STATE OF MINNESOTA
IN SUPREME COURT
Case No. A12-0920

League of Women Voters Minnesota; Common Cause, a District of Columbia nonprofit corporation; Jewish Community Action, a Minnesota nonprofit corporation; Gabriel Herbers; Shannon Doty; Gretchen Nickence; John Harper Ritten; and Kathryn Ibur,

Petitioners;

vs.

Mark Ritchie, in his capacity as Secretary of State of the State of Minnesota, and not in his individual capacity,

Respondent;

and

87th Minnesota House of Representatives and 87th Minnesota Senate,

Intervenors-Respondents.

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INTRODUCTION

Less than six years ago, this Court made it clear that ballot questions used to amend the Minnesota Constitution must not be "so unclear or misleading that voters of common intelligence cannot understand the meaning and effect of the amendment."[1] Under our law, although the legislature need not use the "simplest and fairest form of the question,"[2] failure to use language that is clear and accurate enough to allow voters to understand the meaning and effect of an amendment is "'so unreasonable and misleading as to be a palpable evasion of the constitutional requirement to submit the [amendment] to a popular vote.'"[3]

The Legislature defends the ballot question in this case not by denying *any* fact alleged in the Petition, including the Petitioners' allegations as to the *effects* of the amendment, and not by arguing that the question meets this Court's well-established standards. Instead, the Legislature's defense rests on persuading this Court to effectively reverse its long-standing rulings based on arguments that would radically expand the legislature's power and diminish the judiciary's historical role in our State. The Legislature's first argument is that the legislature's actions in connection with proposed amendments are not reviewable by this Court, notwithstanding the United States Supreme

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[1] *Breza v. Kiffmeyer,* 723 N.W.2d 633, 636 (Minn. 2006).

[2] *State v. Duluth & N.M. Ry. Co.,* 102 Minn. 26, 112 N.W. 897, 898 (1907).

[3] *Breza,* 723 N.W.2d at 636 (quoting *State ex rel. Marr v. Stearns,*72 Minn. 200, 75 N.W. 210, 214 (1898), *rev'd on other grounds*, *Stearns v. Minnesota*, 179 U.S. 223 (1900)).

Court's decision in *Marbury v. Madison* over 200 years ago, and this Court's prior direct review of ballot questions.

Second, the Legislature argues in effect that even if the Court has jurisdiction to review ballot questions for amendments, it should now abandon the "unclear and misleading" test it has applied for over 100 years, in favor of a new test under which the legislature need only identify the "general subject" of the proposed amendment, not its "meaning and effect," in the ballot question. The Legislature argues that the burden is on the voters to find, read, research, analyze, and evaluate an amendment before they receive a ballot, not on the Legislature to accurately tell them the amendment's meaning and effects in the ballot question. The Legislature takes this tack because it cannot argue that the ballot question accurately describes the "meaning and effect of the amendment." Indeed, the Legislature does not dispute that the question is false and misleading in that:

- The question does not disclose that the amendment will create a new provisional ballot system.
- The amendment will not require "[a]ll voters" to show photo ID to vote, but only "voters voting in person."
- The amendment will not permit voters to use valid photo ID unless it is "government-issued."
- The amendment will require that all voters be subject to "substantially equivalent . . . eligibility verification" before voting, which the Legislature does not deny will end election-day registration.
- The amendment will require that all voters must "be subject to substantially equivalent identity . . . verification" before voting, which will either (a) create two classes of voters in Minnesota (those voting in person who must present valid government-issued photo ID to an election judge, and those voting by mail who cannot do so), or (b) end absentee voting by mail.

- The amendment will require the state to provide free identification only to some eligible voters.

Finally, the Legislature argues that even when, as here, a ballot question for amending the Constitution goes beyond the mere identification of the subject of the proposed amendment, and purports to describe its meaning and effect, this Court should decide that it is powerless to prevent an unreasonable, unclear and misleading question, or even a fraudulent one, from being presented to the voters. Thus, the Legislature asks the Court in effect to reverse all of its prior ballot question rulings, including its 2006 ruling in *Breza v. Kiffmeyer*, and hold that it will no longer review a ballot question to determine if it is "so unclear or misleading that voters of common intelligence cannot understand the meaning and effect of the amendment." *Breza,* 723 N.W.2d at 636.

The ballot question mandated by the Legislature for the proposed amendment so utterly fails to allow voters to "understand the meaning and effect of the amendment" that under long-standing Minnesota law it must be stricken. For this ballot question to survive, this Court must either (1) determine that it lacks the power to review ballot questions for constitutional amendments; or (2) decide that the Constitution permits the legislature to frame questions that will mislead voters as to the meaning and effect of a constitutional amendment. Petitioners respectfully request that this Court decline this invitation to abdicate its constitutional responsibilities.

ARGUMENT

I. This Court has the power and duty to decide whether the ballot question's description of the proposed amendment is unconstitutionally misleading.

The Legislature's first argument in defense of the ballot question is that this Court lacks subject matter jurisdiction to decide if the question is unconstitutionally misleading. The challenges to this Court's jurisdiction are meritless, ignoring both this Court's controlling decision in *Winget v. Holm,* 187 Minn. 78, 244 N.W. 331, 332 (1932), and bedrock principles of constitutional jurisprudence dating to *Marbury v. Madison.*

The Minnesota Constitution vests this Court with the "judicial power of the state." Art. VI, § 1. Under our constitutional system, judicial power is the power to ascertain and apply the law, including determining whether legislation is unconstitutional. *See Marbury v. Madison*, 5 U.S. 137, 176-79; *Minnesota State Bd. of Health v. City of Brainerd*, 308 Minn. 24, 241 N.W.2d 624, 633 n.5 (1976); *State v. Fairmont Creamery Co.*, 162 Minn. 146, 202 N.W. 714, 719 (1925). The judiciary cannot abdicate this power; it has the duty to strike down unconstitutional legislation. *See Marbury*, 5 U.S. at 176-79; *Fairmont Creamery*, 202 N.W. at 719. "If the Legislature transgresses its constitutional limits the courts must say so, for they must ascertain and apply the law, and a statute not within constitutional limits is not law." *Id.* It is the Court's duty to prevent the Secretary of State from placing on the ballot a question mandated by the Legislature that violates Minnesota law. *See Marbury*, 5 U.S. at 176-79; *Fairmont Creamery*, 202 N.W. at 719.

The Minnesota Constitution also provides that this Court "shall have original jurisdiction in such remedial cases as are prescribed by law." Art. VI, § 2. MINN. STAT. § 204B.44 (2011) grants this Court original jurisdiction to decide whether the legislature has directed the Secretary of State to prepare official ballots that violate Minnesota law. *See Breza,* 723 N.W.2d at 634 n.1; *Winget,* 244 N.W at 332.

The statute provides that any individual may file a petition for the correction of any of the following errors, omissions, or wrongful acts which are about to occur:

> (a) an error or omission in the placement or printing of the name or description of . . . any question on any official ballot;
>
> (b) any other error in preparing or printing any official ballot;
>
> * * *
>
> (d) any wrongful act, omission, or error of . . . the secretary of state, or any other individual charged with any duty concerning an election.

MINN. STAT. § 204B.44.

This statute confers the Court with jurisdiction over this matter. Petitioners allege that the ballot question violates art. IX, § 1 of the Minnesota Constitution, and that the ballot question title violates MINN. STAT. § 204D.15. The Secretary of State's imminent preparation of official ballots at the Legislature's command that violate Minnesota law is an "error" and wrongful "act" about to occur. *See Breza*, 723 N.W.2d at 634 n.1; *Winget,* 244 N.W. at 322.

In arguing that the statute does not permit review of its conduct in drafting an allegedly unconstitutional ballot question, the Legislature simply ignored *Winget.* The

petitioner in *Winget* challenged the legislature's ballot question for a proposed constitutional amendment on the ground it was multifarious. The petitioner relied on a statutory predecessor to MINN. STAT. § 204B.44, which provided this Court with jurisdiction to correct an error in "preparing or printing . . . ballots." *Winget,* 244 N.W. at 332. This Court held that the statute gave it jurisdiction to review the legislature's ballot question because it could restrain the Secretary of State from the ministerial act of preparing ballots with an unconstitutional question. *Id* at 332. The same reasoning applies here.

Furthermore, in *Breza* this Court noted that MINN. STAT. § 204B.44(a) was the jurisdictional basis for its review of the ballot question. *See Breza,* 723 N.W.2d at 634 n.1. Regardless of whether the respondent in *Breza* raised the subject matter jurisdiction issue, had this Court lacked subject matter jurisdiction it would have dismissed the petition *sua sponte*. *See, e.g., Davidner v. Davidner*, 304 Minn. 491, 232 N.W.2d 5, 7 (1975). It did not do so, of course, because the teaching of *Winget* was that this Court does have jurisdiction.

Moreover, the Legislature has known since at least 2006 that this Court interprets MINN. STAT. § 204B.44 as giving it original jurisdiction over challenges to ballot questions for constitutional amendments. *Breza,* 723 N.W.2d at 634 n.1. Since that time, the Legislature has not amended MINN. STAT. § 204B.44 to address the Court's interpretation. Having failed to act, it is at best odd for the Legislature to argue that the statute has a different interpretation than the one expressed by this Court. *See, e.g., State ex rel. Ervin v. Crookston Trust Co.,* 203 Minn. 512, 282 N.W. 138, 140 (1938)

(plausible construction of statute known to legislative department should not be set aside by the courts if no effort made to change the statute).

The Legislature mistakenly relies on *Schiff v. Griffin*, 639 N.W.2d 56, 60 (Minn. Ct. App. 2002), for the proposition that an "action of the Minnesota Legislature . . . by definition is not an action, much less a 'wrongful act,' by any of the election officials itemized in the statute." (Leg. Br. at 7.) The issue in *Schiff* was not whether a "wrongful act" had occurred within the meaning of the statute, but rather whether the petitioner had standing under the statute to challenge an alleged ballot error. Because the Secretary of State is an election official expressly named in the statute, and because Petitioners allege it would be an error or wrongful act for the Secretary of State to place the challenged question on the ballot, MINN. STAT. § 204B.44 provides the basis for this Court to decide this case, and nothing in *Schiff* suggests otherwise.

Likewise, *Schroeder v. Johnson,* 311 Minn. 144, 252 N.W.2d 851 (1976) provides no support for the Legislature's argument. In *Schroeder,* this Court construed MINN. STAT. § 203A.18 as not giving a candidate recourse to the courts to correct a ballot error caused by the *candidate's* own mistake. *Id.* at 852. No Minnesota case has ever deviated from the bedrock principles laid down in *Marbury v. Madison* and its Minnesota progeny to support the radical proposition that the Legislature can immunize itself from judicial review to correct or prevent errors that would result from the Secretary of State incorporating the Legislature's work on a ballot.[4]

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[4] The challenge to Petitioners' standing raised by an *amicus curiae*, but not the Legislature, is baseless. The Petition alleges that each individual Petitioner is registered

II. The ballot question fails to meet the constitutional standard established by this Court.

The Legislature simply ignores that the standard for determining whether a ballot question meets the constitutional requirements is whether the question is "so unclear or misleading that voters of common intelligence cannot understand the meaning and effect of the amendment." *Breza,* 723 N.W.2d at 636. Instead of attempting to meet this standard, the Legislature argues that it need only "properly describe. . . the general subject of the proposed amendment" in a ballot question. (Leg. Br. at 12.) The Legislature is forced into this position because the ballot question it has mandated focuses solely on photo ID and, as the Legislature does not dispute, the question fails to disclose the following provisions of the amendment:

- it will establish a new provisional voting system;
- not "[a]ll voters," but only those voting "in person," would be required to show photo ID;
- the photo ID presented must be "government-issued"; and
- "substantially equivalent identity and eligibility verification" will be required for all voters.

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to vote in Minnesota, which gives them standing under MINN. STAT. § 204B.44. (Pet. ¶¶ 4-8.) *See Schiff v. Griffin*, 639 N.W.2d at 59-60. The association Petitioners have associational standing, because (1) they have members who are registered voters, who would have standing in their own right; (2) the issue is germane to each organization's purpose; and (3) neither the claim nor the relief sought requires the individual members to participate. (Pet. ¶¶ 1-3.) *See State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 497-98 (Minn. 1996) (citing with approval *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)).

Likewise, the Legislature does not dispute that the ballot question fails to disclose at least the following *effects* of the amendment:

- that it will eliminate election-day voter registration; and
- that it will either create different standards for in-person and mail-in voters, or eliminate mail-in voting (because those voting by mail cannot present photo ID to an election judge).

(Leg. Br. at 14.)

Because (1) the ballot question fails the *Breza* test, (2) there is no basis for overruling this test and replacing it with the "general subject" test, and (3) the ballot question would fail that test, too, Petitioners respectfully request that this Court order that the ballot question mandated by the Legislature be stricken from the ballot.

A. The ballot question fails the *Breza* test.

In *Breza*, the petitioner challenged the legislature's ballot question in connection with a proposed constitutional amendment to allocate certain revenue "not less than 40 percent" for transit and "not more than 60 percent" for highways. The petitioner urged that the ballot question was infirm, because, instead of tracking the precise "not less than 40 percent" language of the amendment, the question said "at least 40 percent." Noting that the Court could "conceive of a situation . . . where the language of a ballot question is so complex that voters could not fairly be expected to understand the meaning or essential purpose of the proposed constitutional amendment," the Court determined that such was not the case in *Breza*, because use of the words "at least" in the ballot question, rather than "not less than," did not make the question "so unclear or misleading that voters of common intelligence cannot understand the meaning and effect of the

amendment." *Breza,* 723 N.W.2d at 635. Thus, this Court held that "the ballot question is not misleading so as to evade the requirement of Minn. Const. art. IX, § 1, that constitutional amendments shall be submitted to a popular vote." *Id.*

One strong signal that the Legislature recognizes the ballot question here does not meet the *Breza* test is that most of its brief is dedicated to arguing that the Constitution permits questions that merely describe the "general subject" of the amendment, even though the mandated question actually purports to describe the meaning and effect of the amendment ("Shall the Minnesota Constitution be amended to require all voters to present valid photo identification to vote and to require the state to provide free identification to eligible voters . . . ."). A second strong signal is that in the two pages of its brief that the Legislature spends trying to explain how to read the actual language in the ballot question, the Legislature simply ignores *Breza's* focus on whether the challenged question permits voters to "understand the meaning and effect of the amendment." (Leg. Br. at 13-14.) Ultimately, the Legislature is reduced to arguing that the question is sufficient because (1) both the amendment and the question refer to photo ID, and (2) notwithstanding all of the actual changes and effects of the amendment, the Court should blindly accept the Legislature's assertion that the amendment's sole "clear and essential purpose" relates to showing photo ID.

Not only should this Court consider the actual meaning and effects of the amendment, it also should be skeptical of the Legislature's assertion as to the amendment's "objective." First, this Court directed that any material fact issues in dispute be brought to its attention weeks ago, and the Legislature has never denied the

allegations in the Petition as to the changes and effects that will be caused by the amendment, including the allegation in ¶ 31 that the amendment will end election-day registration ("EDR"). Instead, the Legislature merely asserts that these facts are not "relevant." (Leg. Br. at 4-5.) The failure to deny an allegation in a pleading constitutes an admission. Minn. R. Civ. P. 8.04. The "relevance" of the admitted fact that the amendment will end EDR could not be more apparent—it will profoundly change voting in Minnesota. The significance of EDR is under-scored by the fact that Rep. Kiffmeyer, the principal drafter of the amendment and ballot question, and an *amicus curiae* in this case, is the sole member of the "advisory board" for the lead plaintiff in a pending lawsuit seeking to end EDR in Minnesota. *See* http://mnvoters.org/index.php?option=com_ ontent&view=article&id= 171&Itemid=202. Plaintiffs' counsel in that lawsuit is counsel to Rep. Kiffmeyer in this proceeding. *See* complaint in *Minnesota Voters Alliance v. Ritchie*, Case No. 12-CV-00519 DWF-LIB (D. Minn.). By omitting from the ballot question the effect of the "substantially equivalent" provision in the amendment, the Legislature is intentionally concealing this material purpose and effect of the amendment. Plainly, photo ID is the Legislature's Trojan horse to eliminate EDR.

At no point does the Legislature argue that the question accurately describes the actual meaning and effect of the amendment. Indeed, the Legislature fails even to acknowledge the obvious, that the question says the amendment will "require *all* voters to present valid photo identification to vote," when in fact the amendment actually requires only some voters to do so, those "voting in person." (Emphasis added). The only "argument" the Legislature offers is its suggestion that because the amendment requires

some voters (those voting in person) to present valid government-issued photo ID, and all voters, including those who do not vote in person, to be "subject to substantially equivalent identity . . . verification," representing that the amendment requires "all voters" to present photo ID is not misleading. (Leg. Br. at 13.) If this is the Legislature's argument, it is wrong. "[S]ubstantially equivalent identity . . . verification" can mean only one of two things: (1) verification with something *other* than *photo* ID presented to an election judge, in which case the ballot question is false; or (2) actual *photo* ID, in which case the amendment will abolish absentee voting by mail.

The Legislature's only responses to the omissions from its description of the meaning and effect of the amendment in the question are that:

- the Court should defer to the Legislature;

- the voters should not rely on the question they are voting on, but should instead rely on accurate information about the amendment from other sources, including the attorney general's anticipated "careful analysis" of the amendment that voters will somehow gain access to;

- despite disclosing, albeit inaccurately, the meaning and effect of two provisions of the amendment in the question, it is unnecessary to disclose that the amendment will cause *other* voting changes because what constitutes a substantive provision in the amendment is "subjective";

- the voters need not be told that a new provisional ballot system will be created by the amendment, because there is no consensus as to what "challenges" this new system will create; and

- there is no harm in excluding from the question any reference to any changes in Minnesota's voting law aside from the photo ID provision, and no need even to accurately describe the actual photo ID requirements, because the question captures the Legislature's "objective" in proposing the amendment.

Not even the Legislature has the temerity to contend that these arguments establish that the ballot question meets the *Breza* test. Instead, and at most, it appears that the Legislature is *sub silentio* asking the Court to overrule *Breza*.

This conclusion becomes even more clear from reviewing the arguments and facts the Legislature has simply ignored. The Legislature simply fails to respond to the fact that the amendment requires that photo ID be "government-issued"; the fact that the amendment will only permit some voters to receive "free" ID; and the fact that the undisclosed "substantially equivalent . . . eligibility verification" requirement will eliminate EDR.

The rule established by this Court preventing ballot questions from being "so unclear or misleading that voters of common intelligence cannot understand the meaning and effect of the amendment," because such questions would "evade the requirement . . . that constitutional amendments shall be submitted to a popular vote," (*Breza*, 723 N.W.2d at 635) captures the spirit of the test this Court has developed for common law fraud. Accordingly, it is useful in evaluating this ballot question to review Minnesota's common law fraud principles.

One such principle governs what one must say once one chooses to speak. Under Minnesota law, when one has no duty to speak he or she may remain silent. Here, even if

the Legislature had no duty to explain the meaning and effect of the amendment (which we dispute), once the Legislature chose to do so it was required to speak truthfully and not to omit from the question material facts that would show the falsity of the representations contained in the question. *See, e.g., Klein v. First Edina Nat.'l Bank*, 293 Minn. 418, 196 N.W.2d 619, 622 (1972) ("One who speaks must say enough to prevent his words from misleading the other party."); *Newell v. Randall*, 19 N.W. 972, 973 (Minn. 1884) ("[W]hen he undertook to answer he was bound to tell the whole truth, and was not at liberty to give an evasive or misleading answer. . . . To tell half a truth only is to conceal the other half. Concealment of this kind . . . amounts to a false representation."). Not only has the Legislature made affirmative misrepresentations and omitted material facts in the ballot question, the transcripts of the Legislature's floor debates and committee hearings show that doing so was not an inadvertent oversight—it was willful. Indeed, the Legislature was repeatedly warned of the ballot question's deficiencies and still the Legislature intentionally chose to make false and incomplete representations in the ballot question. Having chosen this course, it is the Legislature that forces this Court to uphold the law, even as to the law makers.

Because the ballot question does not meet the *Breza* test, the Legislature's defense of the question appears to hinge on this Court overruling *Breza*, and holding that there is no effective judicial review of the Legislature's ballot questions for constitutional amendments. In other words, the Legislature effectively asks this Court to hold that that the standard in Minnesota is "voter beware," because the Legislature is free to mislead and deceive voters as to the meaning and effect of the amendments it submits for

approval. Petitioners respectfully request that the Court decline the Legislature's invitation.

B. Properly describing the general subject of an amendment is not the test for the constitutionality of a ballot question.

The Legislature's argument that it need only properly describe "the general subject" of a constitutional amendment in a ballot question finds no support in *Breza*, the only case in which this Court has evaluated whether a ballot question to amend the *Constitution* is too misleading. Rather the Legislature's argument appears to be based on (1) observations made by the Court in 1898 in *State ex rel. Marr v. Stearns*, 75 N.W. at 214, (ballot question to approve a tax statute, not to amend Constitution), (2) a case decided in 1907, *State v. Duluth & N.M. Ry. Co.,* 112 N.W. 897 (ballot question to approve a tax statute, not to amend Constitution), and (3) the four ballot questions described in the Legislature's brief, none of which was challenged in court nor passed upon by this or any other court. None of these sources supports the Legislature's argument that Minnesota law allows the Legislature merely to identify the "general subject" in a ballot question used to amend the Constitution.

In *Stearns*, this Court reviewed the ballot question submitted to Minnesota's voters in 1895 to approve a law to permit taxation of land owned by railroads. *Stearns*, 75 N.W. at 210. Under the Minnesota Constitution at that time, land owned by railroads could only be taxed if a majority of the voters approved the tax. *Id.* at 217. Seeking approval for a statute passed by the legislature to tax land owned by railroads, the legislature framed the following question for voters: "For taxation of railroad lands. Yes.__

No.__." Unremarkably, there being no other "meaning" or "effect" of the statute being approved, this Court found that asking the voters whether they were "[f]or taxation of railroad lands" was not an unreasonable or misleading way to determine whether the voters were for or against taxing railroad lands. *Id.* at 214.

In considering the petitioner's argument that the entire statute should have been included on the ballot, the *Stearns* Court observed that neither the provision in the Constitution for submitting *statutes* to voters, nor the provision in the Constitution for submitting *constitutional amendments* to voters, specified that the entire proposed statute or amendment be printed on the ballot. The Court further observed, without identifying any particular amendment, that "a large number of important amendments to the constitution [had been] submitted by a ballot upon which there was no suggestion as to the nature of the amendment." *Id.* at 215. The Court went on to note that no one had ever "suggested that such amendments are void." *Id.* Petitioners also make no such claim.[5]

The quoted observation in *Stearns* does not constitute either a holding, or the embracement by this Court of a standard different from that articulated in *Breza*. Rather *Stearns* is significant because the facts of that case illustrate how careful the legislature has been, until now, to avoid making ballot questions misleading. *Stearns* plainly does

[5] To the extent the Legislature argues or implies that finding the current ballot question unconstitutionally misleading might call into question past, unchallenged amendments, the Legislature ignores the general revision of the Constitution in 1974, Minnesota's six-year statute of limitations, MINN. STAT. § 541.05(2), and this Court's power to deny any petition that was not promptly filed as being barred by laches, *see, e.g., Breza*, 723 N.W.2d at 635.

not *hold* that a ballot question passes constitutional muster if it identifies the "general subject" of a proposed amendment. It held only that a ballot question was not unfair and misleading even though the entire statute was not included on the ballot. Accordingly, and because before *Breza* no one had challenged as misleading any ballot question to approve a constitutional amendment, the Legislature has overreached in citing *Stearns* for the proposition that:

> this Court has held there is no constitutional requirement for the Minnesota Legislature to describe *any* of the so-called 'substantive provisions' of a proposed amendment in the ballot question, [and] it necessarily follows that there is no constitutional requirement to describe *all* of the substantive provisions of a proposed **amendment** in the ballot question.

(Leg. Br. at 11 (bold emphasis added)).

The second case in which this Court considered "the language used" in a ballot question to determine whether it "was misleading" and therefore "not properly submitted to the people," was *State v. Duluth & N.M. Ry. Co.,* 112 N.W. 897. In *State v. Duluth,* the legislature had passed an act creating a uniform 4% gross earnings tax on railroads, to replace a law that provided for a tax that gradually increased the rate from 1% to 3%, based on how long the railroad operated. The Minnesota Constitution required the new law to be approved by a majority of the voters before it could become effective. Accordingly, the legislature submitted the new tax act to the voters with this question: "For increasing the gross earnings tax of railroad companies from three to four per cent. Yes ___. No___." *Id.* at 898.

A railroad that had not yet operated long enough to be taxed at the 3% rate when the ballot question was submitted, argued that the ballot question was misleading. This Court disagreed, cited *Stearns,* and then noted: "It may be conceded that the simplest and fairest form of the question submitted" would have been to omit the words "from three" after the word "companies" in the question. *Id.* Because the ultimate tax rate railroads would pay under the then existing law was 3%, and most railroads were by that time already paying tax at the 3% rate, however, the Court concluded that the "clear and essential purpose of the act was to increase the gross earnings tax of all railroads to 4 per cent, and this purpose was fairly expressed in the question submitted." *Id.* at 898-99. Nothing in *State v. Duluth* supports the argument that anything short of a clear and accurate description of the meaning and effect of a statute (or amendment) is sufficient.

Likewise, nothing in *Breza* suggests that a ballot question passes muster if it merely describes the "general subject" of the amendment. Instead, *Breza* focused on whether the question for the proposed constitutional amendment was so "unclear or misleading" that voters would not understand the "meaning and effect" of the amendment. Put another way, *Breza* flatly contradicts the Legislature's assertion that the law allows it to abdicate its responsibility to give voters a ballot question that accurately describes the "meaning and effect" of the proposed amendment.

Finally, because the four unchallenged ballot questions described in the Legislature's brief were not reviewed by the courts they do not establish a rule that properly describing the general subject of an amendment in a ballot question meets the test this Court re-confirmed in *Breza*. To the contrary, as this Court has made clear, the

requirements of the law do not change to conform to one's mistaken past assumptions or behaviors, even if the past mistakes were made in good faith for many years. *See, e.g.*, *State ex rel. Peterson v. Quinlivan*, 198 Minn. 65, 268 N.W. 858 (1936) (the Constitution requires University of Minnesota's regents be appointed by legislature, not governor, despite longstanding practice to the contrary).

The most noteworthy conclusions to be drawn from a review of the ballot questions at issue in *Stearns, State v. Duluth,* and *Breza*, are that: (1) while the challenged ballot questions in those cases may not have been perfect, they clearly captured the *entire* "essential purpose" of each of the acts and the amendment the voters were considering; (2) in the words of this Court in *Breza,* the ballot questions were not "so unclear or misleading that voters of common intelligence [could not] understand the meaning and effect" of the respective acts and amendment; and (3) there is no hint that the challenged ballot questions either misstated what the acts or amendment would do, or concealed any substantive changes that would be effected if approval was given. Indeed, a review of the ballot questions for the 211 constitutional amendments submitted to Minnesota's voters from 1858 to 2008, shows that for the first 150 years of our State's history, the legislature responsibly performed its duty to frame ballot questions that were neither unfair, unclear, nor misleading. (*See* Leg. App. at 1-16.) And the legislature did so even for controversial and hotly disputed amendments. As a result, only one of these 211 questions, in *Breza*, was challenged on the ground it was misleading. And that challenge was at least borderline frivolous. The *responsible* performance of the

legislature in drafting ballot questions for the first 150 years of Minnesota's history stands in sharp contrast to the *irresponsible* conduct of the Legislature here.

Ultimately, however, even if the law supported the Legislature's argument that it was not required to do more than describe the "general subject" of the proposed amendment in the ballot question, that is not what the Legislature did. Instead of asking, for example, if the voters were: "For changing voting requirements," the Legislature's ballot question purports to describe the meaning and effect of the amendment. It asks: "Shall the Minnesota Constitution be amended to require all voters to present valid photo identification to vote and to require the state to provide free identification to eligible voters . . . ." Having purported to tell the voters the meaning and effects of the amendment in the ballot question, Minnesota law requires that the mandated question be sufficiently clear and accurate that voters of common intelligence can understand the amendment's actual meaning and effect.

This Court should reject the Legislature's invitation to decide for the first time here whether a mere description of the subject of the amendment would have been constitutionally sufficient, because that is not what the Legislature did. To make such a ruling in this case would constitute an advisory opinion. As this Court has made clear: "We do 'not issue advisory opinions, nor decide cases merely to establish precedent.'" *State v. Arens*, 586 N.W.2d 131, 132 (Minn.1998) (citation omitted).[6]

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[6]In addition to the role the courts play in the amendment process, the Governor has a right to approve or veto proposed ballot questions under Article IV, sections 23 and 24 as suggested by the City of St. Paul in its *amicus curiae* brief. Indeed, this issue was directly presented to this Court and decided in *Secombe v. Kittleson,* 29 Minn. 555, 12

III. Minnesota law requires that the Secretary of State, not the Legislature, provide the title for ballot questions.

MINN. STAT. § 204D.15 states that: "The secretary of state shall provide an appropriate title for each question printed on the pink ballot. The title shall be approved by the attorney general, and shall consist of not more than one printed line above the question to which it refers." MINN. STAT. § 204D.15. The word "shall" is mandatory. MINN. STAT. § 645.44, subd. 16. In *Breza,* this Court stated that the statute means what it says: "By statute, the secretary of state must provide an appropriate title for each question presented on the ballot for constitutional amendments, and the title must be approved by the attorney general. MINN. STAT. § 204D.15 (2004)." 723 N.W.2d at 635 n.3.

Nevertheless, the Legislature argues the statute does not mean what it says. According to the Legislature, "This statute simply provides a rule to govern instances when the Legislature does not specify a title for a ballot question." (Leg. Br. at 29-30.) But this argument is directly contrary to the statute's unambiguous language, and this

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N.W. 519 (1882) (challenge to 1858 amendment to Constitution on grounds the proposed amendment had not been signed by governor as required by predecessor to Article IV, sections 23 and 24 prior to being put to vote of the people was rejected by this Court because proposed amendment had been validly signed by secretary of state as acting governor.) However, Petitioners did not assert the validity of Governor Dayton's veto of the ballot question in their Petition and the Legislature has chosen not to address the City of St. Paul's argument in its brief; therefore, the issue of the validity of Governor Dayton's veto has not been put in issue by the parties in this proceeding before the Court and Petitioners will not address the issue further. If, however, the Court determines that the issue of the validity of the veto must be resolved in this case, Petitioners respectfully ask for leave to file a supplemental brief on the issue of the validity of Governor Dayton's veto.

Court must apply its plain meaning. *See, e.g., In re S.M.*, 812 N.W.2d 826, 829-30 (Minn. 2012). Even if interpretation of ambiguous language were required, moreover, under basic principles of statutory construction the statute's express direction that it is the secretary of state who shall supply a title means that others are excluded from doing so. *See, e.g., Maytag Co. v. Commissioner of Taxation*, 218 Minn. 460, 17 N.W.2d 37, 40 (1944).

In a footnote, the legislature suggests that applying the statute as written would present a "difficult constitutional question," but the Legislature provides no explanation what it is, and we are hard-pressed to guess what that issue might be. (Leg. Br. at 30 n.12). MINN. STAT. 204D. 15. This statute has been in effect for over 30 years. *See* 1981 Minn. Laws. 127. If the Legislature truly believed it had enacted an unconstitutional statute, its first recourse would be to repeal it. If it could not do so, another recourse might be to ask a court to declare the statute unconstitutional. But under no circumstances may the Legislature, or any other governmental body or official, ignore a duly enacted statute for reasons of perceived political advantage. *See, e.g., In re Mulligan,* 71 U.S. 2, 19 (1866) ("Our system knows no authority beyond or above the law.").

IV. This Court does not have the power to rewrite the ballot question or to order that the ballot contain language not passed by the Legislature.

The Legislature's sole response to the Petition in this case is to ask this Court to deny the Petition. The Legislature, quite properly, has not asked the Court to grant any other relief, such as re-writing the ballot question, or ordering that the entire proposed

amendment be placed on the ballot. Indeed, the basic constitutional principle of separation of powers precludes this Court from re-writing the question to make it constitutional. *See McGuire v. C&L Restaurant Inc.*, 346 N.W.2d 605, 614 (Minn. 1984); *accord United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010) (re-writing statute to make it constitutional would be "serious invasion of the legislative domain" and diminish legislature's incentive to draft proper laws in first place) (citations omitted); *see also State v. Duluth & N.M. Ry. Co.,* 112 N.W. 897, 898 (Minn. 1907) (separation of powers means courts "can only declare the submission void when the question is so framed as to be a palpable evasion of the Constitution"). It is for the Legislature, and the Legislature alone, to prepare a ballot question that meets the constitutional requirements mandated by this Court in *Breza*. To the extent some *amicus curiae* suggest alternative remedies the Court might impose, the Legislature has not asked for them and there is no constitutional basis upon which this Court might formulate them.

CONCLUSION

The ballot question mandated by the Legislature is "so unreasonable and misleading as to be a palpable evasion of the constitutional requirement to submit the [amendment] to a popular vote" and, as such, fails the test set forth in *Breza.* Notably, neither the Respondent Secretary of State nor the Attorney General of Minnesota have even made a perfunctory attempt to defend the ballot question, and the Legislature makes no serious effort to refute Petitioners' claims; instead, the Legislature attacks this Court's jurisdiction and argues that this Court should adopt a different test, both of

which arguments are wholly lacking in merit. Petitioners respectfully request that their Petition be granted and the Secretary of State be enjoined from placing the question on the November 2012 ballot.

Respectfully submitted,

DATED: July 2, 2012

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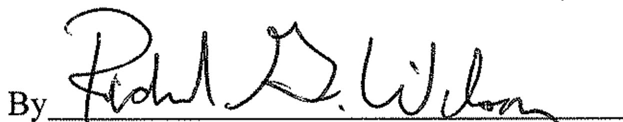
By 

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