**NO. A16-1634**

# State of Minnesota
# In Court of Appeals

Rebecca Otto, in her official capacity as
State Auditor of the State of Minnesota,

*Appellant/Cross-Respondent,*

v.

Wright County, Becker County, and Ramsey County,

*Respondents/Cross-Appellants.*

## BRIEF OF *AMICI CURIAE*
## AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA, *ET AL*.


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## STATEMENT OF *AMICI CURIAE*[1]

Amicus ACLU-MN is a not-for-profit, non-partisan, membership-supported organization dedicated to the protection of civil liberties. It is the state-wide affiliate of the American Civil Liberties Union and has more than 6,000 members in the State of Minnesota. Its purpose is to protect the rights and liberties guaranteed to all Minnesotans by the state and federal constitutions. Among those liberties is the right of the citizenry to a fair and transparent democratic process leading to the enactment of laws that affect the constitutional functions of the Minnesota government and enabling citizens to evaluate the performance of their elected representatives based upon the votes they cast for specific laws.

Amicus David Schultz is a citizen of Minnesota and a resident of Ramsey County. He is a professor of political science at Hamline University in St Paul, Minnesota, and has been a professor there since 1999. He is also a Professor of Law at the University of Minnesota and has been so since 1999. Professor Schultz has taught at the University of St. Thomas and Hamline Schools of Law. Professor Schultz is one of a small number of professors who specializes in teaching state constitutional law, which he has taught for 25 years. He has published on this subject as well as on U.S. Constitutional law in numerous books and articles. In his teaching on state constitutional

[1] Pursuant to Minnesota Rule of Civil Appellate Procedure 129.03, amici hereby certify that its counsel authored this brief in its entirety. No individual or entity apart from the amici or their counsel made a monetary contribution to the preparation or submission of this brief.

law he covers extensively the subject of the Minnesota Constitution, as well as other state constitutions, and has done extensive research on the topic.

Amicus Growth & Justice is a non-partisan research and advocacy organization that develops innovative public policy proposals based on independent research and civic engagement, with the mission of developing and advocating for public policy that makes Minnesota's economy more prosperous and fair for all Minnesotans.

Amicus Jack Davies has decades of experience in both the legislative and judicial branches of Minnesota's government. He was a Minnesota State Senator from 1959 to 1983, and was a judge on the Minnesota Court of Appeals from 1990 to 2000. Davies served as chair of the Senate Judiciary Committee from 1973 to 1982, and as President of the Senate during his last term. Davies serves as a Minnesota Commissioner on Uniform State laws as a member of the National Conference of Commissioners on Uniform State Laws from 1966 to the present, and was a Professor of Law at William Mitchell College of Law from 1965 to 1989.

Amicus Jewish Community Action, founded in 1995, organizes Jewish Minnesotans to act together for social change, and in so doing advocates for the development and passage of public policies addressing the root causes of poverty, racism, and injustice.

## INTRODUCTION

The trial court below erred when it concluded that the enactment of Minnesota Statutes § 6.481 (the "Privatization Statute") as a provision within the 2015 State Government Finance Omnibus Bill ("Omnibus Bill") complies with the Single Subject and Title Clause, Article IV, Section 17 of the Minnesota Constitution. In so holding, the trial court impermissibly "stretch[ed] the Constitution to suit the convenience of the hour." *Reed v. Bjornson*, 253 N.W. 102, 104 (Minn. 1934). Accordingly, the trial court's decision should be reversed.

Appellant presents two separate and independent grounds for reversal, and amici's argument is directed only to the legislature's violation of the Single Subject and Title Clause. Amici respectfully submit that by reversing the trial court on this issue, this Court may avoid having to decide the difficult issues regarding separation of powers. Those important and complex issues need not be addressed if the Court concludes, as it should, that the inclusion of the Privatization Statute within the Omnibus Bill went well beyond what is permitted by the Single Subject and Title Clause.

Over the years, Minnesota courts have been inappropriately deferential to the legislature's disregard of the Single Subject and Title Clause, such that this constitutional provision has been virtually stripped of any force or meaning. By failing to enforce the Single Subject and Title Clause, courts have permitted the legislature nearly unencumbered power to enact multi-subject legislation in violation of the constitutional framers' intent. This improper permissiveness is illustrated by the Supreme Court's adoption of the weak and largely impotent "mere filament" test to determine whether a

bill complied with the Single Subject and Title Clause while, in the same opinion, giving notice that it was concerned that the legislature was overstepping constitutional limitations and intimating that such behavior was not likely to be tolerated in the future. *See Blanch v. Suburban Hennepin Regional Park Dist.,* 449 N.W. 2d 150, 154-157 (Minn. 1989) (holding that where "the common thread which runs through the various sections of chapter 686 is indeed a mere filament," statute did not violate Single Subject and Title Clause). While the Supreme Court has subsequently declined to "push the mere filament to a mere figment," *Associated Builders and Contractors v. Ventura,* 610 N.W. 2d 293, 303 (Minn. 2000), the trial court did precisely that when it held that the Privatization Statute does not violate the Single Subject and Title Clause.

The test enunciated by the Supreme Court for determining whether a law complies with the Single Subject and Title Clause is not much of a test. We know that connection of the various sections of the law by a "mere filament" is sufficient, but that connection to a "mere figment" is insufficient. What does that mean? A "filament" is a "fine or thinly spun thread, fiber, wire of the like." *Filament*, *The American Heritage Dictionary of the English Language* (5th ed. 2016). A "figment" is "a fabrication of the imagination." *Figment*, *Id.*. How does this help? Not much. It tells us that the various sections of the law have to be connected by a fine, though not imaginary, thread. As legal tests go, this is less than helpful; as legal tests for determining constitutional rights go, it is pitiful.

The Minnesota Supreme Court signaled in *Associated Builders* that it was inclined to abandon the "mere filament" analysis because it renders the Single Subject and Title

Clause utterly ineffective. Amici applaud this inclination, because the "mere filament" test has stretched the boundaries of constitutional interpretation beyond anything recognizable.

Worse yet, because the boundaries have become so unrecognizable, the citizens of Minnesota have been deprived of all of the benefits the Single Subject and Title Clause was intended to bestow upon them, including most importantly the salutary benefit of transparency and accountability in the legislative process. At a time when we reflect upon the recent national election in which tens of millions of Americans have expressed a feeling of disenfranchisement and having been ignored by their elected representatives, both in St. Paul and in Washington, D.C., the excessively deferential review of Single Subject and Title Clause challenges fans the flames of that discontent, because it deprives Minnesotans of their right to know what their legislators are voting upon and to hold them accountable for those votes.

We agree with Appellant that the Privatization Statute should be invalidated because its enactment at the very least did not comply with the existing but ill-conceived and grossly deferential "mere filament" test. More importantly, we urge this Court to explicitly hold that the Supreme Court has in fact abandoned the "mere filament" test, and we ask this Court to adopt a more robust test that applies the Single Subject and Title Clause to legislation in a reasonable and common-sense manner consistent with the salutary goals of that Clause. By continued application of the "mere filament" test that benefits the legislature at the expense of the people, the Court has "expand[ed] the meaning of constitutional provisions through the post-hoc application of an inconsistent

functionality test [and] allow[ed] the Constitution to be read as permitting that which it was clearly meant to prohibit." *Fent v. State ex rel. Oklahoma Capitol Improvement Auth.*, 214 P.3d 799, 804 (Okla. 2009) (interpreting Oklahoma's Single Subject rule).

## ARGUMENT

## I. ENFORCEMENT OF THE SINGLE-SUBJECT PROVISION OF MINNESOTA'S CONSTITUTION IS NECESSARY TO PROTECT THE PEOPLE OF MINNESOTA FROM THE EVILS OF AN OPAQUE AND UNACCOUNTABLE LEGISLATIVE PROCESS.

### A. The Court May Resolve This Case Without Wrestling With Complex Separation of Powers Issues.

As a preliminary matter, amici note that resolving this case on the basis of the state constitutional separation of powers clause, Minn. Con. Art. III, would require the court to address complex issues regarding the proper scope and application of power between the state legislature and the constitutional office of State Auditor. This drawing of lines between the authority of the legislature and the Auditor would require the Court to second-guess the authority of another branch, something the Court historically avoids where possible. *State ex rel. Sviggum v. Hanson*, 732. N.W.2d, 312, 321-322 (Minn. App. 2007). This Court need not go there.

The Minnesota Supreme Court's "general practice is to avoid a constitutional ruling if there is another basis on which a case can be decided." *State v. Bourke*, 718 N.W. 2d, 922, 926 (Minn. 2006). Although the Single Subject and Title Clause clearly presents an important constitutional issue, resolving this dispute on the more straightforward grounds of the Single Subject and Title Clause would give this Court the opportunity to avoid addressing or ruling directly on the allocation of power between two

constitutional branches, while simultaneously defending an oft-ignored constitutional provision.

### B. The Single Subject and Title Clause Was Intended To Protect The People Of Minnesota By Ensuring A Level Of Transparency And Accountability In The Legislative Process.

It is evident that a great chasm of trust separates the people from their government. The 2016 election season, marked as it was by unprecedented accusations of dishonesty, underhandedness, corruption, and criminality at almost every level of government, has laid bare a raw hunger for transparency and accountability regarding the inner workings of government, particularly the legislative process. It was concerns of this very nature that in the 19th Century led the framers of the constitutions of most states to mandate that the legislative process be as transparent as possible by adopting constitutional provisions such as Minnesota's Single Subject and Title Clause, which provides that "[n]o law shall embrace more than one subject, which shall be expressed in its title." Minnesota Constitution, Article IV, Section 17.[2]

"Single subject" requirements for legislation can be found as early as 98 B.C., when the Roman *Lex Caecilia Didia* prohibited laws containing unrelated provisions.[3]

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[2] Other provisions which the framers of the Minnesota Constitution included to make the legislative process open and transparent include the requirement that "Each house shall be open to the public during its sessions except in cases which in its opinion require secrecy," Minn. Const. Art. IV, § 14, and the requirement that "Every bill shall be reported on three different days in each house" except in certain circumstances. *See* Minn. Const. Art. IV, § 19.

[3] *See* Robert Luce, *Legislative Procedure* 548 (1922) (cited in Millard H. Ruud, "No Law Shall Embrace More than One Subject," 42 MINN. L. REV. 389 (1958)).

One late-18th century parliamentarian cautioned that "putting together in the same Bill clauses that have no relation to each other, and the subjects of which are entirely different, ought to be avoided .... [T]he heaping together in one law such a variety of unconnected and discordant subjects is unparliamentary and tends only to mislead and confound those who have occasion to consult the Statute Book." 3 John Hatsell, PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS 162 (1785). In 1798, Georgia became the first state to include a "single subject" provision in its constitution. *See* James L. McDowell, "'Single Subject' Provisions in State Legislatures," SPECTRUM: THE JOURNAL OF STATE GOVERNMENT 23, 33-34 (Spring 2003) (hereinafter referred to as "McDowell"). Subsequently, single-subject requirements were adopted by states throughout the 19th century "in response to perceived abuses of the legislative process." *Id*. at 34. Over forty state constitutions currently contain a single-subject requirement or a variation thereof, the vast majority of which were adopted in the latter half of the 19th century. *See* Chad W. Dunn, "Playing By the Rules: The Need for Constitutions to Define the Boundaries of the Legislative Game with a One-Subject Rule," 35 UWLA L. REV. 129, 142-43 (2003); *see also* Ruud, 42 MINN. L. REV. at 389 and Table I (1958).

Scholars agree that single subject rules are generally intended to accomplish five distinct, though related, goals:

- To prevent "logrolling" in the enactment of legislation.[4] Professor Ruud describes logrolling as "the practice of several minorities combining their

[4] Legislative logrolling is as old as the legal system itself. However, the origins of the term "logrolling" appear to be based on the old pioneering concept of landowners

several proposals as different provisions of a single bill and thus consolidating their votes so that a majority is obtained for the omnibus bill where perhaps no single proposal of each minority could have obtained majority approval separately." Logrolling increases the chance of fraudulent insertion of provisions into a bill, and gives improper notice to the legislature and to the public about a bill's content. Ruud, 42 MINN. L. REV. at 391.[5]

- To prevent "riders" containing legislation which could not secure adoption on its own merits from being attached to popular bills that are certain to pass. *Id.* This dynamic is particularly prevalent with "must pass" appropriations bills such as the Omnibus Bill. *See*, *e.g.*, www.revisor.leg.state.mn.us/revisor/pubs/bill_drafting_manual/Chapter%205.htm ("Each omnibus bill has many examples of riders attached to appropriation items.").
- To facilitate an orderly legislative procedure. According to Professor Ruud, "by limiting each bill to a single subject, the issues presented by each

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enlisting their neighbors to "help roll a fallen tree too heavy to be moved by one person into a pile for burning." *Nova Health Sys. v. Edmonson*, 233 P.3d 380, 381 n.4 (Okla. 2010).

[5] The practice of logrolling extended even to the early American colonies, where the Committee of the Privy Council and Queen Anne both complained of the American legislative practice of combining "diverse acts . . . 'under ye same title.'" Robert D. Cooter & Michael D. Gilbert, A Theory of Direct Democracy and the Single Subject Rule, 110 COLUM L. REV. 687, 704 (2010).

bill can be better grasped and more intelligently discussed." Ruud, 42 MINN. L. REV. at 391.

- To reduce the deception and confusion of voters. *See* Kurt G. Kastorf, Logrolling Gets Logrolled: Same-Sex Marriage, Direct Democracy, and the Single Subject Rule, 54 EMORY L.J. 1633, 1641 (2005). It is clear that the citizenry directly benefits from the increased transparency and accountability inherent in single subject rules, which promote voter and legislator comprehension of legislative proposals by simplifying the intent and substance of legislative proposals. *See* Ruud, 42 MINN. L. REV. at 391. As one court explained, the single subject rule ''ensures that the legislature addresses the difficult decisions it faces directly and subject to **public scrutiny**, rather than passing unpopular measures on the backs of popular ones.'' *Johnson v. Edgar*, 680 N.E.2d 1372, 1379 (Ill. 1997) (emphasis added).
- To protect the gubernatorial veto power. *See generally* Deborah S. Bartell, Note, The Interplay Between the Gubernatorial Veto and the One-Subject Rule in Oklahoma, 19 OKLA. CITY U. L. REV. 273 (1994) (discussing the history of the one subject rule and its role in protecting gubernatorial veto powers). Indeed, when Governor Dayton signed the Omnibus Bill he stated that he did so despite deep opposition to the Privatization Statute; the Governor felt unable to exercise his veto power, as doing so would result in

thousands of State government employee lay-offs. *See* Appellant's Brief at 21-22.

Most "single subject" constitutional provisions actually contain two parts, just as Minnesota's Single Subject and Title Clause does: The first part of the rule is that a bill shall not include more than one subject; the second part of the rule is that the single subject must be expressed in the title of the law. Professor Ruud notes that the requirement that the single subject be expressed in the title is "independent" of the requirement that the bill deal with a single subject, has "independent operation," has "independent historical bases," and has "separate purposes." Ruud, 42 MINN. L. REV. at 391. He states "it is the purpose of the title requirement to prevent legislation by stealth," and complements its "sister requirement" that the law not include more than one subject. *Id.* at 392.

There can be no doubt that the framers of Minnesota's Single Subject and Title Clause well understood "the potential for mischief in bundling together into one bill disparate legislative provisions." *Associated Builders*, 610 N.W.2d at 299 (citing *The Debates and Proceedings of the Minnesota Constitutional Convention* 124, 262-63 (Francis H. Smith, reporter 1857)). For that reason the framers rejected a proposal which merely required that "a title give some indication of the contents of the bill." *Id.* The Single Subject and Title Clause, which they adopted instead, has ever since resided in Article IV, Section 17: "No law shall embrace more than one subject, which shall be expressed in its title." *Id.*

The Court need not find that the legislature intended to do mischief, or have any ill motive, before holding that legislation violates the Single Subject and Title Clause. "It is *assumed, without inquiring into the particular facts*, that the unrelated subjects were combined in one bill in order to convert several minorities into a majority." Ruud, 42 MINN. L. REV. at 399 (emphasis added); *see also Associated Builders,* 610 N.W.2d at 303 ("So while we do not conclude that there was suspicious conduct on the part of the legislature nor impugn its motive …, we are concerned about the lack of a single subject and the characteristics of logrolling.").

In fact, even if the only motive was expediency, a law enacted in violation of the Clause is not constitutional. The logrolling phenomenon in modern politics has been explained as follows:

> These increased duties of state lawmakers, who now must deal with more complicated and controversial issues, results at times in their relying on traditional legislative techniques of late-session logrolling and omnibus conference committee reports to enact needed legislation.

McDowell at 36. But neither complexity nor controversy nor the press of time justify enactment of bills in violation of the Constitution. As McDowell cautions, "[t]his lawmaking approach accordingly extends the obligation of state high courts to protect individual rights against actions beyond the scope of legislative power." *Id.*

Mandatory constitutional provisions, like the Single Subject and Title Clause, must be enforced "as the imperative mandate of the sovereign people, and not as good advice which legislators and courts may accept or reject as they please. The safety of the state, and the protection of the liberties and rights of the people, demand that this rule be

strictly adhered to." *Sjoberg v. Sec. Sav. & Loan Ass'n*, 75 N.W. 1116, 1118 (Minn. 1898) (analyzing the enforceability of the Enacting Clause in Article IV, § 13 of the Minnesota Constitution, and noting, "If such an enacting clause is a mere matter of form, a relic of antiquity, serving no useful purpose, why should the constitutions of so many of our states require that all laws must have an enacting clause, and prescribe its form?").

Given constituent political pressure and the ever-present plague of lobbyists which infect the halls of the State Capitol as various bills come before the legislature for consideration, it is not surprising that legislators might resort to logrolling, attaching riders, and similar procedural tactics to pass otherwise un-passable bills in order to please constituents and lobbyists to whom they may have become beholden. Although the legislature's motivation may be understandable, and perhaps pure in many instances, purity of motive does not make such unconstitutional practices constitutional. The Constitution did not direct the courts of Minnesota to favor efficiency in the legislative process or the back room machinations of special interests over the rights of all Minnesotans to a transparent and open democratic process; indeed, the Constitution demands precisely the opposite: The Court "may not stretch the Constitution to suit the convenience of the hour." *Reed*, 253 N.W. at 104.

## II. UNDER EVEN THE NEAR-TOOTHLESS "MERE FILAMENT" TEST, THE PRIVATIZATION STATUTE IS UNCONSTITUTIONAL.

When interpreting the Single Subject and Title Clause in light of its stated purpose and policies, it is evident that the Privatization Statute runs afoul of the Minnesota Constitution. While the historical judicial interpretation of the Single Subject and Title

Clause has rendered that clause nearly meaningless, the Privatization Statute does not satisfy any reasonable test.

In *Blanch,* the Supreme Court said that to strike down a piece of legislation as violative of the Single Subject and Title Clause, a court must find that the components of the bill have no common thread, even if that thread constitutes a "mere filament." *Blanch,* 449 N.W.2d at 154. It is unclear how or why the word "one" in the Single Subject and Title Clause should be interpreted to mean a "very fine thread." The framers of the Constitution undoubtedly understood "one" to have its ordinary meaning when they wrote the Clause in simple, declarative prose.

Moreover, the trial court's conclusion that a common thread exists to connect the wildly disparate parts of the Omnibus Bill, in which the Privatization Statute is buried, demonstrates how far the test has been stretched. The Omnibus Bill includes such wholly unconnected provisions as (1) establishing a "Healthy Eating, Here at Home" program designed to incentivize use of the federal Supplemental Nutritional Assistance Program ("SNAP") benefits at farmers' markets (Article 2, § 17); (2) determining continuing education requirements for cosmetologists, nail technicians, estheticians, advanced practice estheticians, and salon managers (Article 2, § 45); setting the "racing season" for pari-mutuel horse racing (Article 4, § 1); and, of course, limiting the authority of the Office of the State Auditor to audit Minnesota Counties (Article 2, §§ 3, 88(b)). *See* 2015 Laws of Minn. ch. 77. The trial court's determination that incentivizing use of SNAP at farmers markets, education requirements for cosmetologists, setting the season for pari-mutuel betting on horse racing, and giving counties the authority to choose

private accounting firms to audit them are all connected by the "filament" of government operations makes a mockery of the Single Subject and Title Clause and deprives the people of Minnesota of an important right granted to them by the Constitution of this state.

As this Court recognized in *Defenders of Wildlife v. Ventura*, such wholly unrelated provisions cannot survive even the incredibly deferential "mere filament" standard. *See Defs. of Wildlife v. Ventura*, 632 N.W.2d 707, 712 (Minn. Ct. App. 2001) (noting that *Mattson* "included vastly dissimilar provisions ranging from 'provisions relating to agricultural land, a council of Asian Pacific Minnesotans and the establishment of a recycling program'" (citing *State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777 (Minn. 1986) )("*Mattson*"))). Because the dissimilarities between the Privatization Statute and other provisions in the Omnibus Bill are so great that they are not related, even by a "mere filament," the Court should hold that the Statute violates the Single Subject and Title Clause.

Furthermore, based upon the procedural history of the Privatization Statute, there can be no doubt that the Statute's inclusion in the Omnibus Bill is a result of tacking or logrolling. *See* Appellant's Brief at 19-22 (describing procedural progression of the proposed bills, including addition of the Privatization Statute to the Omnibus Bill over legislator protests of a "bait and switch," and statements by the Governor that he felt unable to exercise the gubernatorial veto power despite opposition to the Privatization Statute, because of its inclusion in the Omnibus Bill). The Privatization Statute's

legislative history bears clear indicia of logrolling, and is unconstitutional. *See* Ruud, 42 MINN. L. REV at 391.

## III. THIS COURT SHOULD ADOPT A ROBUST TEST THAT ACCURATELY REFLECTS THE SUPREME COURT'S CLEARLY-ARTICULATED INTENT TO GIVE EFFECT TO THE PURPOSE OF THE SINGLE SUBJECT AND TITLE CLAUSE.

In enacting the Privatization Statute, the legislature has shown that it will not adhere to constitutional principles without firm judicial intervention. The time to employ a test that restores the framers' intended meaning to the Single Subject and Title Clause is now.

### A. The Minnesota Supreme Court All But Abandoned the "Mere Filament" Test in *Associated Builders.*

In Associated Builders, the Supreme Court appears inclined to finally and fully abandon the "mere filament" test outright. At a bare minimum the Court gave a powerful signal that it was moving away from this largely ineffectual standard. See 610 N.W. 2d at 303 (stating that the law must "genuinely encompass[ ] one general subject") and at 311 (P. Anderson, J., concurring and dissenting) (stating that the rule "has now become so deferential as to render Section 17 ineffectual").

Amici believe that the warning to the legislature given by the Supreme Court when it adopted the "mere filament" test in Blanch, and the court's subsequent statements in Associated Builders, strongly suggest that the "mere filament" test was not intended to have future applicability decades later, and justifies this Court in rejecting the "mere filament" test outright. This Court should adopt a rule of construction that gives meaning to both the letter and the spirit of the Single Subject and Title Clause and that can be

applied in future cases to protect the citizens of this State from the evils the Clause was intended to prevent.[6]

In its 2000 Associated Builders decision, the Supreme Court made good on an earlier promise to hold the legislature accountable for future violations of the Single Subject and Title Clause. In his powerful concurrence in Mattson, Justice Yetka warned:

> While we recognize that modern times require modern methods of legislating, it was never intended by our founding fathers that the legislature be able to combine into one act a number of totally unrelated subjects. Thus, we should publicly warn the legislature that if it does hereafter enact legislation similar to Chapter 13, which clearly violates Minn. Const. art. IV, § 17, we will not hesitate to strike it down regardless of the consequences to the legislature, the public, or the courts generally.

*Mattson*, 391 N.W.2d 777, 785 (Minn. 1986) (Yetka, J., concurring).

Regardless of whether *Associated Builders* reflects actual abandonment of the "mere filament" standard or simply an expression of the court's desire to back away from the standard in the future, the time has most certainly come for rejection of this meaningless test. As then soon-to-be-Governor Tim Pawlenty commented on the Single Subject and Title Clause after the court's decision in *Associated Builders*: "We may hope that the Legislature will conduct itself in a manner that is clearly more consistent with constitutional principles in the future. If not, the Court's gentle nudge may need to

[6] The amici wish to make it clear that in their view the Privatization Statute is unconstitutional under any test, including the "mere filament" test. Nonetheless, it is long past due for there to be clearer, firmer, and more meaningful judicial guidance to the legislature as to what will be tolerated under the Clause, so that the citizenry may—as is its right—receive the protections the Clause was intended to provide.

become a little firmer." Timothy J. Pawlenty, "Distinguishing Filament from Figment: Minnesota's Single Subject Rule," BENCH & BAR OF MINNESOTA (July 2000).

### B. The "Mere Filament" Test Perverts the Intent of the Single Subject and Title Clause.

Under the clear language of the Minnesota Constitution, an act is unconstitutional on single-subject grounds where it "embrace[s] two or more dissimilar and discordant subjects which cannot *reasonably* be said to have any legitimate connection." *Buhl v. Joint Ind. Consol. Sch. Dist. No. 11,* 82 N.W.2d 836, 839 (Minn. 1957) (emphasis supplied). The operative word is "reasonable." Creative minds can manufacture tangential connections (or spin threads or filaments) between any two topics *ex post facto.* However, the Court must assert its authority and lend its voice of reason as a backdrop to the legislative process to protect citizens from the mischief the Clause was intended to prevent.

As this Court observed in *Unity Church*, beginning at least with *Associated Builders,* the writing has been on the wall that the long-time, wrong-headed historical Single Subject and Title Clause jurisprudence cannot stand. *Unity Church of St. Paul v. State*, 694 N.W.2d 585, 594 (Minn. Ct. App. 2005). As this Court noted, "the Minnesota Supreme Court recently sounded an alarm to the Minnesota legislature that the judiciary will strike down oversweeping legislation. The Minnesota Supreme Court drew the line in *Associated Builders*[.] The *Associated Builders* court expressed its frustration with 'garbage' or omnibus bills encompassing many unrelated subjects." *Id.* This Court struck down the challenged statute, holding, "We are compelled to find that chapter 28,

which contains dissimilar provisions, must be declared unconstitutional in violation of the single-subject requirement." *Id.* at 595. In so doing, the Court specifically acknowledged that the Supreme Court had made a break with the outdated and ineffective "mere filament" test in *Associated Builders*. *See id*., characterizing that case thusly: "*See Associated Builders,* 610 N.W.2d at 301 (noting that, **contrary to prior deferential decisions**, any bill containing vastly dissimilar provisions **must** be struck down)" (emphasis added). The Court of Appeals further noted that:

> This case is about performing the judiciary's constitutional role of upholding the Minnesota Constitution and giving effect to each of its provisions. To date, the 148 years of Minnesota's statehood have produced approximately five successful attacks on legislation under the single-subject requirement of the Minnesota Constitution. If the legislature deems it an impediment that perhaps one bill gets shot down on an average of once every 20 or 30 years, they, not the courts, hold the keys to amending the Minnesota Constitution and repealing the single-subject requirement. The Minnesota legislature originally passed Article IV, Section 17, and, to date, the legislature has not set the wheels in motion to repeal it. The legislature writes the constitutional provisions. The judiciary simply has an obligation to interpret them.

*Unity Church of St. Paul,* 694 N.W.2d at 597.

And yet, despite ample evidence to the contrary, and despite the clear warnings given in *Associated Builders* and *Unity Church*, the trial court in this case held, without further explanation, that "the section of the 2015 Government Finance Omnibus Bill permitting counties to hire CPA firms for performing county audits is related to the operation of state government by more than a mere filament." But is that really true? Isn't any connection between the disparate parts of the 2015 Government Finance

Omnibus Bill purely imaginary, a mere figment? Indeed, the logical extension of the trial court's analysis is that any two subjects are related if they relate to the broader topic of "government operation." Under that standard a student of government would be hard pressed to think of any law that could not be lumped into a broad and amorphous category called "government operations." This is not a reasonable or legitimate way to apply the Single Subject and Title Clause. As Justice Yetka said in *Mattson*, "now all bounds of reason and restraint seem to have been abandoned." *Mattson*, 391 N.W.2d at 784 (Yetka, J, concurring.).

The interpretation of the mere filament test espoused by the trial court renders the single-subject requirement meaningless. The Court must construe Article IV, Section 17 in a manner that gives it effect. "Every law shall be construed, if possible, to give effect to all its provisions." MINN. STAT. § 645.16. Just as with the drafters of a statute, the drafters of Minnesota's constitution surely intended each provision to have a purpose and meaning. *See also Associated Builders,* 610 N.W.2d at 311 (P. Anderson, J., concurring and dissenting) (calling for interpretation of Single Subject and Title Clause that "give[s] each part of the constitution the plain meaning and effect of its language"); *Lyons v. Spaeth*, 567–68, 20 N.W.2d 481, 484 (Minn. 1945) ("The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it."); *State v. Chase*, 220 N.W. 951 (Minn. 1928) (holding that a practical construction cannot be adopted contrary to plain meaning of constitutional provision).

By permitting the legislature to fabricate *any* far-fetched connection—indeed, between horse racing, cosmetologists, and the Office of the State Auditor—the trial court has effectively gutted a constitutional provision. The legislature must comply with the constitution even if the legislature thinks it is inconvenient to do so. As Justice Stringer noted in *Associated Builders,* the Minnesota Supreme Court has repeatedly "sound[ed] an alarm that we would not hesitate to strike down oversweeping legislation that violates the Single Subject and Title Clause, *regardless of the consequences*." 610 N.W.2d at 301 (emphasis added).

The Supreme Court of Kentucky spoke to this issue in striking down a piece of legislation that tacked a rider about peer standard review organizations to a statute governing medical malpractice insurance and claims:

> § 51 of the Kentucky Constitution [the single-subject provision] has enjoyed, or suffered, an extremely liberal construction over the years, and we realize that time and technology have diminished the risks of deception it was intended to guard against. Still, however, it is not a lifeless anachronism, and there are wholesome limits to what can be loaded into one bill. We have only to ponder the incredible morass in Washington, D.C., to be admonished against what can happen to legislation when it can be made up, sidetracked, taken apart, switched around and put together again like a freight train. Happily, our Constitution does not permit it.

*McGuffey v. Hall,* 557 S.W.2d 401, 407 (Ky. 1977). The Minnesota Constitution also does not permit it. Yet when applying the "mere filament" test, Minnesota's courts have inexplicably been loath to set and enforce such "wholesome limits." *See Associated Builders,* 610 N.W.2d at 300 (Minn. 2000) (noting that earlier challenges to legislation

were more successful in the courts than those in recent years). Other states with similar single subject rules presently employ tests to determine violation of their clauses that are far stricter than Minnesota's mere filament test, while still respectful to the legislative process.[7]

The amici urge this Court to adopt a clearer and more reasonable rule for determining whether legislation complies with the Single Subject and Title Clause so that this important protection that our constitutional framers granted our citizens is not permanently eroded.

### C. This Court Should Adopt A New Test That Restores Meaning To The Single Subject and Title Clause.

While the doctrine of *stare decisis* is an important principle in appellate law, courts have to be willing to correct mistakes in judgment and mistakes in the interpretation of the Constitution committed by prior courts which have been more-or-less blindly followed for decades, or even a century. It takes courage for a court to stare into the face of established prior case law and say that those who sat on the bench in prior years were wrong. But for such courage, *Brown v. Board of Education,* 347 U.S. 483

[7] *See, e.g., Douglas v. Cox Retirement Properties, Inc.*, 302 P.3d 789, 792-793 (Okla. 2013) (stating the "germaneness" test inquires "not how similar two provisions in a proposed law are, but whether it appears that the proposal is misleading or that the provisions in the proposal are so unrelated that those voting on the law would be faced with an all-or-nothing choice"); *Arangold Corp. v. Zehnder*, 718 N.E.2d 191, 198 (Ill. 1999) ("whether the contents included within the enactment have a natural and logical connection to a single subject"); *Missouri Health Care Ass'n v. Attorney General of the State of Mo.*, 953 S.W.2d 617, 622 (Mo. 1997) ("whether the bill's provisions fairly relate to, have a natural connection with, or are a means to accomplish the subject of the bill as expressed in the title").

(1954), would never have resulted in the United States Supreme Court declaring that "separate but equal" schools for white and black students were unconstitutional. We ask this court to show similar courage.

The "mere filament" test that has all-but decimated the Single Subject and Title Clause of the Minnesota Constitution so as to make it almost non-existent must be condemned to permanent oblivion once and for all. In the past both this Court and the Supreme Court have expressed a firm desire to give effect to the intended purpose of the Single Subject and Title Clause, regardless of the consequences to a legislature apparently bent on ignoring the Courts' warnings. The time for courage is now.

Accordingly, amici strongly urge the Court to create, adopt, and employ a robust and fair test for determining compliance with the Single Subject and Title Clause, starting with this case, consistent with and embodying the following principles:

> The single subject in the title of the bill must be short, concise, written in plain language, and convey accurately and unambiguously the essential subject matter of the legislation. Each section of the bill must relate directly, obviously, clearly, and unambiguously to the single subject stated in the title in such a manner that an average layperson reading the text will immediately be able to understand how the text relates to the stated single subject. Any title or text that is inconsistent with these standards violates the Single Subject and Title Clause of the Constitution of Minnesota.

The above test accurately reflects the intention of the constitutional framers to protect the people by and through the preservation of a transparent and accountable government. This new test does away with the absurdity of the toothless, weak, and constitutionally infirm "mere filament" analysis, which the trial court employed despite

the Supreme Court's strongly expressed desire to move in quite the opposite direction. Without a more robust test, like that outlined above, the Court would allow the "Constitution to be read as permitting that which it was clearly meant to prohibit." Recognizing that this cannot be the intention of the Court, amici strongly urge the Court to adopt our proposed test.

## IV. THE COURT MAY CONSIDER A LESS DRASTIC REMEDY WHEN THE LEGISLATURE IMPERMISSIBLY COMBINES MORE THAN ONE SUBJECT IN APPROPRIATIONS BILLS.

Legislation such as the Omnibus Bill provides the Court an opportunity to also consider what may be a more palatable remedy for addressing violations in appropriations bills. Should the Court decide that it does not wish to adopt a new test consistent with the principles suggested above, we suggest that the Court adopt a lesser remedy, the result of which is that provisions which are tacked on to omnibus appropriation bills sunset—that is, disappear—when the appropriations themselves expire two years after their enactment.

The writers of the Minnesota constitution had a good reason for combining the single subject and title requirements in a single provision. The title requirement has, through history, provided a vital tool through which the single subject requirement has been enforced. If the legislature could not formulate a title that, on its face, contained a single subject, then the legislation likely did not satisfy the Single Subject and Title Clause, and the judiciary could carve out the offending provision.

But this tool for analyzing whether legislation complies with the Single Subject and Title Clause does not work with appropriations bills, such as the Omnibus Bill at

issue in this lawsuit. Appropriations bills require an extensive title—indeed, the title of the Omnibus Bill is over 500 words. *See* 2015 Laws of Minn. ch. 77. Thus the judicial branch is deprived of a tool used in evaluating challenges based on the Single Subject and Title Clause. We suggest that as an alternative to adopting an entirely new test, which is our preferred solution to the abuse of the Single Subject and Title Clause, a substitute tool be employed when a provision in a major appropriations bill is challenged on Single Subject and Title Clause grounds. Our alternative suggestion is that the Court adopt the following test and remedy:

> A significant and relevant characteristic of every appropriation measure is that it expires at the end of the fiscal biennium for which the appropriations bill was enacted. Any provision of an appropriations bill that purports to last beyond that moment is inherently a separate subject and invalid. Making permanent law is a different legislative task from appropriating funds for the maintenance of government operations, and therefore cannot be part of the "single subject" to which the appropriations bill relates. Accordingly, such violations shall be and are invalidated commencing at the end of the fiscal biennium.

This rule would ensure that all provisions of an appropriations bill are similarly situated and treated. Adopting such a rule could, to a significant extent, restore some of the integrity of the Single Subject and Title Clause by eliminating much of the legislature's incentive to impermissibly attach unrelated provisions to appropriations bills, as it did in this case.

## CONCLUSION

For all the above reasons, amici curiae American Civil Liberties Union of Minnesota; Professor David Schultz; Growth & Justice; Honorable Jack Davies; and

Jewish Community Action respectfully ask the Court to (1) adopt a more robust test for use in evaluating Single Subject and Title challenges, consistent with the test outlined by amici; and (2) reverse the decision of the trial court below, because the Privatization Statute is unconstitutional as violative of the Single Subject and Title Clause under either the highly-deferential "mere filament" test or under new test which the Court might adopt which gives the people of Minnesota the full benefit of the Single Subject and Title Clause to promote transparency and accountability in the legislative process; or (3) hold in the alternative that the Privatization Statute will expire when the appropriations with which it shares a bill expire.

Respectfully submitted,

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Dated: November 21, 2016 By: *s/Melissa Muro Lamere*

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## CERTIFICATE OF COMPLIANCE WITH MINN. R. APP. P 132.01, Subd. 3

The undersigned certifies that the Brief submitted herein contains 6,986 words, excluding the title page and tables of contents and authorities, and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2010, the word processing system used to prepare this Brief.

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