

**FILED**

September 20, 2017

**OFFICE OF  
APPELLATE COURTS**

**CASE NO. A17-1142**

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**STATE OF MINNESOTA  
IN SUPREME COURT**

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The Ninetieth Minnesota State Senate and the Ninetieth Minnesota  
State House of Representatives,

*Respondents,*

vs.

Mark B. Dayton, in his official capacity as Governor of the State of  
Minnesota, and Myron Frans, in his official capacity as Commissioner  
of the Minnesota Department of Management and Budget,

*Appellants.*

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**APPELLANTS' MOTION TO STRIKE**

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## Introduction

Appellants Governor Mark Dayton and Commissioner Myron Frans move to strike the Conclusion in the Legislature’s Informal Memorandum, pp. 22-23, that argues Governor Dayton had agreed in advance to five individual provisions before the Legislature enacted them at the end of the 2017 special session. This argument is unsupported by citations to the record, beyond the scope of the briefing requested in the Court’s September 8, 2017 Order, and was not made below. In addition, Appellants ask the Court to strike the Introduction to the Informal Memorandum, pp. 1-3, as beyond the scope of the briefing requested in the Court’s September 8, 2017 Order and, in effect, an unauthorized additional brief on the merits of the case.

## Argument

This Court will grant a motion to strike portions of a brief when its arguments are unsupported by facts in the record. *See State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003) (citing *State v. Taylor*, 650 N.W.2d 190, 204 n.12 (Minn. 2002)). Likewise, the Court will grant a motion to strike portions of a brief that exceed the applicable scope of briefing. *See, e.g., State v. Yang*, 774 N.W.2d 539, 558 (Minn. 2009) (granting motion to strike material in reply brief that went beyond “new matter raised in [respondent’s] brief” per Minn. R. Civ. App. P. 128.02, subd. 3). Finally, arguments not raised in the district court are waived. *Dickhoff ex rel. Dickhoff v. Green*, 836 N.W.2d 321, 343 (Minn. 2013) (“Sound judicial principles dictate that we should not render a decision on important legal issues that have not been properly developed.”); *In re Welfare of K.T.*, 327 N.W.2d 13,

16-17 (Minn. 1982) (stating that “a party may not raise for the first time on appeal a matter not presented to the court below”).

1. The Conclusion

The Legislature’s Informal Memorandum, pp. 22-23, argues that the Governor agreed to the final components of a “comprehensive legislative framework” at the end of the 2017 special session, including the Omnibus Tax Bill, but later changed his mind regarding—“five individual provisions in that comprehensive package of legislation.” (Legis. Inf. Mem. p. 23 n.11.) This argument is unsupported by the record, goes beyond the scope of the requested briefing as directed in the Court’s September 8, 2017 Order, and was not raised in the district court.

No citations to the record appear in support of the Legislature’s argument that the Governor agreed to what the Legislature provided to him at the end of the special session (See Legis. Inf. Mem. pp. 22-23.) The Legislature’s own Complaint does not allege the existence of such an agreement. Nor does the Appellants’ Answer admit to this unpleaded, purported agreement. The district court’s finding regarding any agreement with the Governor was limited to merely a finding that the Legislature “negotiated away its constitutional right to meet in session to consider overriding vetoes or line-item vetoes.” (Order ¶ 8.) The parties’ joint petition for accelerated review likewise makes no mention of this purported agreement. No record evidence supports the argument that the

Governor agreed to what the Legislature provided to him at the end of the special session. The Court should strike the material from the Legislature's Informal Memorandum.<sup>1</sup>

Additionally, the Court should strike the argument because it exceeds the scope of the Court-ordered briefing. The Court's September 9, 2017 Order, ¶ 2, specified the scope of the informal memoranda that the parties were to file. That Order directed briefing regarding (1) the constitutionality of the Judicial Branch ordering funding to the Legislature after June 30, 2017; (2) other potential judicial remedies; and (3) the AGA's motion to intervene, including specifically its argument regarding subject-matter jurisdiction. The argument is entirely unrelated to the three issues requested by the Order (*See* Legis. Inf. Mem. pp. 22-23.) This new argument is well beyond the scope of the directed briefing, and it should be struck. *See Yang*, 774 N.W.2d at 558.

Finally, the Legislature failed to raise this argument in the district court, and so it is waived. *Dickhoff*, 836 N.W.2d at 343; *In re Welfare of K.T.*, 327 N.W.2d at 16-17. Since the Legislature waived this argument, the Court should strike the material from the Informal Memorandum.

## 2. The Introduction

The introduction of the Legislature's Initial Memorandum, pp. 1-3, also exceeds the scope of the Court-ordered briefing. It re-argues the district court's reasoning, advocating that the district court "correctly concluded" that the line-item vetoes were constitutional, (*see* Legis. Inf. Mem. p. 1) and falsely claiming that Appellants do not

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<sup>1</sup> Had this argument been raised in the district court, Appellants could have shown that no specific agreement was reached, and the Legislature itself first breached any agreement, justifying the Governor's later actions.

dispute that the line-item vetoes “effectively deprive[d] the Legislature of its ability to function.” (*Id.*) The introduction goes on to argue that “[t]he funds appropriated to the Legislature in the Omnibus State Government Appropriations bill...must be deemed available to the Legislature.” (*Id.* at 2.) These arguments exceed the scope of the Court’s order for additional briefing. The arguments also constitute an attempt to submit further briefing on the merits of the case, which is not authorized either by the appellate rules or this Court’s Order for additional briefing.

### **Conclusion**

Appellants Governor Mark Dayton and Commissioner Myron Frans respectfully ask the Court to strike the Introduction, pp. 1-3, and the Conclusion, pp. 22-23, of the Legislature’s Informal Memorandum.

Respectfully submitted.

Dated: September 20, 2017

**BRIGGS AND MORGAN, P.A.**

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