create an unconstitutional end result: the defunding of the Legislative Branch.

It cannot be seriously disputed that the natural end result of the challenged line-item vetoes is unconstitutional: the crippling of an entire coequal branch of government. And the Governor *does not dispute* it. Instead, in a clever sleight-of-hand, the Governor's response is to concede that the end result is *so clearly unconstitutional* that the Legislature can confidently rely on a different judicial remedy: "The Governor's exercise of his line item veto power did not effectively 'abolish' the Legislature because the Legislature *had the remedy* to seek core

function funding." Governor's Br. at 18 (emphasis added).[3]

The very existence of a judicial "remedy" implies the existence of some wrong that must be remedied. Although the Governor's Brief is mostly careful to obscure that fact, it does concede that "the distributive clause" of the Separation of Powers Clause "implies a right to minimum funds necessary to exercise that power." Governor Br. at 21. It cannot be disputed that the challenged line-item vetoes contravened this right, absent some judicial intervention.

The Governor seeks to analogize this situation with prior government shutdowns, where the lower courts ordered core funding. *Id.* at 19-22. That analogy is only partly illuminating. In each of those cases, the remedy was justified by the conclusion that failure to fund core functions of a branch or office established by the Constitution would "contravene" the Separation of Powers Clause. *E.g.*, *In re Temp. Funding of Core Functions of the Exec. Branch*, No. 62-CV-11-5203, ¶ 3 (Ramsey Cty. Dist. Ct. June 29, 2011) (Add. 29). The same is certainly true here.

But the *Starkweather* framework reveals an important distinction between those prior shutdown cases and this case. In none of those cases was any branch intending to "use a constitutional power to accomplish an unconstitutional

[3] *See also id.* at 32 ("[B]ecause the Legislature *is entitled to funding* for its critical, core functions, the Governor is incapable of removing all of the Legislature's core functions simply by vetoing appropriations.") (emphasis added).

result." *Starkweather*, 245 Minn. at 380, 71 N.W.2d at 876. Accordingly, none of those cases had the occasion to determine whether a core function proceeding was the *sole* remedy (much less the *preferable* remedy) in a situation like this one, where the Governor uses the line-item veto power to directly attack another branch in order to coerce its exercise of its discretionary authority.

2. The vetoes were indisputably driven by an unconstitutional motive: to coerce the discretionary choices of the Legislative Branch.

As this Court has explained, "where the constitution commits a matter to one branch of government, the constitution prohibits the other branches from invading that sphere or interfering with the coordinate branch's exercise of its authority." *In re Civil Commitment of Giem*, 742 N.W.2d 422, 429 (Minn. 2007). "[T]he legislative branch has the responsibility and authority to legislate" and "to establish the spending priorities of the state," with an exception for the Governor's veto (and line-item veto) power, which "must be construed narrowly to prevent usurpation of the Legislature's proper authority." *Brayton v. Pawlenty*, 781 N.W.2d 357, 365-66 (Minn. 2010).

The Governor made clear that the challenged line-item vetoes are *designed* to invade the Legislature's authority to legislate, and to "control or coerce" the Legislature "in the exercise of its constitutional powers." *State ex rel. Birkeland*, 179 Minn. at 340, 229 N.W. at 314. In his official veto letter, he explained that he

was making these line-item vetoes in response to legislative "language" that he did not like, in an effort to coerce further legislative action: "As a result of this action, 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. The Governor attached a letter addressed to the Legislature's leaders spelling out the five items of legislation he was demanding, noting that he would not even call the Legislature into a special session unless it agreed to pass all five demanded legislative items. Add. 43-45.

Having spelled out his unconstitutional motivation so clearly in his official correspondence, the Governor makes no effort to dispute it here. Instead, the Governor simply urges the Court to avert its eyes from the evidence by noting the possibility that there would be tougher "disputed cases" which would "put courts in the awkward position of investigating what the Governor's motivations actually were." Governor's Br. at 27.[4] Presumably, these tougher cases would arise where the Governor is less candid than the Governor was here.

Here, *Starkweather* also provides useful guidance. The *Starkweather* Court

[4] Notably, the Governor's brief makes no effort to reconcile its request to shield the executive branch from "awkward" litigation with its advocacy for intrusive litigation about which of the items in the Legislature's budget are truly for critical, core functions. *See* Governor's Br. at 21-22, 32-34.

suggested that evidence of motive must be found in the official "journal entries" of the Legislature. 245 Minn. at 380-84, 71 N.W.2d at 876-78. As noted above, confining the judicial inquiry to the official record is sufficient in this case to establish the Governor's unconstitutional motive.[5]

II. The political question doctrine does not support the Governor's position that the proper remedy for the unconstitutional end result of his vetoes is further litigation about core functions.

Despite the Governor's argument that the line-item vetoes give rise to a mandatory judicial remedy, he nevertheless argues that the political question doctrine compels "the nonjusticiability of the Legislature's effort to undo the line-item vetoes via court order." Governor's Br. at 29-30. The Governor makes no effort to reconcile these contradictory positions, but it simply cannot be the case (as explained above) that the Governor has the unfettered and unreviewable power to use the line-item veto power to coerce the other branches of government by eliminating their funding.

Even if the political question doctrine had some applicability here, the factors and considerations articulated by the U.S. Supreme Court in *Baker v. Carr*,

[5] It is at least theoretically possible, as the Governor suggests, that some future governor might try to evade the *Starkweather* test by better concealing an unconstitutional motive. But it is telling that the Governor felt the need to clearly spell out his coercive threat here in order to advance his demands. Likely, such a coercive scheme would be less effective if a future governor did not communicate the threat as clearly as it was communicated here (or in the fictional veto letter at page 1, *supra*).

369 U.S. 186 (1962), actually counsel *against* the Governor's position that the proper remedy for the unconstitutional results of the line-item vetoes is further litigation about the Legislature's core functions. For example, the Governor argues that there are "no judicially manageable standards for qualifying" the Governor's veto right. Governor's Br. at 30. To the contrary, *Starkweather* provides a judicially manageable standard, as explained above. And this criticism—as well as the Governor's warning that "[i]f the Judiciary enters the fray, a court must make an initial policy determination of the proper appropriation for the Senate and the House" (*id.*)—is even more applicable to the "core function proceeding" the Governor advocates, in which "the Legislature would of course need to provide detail on its proposed expenditures and demonstrate which are critical" (*id.* at 22). As the Kentucky Supreme Court noted in an effort to apply a similar test, "[w]hat constitutes an essential service depends largely on political, social and economic considerations, not legal ones." *Fletcher v. Commonwealth*, 163 S.W.2d 852, 860 (Ky. 2005).

Thus, to the extent the political question doctrine is applicable here, it counsels against the Governor's proposed "core function proceeding" remedy for his unconstitutional vetoes, and in favor of the ruling below simply invalidating the vetoes by applying the *Starkweather* framework.

CONCLUSION

The Separation of Powers Clause prohibits efforts by any branch of government to control, coerce, or restrain any other branch of government in its exercise of its discretion, including the line-item vetoes challenged here. The district court's judgment invalidating the Governor's line-item vetoes should be affirmed.

Dated: August 15, 2017

Respectfully submitted,

/s/ Harry N. Niska
Harry N. Niska (#0391325)
ROSS & ORENSTEIN LLC
222 South Ninth Street, Suite 470
Minneapolis, MN 55402
(612) 436-9804

Kimberly Reynolds Crockett (#0388309)
CENTER OF THE AMERICAN EXPERIMENT
8421 Wayzata Boulevard, Suite 110
Golden Valley, MN 55426
Counsel for Amicus Curiae
Center of the American Experiment