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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
CASE TYPE: Civil Other

Destiny Dusosky, Plaintiff, v. Michelle Fischbach, Defendant.	Court File No. 62-CV-18-2348 Chief Judge John H. Guthmann **MEMORANDUM SUPPORTING DEFENDANT'S MOTION TO DISMISS**

INTRODUCTION

Senator Michelle Fischbach moves the Court to dismiss Plaintiff's Complaint. This is the second lawsuit filed by Plaintiff against Senator Fischbach this year. The Court dismissed the previous lawsuit without prejudice after finding (1) the Court lacked subject matter jurisdiction; (2) Plaintiff lacked standing; (3) the controversy was unripe for adjudication; and (4) the case involved several nonjusticiable political questions. The Court stated it was "not the right case, the right plaintiff, the right time, or the right legal context to consider [Senator Fischbach's] eligibility to serve in the Minnesota Senate."[1] None of those considerations have changed.

The Minnesota Constitution prescribes the only means to remove Senator Fischbach from office. The Minnesota Senate may determine Senator Fischbach's eligibility to remain seated or expel her from the senate, and the voters of Senate District 13 may petition to recall her from office. MINN. CONST. art. IV, §§ 6, 7; *id*. art. VIII, § 6. It has been 77 days since this Court dismissed Plaintiff's previous lawsuit and 69 days since the Minnesota Legislature reconvened in

[1] Order at 28, *Dusosky v. Fischbach*, Ramsey Cnty. No. 62-CV-18-254 (Minn. Dist. Ct. Feb. 12, 2018).

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session. During that time, neither the senate nor the voters of Senate District 13 have sought to remove Senator Fischbach from office. Their silence speaks volumes. The record does not suggest Plaintiff has asked the senate to act or pursuant a recall petition.

This is still the wrong case, the wrong plaintiff, the wrong time, and the wrong legal context. The Court lacks subject matter jurisdiction because no cause of action permits a constituent lawsuit to remove a duly elected legislator from office. Plaintiff lacks standing because her alleged injury is no different than that potentially sustained by every other resident of Senate District 13. The controversy is unripe because Senator Fischbach has not cast the deciding vote on any law that specifically injured Plaintiff. The case presents multiple nonjusticiable political questions because only the senate and voters of Senate District 13 may remove Senator Fischbach from office. Thus, Senator Fischbach respectfully requests that the Court dismiss the Complaint again.

FACTS

The facts are familiar to the Court.[2] On January 2, 2018, United States Senator Al Franken resigned from office. (Compl. ¶ 5.) Lieutenant Governor Tina Smith resigned from office later that day. (Compl. ¶ 7.) On January 3, 2018, Governor Mark Dayton appointed Smith to temporarily fill the senate seat vacated by Franken. (Compl. ¶ 7.)

The Minnesota Constitution provides that "[t]he last elected presiding officer of the senate shall become lieutenant governor in case a vacancy occurs in that office." MINN. CONST. art. V, § 5. Senator Fischbach was the last elected president of the Minnesota Senate when Smith resigned. (Compl. ¶ 9.) Senator Fischbach consequently became the acting lieutenant governor by operation

[2] Although the facts are presented here briefly, the Court may take judicial notice of the various facts Plaintiff asserted and therefore admitted in her previous lawsuit. Minn. R. Evid. 201.

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of law. (Compl. ¶ 10.) Senator Fischbach has not taken the oath of office of lieutenant governor. (Compl. ¶ 47.) Plaintiff has not alleged that Senator Fischbach has exercised a single duty properly belonging to the lieutenant governor or governor.

On January 12, 2018, Plaintiff filed a lawsuit against Senator Fischbach that is nearly identical to this case. (Compl. ¶ 16.) On February 12, 2018, this Court dismissed that lawsuit without prejudice because (1) the Court lacked subject matter jurisdiction; (2) Plaintiff lacked standing; (3) the controversy was unripe for adjudication; and (4) the case presents multiple nonjusticiable political questions.[3]

The Minnesota Legislature reconvened on February 20, 2018. (Compl. ¶ 19.) Since then, Senator Fischbach has voted on matters before the senate and signed at least one bill passed by the senate. (Compl. ¶ 21, Ex. B, C.) The senate has not voted on Senator Fischbach's eligibility to remain in the senate or moved to expel her from the senate. (Compl. ¶ 18.) There is nothing in the record to suggest Plaintiff or anyone else has asked the senate to do so.

Senator Fischbach is the tenth senator to become lieutenant governor by reason of a vacancy. (Aff. of Brett D. Kelley Ex. 1, April 30, 2018.)[4] Seven of the nine previous senators who became lieutenant governor retained their senate seat and acted as both senator and lieutenant

[3] *See* Order, *Dusosky v. Fischbach*, Ramsey Cnty. No. 62-CV-18-254 (Minn. Dist. Ct. Feb. 12, 2018) ("Order"). The Order is explicitly referenced by Plaintiff at Paragraphs 17 and 18 of the Complaint. The "court may consider documents referenced in a *complaint* without converting a motion to dismiss to one for summary judgment." *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 490 (Minn. 2004).

[4] Exhibit 1 to the Kelley Affidavit was explicitly referenced by Plaintiff at Paragraph 42 of the Complaint. The Court may consider Exhibit 1 without converting Senator Fischbach's motion to dismiss into one for summary judgment. *N. States Power Co.*, 684 N.W.2d at 490; *see also Dahl v. R.J. Reynolds Tobacco Co.*, 742 N.W.2d 186, 197 (Minn. Ct. App. 2007) (the court may consider affidavits on a question of law without converting a motion to dismiss to a motion for summary judgment).

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governor. (Kelley Aff. Ex. 1.) The other two voluntarily resigned from the senate.[5] (Kelley Aff. Ex. 1.) Litigation resulted in just one of these nine instances. *State ex rel. Marr v. Stearns,* 75 N.W. 210, 214 (Minn. 1898), *rev'd on other grounds sub nom.*, *Stearns v. State of Minn.*, 179 U.S. 223 (1900). In *Stearns*, the Minnesota Supreme Court unequivocally held that the relevant senator "did not cease to be a senator when he became lieutenant governor." *Id*. at 214. That decision remains controlling law in Minnesota.

ARGUMENT

Senator Fischbach moves to dismiss the Complaint on four grounds. First, the Court lacks subject matter jurisdiction. Minn. R. Civ. P. 12.02(a). There is no cause of action allowing a constituent to remove a duly elected senator from office. The constitution prescribes the only means to remove a duly elected senator from office. Only the senate may determine the eligibility of its members, MINN. CONST. art. IV, § 6, or expel one of its members, *id*. art. IV, § 7. Only the voters may recall a senator from office. *Id*. art. VIII, § 6. Courts have no authority to remove a duly elected senator from office.

Second, the Court lacks jurisdiction over this controversy for three additional reasons: (1) Plaintiff lacks standing because she fails to allege an injury-in-fact; (2) the controversy involves several nonjusticiable political questions because the constitution textually commits the power to remove a duly elected legislator from office to the legislature and the voters; and (3) the case is unripe for adjudication because Senator Fischbach has not cast the deciding vote on a law that

[5] The two senators who voluntarily resigned were Archie H. Miller in 1943 and Alec G. Olson in 1976. (Kelley Aff. Ex. 1.) Plaintiff erroneously claims that Senate Counsel Peter Wattson advised Senator Olson to resign from the senate. (Compl. ¶ 42, Ex. D.) Mr. Wattson's memorandum speaks for itself. He did not advise Senator Olson to resign from the senate. Mr. Wattson simply noted that someone might challenge Senator Olson's ability to serve as senator and lieutenant governor if he did not resign. (Compl. Ex. D at 3–5.) Regardless, Mr. Wattson's informal memorandum has no legal force.

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specifically injured Plaintiff or performed a single duty belonging to the lieutenant governor. Minn. R. Civ. P. 12.08(c).

Third, Plaintiff fails to state a claim upon which relief can be granted. Minn. R. Civ. P. 12.02(e). The supreme court has unequivocally held that a senator does not cease being a senator after becoming lieutenant governor by reason of a vacancy in that office. *Stearns,* 75 N.W. at 214. There is no compelling reason to disturb that decision now. The doctrine of stare decisis directs the Court to adhere to the *Stearns* decision.

Fourth, Plaintiff failed to join the senate as an indispensable party. Minn. R. Civ. P. 12.02(f), 19.01; Minn. Stat. § 555.11. Removing Senator Fischbach from office would upset the balance of power in the senate. The senate should be joined as a party to defend its constitutional interests. This case cannot proceed in equity and good conscience without the senate's participation. Minn. R. Civ. P. 19.02.

I. THE COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE PLAINTIFF HAS NO CAUSE OF ACTION.

This Court dismissed Plaintiff's previous lawsuit in part because no cause of action permits a constituent lawsuit to remove a duly elected legislator from office. "The Minnesota Constitution does not provide a means by which citizens may sue in district court either to remove duly elected legislators from office or to prohibit their service." (Order at Conclusion ¶ 8.) That unappealed and final ruling remains true, and this nearly identical lawsuit is frivolous on its face.

The Court must dismiss an action if it lacks subject matter jurisdiction. Minn. R. Civ. P. 12.02(a). The supreme court has defined subject matter jurisdiction as the "authority to hear and determine a particular class of actions" and the "authority to hear and determine the particular questions the court assumes to decide." *Sache v. Wallace*, 112 N.W. 386, 387 (Minn. 1907). Minnesota "[d]istrict courts are courts of general jurisdiction and have the power to hear all types

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of civil cases, with a few exceptions[.]" *Irwin v. Goodno*, 686 N.W.2d 878, 880 (Minn. Ct. App. 2004) (citing MINN. CONST. art. VI, § 3) (other citation omitted); *see* Minn. Stat. § 484.01, subd. 1.

Plaintiff demands a declaration that Senator Fischbach "is prohibited from continuing to hold the office of state senator for Senate District 13 and from continuing to exercise the powers of such office." (Compl. ¶ 52.) Plaintiff also demands a permanent injunction enforcing that declaration. (Compl. ¶ 53.) Both Counts I and II stem from Minnesota's Uniform Declaratory Judgments Act ("UDJA"). The UDJA grants the courts the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed within their respective districts." Minn. Stat. § 555.01. However, the UDJA "cannot create a cause of action that does not otherwise exist." *Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 916 (Minn. Ct. App. 2003). There must be an underlying justiciable controversy "regarding claims of statutory or common-law rights." *Anderson v. Cnty. of Lyon*, 784 N.W.2d 77, 80 (Minn. Ct. App. 2010) (citation omitted).

Plaintiff fails "to identify the underlying substantive law creating a cognizable cause of action in her favor." (Order 8.) She fails because she cannot do so under any stretch of the facts. There is no statute creating a cause of action that permits a constituent lawsuit to remove a duly elected legislator from office based on an alleged constitutional violation. Likewise, Minnesota's common law does not recognize a private cause of action to remove a duly elected legislator from office for a purported constitutional violation. *See, e.g.*, *Guite v. Wright*, 976 F.Supp. 866, 871 (D. Minn. 1997) ("there is no private cause of action for violations of the Minnesota Constitution."), *aff'd on other grounds*, 147 F.3d 747 (8th Cir. 1998); *Laliberte v. State*, No. A13-0907, 2014 WL 1407808, at *2 (Minn. Ct. App. Apr. 14, 2014) (no private cause of action for violations of the

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Minnesota Constitution); *Davis v. Hennepin Cnty.*, No. A11-1083, 2012 WL 896409, at *2 (Minn. Ct. App. Mar. 19, 2012); *Danforth v. Eling*, No. A10-130, 2010 WL 4068791, at *1 (Minn. Ct. App. Oct. 19, 2010); *Mlnarik v. City of Minnetrista*, No. A09-910, 2010 WL 346402, at *1 (Minn. Ct. App. Feb. 2, 2010). Plaintiff cites no legal authority to the contrary.

The constitution explicitly establishes the procedures for removing a duly elected senator from office. Only the senate or the people of Senate District 13 may remove Senator Fischbach. The senate is "the judge of the election returns and eligibility of its own members." MINN. CONST. art. IV, § 6. The senate may also "expel a member" by a two-thirds vote. *Id*. art. IV, § 7. Voters may recall a senator from office for "serious malfeasance or nonfeasance during the term of office in the performance of the duties of the office or conviction during the term of office of a serious crime." *Id*. art. VIII, § 6. Plaintiff could have lobbied the senate to remove Senator Fischbach from office or pursued a recall petition, but she cannot seek those remedies from the Court. There is no cause of action allowing a private citizen to remove a duly elected senator from office. The Court must dismiss this action for lack of subject matter jurisdiction.

II. THE COURT MUST DISMISS THIS ACTION AS NONJUSTICIABLE.

"When a lawsuit presents no injury that a court can redress, the case must be dismissed for lack of justiciability." *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 321 (Minn. Ct. App. 2007); Minn. R. Civ. P. 12.08(c). "[A] declaratory judgment action must present an actual, justiciable controversy." *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 337 (Minn. 2011); *see Minneapolis Fed'n of Men Teachers, Local 238, AFL v. Bd. of Educ. of Minneapolis*, 56 N.W.2d 203, 205–06 (Minn. 1952) (providing direction for determining justiciability in declaratory judgment actions); *State ex rel. Smith v. Haveland*, 25 N.W.2d 474, 476–77 (Minn. 1946).

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"A justiciable controversy exists if the claim (1) involves definite and concrete assertions of right that emanate from a legal source, (2) involves a genuine conflict in tangible interests between parties with adverse interests, and (3) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion.' " *Onvoy, Inc. v. ALLETE, Inc.*, 736 N.W.2d 611, 617–18 (Minn. 2007). The courts "do not issue advisory opinions, nor do [they] decide cases merely to establish precedent." *Jasper v. Comm'r of Pub. Safety*, 642 N.W.2d 435, 439 (Minn. 2002). "[T]he judiciary must act prudentially to abstain from encroaching on the power of a coequal branch." *Sviggum*, 732 N.W.2d at 321 (citing *Sharood v. Hatfield*, 210 N.W.2d 275, 279 (Minn. 1973)). "Issues which have no existence other than in the realm of future possibility are purely hypothetical and are not justiciable." *Lee v. Delmont*, 36 N.W.2d 530, 537 (Minn. 1949).

A. Plaintiff Lacks Standing.

Standing is essential to the court's exercise of jurisdiction. *Annandale Advocate v. City of Annandale*, 435 N.W.2d 24, 27 (Minn. 1989) (citations omitted). "Standing is the requirement that a party has a sufficient stake in a justiciable controversy to seek relief from a court." *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996) (citing *Sierra Club v. Morton*, 405 U.S. 727, 731–32 (1972)). "Standing is acquired in two ways: either the plaintiff has suffered some 'injury-in-fact' or the plaintiff is the beneficiary of some legislative enactment granting standing." *Id*. (quoting *Snyder's Drug Stores, Inc. v. Minnesota State Bd. of Pharmacy*, 221 N.W.2d 162, 165 (Minn. 1974)).

Plaintiff claims no statutory standing. She must therefore demonstrate injury-in-fact. In the context of public interest actions by citizens, injury-in-fact requires "some damage or injury to the individual bringing the action which is special or peculiar and different from damage or injury

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sustained by the general public." *Channel 10, Inc. v. Indep. Sch. Dist. No. 709, St. Louis Cnty.*, 215 N.W.2d 814, 820 (Minn. 1974) (citations omitted). This peculiar injury "requirement precludes citizens from bringing lawsuits against governmental agencies based only on their disagreement with policy or the exercise of discretion by those responsible for executing the law." *Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143, 146 (Minn. Ct. App. 1999) (citation omitted). "Rights of a public nature are to be enforced by public authority rather than by individual citizens so as to avoid multiplicity of suits."[6] *Channel 10, Inc.*, 215 N.W.2d at 820.

In the previous lawsuit, Plaintiff claimed she had standing because she "will be deprived of representation in the Minnesota Senate due to now-Lieutenant Governor Fischbach's attempt to continue to hold the office of state senator . . . ."[7] The Court concluded Plaintiff lacked standing because she "alleged no harm to herself that is different than or unique from the potential harm suffered by all residents of Senate District 13[,]" and "failed to demonstrate that she was injured in a way that is any different than all residents of Senate District 13." (Order at Conclusion ¶¶ 1–2.) "The harm sustained by plaintiff is specific to no person. In fact, plaintiff offers no legal authority for the proposition that she has standing." (Order 19.)

Disregarding the Court's Order, Plaintiff doubled down on her previous claim that *she* would be deprived of representation in the senate by now alleging that *both* she and all "the constituents of Senate District 13" have been "deprived of representation in the Minnesota Senate."

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[6] "One recognized exception to this rule is an action brought by a taxpayer to challenge an illegal expenditure." *Channel 10, Inc.*, 215 N.W.2d at 820 (citations omitted); *see McKee v. Likins*, 261 N.W.2d 566, 570 (Minn. 1977) ("it generally has been recognized that a state or local taxpayer has sufficient interest to challenge illegal expenditures."). Plaintiff does not challenge an alleged improper or unlawful use of taxpayer funds. The taxpayer standing exception is therefore inapplicable.

[7] Compl. ¶ 18, *Dusosky v. Fischbach*, Ramsey Cnty. No. 62-CV-18-254 (Minn. Dist. Ct. Jan. 12, 2018).

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(Compl. ¶ 28.) This purported harm remains specific to no person. Plaintiff's lawsuit remains premised on the same general injury allegedly sustained by every person in Senate District 13. The only noticeable change to Plaintiff's standing argument is that she mimicked the Court's Order by adding this legal conclusion: "Plaintiff Dusosky suffered an injury which is 'special or peculiar from damage or injury sustained by the general public.' *See Channel 10, Inc. v. Ind. Sch. District. No. 709*, 215 N.W.2d 814, 820 (1974)." (Compl. ¶ 26.) However, Plaintiff alleges no new facts that establish injury-in-fact. (*See* Compl. ¶¶ 26–32.) She fails again to allege an actionable injury.

Moreover, Plaintiff's lawsuit is based on the false premise that she and the people of Senate District 13 were denied representation in the senate when Senator Fischbach assumed the additional title of lieutenant governor on January 3, 2018. Senator Fischbach was sworn into the senate on January 3, 2017,[8] and has represented Senate District 13 ever since. Plaintiff admits Senator Fischbach has acted as a senator since the legislature reconvened. (Compl. ¶¶ 19–22.) The people of Senate District 13, including Plaintiff, would only be denied representation in the senate if Senator Fischbach were removed from office. Ironically, that result is exactly what Plaintiff seeks to accomplish through this lawsuit.

Plaintiff alleges no specific injury that is peculiar and different from that allegedly sustained by every other person in Senate District 13. She has not sustained an injury-in-fact and does not fall within any recognized exception to the peculiarity requirement. Plaintiff lacks standing. This Court must dismiss the Complaint.

[8] As the Court noted in its Order, it is undisputed that Senator Fischbach was sworn into the senate on January 3, 2017. (Order at Finding ¶ 3.) This date is a matter of public record and readily verifiable. The Court may take judicial notice of this undisputed fact. Minn. R. Evid. 201.

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B. This Controversy Involves Nonjusticiable Political Questions.

A nonjusticiable political question arises where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department . . . or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." *Baker v. Carr*, 369 U.S. 186, 217 (1962) (identifying several other political question formulations); *e.g. Powell v. McCormack*, 395 U.S. 486, 518–19 (1969). The Minnesota Constitution provides three remedies to this political dispute which render this action nonjusticiable under the political question doctrine.

First, the constitution textually commits the exclusive power to determine the eligibility of its members to the senate: "Each house shall be the judge of the election returns and eligibility of its own members." MINN. CONST. art. IV, § 6. Only the senate may determine whether Senator Fischbach is eligible to remain in office. MINN. CONST. art. IV, § 6; *Derus v. Higgins*, 555 N.W.2d 515, 518 (Minn. 1996) (the "ultimate qualification of a member" of the legislature is "a matter reserved for the legislature."); *Pavlak v. Growe*, 284 N.W.2d 174, 179 (Minn. 1979) ("emphasiz[ing] the importance and exclusiveness of this legislative prerogative."); *Scheibel v. Pavlak*, 282 N.W.2d 843, 847–48 (Minn. 1979) (stating the supreme court lacks jurisdiction to issue a "final and binding decision" on the eligibility of members of the house of representatives, and issuing an advisory opinion instead); *see also Phillips v. Ericson*, 80 N.W.2d 513, 517–18 (Minn. 1957) ("The right of self-determination under this constitutional provision extends not only to the question of who won the election but eligibility as well."). Second, the constitution textually commits the exclusive power to expel a duly elected senator to the senate: "Each house may determine the rules of its proceedings, sit upon its own adjournment, punish its members for disorderly behavior, and with the concurrence of two-thirds expel a member[.]" MINN. CONST. art.

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IV, § 7. Third, the constitution textually commits the power to recall a legislator from office to Minnesota's voters. MINN. CONST. art. VIII, § 6; Minn. Stat. §§ 211C.01–211C.09 (recall statutes); *see generally In re Ventura*, 600 N.W.2d 714, 715 (Minn. 1999) (discussing the recall process). The availability of each of these constitutional remedies renders this civil action nonjusticiable.

Plaintiff now argues the Court must declare Senator Fischbach's senate seat vacant so a special election may be called. (Compl. ¶ 31.) This Court ruled on this precise issue in its February 12 Order: "In short, granting the relief sought by plaintiff in the context of the instant litigation would disregard the Minnesota Constitution's plain language and overrule cases recognizing the exclusive legislative prerogative to determine the eligibility of its members." (Order 17.)

The decision to remove Senator Fischbach from office lies entirely within the discretion of the senate and the voters of Senate District 13. Both have had ample opportunity to exercise that authority yet each has declined to do so. Their inaction ends the discussion. The Court cannot resolve this controversy without trampling upon the rights of the senate and the voters of Senate District 13. The Court must dismiss this action under the political question doctrine.

C. This Controversy Remains Unripe for Adjudication.

Ripeness, like standing, is a justiciability doctrine. *McCaughtry*, 808 N.W.2d at 338. Standing is concerned with "*who* may bring the challenge" while ripeness relates to "*when*" the lawsuit may be brought. *Id*. "The ripeness doctrine is based on the general principle that Minnesota courts will consider only redressable injuries." *State ex rel. Friends of Riverfront v. City of Minneapolis*, 751 N.W.2d 586, 592 (Minn. Ct. App. 2008) (citation omitted). "To establish a justiciable controversy, the litigant must show a direct and imminent injury." *Leiendecker v. Asian Women United of Minnesota*, 731 N.W.2d 836, 841 (Minn. Ct. App. 2007) (quotations omitted). The challenging party must demonstrate that the law "is, or is about to be, applied to [her]

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disadvantage." *Lee v. Delmont*, 36 N.W.2d 530, 537 (Minn. 1949). "Issues which have no existence other than in the realm of future possibility are purely hypothetical and are not justiciable. Neither the ripe nor the ripening seeds of controversy are present." *Id.*

Plaintiff has sustained no cognizable injury. As discussed above, her alleged injury rests on the false premise that she has been deprived of representation in the senate since Senator Fischbach assumed the additional title of lieutenant governor. Naturally, however, Plaintiff admits she has been represented in the senate by Senator Fischbach since the legislature reconvened. (Compl. ¶¶ 19–22.)

As the Court observed in its February 12 Order, things might be different if a plaintiff presented a *Stearns*-style scenario where Senator Fischbach cast the deciding vote on a law that specifically injured the plaintiff. That neither happened nor does Plaintiff allege it did. Senator Fischbach has not cast the deciding vote on a single law, and Plaintiff fails to identify any law that specifically injured her.

This controversy is also unripe because Senator Fischbach has not performed a single duty as lieutenant governor. Plaintiff argues the duties of senator and lieutenant governor are incompatible. Yet Plaintiff concedes Senator Fischbach has not performed any duty properly belonging to the lieutenant governor. (Compl. ¶¶ 48–49.) Senator Fischbach has not taken the oath of office of lieutenant governor and is therefore precluded from discharging the duties of that office. MINN. CONST. art. V, § 6. It is purely conjectural at this point whether Senator Fischbach will ever perform any duty belonging to the lieutenant governor. Further, while Governor Dayton *could* assign certain gubernatorial functions to Senator Fischbach, Minn. Stat. § 4.04, subd. 2, Plaintiff fails to identify any function the governor has assigned to her. The governor is required

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by law to file a written order with the secretary of state identifying any functions delegated to Senator Fischbach in her capacity as lieutenant governor. *Id*. There is no such order in the record.

The supreme court recently provided guidance for courts faced with political disputes like those here. *Ninetieth Minnesota State Senate v. Dayton*, 903 N.W.2d 609, 623–25 (Minn. 2017). If a potential political resolution exists, supreme court precedent counsels that the lawsuit must be dismissed. *Id*. at 626. Although the senate and voters of Senate District 13 have not taken any action against Senator Fischbach, they still could. That is their prerogative alone. Following the supreme court's direction, this Court should exercise restraint and allow these constitutional remedies to play out.

For these reasons, this controversy remains unripe for adjudication. The Court must dismiss the Complaint.

III. PLAINTIFF FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

The Court need not reach the merits of this case based on each of the grounds discussed above. Regardless, the Court should dismiss the Complaint for failure to set forth a legally sufficient claim for relief. Minn. R. Civ. P. 12.02(e). In making this determination, courts "consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003) (citation omitted). The court "review[s] the complaint as a whole, including the documents upon which [the plaintiff] rel[ies] to determine whether as a matter of law a claim has been stated." *Martens v. Minn. Min. & Mfg. Co.*, 616 N.W.2d 732, 740 (Minn. 2000). The court is not bound by legal conclusions stated in a complaint. *Finn v. All. Bank*, 860 N.W.2d 638, 653 (Minn. 2015).

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"When constitutional violations are alleged, the defendant must demonstrate the complete frivolity of the complaint before dismissal under Rule 12.02 is proper." *Elzie v. Comm'r of Pub. Safety*, 298 N.W.2d 29, 32, 33 (Minn. 1980); *Schocker v. State Dep't of Human Rights*, 477 N.W.2d 767, 768–71 (Minn. Ct. App. 1991) (affirming dismissal for failure to state a constitutional due process claim). Dismissal is appropriate "if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *N. States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963) (citation omitted).

"The doctrine of stare decisis directs [the Minnesota Supreme Court] to adhere to [its] former decisions in order to promote the stability of the law and the integrity of the judicial process." *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 604 (Minn. 2014) (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996)). As such, the court requires a compelling reason to overrule its precedent. *Id*.

The Minnesota Supreme Court has definitively ruled on the precise issue before this Court. *Stearns*, 75 N.W. 214. A senator does not cease to be a senator after becoming lieutenant governor by reason of a vacancy in that office. *Stearns*, 75 N.W. at 214. Critical to the court's decision was its finding that there were no "express words of the constitution imperatively requir[ing] such a construction." *Id*. at 213. That remains true today. There have been no changes to the constitution that compel a different outcome.

There is a presumption in ascertaining legislative intent that "when a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language[.]" Minn. Stat. § 645.17(4) (codifying this common law cannon of interpretation). It is therefore presumed that the legislature fully understood the constitutional constructions in *Stearns* and intended to place those

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constructions on each relevant piece of legislation drafted since *Stearns* was decided. If the legislature intended to supersede *Stearns*, it needed to do so expressly. It has not. Plaintiff does not allege otherwise.

Every constitutional provision discussed in *Stearns* has been amended since 1898. Most of those changes occurred during the constitution's 1974 rewrite.[9] *See* 1974 MINN. LAWS, ch. 409. A few amendments included substantive changes. Very few of those substantive changes are relevant to the analysis in *Stearns*. The two relevant, substantive changes are these: the lieutenant governor was removed as *ex officio* president of the senate, and the senate now elects its own presiding officer. 1971 MINN. LAWS 2033–34. These changes do not warrant ignoring the clear mandate expressed in *Stearns*. There is no compelling reason to overrule *Stearns*. The doctrine of stare decisis compels the Court to follow *Stearns*.

Just as definitively, this Court ruled that the power to remove a duly elected senator from office rests exclusively with the senate and the voters. The Court's unappealed decision is final and binding on the parties, and there is no surviving claim in Plaintiff's second attempt to litigate the same issue.

IV. THE MINNESOTA SENATE IS AN INDISPENSABLE PARTY.

The Court may also dismiss the Complaint for failure to join the senate as an indispensable party. Minn. R. Civ. P. 12.02(f), 19.02. Plaintiff also fails to meet the minimum pleading requirements under the UDJA: "When declaratory relief is sought, **all persons shall be made parties** who have or claim any interest which would be affected by the declaration, and no

[9] In 1974, the language in nearly every constitutional provision construed in *Stearns* was modernized, and most of those provisions were renumbered. None of the changes were meant to be substantive. 1974 MINN. LAWS 819. Any change that is "found to be in violation of the constitution or other than inconsequential to litigation . . . shall be without effect and severed from the other changes." *Id*.

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declaration shall prejudice the rights of persons not parties to the proceeding." Minn. Stat. § 555.11 (emphasis added); *Cincinnati Ins. Co. v. Franck*, 621 N.W.2d 270, 275 (Minn. Ct. App. 2001) (The UDJA "provides that all persons potentially affected by a declaratory action must be made parties to the action").

CONCLUSION

For these reasons, Defendant respectfully requests the Court grant its motion and dismiss the Complaint.

Respectfully submitted,

Dated: April 30, 2018

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ACKNOWLEDGEMENT

The undersigned acknowledges that sanctions may be imposed pursuant to Minn. Stat. § 549.211.

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