NO. A16-1634

State of Minnesota

In Supreme Court

Rebecca Otto, in her official capacity as
State Auditor of the State of Minnesota,
Petitioner/Cross-Respondent,

v.

Wright County, Becker County, and Ramsey County,
Respondents/Cross-Petitioners.

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

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INTRODUCTION

The lower courts erred when they concluded that the enactment of Minnesota Statute § 6.481 (the "Privatization Statute") as a provision in the 2015 State Government Finance Omnibus Bill ("Omnibus Bill") complies with the Single-Subject-and-Title Clause in Article IV, Section 17, of the Minnesota Constitution. In so holding, the trial court and court of appeals 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 and court of appeals' decisions 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.[1]

The courts' failure to enforce the Single-Subject-and-Title Clause has permitted the legislature nearly unencumbered power to enact multi-subject legislation in violation of the constitutional framers' intent. This undue deference culminated in the Minnesota Supreme Court's adoption of the well-intentioned but utterly ineffective "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

[1] 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 in the Omnibus Bill went well beyond what is permitted by the Single-Subject-and-Title Clause.

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 and court of appeals did precisely that when they held that the Privatization Statute does not violate the Single-Subject-and-Title Clause. Amici implore this Court to finally right the ship.

We agree with Appellant that the Privatization Statute should be invalidated because its enactment violated the existing but ill-conceived and grossly deferential "mere filament" test. But we also urge this Court to stand by the promise of *Associated Builders* and explicitly abandon the "mere filament" test, adopting in its place a more robust test that applies the Single-Subject-and-Title Clause to legislation in a reasonable and common-sense manner consistent with both the salutary goals of that Clause and the tests employed by courts in other jurisdictions under similar circumstances.

The "mere filament" test has benefited the legislature at the expense of the people and the other branches of government. Its continued use has "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).

The amorphous boundaries of the "mere filament" test have become no more than a figment of judicial imagination—to legislative delight and gubernatorial chagrin. It is

time to abandon this ineffective test in favor of one that restores meaning to our Constitution as it is written.

ARGUMENT

I. Single Subject Requirements Were Intended To Prevent Logrolling, Maintain The Gubernatorial Veto Power, And Afford Citizens And Lawmakers Alike Proper Notice Of Pending Legislation.

"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.[2] 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 "McDowell"). Subsequently, single-subject requirements were adopted by states throughout the 19th century "in response to perceived abuses of the legislative process."

[2] *See* ROBERT LUCE, LEGISLATIVE PROCEDURE; PARLIAMENTARY PRACTICES AND THE COURSE OF BUSINESS IN THE FRAMING OF STATUTES 548 (1922) (cited in Millard H. Ruud, *No Law Shall Embrace More than One Subject*, 42 MINN. L. REV. 389 (1958)).

Id. at 34. Over 40 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 three broad categories of related goals:

- **To prevent "logrolling" and "riders" in the enactment of legislation.** Logrolling is "the practice of several minorities combining their 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. Relatedly, "riders" are legislative provisions that could not secure adoption on their own merits, which are then 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 at issue here.[3]

[3] *See, e.g.*, MINNESOTA OFFICE OF REVISOR OF STATUTES, BILL DRAFTING MANUAL at Ch. 5 (2002),

- **To reduce the deception and confusion of both voters and legislators by providing them notice as to the content and nature of legislation.** According to Professor Ruud, "by limiting each bill to a single subject, the issues presented by each bill can be better grasped and more intelligently discussed." Ruud, 42 MINN. L. REV. at 391. *See also* Kurt G. Kastorf, *Logrolling Gets Logrolled: Same-Sex Marriage, Direct Democracy, and the Single Subject Rule*, 54 EMORY L.J. 1633, 1641 (2005). Single subject rules 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 single subject rule and its role in protecting gubernatorial veto powers). Indeed, when Governor Dayton signed the Omnibus Bill, he stated that he did

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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.").

so despite deep opposition to the Privatization Statute; the Governor felt unable to exercise his veto power, as doing so would have resulted in thousands of State government employee lay-offs. *See* Appellant's Brief at 20-21.

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. "[T]he purpose of the title requirement [is] to prevent legislation by stealth," and complements its "sister requirement" that the law not include more than one subject. *Id.* at 392.

II. Meaningful 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.

The three historical purposes of single subject requirements—to limit logrolling and riders, to provide fair notice of legislation to voters and legislators, and to safeguard the gubernatorial veto power—are designed to uphold the underpinnings of a functioning democracy: transparent and accountable government.

A. The framers of Minnesota's Constitution intended the Single-Subject-and-Title Clause to safeguard basic principles of good and accountable governance.

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.

Indeed, during the Minnesota Democratic Constitutional Convention of 1857, a proposal to require only that the title of a bill indicate its contents was rejected in favor of an amended version proposed by Territorial Supreme Court Justice Bradley Meeker, who said:

> My object in moving this amendment, is to guard against a practice which has been to a greater or less extent, prevalent in this Territory, as well as in other states, of grouping together several different subjects in one bill, and passing them through by means of a system known as log-rolling.

FRANCIS H. SMITH, THE DEBATES AND PROCEEDINGS OF THE MINNESOTA CONSTITUTIONAL CONVENTION 124, 262-263 (1857).

Justice Meeker's amendment prevailed, resulting in Article IV, Section 17, of the Minnesota Constitution, also known as the Single-Subject-and-Title Clause, which provides: "No law shall embrace more than one subject, which shall be expressed in its title."

Yet, as Justice Yetka warned the legislature in his concurring opinion in *State ex rel. Mattson v. Kiedrowski*, "[t]he worm that was merely vexatious in the 19th century has become a monster eating the constitution in the 20th." *State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777, 784 (Minn. 1986) (Yetka, J., concurring). Justice Yetka,

who served for a decade in the Minnesota House of Representatives, was very familiar with the practical realities of lawmaking. Nevertheless, he sounded an alarm regarding the legislature's increasing disregard of the Single-Subject-and-Title Clause. Unfortunately, Justice Yetka's prescient assessment remains accurate well into the 21st century.

Justice Yetka recognized that "garbage bills" and "Christmas tree bills"[4] are legislative enactments that contain "all the objections that the constitution originally intended to prohibit. [They] contain[ ] a number of proposals which, if voted upon separately, might have failed." Justice Yetka called these legislative practices "a direct, cynical violation of our constitution" and pleaded with our courts to "have the will and the courage to resist the temptation to affirm the legislative action" that flouts Article IV, Section 17, "however enticingly [the law] may be drafted and whatever promises [the law] may contain…." Justice Yetka argued:

> It is clear to me that the more deference shown by the courts to the legislature and the more timid the courts are in acting against constitutional infringements, the bolder become those who would violate them. The courts of this nation and of the state were uniquely given the authority to prohibit infringements by either the legislative or executive branch of the government of constitutional rights vested in the people and denied those branches of the government. If we do not act to protect the public, who will? It is our constitutional duty to

[4] *Mattson*, 391 N.W.2d at 785 (Yetka, J., concurring). A "garbage bill" is "legislation where, near the tail end of a session, a group of individual ideas will be combined into one bill to wrap up the legislative business to avoid acting separately on each." *Id.* A "Christmas tree" bill is "a bill so drafted as to give a number of legislators approval of their separate or pet projects in order to gather sufficient votes to pass it." *Id.*

> do so. It has been said that former President Harry S. Truman had a plaque on his desk which said: "The buck stops here." We would do well to follow his example.

Mattson, 391 N.W.2d at 785.

B. Single-Subject-and-Title Clause violations deceive and confuse the public and lawmakers by denying reasonable notice of the content of pending legislation.

Another important purpose for the Single-Subject-and-Title Clause is to prevent voter and legislator confusion and deception. When multiple unrelated subjects are bundled together in a single piece of legislation, it is difficult for legislators to be aware of the nature and content of the law being amended and the effect of the amendment upon it. *See* 1A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 22.16., at 9 (4th ed. 1985). And if it is difficult for legislators to become adequately informed on pending legislation, common sense dictates that voters will be wholly unable to do so. *See also Associated Builders and Contractors v. Carlson*, 590 N.W.2d 130, 136 (Minn. Ct. App. 1999) ("the title requirement is a notice requirement").

The interest of the public in government transparency and accountability is paramount in a functioning democracy. *See* Patrick Henry, Address at the Virginia Constitutional Convention (June 9, 1788) ("The liberties of a people never were, nor ever will be, secure when the transactions of their rulers may be concealed from them."); Louis D. Brandeis, *What Publicity Can Do*, Harpers Wkly., Dec. 20, 1913, at 10 ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."), *cited in Klaus v. Minn. State Ethics Comm'n*, 244 N.W.2d 672, 676 (Minn. 1976). But without

proper notice of pending legislation, the power of the citizenry to hold its government accountable is diminished in two ways.

First, because legislators may not even be on notice of the content of given legislation, it is difficult to hold them accountable for their votes in favor of unrelated provisions inserted into must-pass legislation like omnibus appropriations bills. Legislators may plead ignorance—and may in fact be ignorant[5]—of the very existence of the provisions, or may simply have felt they had no choice but to vote for the bill as a whole, given the dramatic consequences of the alternative.

Second, when multiple unrelated subjects are thrown together in a single piece of legislation, the volume of bills goes down while the size and complexity of each bill goes up. Indeed, the total number of bills passed by the Minnesota legislature has plummeted over the last half century, from a peak of 1,159 laws enacted in 1969, to only 82 laws enacted in the 2017 regular session. *See "*Number of Bills Introduced and Laws Passed in the Minnesota Legislature, 1849-present," Minnesota Legislative Reference Library, *available at* https://www.leg.state.mn.us/lrl/history/bills. Legislators are packing more and more disparate provisions into a smaller number of bills, to the point that it has become nearly impossible for interested parties such as the public, the media, affected

[5] Indeed, after the 2017 budget bill fiasco which resulted in the recent lawsuit between the Legislature and the Governor, one news report observed that "[a]fter the fact, most rank-and-file legislators admitted they didn't even know the provision was in the bill." Brianna Bierschbach, *Can anything be done to make the Minnesota Legislature more transparent?*, MINNPOST, June 6, 2017, https://www.minnpost.com/politics-policy/2017/06/can-anything-be-done-make-minnesota-legislature-more-transparent.

businesses, and public interest groups—such as amici—to keep track of and respond to the many provisions hidden in pending legislation.

C. Widespread violations of the Single-Subject-and-Title Clause, particularly in appropriations bills, unconstitutionally diminish the gubernatorial veto power.

Because of the unique nature of appropriation bills, our state Constitution was amended in 1876 to provide for the line-item veto. But the Constitution bars the governor from exercising a line-item veto over any non-appropriation provisions that are inserted into appropriations bills. In other words, Minnesota governors can line-item-veto *budget* provisions in budget bills, but not *policy* provisions in "budget bills." As a result, violations of the Single-Subject-and-Title Clause improperly force the governor to "take it or leave it" when it comes to policy provisions in appropriations bills, eviscerating the gubernatorial veto power granted by Article IV, Section 23, of the Constitution. Gutting that power cripples the checks and balances inherent in our form of government.

In fact, the Minnesota Senate's own publication acknowledges that the Congress intentionally conceived of the practice of logrolling and inserting riders into appropriations bills as an end-run around the veto: The governor could not veto the provisions without vetoing the entire bill, a political and practical nightmare.[6]

[6] *See* PETER S. WATTSON, SENATE COUNSEL, RESEARCH AND FISCAL ANALYSIS , VETO POWER OF THE GOVERNOR OF MINNESOTA (1995) https://www.senate.mn/departments/scr/treatise/GOVSVETO.htm ("[To] evade a governor's veto power, state legislatures and Congress developed the practice of combining many appropriations into a single omnibus appropriations bill and adding to

This was precisely the manufactured dilemma Governor Dayton faced with respect to the Privatization Statute, buried as it was in an omnibus appropriations bill. *See* Appellant's Brief at 20-21. In a March 13, 2017, letter to the Speaker of the House and the Senate Majority Leader, Governor Dayton wrote:

> **Finally, I strongly oppose including policy language unrelated to the budget in omnibus budget bills.** Those items should travel in omnibus policy bills or stand-alone bills. I am willing to debate policy items with you on their own merits, but I will not trade controversial policy items for spending necessary to provide critical services for the people of Minnesota. If you insert those policy provisions into budget bills in an attempt to force me to accept them, you will create the same impasse, which caused the state government shutdown in 2011. Indeed, one of the agreements critical to ending that 2011 shutdown was to remove policy items from the final budget bills.

Letter from Governor Mark Dayton to Kurt Daudt, House Speaker, and Paul Gazelka, Senate Majority Leader (March 13, 2017) (*available at* http://mn.gov/gov-stat/pdf/2017_03_13_GMD_Legislative_Leaders_Budget_Parameters.pdf) (emphasis in original).

D. Due to lack of enforcement, major violations of the Single-Subject-and-Title Clause persist.

Emboldened by the Court's undue deference, the legislature continues to abuse the Single-Subject-and-Title Clause each session. A recent egregious example is the 480-

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the bill other legislation unrelated to the appropriations. By the use of these two techniques, logrolling and attaching riders, the legislative body was able to present the chief executive with a bill he could not veto, since its necessary and desirable parts so far outweighed its objectionable ones.").

page 2016 supplemental budget bill. As passed, the law touched virtually every subject imaginable. That bill regulated remedial courses at state universities, created a farmer-lender mediation task force, mandated carbon monoxide detectors in boats, authorized a liquor license for IndiaFest, repealed the community-based energy development tariff, created a grant program for minority-owned businesses, changed barber licensing requirements, added a new tax credit for parents of stillborn children, directed courts how to modify parenting-time court orders in a divorce, and established a voluntary pre-K program for public schools. *See generally*, 2016 Minn. Sess. Law Serv. ch. 189. The Court must step in to restore balance to the legislative process, which has been hijacked by legislative leadership to the detriment of the people, the governor, and even rank-and-file legislators.

E. The legislature's motives are irrelevant.

Mandatory constitutional provisions, such as 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 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?").

The Court need not find that the legislature intended to do mischief, or had 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 Single-Subject-and-Title Clause is not constitutional. The logrolling phenomenon in modern politics is a product of the complexity, controversy, and time-sensitivity of legislation:

> 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, controversy, nor time pressure justifies the enactment of bills that violate 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.*

The Constitution does not direct the courts of Minnesota to favor either 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.

III. The "Mere Filament" Test Fails To Give Effect To The Framers' Intent In Adopting The Single-Subject-and-Title Clause, And Thereby Denies Minnesotans The Protections Of The Constitution.

In *Blanch,* the Supreme Court held that to pass muster under the Single-Subject-and-Title Clause, all that a statute needs is a "common thread," consisting of a "mere filament," tying together its provisions. *Blanch*, 449 N.W.2d at 154. It is unclear how or why the words "one subject" in the Single-Subject-and-Title Clause should be interpreted to mean a "very fine thread" between multiple subjects. The framers undoubtedly understood "one" to have its ordinary meaning when they wrote the Clause in simple, declarative prose. Nevertheless, the Privatization Statute fails even the amorphous "mere filament" test.

The test that the *Blanch* Court enunciated for determining whether a law complies with the Single-Subject-and-Title Clause is not much of a test. This Court has since held that connection of the various sections of the law by a "mere filament" is sufficient, but that connection to a "mere figment" is insufficient. *See Associated Builders*, 610 N.W. 2d at 303. As legal tests go, this is less than helpful; as legal tests for determining constitutional rights go, it is pitiful. Preservation of constitutional guarantees requires a standard that is more vigorous and more rigorous.

This 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 recognition.

Worse yet, because the boundaries have become so unrecognizable, the citizens of Minnesota have been deprived 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. An excessively deferential review of Single-Subject-and-Title-Clause challenges deprives Minnesotans of their right to know what their legislators are up to and to hold them accountable for their actions.

IV. Under Even The Near-Toothless "Mere Filament" Test, The Privatization Statute Is Unconstitutional.

Understanding the Single-Subject-and-Title Clause in light of its stated purposes compels the conclusion that the Privatization Statute runs afoul of the Minnesota Constitution. While past judicial interpretation of the Single-Subject-and-Title Clause has rendered that clause nearly meaningless, the Privatization Statute does not satisfy even the old watered-down test.

A. The subject of "government operations" is unreasonably broad, even for an omnibus appropriations bill.

As a preliminary matter, there must be limitations on the breadth of a subject, or else Article IV, Section 17, of the Minnesota Constitution is pointless. As the court of appeals noted in *Associated Builders*, in response to the appellant's argument that various sections of an omnibus tax bill passed constitutional muster because all provisions fell under the "subject" of "taxation and governmental operations,"

> [S]uch a broad subject virtually swallows the single subject requirement; most legislation involves some form of government operations. In addition, the topics of "taxation" and "government operations not involving taxation" may already be two divisible subjects.

590 N.W.2d at 136.

Nevertheless, the trial court in this case held, and the court of appeals affirmed, 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, we respectfully submit, that is simply not true. Rather, any connection between the disparate parts of the Omnibus Bill is purely imaginary, a "mere figment." Indeed, the logical extension of the lower courts' 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 nebulous 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." 391 N.W.2d at 784.

The lower courts' interpretation of the mere-filament test renders the single-subject requirement meaningless. This 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 Associated Builders*, 610 N.W.2d at 311 (P. Anderson, J., concurring and

dissenting) (calling for an interpretation of Single-Subject-and-Title Clause that "give[s] each part of the constitution the plain meaning and effect of its language").

B. The "single subject" of an appropriations bill must be "appropriations" – *not* substantive law.

Omnibus appropriations bills are "peculiarly vulnerable" to Single-Subject-and-Title Clause violations because they, by nature, incorporate appropriations related to a variety of topics. *See Flanders v. Morris*, 558 P.2d 769, 772 (Wash. 1977). Because the title of an appropriations bill is often too vague and amorphous to properly identify the legislation's subject,[7] it is necessary that the provisions in the bill relate to each other in some meaningful way, and not merely to the bill's title. All the provisions in an omnibus appropriations bill should have one thing in common with each other: appropriations.

Moreover, each law is permitted only one filament of connection, and no more than one. For example, the subjects "taxation" and "government operations not involving taxation" cannot be strung together without violating the Constitution simply because each includes the word "taxation". *Associated Builders*, 590 N.W.2d at 136 ("But such a broad subject virtually swallows the single subject requirement; most legislation involves some form of governmental operations."); *see also Unity Church of St. Paul v. State*, 694 N.W.2d 585, 595–96 (Minn. Ct. App. 2005) (finding provision regulating firearms constituted a separate subject from natural resources). Likewise, "government

[7] *See. e.g., Missouri Health Care Ass'n v. Attorney Gen. of the State of Mo.*, 953 S.W.2d 617, 622 (Mo. 1997) ("If the bill's title is not too broad or amorphous to identify the single subject of the bill, then the bill's title serves as the touchstone for the constitutional analysis.").

operations" is not sufficiently specific to tie together the terms of an omnibus appropriations bill—the single subject of an appropriations bill has to be "appropriations." Amending permanent, substantive state law regarding the office of the State Auditor is not an appropriation, nor can it even be seriously suggested that it relates in any natural way to the subject of appropriations.

Indeed, as the Minnesota Court of Appeals 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'"); *see also Blanch,* 449 N.W.2d at 155 (noting that the park bill in the appropriations bill passed constitutional muster because it was "germane to the broad subject of appropriations for the operation of state government" and that if it were not, the Court would "be compelled to declare it violative of art. 4, § 17, and, hence, unconstitutional and void.").

The lower courts' 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 unconnected provisions as 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); 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 Minn. Sess. Law Serv. ch. 77. *See also* Appellant's Brief at 21-22. 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," to the subject of appropriations, the Court should hold that the statute violates the Single-Subject-and-Title Clause. The lower courts' determination that these truly disparate provisions are all connected by the "filament" of government operations makes a mockery of 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 logrolling. *See* Appellant's Brief at 17-21 (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.

In enacting the Privatization Statute, the legislature has shown yet again that it will not comply with the Single-Subject-and-Title Clause unless this Court requires that it do so. Continued application of the toothless "mere filament" test serves only to enable the legislature to fabricate *any* far-fetched connection between provisions of legislation—

indeed, between normal appropriations, horse racing, cosmetologists, and the Office of the State Auditor—gutting the Single-Subject-and-Title Clause. 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).

V. This Court Should Adopt A Robust Test That Accurately Reflects This Court's Clearly-Articulated Intent To Give Effect To The Purpose Of The Single-Subject-and-Title Clause.

This Court has held that an act is unconstitutional when 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 added). 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.

Indeed, in *Associated Builders*, this Court gave a powerful signal that it was ready to do exactly that, and move away from the largely ineffectual "mere filament" 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").

It is long past time for the Court to follow through on its warnings to the legislature in *Blanch* and *Associated Builders*. 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 the courts can apply in future cases to protect the citizens of this State from the evils the Clause was intended to prevent.

In its 2000 *Associated Builders* decision, this Court made good on its promise in *Mattson* 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).

The Court should reject the meaningless "mere filament" 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 become a little firmer." Timothy J. Pawlenty, *Distinguishing Filament from Figment: Minnesota's Single Subject Rule*, BENCH & BAR OF MINNESOTA (July 2000).

A. Other jurisdictions employ tests that strike an appropriate balance between deference to the legislature and ensuring the integrity of Single-Subject-and-Title rules.

Other states with similar single subject rules employ more effective tests and analyses than Minnesota's "mere filament" test, while remaining appropriately deferential to the legislative process.

For example, the Supreme Court of Washington has interpreted that state's Single-Subject-and-Title clause, which is virtually identical to Minnesota's, to preclude an unrelated substantive rider on an appropriations bill. That court ruled that substantive law and appropriations are two distinct subjects, holding that the challenged provision "epitomizes the very type of legislation that the [single subject clause was] designed to protect against." *Flanders*, 558 P.2d at 772. The *Flanders* court highlighted the unique nature of appropriations bills, noting:

> An appropriation bill is not a law in its ordinary sense. It is not a rule of action. It has no moral or divine sanction. It defines no rights and punishes no wrongs. It is purely Lex scripta. It is a means only to the enforcement of law, the maintenance of good order, and the life of the state government. Such bills pertain only to the administrative functions of government.

Id. at 773 (internal citations omitted). Therefore, the court reasoned, change to substantive law cannot be germane to the subject of an appropriations bill. *Id.* at 188.

Just as in *Flanders*, the legislature here has improperly inserted substantive law into an omnibus appropriations bill. In striking down the offending provision, the *Flanders* court noted, "[w]ithout the protection created by the [Single-Subject-and-Title

Clause], appropriation bills would be peculiarly vulnerable to this legislative evil." *Id.* at 772.

The Supreme Court of Appeals of West Virginia has similarly resolved the issue of substantive law amendments buried in appropriations bills. That court observed the difficulty of applying the standard "germaneness" language adopted by so many jurisdictions, including Minnesota:

> The term "germane" is the general test used, and it has been defined as "in close relationship, appropriate, relevant, or pertinent to the general subject." The problem with relying exclusively on the term "germane" to determine whether the one-object rule has been violated [is] that "the [one-object] rule obviously forbids joining disparate provisions which appear germane only to topics of excessive generality such as 'government' or 'public welfare.'"

Kincaid v. Mangum, 432 S.E.2d 74, 80 (1993) (internal citation omitted). The *Kincaid* court then adopted the following comprehensive test, taken largely from *Sutherland Statutory Construction*, for evaluating single subject rule challenges:

> [I]f there is a reasonable basis for the grouping of various matters in a legislative bill, and if the grouping will not lead to logrolling or other deceiving tactics, then the one-object rule in W.Va. Const. art. VI, § 30 is not violated; however, the use of an omnibus bill to authorize legislative rules violates the one-object rule found in W.Va. Const. art. VI, § 30.

Kincaid, 432 S.E.2d at 82 (citing 1A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 17.03, at 9 (4th ed. 1985)).

The West Virginia test adopted in *Kincaid* strikes a healthy balance between the judiciary's deference to the legislature on the one hand, and, on the other, the need to

give effect to an oft-ignored constitutional provision. *See also, Loparex, LLC v. MPI Release Techs., LLC*, 964 N.E.2d 806, 814-15 (Ind. 2012) (applying virtually identical test).

B. This Court should adopt a new test that restores meaning to the Single-Subject-and-Title Clause.

Stare decisis is important, but courts should correct mistakes that have been more-or-less blindly followed for decades, or even a century.

The "mere filament" test, which has all but excised the Single-Subject-and-Title Clause from the Minnesota Constitution, should be condemned to permanent oblivion once and for all. This Court has 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 Court's repeated but ineffectual warnings. This case presents an opportunity for the Court to assert itself and provide clear guidance to the legislature.

Accordingly, amici urge the Court to adopt a more effective test for determining compliance with the Single-Subject-and-Title Clause, consistent with the following:

> If there is a reasonable basis for the grouping of various matters in a legislative bill such that each matter relates to a single subject, and if the grouping neither results from nor will it lead to logrolling or other deceiving tactics or outcomes, then the Single-Subject-and-Title Clause in Article IV, Section 17, of the Minnesota Constitution is not violated.

This test gives effect to the framers' intention to preserve a transparent and accountable government. *See Johnson v. Harrison*, 50 N.W. 923, 924 (Minn. 1891)

("[I]n deciding whether an act is obnoxious to [the Single-Subject-and-Title Clause], a very good test to apply is whether it is within the mischiefs intended to be remedied.") Moreover, this test does away with the toothless and constitutionally infirm "mere filament" analysis, which the trial court and court of appeals used despite this Court's strongly expressed desire to move in 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."

Amici further ask the Court to hold that the single subject of omnibus appropriations bills is "appropriations." Such a holding would reduce the burden on the courts because legislators would be put on notice of the unconstitutionality of attaching unrelated substantive law to appropriations bills, which is the most common mechanism by which the legislature defies the Single-Subject-and-Title Clause.

Finally, amici encourage the Court to apply this test to this appeal and prospectively thereafter. Given the passage of time and the chaos that could result from invalidating the entire bill, amici ask that the Court strike only the challenged Privatization Statute, leaving the rest of the statute intact. However, future violations of the Single-Subject-and-Title Clause should result in the invalidation of entire bills. *See Blanch*, 449 N.W.2d at 155 (Minn. 1989) (Because "it is the presence of more than one subject which renders a bill constitutionally infirm, it appears to us at this time unlikely that any portion of such a bill could survive constitutional scrutiny."). *See also Chevron Oil Co. v. Huson*, 404 U.S. 97, 107 (1971) ("[W]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our

cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."); *Kincaid*, 432 S.E.2d at 82 (recognizing that "chaos would result if we hold that all of the legislative rules are void since the omnibus bills authorizing the rules violate the one-object rule of our constitution").

CONCLUSION

For all the above reasons, amici respectfully ask the Court to (1) adopt a more effective test to evaluate Single-Subject-and-Title Clause challenges, consistent with the test outlined above; (2) reverse the decision of the trial court and court of appeals, because the Privatization Statute violates the Single-Subject-and-Title Clause under either the highly-deferential "mere filament" test or under the test proposed by amici; and (3) hold that the single subject of omnibus appropriations bills is "appropriations."

Respectfully submitted,

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CERTIFICATION OF LENGTH OF DOCUMENT

I hereby certify that this Brief conforms to the requirements of Minnesota Rule of Civil Appellate Procedure 132 and other applicable rules and was prepared using Microsoft Word 2010 and with a proportional 13 point font. The length of this Brief is 6,989 words, exclusive of the table of contents, table of authorities, and addendum.

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