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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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STATE OF NORTH DAKOTA

Supreme Court No. 20170436

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.

CROSS-PETITIONERS' REPLY BRIEF IN SUPPORT OF CROSS-PETITION FOR DECLARATORY JUDGMENT

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LAW AND ARGUMENT

I. The Attorney General has standing to request an exercise of original jurisdiction in matters of public importance.

[¶1] Conceding the Governor can bring the cross petition, see Petitioners' Reply/Response Brief at ¶ 30, the Legislators nonetheless argue the Attorney General lacks standing to do so. This contention ignores clear precedent indicating the State is the real party in interest in matters of publici juris, and that the Attorney General has authority to bring actions on behalf of the State in such matters.

[¶2] For over 100 years this Court has recognized the principle that the State is the real party in interest in matters of publici juris, and that the Attorney General can initiate suit on such matters on behalf of the State. See State ex rel. Linde v. Taylor, 33 N.D. 76, 156 N.W. 561, 563 (1916) (holding "the real plaintiff is the state" in a matter of publici juris, recognizing the Attorney General's authority to sue on behalf of the state, but permitting a private relator to assume the Attorney General's role in limited circumstances where an "infringement which has been or is about to be made upon the sovereignty of the state or its franchises or prerogatives or the liberties of its people, and the court, by virtue of the power granted by the Constitution, commands that the suit be brought by and for the state, even though the Attorney General may refuse to bring this action or consent to its institution"); State ex rel. Conrad v. Langer, 68 N.D. 167, 277 N.W. 504, 514 (1938) ("Inasmuch as an original proceeding in this court can be maintained only where the matter involved affects the sovereign rights of the state or its franchises or prerogatives, or the liberties of the people, it naturally

follows that ordinarily the application to this court for a prerogative writ should be made by the Attorney General as the chief law officer of the state."); State ex rel. Link v. Olson, 286 N.W.2d 262, 266 (N.D. 1979) (indicating the state's interest is "primary" where "the question presented is Publici juris" and that "ordinarily, the attorney general institutes these proceedings as the legal representative of the interests of the state"); State ex rel. Wefald v. Meier, 347 N.W.2d 562, 564 (N.D. 1984) (exercising jurisdiction over a petition filed by the Attorney General in a matter of publici juris); State ex rel. Spaeth v. Olson ex rel. Sinner, 359 N.W.2d 876, 877-78 (N.D. 1985) (same).

[¶3] In addition, "[a]s a general rule the attorney general has control of litigation involving the state and the procedure by which it is conducted." Bonniwell v. Flanders, 62 N.W.2d 25, 29 (N.D. 1953); see also State v. Hagerty, 1998 ND 122, ¶ 25, 580 N.W.2d 139 (quoting Bonniwell). Matters of publici juris *necessarily* involve the State as the real party, and a petition challenging the Legislators' infringement on executive power *necessarily* involves a matter of publici juris. See, e.g., Kelsh v. Jaeger, 2002 ND 53, ¶3, 641 N.W.2d 100 (concluding a claim asserting the legislature was impermissibly attempting to delegate legislative powers "warrants our exercise of original jurisdiction," i.e., is a matter of publici juris); State ex rel. Peterson v. Olson, 307 N.W.2d 528, 531 (N.D. 1981) (exercising original jurisdiction over "challenges [that] relate to the very foundation upon which the executive and legislative branches of government rest").

[¶4] This Court's precedent also implicitly rejects the Legislators' contention that the Attorney General cannot challenge the constitutionality of legislation, inasmuch as Linde, Conrad and Olson all involved constitutional challenges. See Linde, 156 N.W. at 562 (claiming "chapter 62 of the Session Laws of 1915 . . . contains an unwarranted delegation of judicial power to the state examiner and to the commissioner of insurance"); Conrad, 277 N.W. at 508 (claiming the State Board of Equalization was "levying taxes in an amount which they are forbidden by the Constitution to levy"); Olson, 286 N.W.2d at 266 (claiming "the legislative branch has infringed upon the authority granted to [the Governor] by the North Dakota Constitution to assign duties to the lieutenant governor").

[¶5] Indeed, any matter of publici juris where the legislature has infringed on judicial or executive power will require a constitutional challenge. The Legislators contend the Attorney General cannot act on behalf of the State in circumstances where the ability to do so is most critical -- where this Court must be permitted to consider whether legislative action disrupts the balance of power that lies at the heart of the democratic process in violation of the separation-of-powers doctrine. Taken to its logical conclusion, the Legislators' position would permit them to pass a law that prohibits the Court from examining a law's constitutionality, with the State's chief law officer then precluded from petitioning the Court to correct that unconstitutional act.

[¶6] Cases from other jurisdictions also recognize an Attorney General's authority to initiate suits for the state and to raise constitutional challenges when doing so, as demonstrated by this nonexhaustive sampling. See State ex rel.

Morrison v. Sebelius, 179 P.3d 366, 372 (Kan. 2008) ("In this action, the attorney general challenges the constitutionality of the judicial trigger provision, arguing the legislature violated the separation of powers doctrine by directing the attorney general to file the lawsuit contemplated in the provision."); see also State ex rel. Stenberg v. Moore, 602 N.W.2d 465, 470 (Neb. 1999); State ex rel. McLeod v. Knight, 216 S.E.2d 190, 191 (S.C. 1975); State ex rel. Buford v. Daniel, 99 So. 804, 806 (Fla. 1924).

II. The unfettered discretion granted to the Budget Section in House Bill No. 1020 and Senate Bill No. 2013 is unconstitutional.

[¶7] The Legislators contend the Budget Section's ability to "approve or disapprove any request by the SWC to transfer already appropriated funds between the purposes already approved by the Legislative Assembly" renders House Bill No. 1020 constitutional. Petitioners' Reply/Response Brief at ¶ 46. Yet that unfettered discretion to control the purse strings of already-appropriated funds is exactly why the bill violates both the separation-of-powers and non-delegation doctrines. See Cross-Petitioners' Brief at ¶¶ 65-75.

[¶8] The Legislators also contend Senate Bill No. 2013 is constitutional because a statement of legislative intent directed at the governor and the commissioner of university and school lands to "achieve efficiencies and budgetary savings within the department of trust lands" somehow serves the dual purpose of cabining the Budget Section's unfettered discretion to control half the funds appropriated by the full legislative assembly. Petitioners' Reply/Response Brief at ¶ 53.

[¶9] A statement of legislative intent -- not directed at the Budget Section -- cannot bear the weight the Legislators attribute to it. It sets forth no criteria, factors, or reasonably clear guidelines for the Budget Section itself to follow before simply disapproving the expenditure of up to $1.8 million. See Ralston Purina Co. v. Hagemeister, 188 N.W.2d 405, 410 (N.D. 1971) (indicating an attempt to delegate legislative power without "set[ting] forth reasonably clear guidelines which will enable the [delegate] to ascertain the facts" is impermissible). Nor does the statement somehow transform the Budget Section's act of disapproval into a mere fact-finding function, as the Legislators contend.

[¶10] The crux of the Legislators' argument is essentially a request for this Court to create an exception to the separation-of-powers and non-delegation doctrines based upon North Dakota's use of a biennial legislature. See Petitioners' Reply/Response Brief at ¶¶ 47-49, 53. Whatever practical difficulties may arise from a biennial approach, they do not grant the legislature license to act outside of constitutional bounds by invading the province of the executive or judicial branches.

[¶11] Appropriating is a legislative function. Trinity Med. Ctr. v. North Dakota Bd. of Nursing, 399 N.W.2d 835, 841 (N.D. 1987). But "the administration of appropriations . . . is the function of the executive department." State ex rel. McLeod v. McInnis, 295 S.E.2d 633, 637 (S.C. 1982). By granting the Budget Section boundless discretion to administer already-appropriated funds, House Bill No. 1020 and Senate Bill No. 2013 invade the province of the executive

branch. North Dakota's biennial approach does not prevent the legislature from passing laws that utilize the Budget Section within the constitutional limits this Court has discussed on multiple occasions. See, e.g., North Dakota Council of Sch. Adm'rs v. Sinner, 458 N.W.2d 280, 281 (N.D. 1990); Stutsman Cty. v. Historical Soc'y of North Dakota, 371 N.W.2d 321, 326-27 (N.D. 1985); Ralston Purina, 188 N.W.2d at 410.

III. The Legislators cannot pass new and different laws through this litigation.

[¶12] Finally, in an attempt to legislate by litigation, the Legislators provide the Court with "requested modifications" to a bill they previously passed. See Petitioners' Supplemental Addendum at 16-17. The Legislators also advance arguments that request removal of more than just the unconstitutional provisions of House Bill No. 1020 and Senate Bill No. 2013, contending removal of the constitutionally-offensive language alone would result in unworkable legislation. See Petitioners' Reply/Response Brief at ¶¶ 56-60.

[¶13] It is this Court's prerogative -- not the Legislators' -- to examine the two bills at issue, determine whether they contain unconstitutional provisions, excise those provisions, and then decide whether the law that remains "can stand as workable legislation[.]" Olson, 286 N.W.2d at 271. Cross-Petitioners respectfully submit that removing just the language the Governor struck from House Bill No. 1020 and Senate Bill No. 2013 leaves the remaining legislation workable.

[¶14] In House Bill No. 1020, the Governor struck the phrase "subject to budget section approval and upon notification to the legislative management's water topics overview committee" from the bill. Petitioners' Addendum at 70. Under

Olson, removal of that language leaves the remaining bill workable. The remaining bill appropriates a total of $298,875,000 to the state water commission (SWC), divides the total into four separate amounts, states the funding is designated for the specific purposes identified, but then gives SWC the discretion to transfer funding among the designated items.

[¶15] The Legislators contend, however, that the phrase granting SWC discretion to transfer funds must also be removed to make the remaining bill workable. See Petitioners' Reply/Response Brief at ¶¶ 56-60. The structure of the bill's relevant sentence – a primary phrase ending with a semicolon followed by two modifying phrases separated by commas – shows that the provision permitting SWC to transfer funds is independent of the provision requiring budget section approval. The independent nature of the two modifying phrases is further illustrated by the fact that the second modifying phrase addresses two events unseparated by an additional comma.

[¶16] There is nothing unconstitutional about the legislature granting SWC the discretion to transfer funds among the four designated items. Only the second modifying phrase making the transfer subject to budget section approval is unconstitutional.

[¶17] The Legislators' argument with respect to Senate Bill No. 2013 is likewise flawed. The Governor struck the phrase "[o]f the $3,600,000, $1,800,000 may be spent only upon approval of the budget section" from the bill. Petitioners' Addendum at 83. The Legislators now contend the remaining bill appropriating $3.6 million cannot stand as workable legislation, but that a bill substituting a

different amount would be workable. This argument cannot stand unless the Legislators can identify something unworkable or unconstitutional about appropriating two different amounts of money.

[¶18] More importantly, the two bills' unconstitutional provisions cannot be considered when determining "the fundamental purpose the legislature intended to effect" because that would essentially amount to "restoration of the vetoed item" and the Governor would "fail if [he] fail[s] and fail if [he] succeed[s]" in challenging the unconstitutional laws that resulted from the ineffective partial vetoes. Olson, 286 N.W.2d at 271, 272 (internal quotations and citation omitted).

CONCLUSION

[¶19] Cross-Petitioners respectfully request that the Court declare the budget section provisions of House Bill No. 1020 and Senate Bill No. 2013 unconstitutional and, consistent with the Governor's vetoes, allow the remaining legislation to stand as workable.

Dated this 26th day of February, 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,	)	**CERTIFICATE OF COMPLIANCE**
Petitioners,	)	**Supreme Court No. 20170436**
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.	)	

[¶1] The undersigned certifies pursuant to N.D.R. App. P. § 32(a)(7)(A) that the text of Cross-Petitioners' Reply Brief in Support of Cross-Petition for Declaratory Judgment (excluding the table of contents and table of authorities) contains 1,974 words.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 word processing software in Arial 12 point font.

Dated this 26th day of February, 2018.

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