For Opinion See 781 N.W.2d 357

Supreme Court of Minnesota.
Deanna BRAYTON, et al., Respondents,
v.
Tim PAWLENTY, Governor of the State of Minnesota, et al., Appellants.

No. A10-06-64.
February 9, 2010.

Brief of Amici Curiae Professors of Constitution Law and Separation of Powers

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Introduction

Amici curiae[FN1] take no position as to whether the unallotments at issue in this case were authorized by MINN. STAT. § 16A.152, subd. 4 ("the unallotment statute"). We respectfully submit, however, that the unallotment power authorized by the statute is consistent with the Minnesota Constitution's separation of powers. This Court has identified two separation-of-powers constraints on statutes that confer discretion on the executive. Neither is violated here.

> FN1. Counsel certify that this brief was authored in whole by listed counsel and the *amid curiae* professors. No person or entity made any monetary contribution to the preparation or submission of the brief. This brief is filed on behalf of Professors David Stras, Associate Professor of Law at the University of Minnesota, and Ryan Scott, Associate Professor at Indiana University Maurer School of Law in Bloomington, Indiana, who were granted leave to participate as *amid* by this Court's January 28, 2010, Order. It is also filed on behalf of Professor Michael Stokes Paulsen, Distinguished University Chair and Professor at the University of St. Thomas School of Law in Minneapolis if his pending motion to participate as *amicus curiae* is granted by the Court. All three professors participated in the preparation of this brief.

First, the legislature cannot delegate "purely legislative power" to the executive branch. *Lee v. Delmont,* 36 N.W.2d 530, 538 (Minn. 1949). Courts around the country, including the United States Supreme Court, draw a distinction between the legislative power to make appropriations and the executive power to control the *extent* of spending pursuant to an appropriation. *Clinton . City of N.Y.,* 524 U.S. 417, 446 (1998) (discussing the President's "traditional authority to decline to spend appropriated funds," when authorized by Congress). No fewer than thirty-eight States expressly empower their governors to spend less than the amounts appropriated in enacted budgets without legislative approval. *See* National Association of State Budget Officers, *Badget Processes in the States* 29 (2008). There can be no serious claim, therefore, that the unallotment statute delegates "purely legislative power."

Second, the legislature must provide "a reasonably clear policy or standard to guide and control administrative of-

ficers." *City of Richfield v. Local No. 1215, Int'l Ass'n of Fire Fighters,* 276 N.W.2d 42, 45 (Minn. 1979); *Anderson v. Comnm'r of Highways,* 126 N.W.2d 778, 780 (Minn. 1964) (recognizing that the "modern tendency is to be more liberal in permitting grants of discretion" to the executive branch under the separation of powers). The unallotment statute more than satisfies that minimal requirement by (1) limiting the circumstances and scope of the unallotment power, (2) supplying guidelines for the priority of unallotments, (3) requiring the executive to consult with legislative representatives, and (4) reserving to the legislature ultimate authority to prevent or override unallotment decisions.

The district court's contrary ruling, which faulted the executive for the "specific manner" in which the unallotments were implemented (Order 6), is deeply flawed. The validity of a statute conferring discretion on the executive depends on the "nature of the power" exercised, not "the manner of its exercise." *Lee,* 36 N.W.2d at 539. The district court's novel conclusion that the legislature's freedom to delegate to the executive is confined by the Minnesota Constitution to circumstances that were "unknown and unanticipated" when the law was enacted (Order 6) is flatly inconsistent with this Court's decisions. And the district court's approach, which necessitates a case-by-case inquiry into the motives and "manner" of every unallotment, would itself raise separation-of-powers concerns by routinely injecting the courts into contentious budget negotiations and requiring the them to be the final arbiters of inherently political disputes.

Argument

I. The Unallotment Statute Does Not Violate the Separation of Powers.

The Minnesota Constitution divides the powers of state government into legislative, executive, and judicial departments, and provides that "[n]o person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others." MINN. CONST. art. III, § 1. This constitutional feature is designed to "diffuse power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *accord Wulff v. Tax Court of Appeals,* 288 N.W.2d 221, 223 (Minn. 1979) ("the basic principle remains; too much power in the hands of one governmental branch invites corruption and tyranny").

Interpreting that command, this Court has recognized two separation-of-powers limitations on executive actions taken under statutes conferring discretion on the executive branch. First, the legislature cannot grant "purely legislative power" to the governor or any executive agency. *Lee,* 36 N.W.2d at 538. Second, under the Court's nondelegation cases, the legislature may not grant executive officers discretion in executing the law without "a reasonably clear policy or standard to guide and control administrative officers." *City of Richfield,* 276 N.W.2d at 45.

The unallotment statute does not violate either of those limitations. Reasonable minds may disagree, as a matter of public policy, about the wisdom and proper limits of ***4** the statutory power of unallotment. The governor's exercise of that power in this case has touched off a heated partisan battle. But whatever the resolution of those disagreements, the authority granted by the legislature, and exercised by the executive here, does not violate the Constitution. The power to decline to spend appropriated funds is essentially executive, not legislative. And the unallotment power granted by MINN. STAT. § 16A.152, subd. 4, contains limitations that satisfy the minimal requirement of a "reasonably clear policy or standard" under the nondelegation doctrine.

A. The Unallotment Power Is Not "Purely Legislative," and Therefore May Be Constitutionally Assigned to the Executive.

Despite the absolute language of the Constitution's separation-of-powers clause, this Court has long recognized that "there has never been an absolute division of governmental functions in this country, nor was such even intended." *Wulff,* 288 N.W.2d at 223; *see, e.g., State ex rel. Patterson v. Bates,* 104 N.W. 709, 712 (Minn. 1905) (disclaiming the "unwarranted assumption that all the functions of government must necessarily be either executive, legislative, or judicial in their nature"). Instead, the Court has interpreted the separation requirement as prohibiting the legislature

from delegating "purely" or "exclusively" legislative power to the governor or any executive agency or official. *Lee,* 36 N.W.2d at 538; *Patterson,* 104 N.W. at 712; *cf ICC v. Goodrich Transit Co.,* 224 U.S. 194, 214 (1912) ("The Congress may not delegate its purely legislative power to a commission ... "). "Pure legislative power," means "the authority to make a complete law-complete as to the time it shall take effect and as to whom it shall apply-and to determine the expediency of its enactment." *Lee,* 36 N.W.2d at 538.

***5** The discretionary power to decline to spend appropriated funds, especially when specifically authorized by the legislature, is not "pure legislative power." To the contrary, it is the essentially executive power to "take care that the laws be faithfully executed." MINN. CONST. art V, § 3. The constitutional imperative to avoid indebtedness reinforces that the executive, with the blessing of the legislature, may play a proper role in heading off a budget deficit. *Id.* art. XI, §§ 4-6.

1. *The legislature may constitutionally appropriate money for a specific purpose and allow the executive to decline to spend the money.*

There is no dispute that making appropriations is a purely legislative function. *See* MINN. CONST. art. XI, § 1 (providing that appropriations[s]" be made "by law"); *Inter Faculty Org. v. Carlson,* 478 N.W.2d 192, 194 (Minn. 1991) (governor's item veto power over appropriations is "an exception" to the legislature's power). But nothing about the legislature's exclusive power over appropriations precludes the legislature from authorizing the executive branch to spend less than the full amount of appropriated funds. To the contrary, the Supreme Court has recognized that the executive branch holds a "traditional authority to decline to spend appropriated funds" if authorized by the legislature, dating back to the first Congress in 1789. *Clinton,* 524 U.S. at 446 (discussing early appropriations laws that afforded the President discretion to spend less than the full amount, or nothing at all); *id.* at 466-67 (Scalia, J., dissenting) (similar appropriations enacted during the early Eighteenth Century, Civil War, and Great Depression); *id.* at 488-89 (Breyer, J., dissenting) (same). Based on that long history, there is no doubt that the ***6** legislature may constitutionally appropriate money for a specific purpose, but grant the executive discretion to decline to spend the money. *See id.* at 446.

Minnesota law reflects that understanding. It defines an "appropriation" as an *"authorization* by law to expend or encumber an amount in the treasury" for a particular purpose. *See* MINN. STAT. § 16A.11, subd. 4 (emphasis added). Tellingly, it expressly contemplates that executive agencies may have "unused appropriations," MINN. STAT. § 16A.28, and empowers the commissioner to control whether monies not spent by the close of a biennium's first fiscal year carry forward into the next, *id.* § 16A.28, subd. 2-4. Indeed, although the legislature could mandate full expenditure of an appropriation, courts around the country recognize a default rule that an appropriation "is not a mandate to spend," but instead is "an authorization given by the legislature" to spend no more than a "stated sum for specified purposes." *Island Count Comm. on Assessment Ratios v. Dept of Revenue,* 500 P.2d 756, 763 (Wash. 1972); *see New England Div. of the Am. Cancer Soc't v. Comm'r of Admin.,* 769 N.E.2d 1248, 1256 (Mass. 2002) (defining "appropriation" as the "set[ing] apart from the public revenue a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object and for no other") (internal quotation marks and citations omitted).[FN2]

> FN2. *See also Rios v. Symington,* 833 P.2d 20, 24 (Ariz. 1992); *Colorado Gen. Assembly v. Lamm,* 700 P.2d 508, 520 (Colo. 1985) (en bane); *State ex rel. Norfolk Beet-Sugar Co. v. Moore,* 69 N.W. 373, 376 (Neb. 1896); *cf. Detroit City Council v. Mayor of Detroit,* 537 N.W.2d 177, 182 (Mich. 1995) ("an appropriation is not a mandate to spend").

***7** The longstanding recognition that the executive may presumptively decline to spend appropriated funds is grounded in a fundamental distinction between appropriations and spending. Whereas the activity of setting appropriations is a legislative task, "the activity of spending money is essentially an executive task." *Op. of the Justices to the Senate,* 376 N.E.2d 1217, 1222 (Mass. 1978); *see also, e.g., Common Cause of Pa. v. Commonwealth,* 668 A.2d 190, 205-06 (Pa. 1995); *Hunter v. State,* 865 A.2d 381, 390 (Vt. 2004). The spending power derives from the execu-

tive's constitutionally-exclusive power and duty to "take care that the laws be faithfully executed." MINN. CONST. art. V, § 3; *see also* U.S. CONST. art. II, § 3. Thus, when the legislature attempts to directly control spending beyond the appropriations process, it risks unconstitutionally intruding on the powers of the executive branch.[FN3]

> FN3. *See, e.g., Advisory Op. in re Separation of Powers,* 295 S.E.2d 589, 594 (N.C. 1982) (invalidating statute empowering legislative commission to control Governor's budget transfers because it encroached on the executive's authority to "administer the budget"); *Anderson v. Lamm,* 579 P.2d 620, 623 (Colo. 1978) (invalidating statute conditioning spending pursuant to appropriation on approval from the legislature's budget committee); *State ex rel. Schneider v. Bennett,* 547 P.2d 786, 797 (Kan. 1976) (legislative finance committee could not exercise continuing oversight of executive's spending pursuant to appropriations).

There are sound reasons why the power to spend is entrusted to the executive. Faithfully executing the laws necessarily entails "the exercise of judgment and discretion," and the executive is "not obliged to spend [appropriated] money foolishly or needlessly." *Op. of the Justices,* 376 N.E.2d at 1222-23. A mild winter might make it unnecessary to spend the full amount appropriated for snow removal. Cost savings might make it possible to spend less than the full amount appropriated for a highway project. No ***8** separation-of-powers principle prevents the executive from responding to those situations by declining to spend the full amount of every appropriation. *Rios,* 833 P.2d at 29 ("the Governor must manage the government in a fiscally responsible fashion and is not required, under all circumstances, to dispose of all appropriated money before the end of the fiscal year").[FN4]

> FN4. *See also, e., Common Cause of Pa.,* 668 A.2d at 206 ("Once taxes have been levied and appropriation made, the legislative prerogative ends and the executive responsibility begins ....") (quoting *Alexander v. State,* 441 So. 2d 1329, 1341 (Miss. 1983)); *State ex rel. McLeod v. Mclnnis,* 295 S.E.2d 633, 637 (1982) ("[A]dministration of appropriations .. is a function of the executive department."); *Comci'ns workers of Am., AFL CIO v. Florio,* 617 A.2d 223, 234 (N.J. 1992) ("[P]laintiffs fail to recognize the distinction between the power to appropriate or not appropriate funds, a legislative function, and the power to expend the appropriated funds, an executive function.").

The decision in *Bowsher v. Synar,* 478 U.S. 714 (1986), confirms that the power to reduce spending to avoid a budget deficit, within parameters set by the legislature, is essentially executive in nature. *Bowsher* involved a challenge to a federal statute that mandated, upon a federal budget deficit exceeding a specified amount, immediate spending cuts by formula. *Id.* at 717-18. The statute provided that the Comptroller General, a legislative officer, determine the required "program-by-program" spending cuts under the statute. *Id.* at 732. The Court held that, by granting a legislative official "the ultimate authority to determine the budget cuts to be made" pursuant to the statute, the Act impermissibly encroached on the President's power to execute the laws. *Id.* at 733-34. Reducing spending according to standards set by Congress was executive action, the Court held, because it executes the law aimed at reducing the deficit. *Id.* at 732-33 (*"[W]e* view these functions as plainly entailing execution of the law in constitutional terms.").

***9** 2. *The Minnesota Constitution s prohibition against public debt reinforces that the executive may constitutionally decline to spend.*

The Minnesota Constitution's imperative to avoid indebtedness reinforces the conclusion that the legislature is free to assign the executive a role in averting a budget and reserve deficit. Article XI of the Minnesota Constitution provides that the State may not take on public debt, except for limited purposes, such as the acquisition and improvement of land and buildings. MINN. CONST. art. XI, §§ 4-5. It further provides that the State cannot issue short-term certificates of indebtedness from a fund beyond the amount of monies that will be credited to the fund during the biennium. *Id.* art. XI, § 6. Read together, those provisions prohibit the State from spending into indebtedness, save for specified long-term projects.

While this prohibition against public debt guides the legislature as it sets appropriations, it has particular importance

for the executive branch. The executive branch is both responsible for, and "the only branch capable of, having detailed and contemporaneous knowledge regarding spending decisions." *Hunter,* 865 A.2d at 390 (quoting *Op. of the Justices,* 376 N.E.2d at 1223). Thus, even though the executive is constitutionally bound "to apply his full energy and resources, in the exercise of his best judgment and ability, to ensure that the intended goals of legislation are effectuated," *Op. of the Justices,* 376 N.E.2d at 1221, the executive is also bound not to spend more than the State has in reserves and revenues. Since the executive branch would violate the Constitution if its spending to the full amount of appropriations would lead to indebtedness, the executive branch presumptively has discretion to avoid that violation by ***10** spending less than appropriated. *See County of Cabarrus v. Tolson,* 610 S.E.2d 443, 4.46 (N.C. Ct. App. 2005) ("Implicit in the duty to prevent deficits is the ability of the Governor to affect the budget he must administer.").

3. *The unallotment statute does not assign "purely legislative" power.*

In light of the long tradition of executive discretion to decline to spend appropriated funds, as well as the Minnesota Constitution's prohibition on public debt, the unallotment statute does not assign "purely legislative" power to the executive. It does not empower the executive to make a "complete law." *Lee,* 36 N.W. at 538. Instead, under specified circumstances, the statute directs the commissioner to tap the budget reserve "to balance expenditures with revenue" and, if any "additional deficit" remains, to "ma[k]e up" that amount "by reducing unexpended allotments of any prior appropriation or transfer." MINN. STAT. § 16A.152, subd, 4(a)-(b). Unallotment does not disturb the legislature's appropriations, which continue to specify the maximum amount and sole purposes for which state funds may be spent. Nor does unallotment alter the executive's constitutional obligation to take care, to the best of his ability, that the laws be faithfully executed. MINN. CONST. art. V, § 3. If the budget forecast changes, and additional revenues reduce or eliminate the deficit, the executive could resume spending up to the full amount of the legislature's appropriations. Thus, the statute authorizes the commissioner to perform a fundamentally executive function, administering the budget to ensure that expenditures do not outpace revenues.

The plaintiffs contend that unallotment grants the executive "the power to rewrite appropriations," Mem. in Support of Plaintiffs" Motion for TRO at 25 (Nov. 6, 2009); *see* ***11** *id.* at 27 ("power to modify or annul a duly enacted law"), and thereby to " 'totally negate a legislative policy that lies at the core of the legislative function,' " *id.* at 30 (quoting *Hunter,* 805 A.2d at 390). They describe the unallotment power as equivalent to a veto, and therefore incompatible with the Constitution's grant to the executive of line-item veto power for appropriations. *Id.* at 24-25. By treating the discretion to decline to spend funds as purely legislative power, which can never be delegated, the plaintiffs would strip the executive of the essential ability to avoid unnecessary, wasteful, or irresponsible expenditures, no matter how carefully the legislature limited the executive's discretion.

In any event, the plaintiffs' description of the unallotment power is inaccurate. An appropriation is an "authorization" to spend, not a command, MINN. STAT. § 16A.011, subd. 4, and unallotment does not "rewrite" or "veto" anything. Following unallotment, the underlying appropriation remains good law, and retains its full legal effect as an "authoriz[ation] to use that money, and no more, for that object and for no other." *New England Div. of the Am. Cancer Soc'y,* 769 N.E.2d at 1256; see MINN. STAT. § 16A.152, subd. 4(b). Unallotment, when expressly permitted by statute, is executive action because it executes the statute's instruction to avoid a budget deficit. *Bowsher,* 478 U.S. at 733-35 (holding that, when a statute authorizes spending cuts to avoid a budget deficit, "the ultimate authority to determine the budget cuts to be made" pursuant to the statute is executive power). Finally, the legislature remains free to exclude any appropriation from unallotment and to enact a statute overriding any unallotment, preserving the legislature's final say on the appropriation. *See infra* at 16-17.

***12** That the unallotment power is executive in nature is confirmed by the fact that in at least *thirty-eight States,* the governor is expressly authorized to spend less than the amount appropriated in enacted budgets without legislative approval. *See* National Association of State Budget Officers, *Budget Processes in the States* 29 (2008). A power wielded by more than three-fourths of the nation's governors can hardly be characterized as "purely legislative." As the Court of Appeals recognized in rejecting an earlier separation-of-powers challenge to the statute, unallotment does not affect "the legislature's ultimate authority to appropriate money, but merely enables the executive to deal with an

anticipated budget shortfall before it occurs." *Rukavina v. Pawlenty,* 684 N.W.2d 525, 535 (Minn. Ct. App. 2004).

B. The Unallotment Statute Does Not Unconstitutionally Delegate Excessive Legislative Power to the Executive Branch.

Separately, this Court has recognized that, according to the separation of powers, the legislature must provide some "minimum standards" to guide executive officials "for a delegation of legislative power to receive constitutional protection." *City of Richfield,* 276 N.W.2d at 45. But the nondelegation standard is extremely permissive, *Anderson,* 126 N.W.2d at 780-81; *see also Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 474-75 (2001), reflecting a recognition that "legislation must often be adapted to complex conditions," *Lee,* 36 N.W.2d at 538-39. Under that standard, the unallotment statute falls comfortably within the boundaries of the nondelegation doctrine. It limits the circumstances and scope of the unallotment power, supplies guidelines for the priority of unallotnents, compels the executive to consult with the legislature, and preserves the legislature's ultimate authority to prevent or override unallotments.

***13** 1. *Delegation of legislative power pursuant to standards is constitutional.*

A delegation is constitutionally permissible so long as the legislature supplies "a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies." *Lee,* 36 N.W.2d at 538. In announcing that requirement, this Court emphasized that "[t]he policy of the law and the standard of action to guide the administrative agencies may be laid down in very broad and general terms." *Id.* at 538-39. In subsequent years, the Court has elaborated on *Lee's* standard in light of the "modern tendency ... to be more liberal in permitting grants of discretion to administrative officers in order to facilitate the administration of laws as the complexity of economic and governmental conditions increase." *Anderson,* 126 N.W.2d at 780-81. This Court has upheld, as constitutionally sufficient, broad instructions to adopt fire-hazard rules "consistent with nationally recognized good practice" that "safeguard[]" life and property "to a reasonable degree," *City of Minneapolis v. Krebes,* 226 N.W.2d 617, 619 (Minn. 1975); and to prohibit "unprofessional conduct," *Reyburn v. Minn. State Bd. of Optomety,* 78 N.W.2d 351, 354-56 (Minn. 1956). On three occasions, it has indicated that a legislative instruction to regulate a complex area "in the public interest" is constitutionally sufficient. *Minn. Energy & Econ. Dev. Auth. v. Printy,* 351 N.W.2d at 319, 349 n.10 (Minn. 1984); *Lee,* 36 N.W.2d at 539 n.ll; *State e rel. Interstate Air Parts, Inc. v Minneapolis-St. Pazl Metro. Airports Comm'n,* 25 N.W.2d 718, 727-28 (Minn. 1947). Indeed, so far as our research discloses, this Court has never once invalidated a delegation of legislative power to the executive branch for lack of a reasonably clear policy or standard. *Printy,* 351 N.W.2d at 350 n.1l.

***14** This Court's approach to nondelegation is fully consistent with the United States Supreme Court's case law upholding expansive delegations of power to federal agencies. *See, e.g., N.Y. Cent. Sec. Cotp. v. U.S.,* 287 U.S. 12, 24-25 (1932) (power to approve railroad consolidations in the "public interest"); *Nat'l Broad. Co. v. U.S.,* 319 U.S. 190, 225-26 (1943) (power to regulate airwaves in the "public interest, convenience [and] necessity"); *Lichter v. U.S.,* 334 U.S. 742, 785-87 (1948) (power to recoup "excessive profits" from war contractors). Summarizing its cases, the Court has explained that it "almost never fe[els] qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Am. Tmwcking Ass'ns,* 531 U.S. at 474-75 (internal quotation marks omitted). The United States Supreme Court has not struck down a statute on nondelegation grounds since 1935. *Id.*

Nondelegation cases carve out a narrow role for courts in policing the degree of discretion conferred upon the executive branch. *E.g., Wayman v. Southard,* 23 U.S. (10 Wheat.) 1, 46 (1825) (Marshall, C.J.) ("the precise boundary" between a permissible and impermissible delegation "is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily"). That judicial self-restraint reflects important concerns about the competence of courts to determine which branch is best suited to make intricate policy judgments in complex financial and regulatory fields. *Anderson,* 126 N.W.2d at 780-81. As one scholar has explained, an aggressive "judicial enforcement of the [nondelegation] doctrine would produce ad hoc, highly discretionary rulings" that "suffer from the appearance, and perhaps the reality, of judicial hostility to the particular ***15** program at issue." Cass R. Sunstein, *Nondelegation Canons, 67* U.

CHI. L. REV. 315, 327 (2000).

2. *Because the delegation of power under the unallotment statute is constrained in several important ways, it is well within the legislature's constitutional power to delegate.*

Under this Court's permissive nondelegation standard, the unallotment power conferred by the legislature is constitutional. Although § 16A.152, subd. 4, grants the executive discretion over spending decisions when the State faces a budget shortfall, the statute limits the executive's unallotment authority in four significant ways. These constraints bring the unallotment power well within the expansive bounds of the legislature's constitutional power to delegate.

First, the statute limits the *circumstances and scope* of the unallotment power, preventing the commissioner from reducing allotments at will. Authority to reduce allotments is not triggered unless "the commissioner determines that probable receipts for the general fund will be less than anticipated, and that the amount available for the remainder of the biennium will be less than needed." MINN. STAT. § 16A.152, subd. 4(a)-4(b). Even then, the commissioner must fully exhaust the budget reserve account before resorting to unallotment. *Id.* In addition, once triggered, the power to reduce allotments is limited in scope to the amount "needed to balance expenditures with revenue" and to "ma [k]e up" any "additional deficit." *Id.* subd. 4(b). The executive therefore cannot reduce allotments beyond the level necessary to prevent a budget deficit. Hence, the unallotment statute describes "operative facts" and "takes effect upon these facts by ***16** virtue of its own terms, and not according to the whim or caprice of the administrative officers." *Lee,* 36 N.W.2d at 538-39.

Second, the legislature has provided guidance concerning the *purpose and priorHiy* of unallotments. The statute prioritizes "saving[s]" within departments, directing that the commissioner "shall reduce allotments to an agency by the amount of any saving that can be made over previous spending plans through a reduction in prices or other cause." MINN. STAT. § 16A.152, subd. 4(e). It also provides that the commissioner "may consider other sources of revenue available to recipients of state appropriations" (for example, tuition revenues available to state universities) and "may apply allotment reductions based on" that information. *Id.* subd. 4(d). A statute can satisfy the requirement of a reasonably clear policy or standard by "provid[ing] guidelines" to executive officials "about the factors to consider in coming to their decisions." *No Power Line, Inc. v. Min. Envtl. Quality Council,* 262 N.W.2d 312, 330 (Minn. 1977); *see State v. King,* 257 N.W.2d 693, 697 (Minn. 1977).

Third, the statute ensures actual *guidance by the legislature* every time the governor invokes the unallotment power. Before tapping the budget reserve and engaging in unallotment, the governor must first "consult?? the Legislative Advisory Commission." MINN. STAT. § 16A.152, subd. 4(a)-(b). That body, composed of key legislative leaders, *see id. §* 3.30, subd. 2, thus plays a necessary consultative role whenever the executive makes judgments concerning the priorities of unallotment. The statute also compels the executive branch to provide prompt notice of any reduction to four different legislative committees. *Id.* § 16A.152, subd. 6. "[C]lose legislative monitoring of [executive] ***17** operations" through planning and reporting requirements are hallmarks of permissible delegation because they ensure that the legislature retains a degree of influence over the outcome, *Printy,* 351 N.W.2d at 351.

Fourth, the statute permits the legislature *to prevent or override* the governor's unallotment decisions. The legislature retains, and has repeatedly exercised, the power to exempt any individual appropriations it wishes from unallotment. *See, e.g.,* MINN. STAT. § 477A.011, subd. 36(y) (increasing the city aid base, and providing that "[t]he payment under this paragraph is not subject to ... any future unallotment of the city aid under section 16A.152"); *id.* subd. 36(z) (same). In the past, the legislature has not hesitated to exclude even whole categories of appropriations from unallotment. Act of Feb. 13, 1981, ch. 1, § 2 (repealed) (removing the authority to reduce allotments of aid to school districts); *see* Senate Counsel, *Legislative Histoy of Unallotment Power* 4-5 (2009). Indeed, the legislature presently exempts entire funds from the governor's unallotment power. *See* MINN. STAT. § 16B.85, subd. 2(e) (risk management fund "is exempt from the provisions of section 16A.152, subdivision 4"). And, of course, the legislature always retains the power to enact new legislation that reshapes the budget in the manner of its choosing. *See id.* § 41A.09, subd. 3a(h) (directing the commissioner to "reimburse ethanol producers for any deficiency in payments

[during certain time periods] because of unallotment"). The statutory scheme therefore reserves to the legislature, not the governor, ultimate authority over spending priorities.

For those reasons, the court of appeals was correct in concluding that the unallotment power does not offend the state constitution. As Judge Stoneburner ***18** observed, the statute "does not reflect an unconstitutional delegation of legislative power," but instead "enables the executive to protect the state from financial crisis *in a manner designated by the legislature."* *Rikavina,* 684 N.W.2d at 535 (emphasis added).

3. *Foreign decisions reinforce the constitutionality of unallotment in Minnesota.*

The decisions of other state courts reinforce that the unallotment statute does not impermissibly delegate legislative power to the executive branch. In *New England Div. of the Am. Cancer Soc'y v. Comm'r of Administration,* 769 N.E.2d 1248 (Mass. 2002), the court considered a challenge to a statute that directed an executive officer, whenever "available revenues as determined by him from time to time during any fiscal year" would be "insufficient to meet all of the expenditures authorized to be made from any fund," to "immediately notify" key legislative committees and to "reduce allotments ... by a total amount equal to such deficiency." *Id.* at 1250. The court unanimously concluded that the governor's power was not an unconstitutional delegation of legislative authority. *Id.* at 1257.

The court stressed (1) that the unallotment power was confined to the amount of the revenue deficiency, (2) that the governor could reduce "only the allotment" while "the underlying appropriation remains fully in force," (3) that the statutory scheme requited immediate notice to the legislature whenever the power is invoked, (4) that the legislature retained "full authority" *ex ante* to attach conditions to individual appropriations "exempting the funds in question from allotment reductions," (5) that the legislature retained full authority *expost* to balance the budget through new legislation, and (6) the ***19** constitutional duty to take care that the laws be faithfully executed obligated the governor "to ensure that the intended goals of [affected] legislation are effectuated." *Id.*

The same features are present under the Minnesota unallotment statute.[FN5] Indeed, the Minnesota statute grants the governor *less* discretion, since it supplies guidelines for setting unallotment priorities, and it compels the governor to consult with the legislature during the process.

> FN5. *See* MINN. STAT. § 16A.152, subd. 4(b) (amount of unallotment limited to size of deficit); *id.* § 16A.152, subd. 4(a)-(b) (no effect on underlying appropriations); *id.* § 16A.152, subd. 6 (notice to legislative committees); *id.* § 477A.011, subd. 36(y), (z) (exempting individual appropriations); *id.* § 41A.09, subd. 3a(h) (directing reimbursement of previously unalloted funds); MINN. CONST. art. V, § 3 (governor's duty to "take care that the laws be faithfully executed").

At least seven other state supreme courts have upheld unallotment statutes, with widely varying triggers and limitations, against nondelegation challenges. *See Legislative Research Comm'n ex rel. Prather v. Brown,* 664 S.W.2d 907, 925-26 (Ky. *1984);Judy v. Schaefer,* 627 A.2d 1039, 1040,1052 (Md. 1993); *Folsonm v. Wynn,* 631 So. 2d 890, 894-95 (Ala. 1993); *N.D. Council of Sch. Adm'rs. v. Sinner,* 458 N.W.2d 280, 286 (N.D. 1990); *Hunter v. State,* 865 A.2d 381, 395 (Vt. 2004); *Univ. of Conn. Chapter of AAUP v. Governor,* 512 A.2d 152, 158-59 (Conn. 1986); *State ex rel. Schneider v. Bennett,* 564 P.2d 1281, 1290 (Kan. 1977).

Neither of the decisions relied upon by plaintiffs compel a different result here. *See* Meml. in Support of Plaintiffs' Motion for Temp. Restraining Order, at 28-29 (Nov. 6, 2009). In *State v. Fairbanks North Star Borogh,* 736 P.2d 1140 (Alaska 1987) (per curiam), the court struck down an unallotment statute that afforded the governor a "sweeping power over the entire budget with no guidance or limitation," emphasizing that the ***20** legislature "has articulated no principles, intelligible or otherwise, to guide the executive." *Id.* at 1142-43. Once triggered by a budget deficit, the statutory power to reduce allotments was unlimited; nothing in the statute compelled the governor to "limit his cuts to the extent of the shortfall." *Id.* at 1143. But the "[m]ost importantly" factor, according to the court, was the fact that

"the executive is provided with no policy guidance as to how the cuts should be distributed." *Id.*

Those problems are not present here. Section § 16A.152, subd. 4(b) expressly limits the governor's unallotment authority to the extent of the shortfall (to 'ma[k]e up" any "additional deficit"). It also provides intelligible guidance to the executive in two ways: (1) in the statute itself, by articulating guidelines for setting unallotment priorities ("saving[s]" in agency budgets, "all sources of revenue available" to affected departments), MINN. STAT. § 16A.152, subd. 4(d)-(e); and (2) by directly involving the legislature in the decisionmaling process through consultation with the Legislative Advisory Commission, *id.* subd. 4(a)-(b). Those provisions of the Minnesota statute fully address the "most important" flaws in the Alaska statute.

In *Chies v. Children A, B, C, D, E, and F,* 589 So.2d 260 (Fla. 1991), the court struck down an even more expansive delegation of authority to the executive. That case involved an executive commission with "broad discretionary authority to reapportion the state budget" under a statute that authorized the commission to directly "reduce all approved state agency *budget and releases"* to prevent a deficit. *Id.* at 263 (emphasis in original). The court stressed that the statute granted the executive branch "total discretion" to reduce appropriations, directly altering the state budget, and not merely to ***21** decline to spend appropriated funds. *Id.* at 265 ("We construe the power granted in [the statute] as precisely the power to appropriate."). Under the Florida constitution's strict nondelegation standard, the statute was invalid because it did not contain any guidelines that could be "directly followed in the event of a budget shortfall" by specifying *"whichh* budgeting priorities to maintain or to cut from the original appropriation." *Id.* at 267-68 & n.9 (emphasis in original).

The Minnesota unallotment statute is substantially more limited. It grants the executive only the authority to decline to spend appropriated funds, not the power to alter appropriations set out in the legislature's budget, which remains in force. *See Folsom,* 631 So. 2d at 894 (distinguishing *Chiks* on the ground that the Florida statute granted "absolute discretion to reduce and even eliminate all or part of the appropriations to state agencies"). It also provides guidance concerning factors to consider in setting unallotnent priorities, and preserves a direct consultative role for the legislature whenever the power is triggered.

In any event, the *Chiles* court's nondelegation holding is inapposite because it rests on a fundamentally different legal standard. Florida courts have adopted a notoriously restrictive nondelegation standard. Jim Rossi, *Institutional Design and the Lingering Legacy, of Antifederalist Separation of Power Ideals in the States,* 52 VAND. L. REV. 1167, 1195-1200 (1999) (contrasting Florida's "strong" nondelegation doctrine, based on a "somewhat formalistic interpretation of Florida's strict separation of powers clause," with the "moderate" nondelegation approach of states like Minnesota). Minnesota's nondelegation decisions, which require only "a reasonably clear policy or standard of ***22** action" and permit the legislature to use "very broad and general terms," Lee, 36 N.W.2d at 538-39, cannot be reconciled with a requirement of "clearly established" guidelines that "can be directly followed" and specify *"which* budgeting priorities to maintain or to cut," *Chiles,* 589 So. 2d at 267-68.[FN6]

> FN6. In addition, the *Chiles* court's approach is inconsistent with this Court's refusal to "judge the wisdom" of budget decisions, *Johnson v. Carlson,* 507 N.W.2d 232, 235 (Minn. 1993), as even the U.S. Department of Justice has identified *Chikes* as a case "in which courts have injected themselves into the state budget process." Statement of Deputy Atty. Gen. Walter Dellinger, 19 U.S. Op. O.L.C. 8 (1995).

In sum, under this Court's "liberal" nondelegation standard, *Anderson,* 126 N.W.2d at 780, the present unallotment statute readily-passes constitutional muster.

II. The District Court Applied An Incorrect and Unworkable Separation-of-Powers Standard.

The district court not only reached the wrong result, but announced a deeply flawed constitutional standard that creates its own separation-of-powers problems by plunging the courts into every budget battle involving the unallotment

power.

A. The District Court Wrongly Focused on the Manner of Exercise of Unallotment Authority, Rather Than the Nature of That Power.

The district court wrongly focused its constitutional inquiry on the "specific manner in which the Governor exercised his unallotment authority." Order 4; *see id.* 10 ('The Court's decision was based on the way [the Governor] unalloted, not what he unalloted."). The district court apparently accepted that the executive branch had acted within the bounds of the unallotment statute. Nonetheless, the court held these particular unallotments unconstitutional. In the court's view, the statute authorizes some unallotments that are constitutional and others that are not. That is incorrect.

***23** Whether an executive officer's action taken pursuant to a statute violates the separation of powers depends on "the nature of the power, and not the liability of its abuse or the manner of its exercise." *Lee,* 36 N.W.2d at 539.[FN7] Thus, the correct constitutional inquiry asks whether the nature of the unallotment power authorized by the statute is consistent with the separation of powers. It is a categorical, not case-specific, inquiry. If the unallotment statute is constitutional, as the court of appeals concluded, *Rukavina,* 684 N.W.2d at 535, and as demonstrated above, then any exercise of the statute consistent with the its terms is likewise constitutional. *Lee,* 36 N.W.2d at 539. Accordingly, the district court's conclusion that the unallotment statute is constitutional (Order 4), should have ended its constitutional inquiry.

> FN7. The unallotment statute's constitutionality should not be judged against theoretical ways in which it could be abused. *Lee,* 36 N.W.2d at 538. For example, plaintiffs raise the specter of the governor reducing allotments for projects that the legislature sought to fund fully by overriding a prior line-item veto of those projects. Br. 24-25. There is no indication that any governor-in Minnesota or anywhere else-has actually used the unallotment power in that fashion. Striking down the unallotment statute to prevent that theoretical possibility would conflict both with *Lee's* focus on the "nature of the power," and with the presumption that the executive will "take care that the laws be faithfully executed." *See* MINN. CONST. art. V, § 3.

B. The District Court's Case-by-Case Test Is Unworkable and Without Constitutional Foundation.

Instead, the district court fashioned a test that calls for a case-by-case determination of whether any given exercise of the unallotment statute "crossed the line" of constitutionality. Order 6. That approach raises its own separation-of-powers ***24** concerns by making the courts final arbiters of inherently political disputes whenever the unallotment power is exercised.

Although opaque, the district court's test apparently requires courts to scrutinize the executive and legislative branches' respective motives and negotiating tactics, in order to decide which bears more fault for a particular budget impasse. Thus, in explaining how the governor "crossed the line," the court noted that the governor did not veto various appropriation bills, exercised a line-item veto over just one provision in the Health and Human Services bill, and did not call the legislature into a special session. *See* Order 5-6. The court focused on the governor's knowledge regarding projected revenues at the time he signed appropriation bills. *Id.* And the court observed that the "governor vetoed" a revenue bill that "would have balanced the budget." Order 6.

Needless to say, the governor has full discretion over whether to sign a given bill, exercise particular vetoes, or call the legislature into special session. *See, e.g., State ex rel. Birkeland v. Christianson,* 229 N.W. 313, 314 (Minn. 1930) ("Neither department can control, coerce, or restrain the action or nonaction of either of the others in the exercise of any official power or duty conferred by the Constitution, or by valid law, involving the exercise of discretion."); *State ex rel. Burnquist v. Distict Court,* 168 N.W. 634, 636 (Minn. 1918) (same). This Court has made clear that it has no appetite to assign blame or second-guess motives in political fights between coordinate branches of government. When reviewing disputes over the exercise of line-item vetoes, the Court has stressed that it has no role in judging "the

wisdom of a veto, or the motives behind it." *Johnson,* 507 N.W.2d at 235; *see also Inter Faculty Org.*, 478 N.W.2d at 194 (stating that "it is not [the ***25** Court's] role to comment on the wisdom of either the appropriations or the exercise of the item veto"); *cf. Starkweather v. Blair,* 71 N.W.2d 869, 875-76 (Minn. 1955) ("motives" of the political branches are not "the proper subject of judicial inquiry"). For the same reasons, the unallotments at issue here should not rise or fall based on a court's view of their prudence, or of the executive or legislative branches' behavior in the underlying dispute.

C. There Is No Constitutional Foundation for a Requirement that Deficits Be "Unknown and Unanticipated."

According to the district court, the Constitution permits the legislature to delegate unallotment power only to the extent necessary to address budget deficits that are "unknown [and] unanticipated when the appropriation bills were signed." Order 6. The district court cited no authority for that constitutional holding, which limits the *legislature's* power to delegate, and we are aware of none. This Court has approved many delegations that did not involve changed circumstances or emergency situations. *E.g., Krebes, 226* N.W.2d at 619; *Reyburn,* 78 N.W.2d at 354-56. A delegation from the legislature is permissible under *Lee* so long as it contains "a reasonably clear policy or standard of action." That standard is comfortably satisfied in this case.

***26** Conclusion

The judgment of the district court should be reversed.

Deanna BRAYTON, et al., Respondents, v. Tim PAWLENTY, Governor of the State of Minnesota, et al., Appellants. 2010 WL 545164 (Minn.) (Appellate Brief)

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