

IN THE SUPREME COURT

JAN 12 2018

STATE OF NORTH DAKOTA

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North Dakota Legislative Assembly,)
Senator Ray Holmberg, Representative)
Al Carlson, Senator Rich Wardner,)
Senator Joan Heckaman, and)
Representative Corey Mock,)

Petitioners,)

vs.)

State of North Dakota ex rel. Wayne K.)
Stenehjem, in his capacity as Attorney)
General of the State of North Dakota;)
North Dakota Governor Doug Burgum,)

Respondent and)
Cross-Petitioners.)

Supreme Court No. 20170436

**RESPONDENT GOVERNOR BURGUM'S BRIEF IN OPPOSITION
TO THE PETITION FOR DECLARATORY JUDGMENT,
OR IN THE ALTERNATIVE, FOR WRIT OF MANDAMUS
AND BRIEF IN SUPPORT OF CROSS-PETITION
FOR DECLARATORY JUDGMENT**

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STATEMENT OF THE ISSUES

[¶1] Whether the Petitioners' challenges to the Governor's five vetoes present any justiciable controversies for the Court to consider.

[¶2] Whether the budget section provisions in House Bill No. 1020 and Senate Bill No. 2013 are unconstitutional in violation of the non-delegation doctrine and the separation of powers doctrine.

STATEMENT OF THE CASE

[¶3] Petitioners, the North Dakota Legislative Assembly and select leaders of that body (Legislators), seek to invoke this Court's original jurisdiction to challenge five vetoes issued by Respondent Governor Burgum (Governor) following the adjournment of the Regular Session of the Sixty-fifth Legislative Assembly.

[¶4] In an opinion requested by the Legislators, the attorney general declared three of the five vetoes ineffective. See N.D.A.G. 2017-L-04 (concluding the Governor's veto of the phrase "any portion of" in subsection 3 of Section 18 of Senate Bill No. 2018, 2017 N.D. Leg. (the Dickinson State veto) was ineffective; concluding the Governor's veto of a restriction on an appropriation that requires budget section approval in subsection 2 of Section 5 of House Bill No. 1020, 2017 N.D. Leg. (the Water Commission veto) was ineffective; and concluding the Governor's veto of a restriction on an appropriation that requires budget section approval in Section 12 of Senate Bill No. 2013, 2017 N.D. Leg. (the University/School Lands veto) was ineffective.

[¶5] The Governor does not challenge the petition's contention that those three vetoes are ineffective. See Affidavit of Governor Doug Burgum ¶¶ 6, 10; Respondent and Cross-Petitioners' Addendum at 16, 17. Consequently, the Legislators' claims regarding those three vetoes do not present an "actual controversy of justiciable nature" for this Court to consider under its original jurisdiction. State ex rel. Link v. Olson, 286 N.W.2d 262, 266 (N.D. 1979).

[¶6] The other two issues in the petition involve a line item veto of a \$300,000 appropriation in Section 12 of Senate Bill No. 2018, 2017 N.D. Leg. (the Safety Council veto); and a veto of a statement of legislative intent regarding *future* general fund appropriations in Section 39 of Senate Bill No. 2003, 2017 N.D. Leg. (the Future Intent veto).

[¶7] The Legislators' challenge to the Safety Council veto involves: (1) a non-substantive bookkeeping oversight by a state agency, the Office of Management and Budget (OMB), in implementing the veto by initially failing to subtract \$300,000 from a line item on a budget; and (2) an inaccurate assertion regarding the bill's alleged failure to identify a specific funding source.

[¶8] A claim for declaratory relief against the Governor cannot correct a line item on a state budget, the bookkeeping error did not create any substantive spending authority on behalf of the Department of Commerce or the Governor, and, in any event, the non-substantive error has been corrected. Moreover, the factually inaccurate assertion regarding the appropriation's funding source does not provide a substantive legal basis for attacking the veto itself. The Legislators' challenge to the Safety Council veto does not, therefore, present an "actual

controversy of justiciable nature” for the Court to consider under its original jurisdiction. Olson, 286 N.W.2d at 266.

[¶9] The Legislators’ challenge to the Future Intent veto is not an issue of public importance that justifies this Court’s review. Whether the veto was valid or not, the phrase the Governor struck had no legal significance because it was merely a statement of intent with respect to *future* appropriations that had no binding effect on a subsequent legislative assembly.

[¶10] Finally, because the Governor’s Water Commission and University/School Lands vetoes were ineffective, those two bills became law in their entirety. See Olson, 286 N.W.2d at 272-73. Citing Kelsh v. Jaeger, 2002 ND 53, 641 N.W.2d 100, the Governor vetoed the budget section approval provisions in those two bills because they reflected the unconstitutional delegation of plenary legislative power to a subset of legislators. Petitioners’ Addendum at 70, 83.

[¶11] In response to the Legislators’ petition, the Governor and Attorney General Stenehjem file a cross-petition seeking a declaration that House Bill No. 1020 and Senate Bill No. 2013 are unconstitutional in violation of the non-delegation doctrine and the separation of powers doctrine. Both bills grant the Budget Section Committee, a subset of the members of the Legislative Assembly, unfettered discretion to approve or reject appropriations previously approved by the full Legislative Assembly. In addition, both bills purport to grant an executive power -- the authority to administer appropriations -- to a legislative committee without that conduct being subject to bicameral passage and gubernatorial approval.

[¶12] Unlike the bulk (if not all) of the Legislators' petition, the cross-petition presents a true controversy of justiciable nature and is a proper case for this Court to exercise its original jurisdiction.

JURISDICTIONAL STATEMENT FOR CROSS-PETITION

[¶13] This Court's original jurisdiction gives it the "authority to issue, hear, and determine such original and remedial writs as may be necessary to properly exercise its jurisdiction." N.D. Const. Art. VI, § 2. The "[C]ourt shall exercise its original jurisdiction . . . in such cases of strictly public concern as involve questions affecting the sovereign rights of this state or its franchises or privileges." N.D.C.C. § 27-02-04.

[¶14] The ability to enter a judgment that declares a legislative bill unconstitutional is available to this Court in the exercise of its original jurisdiction. See Olson, 286 N.W.2d at 268, 274. Indeed, in Olson this Court exercised its original jurisdiction and addressed a claim brought by a governor challenging the constitutionality of a bill. Id. at 273-74.¹ Just like this case, Olson involved a bill that became law in its entirety following an ineffective veto, and a claim by a

¹ In Olson, the Court noted the attorney general ordinarily institutes proceedings "in which the question presented is Publici juris," but nevertheless entertained a governor-initiated petition because the attorney general was a party to the action and the petition challenged an allegedly incorrect attorney general opinion. Id. at 266. Although the Legislators did not name the attorney general as a party here, this petition likewise claims, in part, that an opinion issued by the attorney general was incorrect. In addition, Attorney General Stenehjem is not only defending the Governor against the original petition, but has joined the Governor in bringing the cross-petition. By signing the cross-petition and this brief, the undersigned represents it is his judgment that the cross-petition is brought in the best interests of the state. See N.D.C.C. § 54-12-02 (authorizing the attorney general both to institute *and* prosecute cases in which the state is a party "whenever in [his] judgment it would be for the best interests of the state so to do").

governor that the resulting bill was unconstitutional because it exceeded the legislators' authority. Id. at 266-67 (concluding the governor's petition "seeking interpretation of a constitutional provision and . . . challenging the validity of a legislative act . . . does present an actual controversy of a justiciable character and warrants our exercise of original jurisdiction").

[¶15] This Court has also exercised its original jurisdiction to address a petition asserting the legislature was impermissibly attempting to delegate legislative power to a subset of its members. See Kelsh, 2002 ND 53, ¶ 3, 641 N.W.2d 100 (concluding a claim asserting the legislature was impermissibly attempting to delegate legislative power "warrants our exercise of original jurisdiction").

[¶16] This Court has also exercised its original jurisdiction when a petition involved "challenges [that] relate to the very foundation upon which the executive and legislative branches of government rest[.]" State ex rel. Peterson v. Olson, 307 N.W.2d 528, 531 (N.D. 1981). In the cross-petition, the Governor and Attorney General Stenehjem seek the application of state constitutional provisions that divide power among the branches of government and contend the legislative branch has exceeded the power conferred to it by those provisions. The cross-petition therefore justifies this Court's exercise of original jurisdiction.

[¶17] Finally, the Governor is permitted to bring the cross-petition in conjunction with his response to the Legislators' petition. In State v. Haskell, 2017 ND 252, 902 N.W.2d 772, the respondent embedded a cross-petition for a supervisory writ within his response to the State's initial petition. See Doc. No. 6, State v.

Haskell, Supreme Court No. 20170293. Although this Court ultimately declined to address the cross-petition because it did not satisfy the standards for the exercise of this Court's jurisdiction, it nevertheless accepted the petition as properly before it. See Haskell, 2017 ND 252, ¶ 12, 902 N.W.2d 772 ("Markel petitions for a supervisory writ to vacate the order dismissing [his] claim [for constructive and retaliatory discharge]").

LAW AND ARGUMENT (PETITION)

I. Any claims involving the three concededly ineffective vetoes do not present actual controversies of a justiciable nature.

[¶18] The Dickinson State veto, the Water Commission veto, and the University/School Lands veto were all found to be ineffective by the attorney general opinion requested by the Legislators on the matter. See N.D.A.G. 2017-L-04. Opinions issued by the attorney general govern the conduct of state officials until such time as the question may be decided by the courts. See State ex rel. Johnson v. Baker, 74 N.D. 244, 276, 21 N.W.2d 355, 372 (1946). The Governor acknowledges the attorney general opinion is correct and does not contest the ineffectiveness of the Dickinson State, Water Commission, and University/School Lands vetoes. See Affidavit of Governor Doug Burgum ¶¶ 6, 10; Respondent and Cross-Petitioners' Addendum at 16, 17.

[¶19] "The existence of a justiciable controversy between parties having adverse legal interests is essential to present a question for judicial determination[.]" State v. Rosenquist, 78 N.D. 671, 705, 51 N.W.2d 767, 787 (1952). The Governor's concession means the parties in this case do not have any adverse interests with respect to the Dickinson State, Water Commission,

and University/School Lands vetoes. Absent that essential element of a justiciable controversy, this Court has no basis for the exercise of its original jurisdiction. See, e.g., Van Sickle v. Hallmark & Assocs., Inc., 2008 ND 12, ¶ 28, 744 N.W.2d 532 (“Any opinion we may give on this issue would be advisory only, and we do not issue advisory opinions.”).

[¶20] Importantly, however, the absence of a justiciable controversy with respect to the Water Commission and University/School Lands vetoes themselves does not mean the issues raised in the cross-petition are not justiciable. Indeed, the Governor attempted to veto the budget section restrictions in House Bill No. 1020 and Senate Bill No. 2013 precisely because of his grave and justified concerns about the constitutionality of those provisions.

[¶21] Because the entire bills become law due to the ineffective partial vetoes, the direct constitutional challenge set forth in the cross-petition is the necessary means by which the Governor can request this Court to address that issue. See Olson, 286 N.W.2d at 273 (addressing a governor’s claim challenging the limits of legislative authority after determining an ineffective veto resulted in an unconstitutional bill becoming law in its entirety).

II. The challenge to the Safety Council veto does not involve a justiciable controversy between the Legislators and the Governor.

[¶22] The Legislators’ challenge to the Governor’s Safety Council veto is comprised of two parts. First, the Legislators claim the Governor impermissibly vetoed a condition on an appropriation without vetoing the appropriation itself because the “\$300,000 . . . was not subtracted from the appropriated funds, so the Governor left himself that amount to use at his discretion” (i.e., the

Subtraction Claim). Petitioner's Br. ¶ 25. Second, the Legislators claim their bill did not specify the specific funding source of the \$300,000, and "[a]s such, the \$300,000 to the workforce safety organization cannot be deemed an appropriation" (i.e., the Funding Source Claim). Id. ¶ 27. Each of these claims will be addressed in turn.

A. The Subtraction Claim involves a non-substantive agency error in implementing the veto rather than an attack on the veto itself, and does not involve a justiciable controversy between the Legislators and the Governor.

[¶23] The Legislators claim that the "Governor's current budget" retains the full \$2.25 million appropriated for the entrepreneurship grants and voucher program, and that \$300,000 was not subtracted from the program's appropriated funds. Petitioners' Br. ¶ 25. As part of this claim, the Legislators further contend the failure to subtract \$300,000 from the appropriated funds left the Governor with the discretion to spend that money however he wished. Id.

[¶24] These contentions are inaccurate. OMB has corrected the bookkeeping entry that initially failed to reflect the subtraction. Furthermore, even if the bookkeeping entry had not been corrected, the error did not somehow grant the Governor or the Department of Commerce any substantive spending authority or discretion over the \$300,000 at issue.

[¶25] OMB is the state agency charged with the statutory duty to "provide for expenditures from general and special fund appropriations[.]" N.D.C.C. § 54-44-04(10). To fulfill this statutory duty, OMB tracks all legislative appropriations for the purpose of identifying both the funding source of an appropriation, and the

spending authority granted by the legislature to a particular state agency for each appropriation. See Affidavit of Pam Sharp ¶ 3, Respondent and Cross-Petitioners' Addendum at 1-2.

[¶26] In fulfilling this statutory duty, OMB tracked the appropriations set forth in Senate Bill No. 2018 through the initial passage of the bill, the Governor's partial veto of the \$300,000 appropriation for the Safety Council and the attorney general opinion determining that the Safety Council veto was valid. Id. ¶¶ 4-19, Respondent and Cross-Petitioners' Addendum at 2-6.

[¶27] During that process, the funding source of the \$300,000 appropriation was identified as the Research North Dakota Fund. OMB made that determination by examining the unambiguous provisions of the bill itself, as well as the appropriation committee minutes dated April 17, 2017. Id. ¶¶ 5-10 & Exhibit 1; Respondent and Cross-Petitioners' Addendum at 2-4, 9. In addition, OMB subsequently verified the funding source by contacting the Legislative Council to confirm that the legislators intended the Research North Dakota Fund to be the funding source for the \$300,000 Safety Council appropriation. Id. ¶ 11 & Exhibit 2; Respondent and Cross-Petitioners' Addendum at 4, 10.

[¶28] Following the passage of the bill, the issuance of the Governor's veto, and the issuance of the attorney general opinion determining the veto was valid, the \$300,000 at issue remained in the Research North Dakota Fund. Id. ¶¶ 18-20, 24; Respondent and Cross-Petitioners' Addendum at 5-7. The \$300,000 at issue was never earmarked for the entrepreneurship grants and voucher program, or for a grant of \$300,000 to the North Dakota Safety Council. Id. ¶¶ 19-20;

Respondent and Cross-Petitioners' Addendum at 6. As such, the \$300,000 remained subject to any and all limitations and restrictions that had previously been placed upon the Department of Commerce for the expenditure of funds in the Research North Dakota Fund. Id. ¶ 24; Respondent and Cross-Petitioners' Addendum at 7.

[¶29] At no time did OMB ever recognize that the Department of Commerce or the Governor had somehow obtained freestanding authority to spend the \$300,000 due to the Governor's veto. Id. ¶ 24; Respondent and Cross-Petitioners' Addendum at 7. Nor does the Governor contend he has that authority.

[¶30] As a result of Senate Bill No. 2018, a line item in the Department of Commerce's budget initially identified \$2,250,000 for the entrepreneurship grants and voucher program. OMB correctly implemented the Governor's veto from a substantive standpoint by ensuring that the \$300,000 at issue remained in the Research North Dakota Fund. Initially, however, the \$2,250,000 listed in the line item for the entrepreneurship grants and voucher program was not corrected to reflect the fact that \$300,000 of that amount remained in the Research North Dakota Fund and could not be earmarked for the program.

[¶31] The bookkeeping entry on the line item for the entrepreneurship grants and voucher program has now been corrected. Id. ¶¶ 22-23 & Exhibits 4 & 5; Respondent and Cross-Petitioners' Addendum at 7, 12-13. Significantly, even without correction, the entry never had the substantive effect of granting the Department of Commerce, or the Governor, with any spending authority that

would be recognized by OMB. Id. ¶ 24; Respondent and Cross-Petitioners' Addendum at 7.

[¶32] Thus, the bookkeeping oversight does not present a justiciable controversy that can be addressed by the relief the Legislators seek in this action. Any relief required to fix a state budget line item entry is unnecessary, as the entry has been corrected. Finally, the bookkeeping entry had no substantive impact and did not somehow grant the Governor or the Department of Commerce with any spending authority for the \$300,000 at issue.

B. The Funding Source Claim is factually inaccurate and does not involve a justiciable controversy between the Legislators and the Governor.

[¶33] Second, the Legislators claim that Senate Bill No. 2018 does not specify the funding source of the \$300,000 at issue. Petitioners' Br. at ¶ 27. Curiously, the Legislators further contend the \$300,000 appropriated to the North Dakota Safety Council "cannot be deemed an appropriation[,]" but do not explain what the \$300,000 appropriation is, if not an appropriation. Id.

[¶34] The claim that Senate Bill No. 2018 does not specify the funding source of the \$300,000 at issue is not accurate. Section 14 of Senate Bill No. 2018 expressly identifies the Research North Dakota Fund as the funding source for the five specific entrepreneurship grants and vouchers set forth in Section 12, one of which was the \$300,000 earmarked for the North Dakota Safety Council. Section 14 specifically identifies "\$3,500,000 from the research North Dakota fund to the department of commerce for department programs." Petitioners'

Addendum at 3. Section 14 further states that of that total amount, “\$1,500,000 is for entrepreneurship grants and vouchers.” Id.

[¶35] The \$1.5 million identified in Section 14 for “entrepreneurship grants and vouchers” corresponds directly with the five specific entrepreneurship grants and vouchers identified in Section 12: (1) \$300,000 to the entrepreneurial center in Bismarck; (2) \$300,000 to the entrepreneurial center in Fargo; (3) \$300,000 to the entrepreneurial center in Grand Forks; (4) \$300,000 to an organization that provides workplace safety, i.e., the North Dakota Safety Council; and (4) \$300,000 for biotechnology grants. Id.

[¶36] Sections 12 and 14, when read together, clearly distinguish between the total amount of \$2,250,000 appropriated for the entrepreneurship grants and voucher *program*, and the specific \$1,500,000 appropriated for the five expressly delineated *grants or vouchers* that were a part of the program. See Affidavit of Pam Sharp, ¶¶ 5-8; Respondent and Cross-Petitioners’ Addendum at xx.

[¶37] If the plain and unambiguous provisions of Sections 12 and 14 were not enough, the Standing Committee Minutes of the Appropriations Committee dated April 17, 2017, confirm that it was the Legislators’ intent “to take a **\$1.5M from Research ND**” for “\$300,000 grants to each of the Entrepreneurship Centers in Grand Forks, Bismarck, and Fargo [and] **[\$]300,000 to ND Safety Council** for training purposes, and \$300,000 for Biotech, which would be \$1.5M.” Affidavit of Pam Sharp, ¶ 9 & Exhibit 1; Respondent and Cross-Petitioners’ Addendum at 3-4, 9 (emphasis added).

[¶38] In addition, OMB followed up with the Legislative Council to confirm that the Legislators' "intent was ***\$1.5 million to be appropriated out of the Research North Dakota fund for the designated entrepreneurship grants*** (entrepreneurship centers, biotech, and **ND Safety Council**).” Affidavit of Pam Sharp, ¶¶ 10-11 & Exhibit 2; Respondent and Cross-Petitioners' Addendum at 4, 10 (emphasis added).

[¶39] To summarize, the first element of the Legislators' challenge to the Safety Council veto involves a non-substantive bookkeeping entry that has been corrected. The second element of the Legislators' challenge to the Safety Council veto is not accurate because Section 14 of Senate Bill No. 2018 specifically identifies the funding source of the \$300,000 appropriation at issue.

[¶40] Stripped of these two elements, the Legislators' petition contains no substantive legal attack against the Governor's veto itself. The Governor therefore respectfully suggests that the Legislature's challenge to the Safety Council veto does not present a justiciable controversy for the Court's review.

III. The Safety Council veto was valid even if the Legislators' petition involves a justiciable controversy.

[¶41] Even if the Court views the Legislators' petition as setting forth an actual justiciable controversy with respect to the Safety Council veto, the Court should deny any requested relief. The Governor's veto was valid for all the reasons expressed in Section II, and as explained below.

[¶42] First, “[a]n appropriation is the setting apart from the public revenue of a definite sum of money for the specified object in such a manner that the officials of the government are authorized to use the amount so set apart, and no more,

for that object.” Olson, 286 N.W.2d at 268 (internal quotation marks and citation omitted); see also Brault v. Holleman, 230 S.E.2d 238, 242 (Va. 1976) (“In the constitutional sense, an item of an appropriation bill is an indivisible sum of money dedicated to a stated purpose; the term refers to something which may be eliminated from the bill without affecting the enactment's other purposes or provisions.”).

[¶43] Senate Bill No. 2018 set apart from the public revenue a definite sum of money (\$300,000) for a specified object (an entrepreneurship grant to the North Dakota Safety Council) such that the officials of the government (the Department of Commerce) were authorized to use that amount, and no more, for that object (the entrepreneurship grant). In addition, the \$300,000 could be eliminated from the bill without affecting the bill's other purposes or provisions (i.e., funding the operational expenses of an entrepreneurship grants and voucher program, and funding the other four specific grants set forth in the bill).

[¶44] Thus, despite the Legislators' unexplained claim that “the \$300,000 to the workforce safety organization cannot be deemed an appropriation,” Petitioners' Br. ¶ 27, the \$300,000 at issue here is clearly an appropriation under Olson's definition.

[¶45] Second, a governor can veto a condition or restriction on an appropriation so long as the appropriation itself is vetoed. Olson, 286 N.W.2d at 270. The resulting bill must “stand as workable legislation which comports with the fundamental purpose the legislature intended to effect when the whole was enacted.” Id. at 271.

[¶46] In this case, the Governor vetoed the condition or restriction on the appropriation (that the funds be given to the North Dakota Safety Council) as well as the appropriation itself (\$300,000). In addition, the line item veto still left the resulting bill workable and consistent with the fundamental purpose the legislature intended to effect when the whole was enacted -- to fund the operational expenses of an entrepreneurship grants and voucher program, and to fund four other specific grants set forth in the bill.

[¶47] In paragraph 25 of their brief, the Legislators cite two cases in support of their claim that the Governor impermissibly vetoed a condition on an appropriation without vetoing the appropriation itself. Both are inapposite to the circumstances involved in this case.

[¶48] In Colorado General Assembly v. Owens, the governor vetoed certain definitional headnotes in an appropriation bill through which the legislature had indicated how the appropriated money should be spent ("capital outlay," "lease space," "operating expenses," etc.). 136 P.3d 262, 264 (Colo. 2006). At the same time, the governor left the total appropriations intact, and informed the legislature through his veto message "that his agencies will comply with the headnotes to the extent feasible while [still] allowing them to spend outside the parameters set forth in the line item." Id. at 267.

[¶49] In other words, Owens involved a classic example of a case where a governor attempted to veto a condition or restriction on an appropriation without vetoing the appropriation itself. See id. ("The headnotes function as legislative conditions and so removal of that condition is beyond the Governor's item veto

power, especially removal with the expectation that the dollar amount could remain intact.”).

[¶50] Similarly, in Rush v. Ray, the governor vetoed provisions from five appropriation bills that stated “funds appropriated by this Act shall not be subject to transfer or expenditure for any purpose other than the purposes specified.” 362 N.W.2d 479, 480 (Iowa 1985). At the same time, the amount of money appropriated in each bill remained intact.

[¶51] Rush v. Ray is thus another situation where a governor attempted to veto a condition or restriction on an appropriation without vetoing the appropriation itself. See id. at 483 (“[T]he legislature clearly limited the expenditure of the appropriated funds to specified purposes. The veto distorted the obvious legislative intent that the funds only be spent for the appropriated purposes and created additional ways the funds might be spent.”).

[¶52] Unlike the situations involved in Owens and Ray, the Governor’s Safety Council veto not only struck the restriction on the appropriation (to spend funds on behalf of the North Dakota Safety Council), but also struck the appropriation itself (\$300,000).

[¶53] Finally, as explained in Section II, the Governor’s line item veto neither left the \$300,000 funds in the overall appropriation for the entrepreneurship grants and voucher program, nor created a freestanding substantive spending authority on behalf of the Governor or the Department of Commerce. Rather, the \$300,000 at issue remained in the funding source identified by the Legislators in the bill (the Research North Dakota Fund), and those funds still remain subject to

all previous limits and restrictions the Legislators have placed on the Department of Commerce's ability to spend them.

IV. The challenge to the Future Intent veto does not warrant the Court's exercise of original jurisdiction.

[¶54] The Governor's Future Intent veto struck a phrase from a sentence that started as follows: "It is the intent of the sixty-fifth legislative assembly that *future* general fund appropriations . . . be adjusted for . . ." Petitioners' Addendum 68 (emphasis added).

[¶55] It is well-settled that one legislature's statement of intent with respect to *future* appropriations has no legal significance because the statement cannot bind a subsequent legislative assembly. See, e.g., Opinion of the Justices, 79 A.2d 753, 756 (Me. 1951) ("[O]ne legislature cannot impose a legal obligation to appropriate moneys upon succeeding legislatures."); Ex parte Collie, 240 P.2d 275, 276 (Cal. 1952) ("It is the general rule that one legislative body cannot limit or restrict its own power or that of subsequent Legislatures and that the act of one Legislature does not bind its successors."); State ex rel. Warren v. Nusbaum, 208 N.W.2d 780, 803 (Wis. 1973) (concluding a bill requiring payment of a reserve fund deficit in a *future* budget was a nullity).

[¶56] In New Jersey Education Ass'n v. State, the court concluded that state constitutional provisions granting plenary and exclusive powers of appropriation to each legislative body "preclude one Legislature from binding future legislatures with respect to prospective appropriations." 989 A.2d 282, 295 (N.J. Super. Ct. App. Div. 2010). Similarly, North Dakota has long recognized that each legislative assembly has plenary legislative power absent restrictions imposed by

the state or federal constitutions, State ex rel. McCue v. Blaisdell, 18 N.D. 55, 147, 118 N.W. 141, 147 (1908), and that the “power to appropriate money is purely a legislative power.” Trinity Med. Ctr. v. North Dakota Bd. of Nursing, 399 N.W.2d 835, 841 (N.D. 1987). Consequently, the Sixty-fifth legislative assembly’s statement of intent about *future* general fund appropriations was a legal nullity -- nothing more than, at best, a mere statement of hope.

[¶57] Without contesting the non-binding nature of their intent regarding *future* appropriations, or presenting a legal issue supported by legal precedent for the Court’s consideration, the Legislators merely state that the “Governor has no authority to supplant an expression of legislative intent with his own[.]” Petitioners’ Br. at ¶ 39.

[¶58] The Legislators’ challenge to the Future Intent veto does not present a justiciable controversy when the phrase the Governor struck already lacked legal significance. The Court’s original jurisdiction should be reserved for weightier matters.

LAW AND ARGUMENT (CROSS-PETITION)

I. Historical background.

[¶59] Between 1987 and 2017, multiple attorneys general representing the State of North Dakota have issued opinions or letters addressing the constitutionality of legislative enactments involving budget section proceedings or activities.

[¶60] In 1987, the attorney general questioned whether the Budget Section’s role in executing N.D.C.C. § 54-44.1-13.1 “impermissibly usurps executive functions and violates fundamental separation of powers principles” after

examining the United States Supreme Court's decisions in I.N.S. v. Chadha, 462 U.S. 919 (1983) and Bowsher v. Synar, 478 U.S. 714 (1986). See N.D.A.G. Letter to Rayl (Sept. 25, 1987).

[¶61] In 1991, the attorney general opined that the Budget Section's action in approving the Board of Higher Education's issuance of bonds pursuant to N.D.C.C. § 15-10-12.1 "is inappropriate because it violates the separation of powers doctrine," finding instructive the United States Supreme Court's decision in Metropolitan Washington Airport Authority v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991). See N.D.A.G. Letter to Treadway (Nov. 6, 1991).

[¶62] In 2007, the attorney general considered whether section 10 of House Bill No. 1015 as passed by the 2007 Legislative Assembly, which granted the Budget Section the power to approve or reject the Emergency Commission's authorized option for constructing or remodeling state correctional facilities, was unconstitutional in violation of the separation of powers doctrine. After reviewing the Supreme Court authority discussed in the prior Attorney General opinions from 1987 and 1991, as well as additional authority, the Attorney General concluded the Budget Section's "power to veto the Emergency Commission's choice without the further action of the passage by both houses of the Legislature and signing by the Governor . . . would violate the separation of powers doctrine and therefore be unconstitutional" if a court were to rule on the matter. See N.D.A.G. 2007-L-08.

[¶63] Most recently, Attorney General Stenehjem addressed the budget section provisions at issue in Senate Bill No. 1020 and House Bill No. 2013, the two bills that are the subject of the cross-petition. House Bill No. 1020 purportedly requires the State Water Commission (SWC) to secure approval from the Budget Section before it may transfer funding among the four listed water-related appropriations set forth in the bill. Senate Bill No. 2013 purportedly grants the Budget Section the authority to limit the Commissioner of University and School Lands' expenditure of \$1.8 million of the total of \$3.6 million the full Legislative Assembly appropriated for an information technology project.

[¶64] Notably, neither of those two legislative enactments set forth any guidelines, standards, or conditional facts for the Budget Section to ascertain when approving or rejecting the listed appropriations already approved by the full Legislative Assembly. Attorney General Stenehjem determined, if a court were to rule on the issue, both legislative enactments would violate the separation of powers doctrine. See N.D.A.G. 2017-L-04.

II. The budget section provisions of House Bill No. 1020 are unconstitutional in violation of the non-delegation and separation of powers doctrines.

A. Non-delegation doctrine.

[¶65] "Unless expressly authorized by the State Constitution, the Legislature may not delegate its purely legislative powers to any other body." Stutsman Cty. v. Historical Soc'y of North Dakota, 371 N.W.2d 321, 326 (N.D. 1985) (citing Ralston Purina Co. v. Hagemeister, 188 N.W.2d 405 (N.D. 1971)).

[¶66] This prohibition applies when the legislature attempts to delegate its full legislative power to a subset of its members. See Eklund v. Eklund, 538 N.W.2d 182, 189 (N.D. 1995) (Sandstrom, J., concurring) (citing N.D. Const. Art. IV §§ 1, 13, 32, 40; Art. V §§ 1, 9, 10; Art. VI § 1; Art. XI, § 26; I.N.S. v. Chadha, 462 U.S. 919 (1983); State ex rel. Spaeth v. Meiers, 403 N.W.2d 392 (N.D. 1987); State ex rel. Barker v. Manchin, 167 W.Va. 155, 279 S.E.2d 622 (W.Va. 1981); State ex rel. Stephan v. Kansas House of Rep., 687 P.2d 622 (Kan. 1984); Iowa Fed. of Labor v. Dept. of Job Serv., 427 N.W.2d 443 (Iowa 1988)).

[¶67] “The true distinction between the powers which the Legislature may delegate and those which it may not is to be determined by ascertaining whether the power granted gives authority to make a law or whether the power pertains only to the execution of the law which was enacted[.]” Ralston Purina Co. v. Hagemeister, 188 N.W.2d 405, 411 (N.D. 1971). “The power to ascertain facts which will bring the provisions of a law into operation by its own terms is not an unconstitutional delegation of legislative powers.” Stutsman Cty., 371 N.W.2d at 327 (citing Ferch v. Hous. Auth. of Cass Cty., 79 N.D. 764, 59 N.W.2d 849 (1953)).

[¶68] Importantly, however, any attempt by the legislature to delegate power without “set[ting] forth reasonably clear guidelines which will enable the [delegate] to ascertain the facts, so that the law takes effect on such facts under its own provisions and not according to the discretion of the [delegate],” is impermissible. Ralston Purina, 188 N.W.2d at 410.

[¶69] In Stutsman County, this Court examined the constitutionality of N.D.C.C. § 55-10-02(4) to determine whether the legislature had improperly delegated authority to the State Historical Board to list a particular site on the State Historical Sites Registry. The statute delegated authority to place a site on the Registry if the Board determined the site “possess[ed] historical value, as defined by this section[.]” 371 N.W.2d at 324 (quoting N.D.C.C. § 55-10-02(4) as it existed at the time). Although the phrase “historical value” was not further defined, this Court nonetheless determined the presence of that guideline (i.e., requiring the Board to ascertain the factual predicate of “historical value”) was sufficient to conclude the statute was constitutional:

The Legislature has conferred upon the Board the power to ascertain, under the law enacted by it, the facts of each particular situation to determine whether a site has historical value. The power granted does not give the Board the authority to make law but pertains only to the execution of a law enacted by the Legislature.

Id. at 327.

[¶70] In stark contrast to the statute involved in Stutsman County, House Bill No. 1020 does not include a factual predicate that limits the Budget Section’s authority to approve or reject the transfer and use of the four water-related appropriations set forth in the bill. Rather, the bill purports to grant plenary authority to the Budget Section to approve or reject SWC’s ability to transfer funding among the four listed items, without setting forth any guidelines whatsoever indicating when such transfers should be allowed and when they should not.

[¶71] The unfettered discretion granted to the Budget Section in House Bill No. 1020 therefore violates the non-delegation doctrine by permitting a subset of the legislative body to exercise plenary legislative power.

[¶72] In paragraph 46 of their brief, the Legislators cite two cases in support of their claim that the budget section provisions in House Bill No. 1020 were proper. Neither case supports the Legislators' claim.

[¶73] In North Dakota Council of School Administrators v. Sinner, this Court addressed whether the legislature improperly delegated legislative authority to the director of the OMB by permitting him to reduce the Department of Public Instruction's overall expenditures by two percent based upon a projected shortfall in general fund revenues for the 1987-1989 biennium. 458 N.W.2d 280, 281 (N.D. 1990). The Court determined there was no violation of the non-delegation doctrine because the statute at issue, N.D.C.C. § 54-44.1-12, specifically set forth four criteria for the OMB director to consider when determining whether the two percent reduction was required. See id. at 286 ("[B]y its terms [the statute] requires the director of the budget to determine that one or more of four enumerated factors is present before an allotment reducing an appropriation may be made. . . . The Legislature has not given the director of the budget power to make a law, but only the authority to execute the law within the parameters established by the Legislature.").

[¶74] In sharp contrast, House Bill No. 1020 sets forth no parameters whatsoever for the Budget Section to consider in determining when and whether to permit the SWC to transfer and use appropriated funds for the four water-

related items set forth in the bill. Instead, the bill purports to grant the Budget Section the unfettered discretion to approve or disallow the SWC to transfer and use the funds appropriated by the full legislative assembly. As such, the budget section provisions in House Bill No. 1020 epitomize a violation of the non-delegation doctrine.

[¶75] Similarly, in Trinity Medical Center v. North Dakota Board of Nursing, this Court determined the legislature did not impermissibly delegate legislative authority to the Board of Nursing because six separate statutes passed by the legislature set specific standards (albeit broad) that guided the Board's rule-making authority. 399 N.W.2d 835, 847 (N.D. 1987). Again, in sharp contrast, House Bill No. 1020 sets forth no standards (broad or otherwise) for the Budget Section to apply in determining whether the SWC can transfer appropriated funds among the four water-related items set forth in the bill.

B. Separation of powers doctrine.

[¶76] It is axiomatic that the legislative branch of government passes laws, the executive branch carries out those laws, and the judicial branch interprets them. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952) (discussing the legislature's "exclusive constitutional authority to make laws"); Kendall v. U.S. ex rel. Stokes, 37 U.S. 524, 612-13 (1838) (noting the President's constitutional obligation "to take care that the laws be faithfully executed"); Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[¶77] As a consequence, the legislature runs afoul of the constitution when it attempts both to pass a law *and* to carry it out. When the legislature conditioned SWC's ability to transfer (and thus use) the funds appropriated in House Bill 1020 upon Budget Section approval, it "not only passed an act-that is, made a law-but it made a joint committee of the Senate and the House as its executive agent to carry out that law. This is a clear and conspicuous instance of an attempt by the [Legislative] Assembly to confer executive power upon a collection of its own members." Stockman v. Leddy, 129 P. 220, 223 (Colo. 1912), overruled on other grounds by United States v. City & Cty. of Denver, By & Through Bd. of Water Comm'rs, 656 P.2d 1 (Colo. 1982).

[¶78] In I.N.S. v. Chadha, the United States Supreme Court addressed the constitutionality of 8 U.S.C. § 1254(c)(2), which authorized either House of Congress to invalidate a decision by the executive branch of government (i.e., the Attorney General of the United States) to permit a deportable alien to remain in the United States. 462 U.S. at 923. The Court held the statute was unconstitutional because it allowed the Legislature to veto a decision by the executive branch without following the legislative procedures set out in Article I of the United States Constitution, i.e., "bicameral passage [of a law] followed by presentment to the President." Id. at 954-55.

The bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded. To accomplish what has been attempted by one House of Congress in this case requires action in

conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President.

Id. at 957-58.

[¶79] Similarly, House Bill No. 1020 permits a subset of members of the legislature to approve or disapprove SWC's transfer and use of appropriated state funds for expenses associated with general water supply, rural water supply, flood control, and general water. In other words, the Budget Section purportedly can exercise an executive power – the administration of appropriated funds -- without bicameral passage of a law followed by presentment to the Governor. This activity violates the provisions of the North Dakota Constitution, which mirror those of the federal constitution, intended to place a check on legislative power. See N.D. Const. art. IV, § 13 (“No law may be enacted except by a bill passed by both houses[.]”); N.D. Const. art. V, § 9 (“Every bill passed by the legislative assembly must be presented to the governor for the governor’s signature.”).

[¶80] The unavoidable conclusion that House Bill No. 1020 violates the separation of powers doctrine by creating an executive agent (the Budget Section) to fully implement a past legislative act -- without following the bicameral and presentment requirements of the North Dakota Constitution -- is well established by other decisions as well. See Bowsher, 478 U.S. at 726-27 (“To permit an officer controlled by [the legislature] to execute the laws would be, in essence, to permit a [legislative] veto. . . . [t]his kind of [legislative] control over the execution of laws, Chadha makes clear, is constitutionally impermissible.”);

Metropolitan, 501 U.S. at 276 (explaining that when a “power is executive, the Constitution does not permit an agent of Congress to exercise it” and when a “power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of [the United States Constitution]”); see also State ex rel. McLeod v. McInnis, 295 S.E.2d 633, 637 (S.C. 1982) (concluding the conduct of South Carolina’s joint appropriations review committee was unconstitutional because the committee “by exercising the powers allocated to it, makes determinations that should be those of the entire General Assembly [and] undertakes to do, not through a legislative process, as it surely could, but through the administration of appropriations which is the function of the executive department”).

[¶81] House Bill No. 1020 fails to set forth any limits on the discretion granted to the Budget Section to approve or reject the transfer of already-appropriated funds. By doing so, House Bill No. 1020 purports to grant executive power (the authority to administer appropriations) to a subset of legislators, without that conduct being subject to the checks on legislative authority granted to the executive branch of government.

[¶82] This purported grant of executive authority therefore violates the separation of powers doctrine by permitting a legislative committee to administer – or veto – appropriated funds without that conduct being subject to bicameral passage and gubernatorial approval.

III. The budget section provisions of Senate Bill No. 2013 are unconstitutional in violation of the non-delegation and separation of powers doctrines.

A. Non-delegation doctrine.

[¶83] Senate Bill No. 2013 also violates the non-delegation doctrine. Similar to the unconstitutional provisions in House Bill No. 1020 that purport to grant the Budget Section unfettered discretion to administer already-approved appropriations, Senate Bill No. 2013 purports to grant the Budget Section unfettered discretion to approve or reject the use of \$1.8 million of the \$3.6 million the full legislative assembly appropriated for the Commissioner of the University and School Lands (Commissioner) to spend on an information technology project.

[¶84] Similar to the unconstitutional provisions in House Bill No. 1020, Senate Bill No. 2013 does not set forth a factual predicate that limits the Budget Section's authority to approve or reject the use of the \$1.8 million already appropriated by the full legislature.

[¶85] Similar to the unconstitutional provisions in House Bill No. 1020, Senate Bill No. 2013 does not include any guidelines whatsoever to indicate under what circumstances the Budget Section should approve or reject the Commissioner's ability to spend the \$1.8 million on an information technology project. Rather, the bill purports to grant plenary authority to the Budget Section to approve or reject the expenditure of funds already approved by the full legislative body.

[¶86] The unfettered discretion granted to the Budget Section in Senate Bill No. 2013 therefore violates the non-delegation doctrine by permitting a subset of the

legislative body to exercise plenary legislative power.

B. Separation of powers doctrine.

[¶87] Senate Bill No. 2013 also violates the separation of powers doctrine. Similar to the unconstitutional provisions in House Bill No. 1020, Senate Bill No. 2013 permits a subset of members of the legislature to approve or disapprove the Commissioner's use of half the full appropriation approved by the legislature. In other words, the Budget Section purportedly can "veto" \$1.8 million of an existing appropriation without bicameral passage of a law followed by presentment to the Governor.

[¶88] Senate Bill No. 2013 fails to set forth any limits on the discretion granted to the Budget Section to approve or reject the use of \$1.8 million of an existing appropriation. By doing so, Senate Bill No. 2013 purports to grant executive power (the authority to administer appropriations) to a subset of legislators, without that conduct being subject to the checks on legislative authority granted to the executive branch of government.

[¶89] This purported grant of executive authority therefore violates the separation of powers doctrine by permitting a legislative committee to administer appropriated funds without that conduct being subject to bicameral passage and gubernatorial approval.

CONCLUSION

[¶90] The Governor respectfully requests that the Legislators' petition be rejected on the grounds that it does not present actual controversies of a justiciable nature. To whatever extent this Court may find that the Legislators'

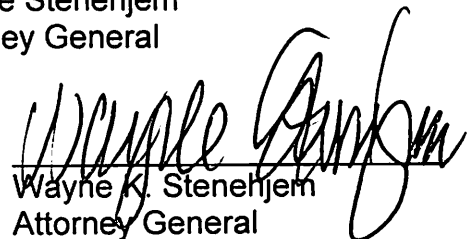
petition raises justiciable issues, the Governor respectfully requests that the Court deny any relief sought in the petition.

[¶91] With respect to the cross-petition, the Governor and Attorney General Stenehjem respectfully request that the Court declare the budget section provisions of House Bill No. 1020 and Senate Bill No. 2013 unconstitutional.

Dated this 12th day of January, 2018.


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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

North Dakota Legislative Assembly,
Senator Ray Holmberg, Representative
Al Carlson, Senator Rich Wardner,
Senator Joan Heckaman, and
Representative Corey Mock,

Petitioners,

vs.

State of North Dakota ex rel. Wayne K.
Stenehjem, in his capacity as Attorney
General of the State of North Dakota;
North Dakota Governor Doug Burgum,

Respondent and
Cross-Petitioner.

**CERTIFICATE OF SERVICE
BY ELECTRONIC MAIL**

Supreme Court No. 20170436

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)


[¶1] Melissa Castillo states under oath as follows:

[¶2] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

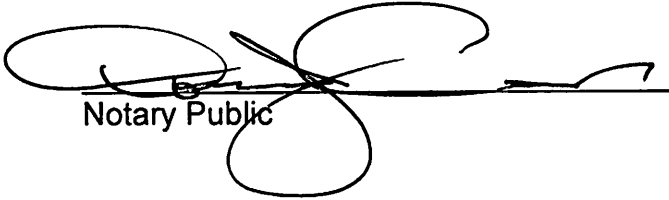
[¶3] I am of legal age and on the 12th day of January, 2018, I served the attached **CROSS-PETITION FOR DECLARATORY JUDGMENT; RESPONDENT GOVERNOR BURGUM'S BRIEF IN OPPOSITION TO THE PETITION FOR DECLARATORY JUDGMENT, OR IN THE ALTERNATIVE, FOR WRIT OF MANDAMUS AND BRIEF IN SUPPORT OF CROSS-PETITION FOR DECLARATORY JUDGMENT; and ADDENDUM TO RESPONDENT AND CROSS-PETITIONERS' BRIEF** upon Randall J. Bakke and Shawn A. Grinolds by electronic mail as follows:

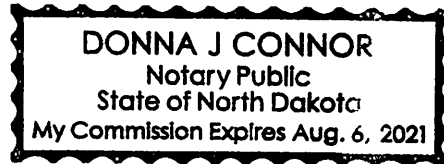
Randall J. Bakke
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Melissa Castillo

Subscribed and sworn to before me
this 12th day of January, 2018.


Notary Public



JAN 12 2018

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA

North Dakota Legislative Assembly,)
Senator Ray Holmberg, Representative)
Al Carlson, Senator Rich Wardner,)
Senator Joan Heckaman, and)
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vs.)

State of North Dakota ex rel. Wayne K.)
Stenehjem, in his capacity as Attorney)
General of the State of North Dakota;)
North Dakota Governor Doug Burgum,)

Respondent and)
Cross-Petitioners.)

Supreme Court No. 20170436

ADDENDUM TO RESPONDENT AND CROSS-PETITIONERS' BRIEF

State of North Dakota
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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

North Dakota Legislative Assembly,)
Senator Ray Holmberg, Representative)
Al Carlson, Senator Rich Wardner,)
Senator Joan Heckaman, and)
Representative Corey Mock,)

Petitioners,)

vs.)

State of North Dakota ex rel. Wayne K.)
Stenehjem, in his capacity as Attorney)
General of the State of North Dakota;)
North Dakota Governor Doug Burgum,)

Respondent and)
Cross-Petitioners.)

Supreme Court No. 20170436

ADDENDUM TO RESPONDENT AND CROSS-PETITIONERS' BRIEF

State of North Dakota
Wayne Stenehjem
Attorney General

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Attorneys for Respondent and Cross-
Petitioners.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

North Dakota Legislative Assembly,)
Senator Ray Holmberg, Representative)
Al Carlson, Senator Rich Wardner,)
Senator Joan Heckaman, and)
Representative Corey Mock,)

Petitioners,)

vs.)

North Dakota Governor Doug Burgum,)

Respondent and)
Cross-Petitioner.)

AFFIDAVIT OF PAM SHARP

Supreme Court No. 20170436

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Pam Sharp states under oath as follows:

1. I am the director of the North Dakota Office of Management and Budget (OMB). Pursuant to statute, OMB oversees the budgeting, accounting, payroll and financial reporting functions for all North Dakota state government entities. See N.D.C.C. § 54-44-04.

2. One of the specific statutory duties of OMB is to "provide for expenditures from general and special fund appropriations to be made in accordance with the requirements of the state's central accounting system." N.D.C.C. § 54-44-04(10).

3. In order to satisfy that statutory duty, OMB tracks all legislative appropriations to determine both the funding source identified by the legislature for all of

its appropriations, and the spending authority granted by the legislature to particular state agencies for all legislative appropriations.

4. During the Sixty-fifth Legislative Assembly, OMB tracked the legislature's consideration of Senate Bill No. 2018, a bill that provided an appropriation for the expenses of the Department of Commerce. OMB tracked the legislature's consideration of Senate Bill No. 2018 to determine both the funding sources for the amounts appropriated by the legislature to the Department of Commerce, and the spending authority granted to the Department of Commerce with respect to those final appropriations.

5. As passed by both houses, Section 12 of Senate Bill No. 2018 granted the Department of Commerce spending authority in the amount of \$2,250,000 for an entrepreneurship grants and vouchers program. Of that total amount, the legislature limited the Department of Commerce's spending authority with respect to \$1,500,000 by directing that \$900,000 would be distributed equally to entrepreneurial centers located in Bismarck, Fargo, and Grand Forks (\$300,000 each), \$300,000 to an organization that provides workplace safety (the North Dakota Safety Council), and \$300,000 for biotechnology grants.

6. Section 12 also identified the funding sources for the \$2,250,000 appropriated for the entrepreneurship grants and vouchers program. The funding sources were identified as \$600,000 from the general fund and \$1,650,000 from special funds. Because the legislature identified \$1,650,000 from special funds, OMB further had to identify the specific special funds the legislature intended for the total appropriations set forth in the bill.

7. OMB determined that the legislature designated the Research North Dakota Fund as the funding source of \$1,500,000 in special funds, and the Economic Development Fund as the special funding source for the other \$150,000. OMB made its determination regarding the Research North Dakota Fund, in part, because Section 14 of Senate Bill No. 2018 expressly states that \$1,500,000 of the estimated income of the Research North Dakota Fund is for the specific entrepreneurship grants and vouchers that are a part of the entrepreneurship grants and vouchers program. This amount corresponds with the spending authority of \$1,500,000 granted by the legislature in Section 12 of Senate Bill No. 2018 for \$900,000 to be distributed equally to entrepreneurial centers in Bismarck, Fargo, and Grand Forks, \$300,000 to an organization that provides workplace safety (the North Dakota Safety Council), and \$300,000 for biotechnology grants (a total of \$1,500,000).

8. In other words, Section 12 of Senate Bill No. 2018 identifies \$2,250,000 in overall funding for the program itself, and further identifies \$1,500,000 for specific grants and vouchers that are a part of the program. Section 14, in turn, identifies the funding source of \$1,500,000 to be used for the specific grants and vouchers identified in Section 12. Section 14's specific reference to "entrepreneurship grants and vouchers," as opposed to a more general reference to the "entrepreneurship grants and vouchers program," ties the funding source of \$1,500,000 identified in Section 14 to the specific grants and vouchers identified in Section 12.

9. OMB verified this determination through the 2017 Senate Standing Committee Minutes of the Appropriations Committee dated April 17, 2017, wherein Representative Bob Martinson indicates that he wants the committee to consider taking

\$1.5 million from the Research North Dakota Fund for "\$300,000 grants to each of the Entrepreneurship Centers in Grand Forks, Bismarck and Fargo . . . [\$]300,000 to ND Safety Council for training purposes, and \$300,000 for Biotech, which would be \$1.5M." See Exhibit 1 attached.

10. The legislative process is dynamic and fluid. Frequently, the legislature's decisions with respect to both funding sources for a particular appropriation, as well as the spending authority granted to a particular state agency, fluctuate over the course of a bill's consideration. As a result, it is not uncommon for OMB to verify a funding source with the particular state agency seeking an appropriation from the legislature, or to verify a funding source by contacting the legislative council.

11. In this case, OMB management and fiscal analyst Becky Keller contacted the Legislative Council to verify the funding source of the \$1.5 million identified in Section 12 of Senate Bill No. 2018, which was to be distributed to the designated entrepreneurship grants set forth in the bill (i.e., \$300,000 each to the entrepreneurship centers in Bismarck, Fargo, and Grand Forks, \$300,000 for an organization that provides workplace safety (the North Dakota Safety Council), and \$300,000 for biotechnology grants). On Monday, April 24, 2017, Keller received confirmation that the legislature's intent was for "\$1.5 million to be appropriated out of the Research North Dakota fund for the designated entrepreneurship grants (entrepreneurship centers, biotech, and ND Safety Council)." See Exhibit 2 attached.

12. Senate Bill No. 2018 itself, as well as the statements of intent of the legislature, specify the fund from which the \$300,000 designated for the North Dakota Safety Council should be drawn. Section 14 of Senate Bill No. 2018 specifically directs

that \$1,500,000 of the estimated income from the Research North Dakota Fund shall be for entrepreneurship grants and vouchers (as opposed to a more general reference to the program itself), which corresponds with the \$1,500,000 designated \$300,000 each to five separate entities in Section 12, one of which was the North Dakota Safety Council (i.e., an organization that provides workplace safety).

13. The April 17 minutes from the Appropriation Committee confirm that the specific source of the \$300,000 designated for the North Dakota Safety Council is the Research North Dakota Fund.

14. The subsequent verification of legislative intent received by OMB on April 24, 2017, confirms that the specific source of the \$300,000 designated for the North Dakota Safety Council is the Research North Dakota Fund.

15. On May 3, 2017, Governor Burgum vetoed part of Section 12 of Senate Bill No. 2018 by striking that portion of the bill granting the Department of Commerce spending authority for "\$300,000 to an organization that provides workplace safety."

16. On June 19, 2017, Attorney General Stenehjem issued an opinion stating that the Governor's veto of a portion of Section 12 of Senate Bill No. 2018 was authorized by the North Dakota State Constitution.

17. Pursuant to State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946), OMB operates with the understanding that the Attorney General's opinion governs its actions unless the North Dakota Supreme Court indicates otherwise.

18. Accordingly, following the veto and the issuance of the Attorney General's opinion, OMB contacted the Department of Commerce to verify the Department's understanding that the portion of Senate Bill No. 2018 purporting to grant it spending

authority for \$300,000 to the North Dakota Safety Council was ineffective. Because the Research North Dakota Fund is a special fund under the control of the Department of Commerce, OMB contacted the Department of Commerce to further confirm the Department's understanding that it did not have authority to earmark, or code, \$300,000 from the Research North Dakota Fund for its entrepreneurship grants and vouchers program.

19. The Department of Commerce confirmed its understanding that it did not have spending authority to use \$300,000 from the Research North Dakota Fund for the entrepreneurship grants and vouchers program, or in turn for the North Dakota Safety Council, unless and until the North Dakota Supreme Court indicated otherwise. The Department of Commerce further confirmed that the \$300,000 that was the subject of the Governor's veto had not been earmarked, or coded, for the entrepreneurship grants and vouchers program, had not been transferred to the North Dakota Safety Council, and remained in the Research North Dakota Fund.

20. The Department of Commerce assigned a project code, BD82003, for grants awarded through the entrepreneurship grants and vouchers line, 60175, and assigned project activity codes of 01 for grants to entrepreneurship centers, 02 for biotechnology grants and 03 for workplace safety grants. A review of the itemized transaction register for expenditures from the Research North Dakota Fund, fund 382, further confirmed that no payments have been made for workplace safety grants to the North Dakota Safety Council. See Exhibit 3 attached.

21. On December 8, 2017, I learned that the North Dakota Legislative Assembly had sued Governor Burgum to challenge the partial veto of Senate Bill No.

2018. It was subsequently brought to my attention that the suit contended, in part, that the Governor's current budget retains the full \$2.25 million appropriation set forth in Section 12 of Senate Bill No. 2018.

22. Upon investigating this matter, I determined that the line item for the entrepreneurship grants and vouchers program in the Department of Commerce's budget had not been adjusted on the PeopleSoft Financial system from \$2,250,000 to \$1,950,000 to reflect the Department's acknowledged lack of spending authority for the \$300,000 affected by the Governor's veto and the Attorney General's opinion. I then immediately took steps to correct this.

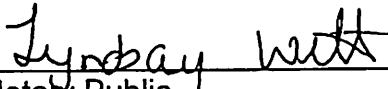
23. On December 12, 2017 OMB Fiscal Management staff made the entry in the PeopleSoft Financial system to reduce the Department of Commerce budget, Unit 60100, by \$300,000. To do this, two appropriation journals are done within PeopleSoft. One journal, Journal ID 0001869350, will reduce their Special Fund Authority. See Exhibit 4 attached. The second budget journal, Journal ID 0001869351, will decrease their appropriation line (60175) Entrepreneurship Grants. See Exhibit 5 attached. Each journals is for \$300,000.

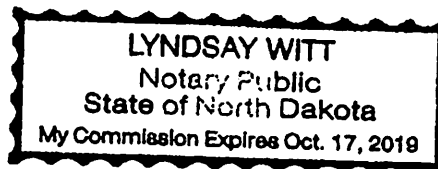
24. With or without the correction of this administrative oversight, the Governor's veto did not have the effect of the Governor giving himself the discretion to use the \$300,000 that was the subject of the veto. Even in the absence of the adjustment to the appropriation authority, the \$300,000 at issue remained in the Research North Dakota Fund, and was still subject to any and all continuing limitations imposed by the legislature upon the Department of Commerce for the use of any and all funds contained in the Research North Dakota Fund.

Dated this 8 day of January, 2018.


Pam Sharp, Director
Office of Management and Budget

Subscribed and sworn to before me
this 8th day of January, 2018.


Notary Public



2017 SENATE STANDING COMMITTEE MINUTES

Appropriations Committee
Harvest Room, State Capitol

SB 2018
4/17/2017
JOB # 30153

☐ Subcommittee
☒ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

A Conference Committee hearing for Department of Commerce

Minutes:

1. Proposed Amendment # 17.0526.02004
(submitted by Rep. Schreiber-Beck)
2. Proposed Amendment # 17.0526.02008
(submitted by Rep. Streyle)
3. Base Level Funding Changes

Chairman Holmberg: Called the Conference Committee to order on SB 2018 at 10:00 am in the Harvest Room. The record will indicate that all conferees are present: **Chairman Holmberg, Senators Dave Oehlke, Larry Robinson; Representatives: Roscoe Streyle, Bob Martinson, and Mike Schatz.** Levi Kinnischtzke, Legislative Council and Becky J. Keller, OMB are also present.

Chairman Holmberg: Levi, you were keeping track of what we were talking about the other day, do you have a piece of paper that has something on it. submitted something.

(0:01:40-0:04:38) Levi Kinnischtzke, Legislative Council: Using Attachment #3, Base Level Funding Changes, he explained the changes as follows:

- #1 Added \$200,000 for Operation Intern.
- #2 Removed funds from Discretionary Grant line item, to be for homeless shelter grants.
- #3 Added funding back for the ND Trade Office.
- #4 Add money for entrepreneurship grants from the ND Research fund.
- #5 Increase in base realignment grants coming from SIIF.
- #6 UAS carry over authority used for enhanced use lease grants for Grand Sky. So that would be \$500,000 of turn-back at the end of the 15-17 biennium and then re-appropriated in 17-19 biennium for enhanced use lease grants.

(0:04:58) Representative Martinson: I would like us to consider on Entrepreneurship grants is to take a \$1.5M from Research ND, rather than \$1M. In the past sessions we've given \$300,000 grants to each of the Entrepreneurship Centers in Grand Forks, Bismarck and Fargo. I would suggest we give them each \$300,000. %300,000 to ND Safety Council for training purposes, and \$300,000 for Biotech, which would be \$1.5M. **(0:05:34)**

EXHIBIT
1

Keller, Becky J.

From: Kinnischtzke, Levi
Sent: Monday, April 24, 2017 10:40 AM
To: Keller, Becky J.
Subject: FW: SB 2018 entrepreneurship amendment

From: Dever, Justin R.
Sent: Monday, April 24, 2017 10:27 AM
To: Kinnischtzke, Levi <lkinnischtzke@nd.gov>
Cc: Streyle, Roscoe K. <rstreyle@nd.gov>; Martinson, Bob W. <bmartinson@nd.gov>; Holmberg, Ray E. <rhholmberg@nd.gov>
Subject: SB 2018 entrepreneurship amendment

Levi,

I spoke with Representatives Streyle and Martinson, and they both agreed that the intent was \$1.5 million to be appropriated out of the Research North Dakota fund for the designated entrepreneurship grants (entrepreneurship centers, biotech, and ND Safety Council). There would be \$600,000 general fund and \$150,000 in special fund authority for the administration of the Innovate ND program, which is same as the House version.

Thanks.

Justin Dever
Co-Deputy Commissioner
NORTH DAKOTA DEPARTMENT OF COMMERCE
p: 701-328-7258 / f: 701-328-5320 / www.NDCommerce.com

North Dakota
LEGISLATURE



Itemized Transaction Register
 From Jul 1, 2017 to Dec 18, 2017

Account	Class	Dept	Fund	Project	Activity	Date	Journal / Voucher ID	Header Descr / Invoice	Line Descr / Vendor	Amount
442040		8200	382			8/28/17	INTJUL2017	2017-08-28	Interest On Investment	481.28
442040		8200	382			9/26/17	INTAUG2017	2017-09-26	Interest On Investment	398.56
442040		8200	382			10/18/17	INTSEP2017	2017-10-18	Interest On Investment	368.69
442040		8200	382			11/27/17	INTOCT2017	2017-11-27	Interest On Investment	369.79
Total Account 442040	1,618.32									
603035	90170	8200	382			8/31/17	00038123	33572 & 33951	SUMMIT GROUP SOFTWARE INC	90.00
Total Account 603035	90.00									
623175	90170	8200	382			10/12/17	00038375	TECHNICAL REVIEW	INDUSTRIAL COMMISSION,ND	900.00
Total Account 623175	900.00									
712070	90170	8200	382			7/20/17	00037941	MATTRESS COMFORT CUST	NORTH DAKOTA STATE UNIVERSITY	16,000.00
712070	90170	8200	382			8/1/17	00037980	CHS FROM TRICH	NORTH DAKOTA STATE UNIVERSITY	75,000.00
712070	90170	8200	382			8/1/17	00037981	SOFTWARE OF UNCONV RESERV	UNIVERSITY OF NORTH DAKOTA	50,000.00
712070	90170	8200	382			8/15/17	00038058	CONVERTING UAS THERMAL IMAGES	UNIVERSITY OF NORTH DAKOTA	174,325.00
712070	90170	8200	382			8/22/17	0001841326	2017-08-22	Grants To State Colleges	(843.60)
712070	90170	8200	382			8/31/17	00038124	Smart Seatz	UNIVERSITY OF NORTH DAKOTA	50,000.00
712070	90170	8200	382			8/31/17	00038125	Porcine Epid. Diarrhea Virus	UNIVERSITY OF NORTH DAKOTA	198,209.69
712070	90170	8200	382			8/31/17	00038126	Mass Production of Lithium Ion	UNIVERSITY OF NORTH DAKOTA	49,270.50
712070	90170	8200	382			8/31/17	00038127	Portable Quality Monitoring	NORTH DAKOTA STATE UNIVERSITY	50,000.00
712070	90170	8200	382			10/5/17	00038309	UAS SUPPORT FOR ENVIRONMENTAL	UNIVERSITY OF NORTH DAKOTA	49,988.00
712070	90170	8200	382			10/5/17	00038312	ALTA AIR	UNIVERSITY OF NORTH DAKOTA	100,000.00
712070	90170	8200	382			10/5/17	00038314	NEW SUSTAINABLE CONCRETE ND	NORTH DAKOTA STATE UNIVERSITY	37,625.00
712070	90170	8200	382			10/5/17	00038315	POLYMERS FROM PLANT/VEG OILS	NORTH DAKOTA STATE UNIVERSITY	49,994.50
712070	90170	8200	382			10/17/17	00038403	DETECTION OF BLOCK IN PIPELINE	UNIVERSITY OF NORTH DAKOTA	49,966.00
712070	90170	8200	382			10/25/17	00038499	SEED SENSOR-PHASE II	NORTH DAKOTA STATE UNIVERSITY	75,000.00
712070	90170	8200	382			11/22/17	00038657	HIGH DENSITY POWER SYSTEM	NORTH DAKOTA STATE UNIVERSITY	50,000.00
712070	90170	8200	382			11/22/17	00038658	PROTEIN EXPRESSION SYSTEM	NORTH DAKOTA STATE UNIVERSITY	50,000.00
712070	90170	8200	382			12/13/17	00038793	BUTANEDIOL PRODUCTION	UNIVERSITY OF NORTH DAKOTA	50,000.00
712070	90170	8200	382			12/13/17	00038794	UAS....DAMAGE ASSESSMENT	UNIVERSITY OF NORTH DAKOTA	205,421.00
712070	90170	8200	382			12/13/17	00038796	UAS FOR BUILDING ASSESSMENT	UNIVERSITY OF NORTH DAKOTA	12,570.44
Total Account 712070	1,392,526.53									
712180	90170	8200	382	BD82003	00	10/31/17	00038547	change class/ou/fund/dept/proj	NDSU RESEARCH & TECHNOLOGY PARK INC	250,000.00
712180	90170	8200	382	BD82003	00	10/31/17	00038548	JV CHANGE CLS/OU/FUND/DPT/PJCT	CTR FOR INNOVATION & BUSINESS DEV FNDTN	150,000.00
712180	90170	8200	382	BD82003	00	10/31/17	00038549	JV CHANGE CLS/OU/FUND/DPT/PRJT	CENTER FOR TECHNOLOGY & BUSINESS	75,000.00
712180	60175	8200	382	BD82003	00	11/30/17	0001866441	2017-11-30	CHANGE LINE/CLASS	475,000.00
712180	90170	8200	382	BD82003	00	11/30/17	0001866441	2017-11-30	Misc. Grants	(475,000.00)
712180	60175	8200	382	BD82003	00	12/14/17	0001869975	2017-12-14	Misc. Grants	(475,000.00)
712180	60175	8200	382	BD82003	01	12/14/17	0001869975	2017-12-14	Misc. Grants	475,000.00
Total Account 712180	475,000.00									
722001	90170	8200	382			7/14/17	0001827827	2017-07-14	Tsfr To General Fund	4,000,000.00
Total Account 722001	4,000,000.00									

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STFP

Budget Header Budget Lines Budget Errors

Unit 60100

Journal ID 0001869350

Date 12/12/2017

Budget Header Status Posted

*Process Copy Journal

Process

Lines

Personalize Find View All First 1 of 1 Last

Chartfields and Amounts Base Currency Details

Line	Ledger	Budget Period	Oper Unit	Fund	Amount
1	APPROP_BUD	2019A	601	003	-300,000.00

From Line To Generate Budget Period Lines

Totals

Total Lines 1

Total Debits 300,000.00

Total Credits 0.00

Save

Return to Search

Notify

Refresh

Add

Update/Display



STFP

Budget Header Budget Lines Budget Errors

Unit 60100 Journal ID 0001869351 Date 12/12/2017 Budget Header Status Posted Process

Lines Personalize | Find | View All | 1 of 1 First Last

Chartfields and Amounts Base Currency Details Budget Period

Line	Ledger	Budget Period	Oper Unit	Class	Amount
1	APP_LN_BUD	2019L1	601	60175	-300,000.00

From Line To Generate Budget Period Lines

Totals

Total Lines 1 Total Debits 300,000.00 Total Credits 0.00

Save Return to Search Notify Refresh Add Update/Display



IN THE SUPREME COURT

STATE OF NORTH DAKOTA

North Dakota Legislative Assembly,)
Senator Ray Holmberg, Representative)
Al Carlson, Senator Rich Wardner,)
Senator Joan Heckaman, and)
Representative Corey Mock,)

Petitioners,)

vs.)

North Dakota Governor Doug Burgum,)

Respondent and)
Cross-Petitioner.)

**AFFIDAVIT OF
GOVERNOR DOUG BURGUM**

Supreme Court No. 20170436

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Doug Burgum states under oath as follows:

1. This Affidavit is submitted in support of the response to the petition brought by the state legislative assembly, and in support of the cross petition brought by the Attorney General and the Governor.

2. Since taking office on December 15, 2016, I have served as Governor of the State of North Dakota.

3. Under state law, all bills passed during a regular or special session of the state legislature must be delivered to the Governor. On April 27, 2017, the 77th day of the sixty-fifth legislative session, several bills were delivered to the Governor's office, including four appropriation bills pertinent to the petition: a) the Department of Commerce appropriations bill (Senate Bill 2018); the State Board of Higher Education

appropriations bill (Senate Bill 2003), the State Water Commission appropriations bill (House Bill 1020) and the Department of University and School Lands appropriations bill (Senate Bill 2013). At approximately 7:15 p.m., April 27, 2017, the state legislative assembly adjourned *sine die*.

4. These four appropriation bills were approved by the Governor, subject to item vetoes. The bills were returned with the Governor's signature and filed with a written statement outlining the basis (purpose, intent and impact) of the item vetoes issued.

5. Senate Bill 2018. The single item veto in Section 12 of SB 2018, eliminated a commerce department appropriation of "\$300,000 to an organization that provides workplace safety." This earmarked appropriation appeared at the eleventh-hour in the final version of SB 2018, inserted without the benefit of full transparency and scrutiny afforded appropriations that proceed through a public hearing process and full legislative review. In the Attorney General's opinion requested by House Majority Leader, Representative Al Carlson and Senate Majority Leader, Senator Rich Wardner, Attorney General Wayne Stenehjem determined the Governor's item veto in Section 12 of SB 2018 was authorized by the constitution and effective. NDAG 2017-L-04. It is my belief that the AG's opinion addresses and resolves the question of the effectiveness of this veto.

6. Senate Bill 2003. Although items in five sections of SB 2003 were vetoed, petitioners' challenge is limited to the vetoes in Sections 18 and 39.

The veto in Section 18 of SB 2003, eliminates the ambiguous and confusing phrase "any portion of", relating to funds appropriated for the nursing program at

Dickinson State University. The Attorney General's opinion determined this veto was not effective, because it eliminated a condition on an appropriation without also eliminating the corresponding appropriation. I acknowledge that the AG's opinion resolves the question of the effectiveness of the veto of three words in Section 18, SB 2003, and do not contest the claims raised by the petitioners regarding this veto.

The veto in Section 39, SB 2003, eliminates an adjustment to future general fund appropriations based upon "credit hours completed at the school". This veto was issued to avoid an inconsistency with the legislatively approved higher education funding formula. The Attorney General's opinion determined this veto was effective, based upon the constitutional principle that one legislative assembly may not restrict or bind future legislative action. It is my belief that the AG's opinion addresses and resolves the question of the effectiveness of this veto.

7. House Bill 1020. Petitioners' challenge is limited to one of the two vetoes issued in HB 1020, specifically the item veto in paragraph 2, Section 5. The veto in Section 5, HB 1020, removes a condition requiring "budget section approval" and "notification to the legislative management's water topics overview committee" prior to moving appropriated funds between designated water commission projects. The Attorney General's opinion determined the veto was ineffective, because it removed the condition on an appropriation without also removing the corresponding appropriation.

8. Senate Bill 2013. Petitioners challenge is limited to the item veto in Section 12 of SB 2013, one of three item vetoes issued in the department of university and school lands appropriations bill. The veto eliminated the need for approval by the budget section prior to spending \$1,800,000 of the \$3,600,000 already appropriated by

the full legislative assembly. The Attorney General's opinion determined the veto was not effective, as it eliminated the restriction on the appropriation without also removing the corresponding appropriation. NDAG 2017-L-04.


9. The vetoes issued in Section 5, HB 1020 and Section 12, SB 2013 were intended to protect executive branch authority, preserve the separation of powers and prevent delegation of legislative authority to a subset of the assembly.

10. The Attorney General's opinion reviewed and analyzed the five item vetoes challenged by petitioners and determined the vetoes issued in SB 2018, section 12 and SB 2003, Section 39 were effective and the vetoes issued in SB 2003, Section 18, HB 1020, Section 5 and SB 2013, Section 12 were ineffective. I acknowledge that the AG's opinion resolves the question of the effectiveness of these vetoes and do not contest the claims raised by the petitioners regarding these vetoes.

11. Additionally, the Attorney General's opinion addresses the scope and impact of the authority delegated by the legislature assembly to its budget section subset, found in Section 5, HB 1020 and Section 12, SB 2013. The AG's opinion notes: "these significant budgetary decisions delegated to the Budget Section by the Legislature in HB 1020 and SB 2013 are rightly within the function of the executive branch." NDAG 2017-L-04. Finally, the AG's opinion concludes: "[a]lthough the Governor's vetoes of a portion of section 5 of HB 1020 and a portion of SB 2013, 2017 ND Leg. are not authorized by the Constitution, the vetoed language, in my opinion, would be found by a court to violate the separation of powers doctrine." NDAG 2017-L-04.

12. I agree with the Attorney General's opinion and his conclusion that delegation of legislative authority to the budget section subset, as reflected in Section 5, HB 1020 and Section 12, SB 2013, is unconstitutional and violates the separation of powers doctrine.

Dated this 12 day of January 2018.


Doug Burgum
Governor

Subscribed and sworn to before me this 12 day of January 2018.


Notary Public

