STATE OF MINNESOTA
IN SUPREME COURT
A17-1142

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

Respondents,

v.

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,

RESPONDENTS' MEMORANDUM IN RESPONSE TO THE COURT'S ORDER

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INTRODUCTION

The Court's September 8, 2017 Order (the "Order"), highlighted the precise issue that confronted the district court—resolving two conflicting provisions of the Minnesota Constitution. The first is the Governor's power to line-item veto items of appropriation passed by the Legislature. The second is the Minnesota Constitution's guarantee of three independent, functioning branches of government.

Faced with this conflict between separate provisions of the constitution, the district court correctly concluded that the exercise of the line-item veto authority cannot, under the facts of this case, override the rights of the citizens to an independent, functioning Legislature guaranteed by the constitution. As a result, the district court voided the line-item vetoes as unconstitutional. By its Order, this Court recognizes that principle, stating: "Constitutional powers may not be used 'to accomplish an unconstitutional result.' " (Order 2, Sept. 8, 2017 (quoting *Starkweather v. Blair*, 71 N.W.2d 869, 876 (Minn. 1955))). Thus, this Court recognizes that the current impasse raises doubt about the continuing functioning of the Legislature.

Although the parties have disagreed over the appropriate label to describe the result of the Governor's line-item vetoes, none dispute the district court's factual finding that the Governor's line-item vetoes of the funding to the Legislature for the 2018–2019 fiscal biennium effectively deprive the Legislature of its ability to function. *Add. 3* ¶*10*.[1] To prevent the Legislature from ceasing operations, the Governor proposes that the Court use its equitable power to order funding of the "core" legislative functions. The Order requests updated calculations from those presented to the district court, describing the date by which

[1] Citations to "Add." refer to the addendum to Appellants' principal brief.

the Senate and House will run out of money. These updated calculations provided in the Parties' Joint Statement on Carryover Funds, filed separately herewith, are not materially different from those presented to the district court.

The district court carefully analyzed the Separation of Powers Clause of the Minnesota Constitution and this Court's legal precedent and determined that the Separation of Powers Clause operates as a check on the Governor's line-item veto authority. The Order recognizes but has not resolved that issue.

Marbury v. Madison, 5 U.S. 137, 176 (1803), recognized and established the role of the judiciary to determine the constitutionality of the actions of the legislative and executive branches. Since *Marbury*, courts have repeatedly reaffirmed that executive action which transcends constitutional authority is void. *Id.* Applying that standard, the district court concluded the Governor's line-item veto of the entire appropriations to the Legislature violated the Separation of Powers Clause and was therefore void. The funds appropriated to the Legislature in the Omnibus State Government Appropriations bill, which became law when the Governor signed it on May 30, 2017, must be deemed available to the Legislature.

The record before this Court includes a valid judgment entered on July 20, 2017, that restores all the appropriations to the Legislature for the 2018–2019 fiscal biennium included in the Omnibus State Government Appropriations bill. That judgment remains in effect. The Legislature's entire operating budget is therefore funded by lawful appropriations. The issue of emergency court-ordered funding for core functioning will not ripen for adjudication unless this Court vacates the district court's judgment and remands this case for a decision on the remaining two counts of the Complaint requesting injunctive and mandamus relief.

Despite the district court's decision restoring the appropriations to the Legislature and its entry of final judgment on Count I, the Governor chooses to ignore that judgment. The Governor neither requested nor obtained a stay of the judgment. Instead, he agreed to fund the Legislature without asking the district court to revisit the judgment. *See ROA 41.*

DISCUSSION

I. THE CONSTITUTIONALITY OF COURT-ORDERED FUNDING IN THE ABSENCE OF AN APPROPRIATION.

A. The Legislature Is Currently Funded by Valid Appropriations.

This Court directed the parties to discuss the constitutionality of court-ordered funding to the Legislature after June 30, 2017. As noted above, there has been no court-ordered funding of the Legislature in light of the district court's July 19, 2017 order restoring the Legislature's appropriations. Any dispute over funding for the period from July 1 to July 19, 2017, is now moot.

The issue of court-ordered funding in the absence of an appropriation is not before this Court. The district court never decided the ability of courts to order such funding. That issue was raised in Counts II and III of the Complaint, which was specifically reserved by the district court for later decision. At this point in the litigation, this Court has no district court decision on court-ordered funding to review.

The Court referenced the preliminary injunction funding the Legislature through October 1, 2017. Neither party appealed any aspect of that order. If the parties sought to extend the order, the district court would need to initially rule upon such request. Given the district court's judgment, no further injunction is necessary since the appropriations to the Senate and the House for the 2018–2019 fiscal biennium remain in effect.

Even if this Court disagrees that the appropriations to the Legislature were restored by the district court's judgment, the preliminary injunction does not violate Article XI, section 1. Although the district court used a different calculus to conclude that temporary injunctive relief was authorized,[2] this is a classic case for injunctive relief that does not implicate the appropriation clause, Article XI, section 1. The Senate and the House claimed that the line-item vetoes of their appropriations exceeded the Governor's authority because they violated the Separation of Powers Clause. Thus, the vetoes became void and the appropriations became law. The relief sought merely to preserve the status quo and keep the Senate and House in operation until the legal issues could be adjudicated. The key finding turned on the fact there had been a valid appropriation because the line-item vetoes were invalid. In granting the temporary injunction, the district court did not judicially appropriate funding, but instead just found a likelihood that a legislative appropriation had already been passed into law.

B. Article XI, Section 1 of the Minnesota Constitution Prohibits Judicial Funding of the Legislature in the Absence of an Appropriation.

The judgment below restored the appropriations to the Legislature contained in the Omnibus State Government Appropriations bill. Any funding provided to the Legislature during the interim was consequently supported by a valid appropriation. Therefore, court-ordered funding is not at issue. The Legislature will nonetheless address the issue as requested by the Court.

[2] In its analysis, the district court concluded that Article XI, section 1 must give way to Article IV which requires that the Legislature to perform certain core functions. *ROA 30 at Conclusion ¶9*.

Article XI, section 1 of the Minnesota Constitution provides: "No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law." This provision was modeled after the United States Constitution. *See* U.S. CONST. art. I, § 9, cl. 7.[3] This Court has long-recognized that the Minnesota Legislature controls the power of the purse. *See State v. Iverson*, 145 N.W. 607, 608 (Minn. 1914); *Brayton v. Pawlenty*, 781 N.W.2d 357 (Minn. 2010) (describing the Legislature's primary role in the budget process). "The purpose of the Constitution in prohibiting the payment of money from the state treasury, except upon appropriation made by law, was intended to prevent the expenditure of the people's money without their consent first had and given." *Iverson*, 145 N.W. at 608.[4]

The Separation of Powers Clause forbids the Judiciary from exercising the power of the purse, and the constitution provides no exception. MINN. CONST. art. III, § 1. "[N]o branch can usurp or diminish the role of another branch." *Brayton*, 781 N.W.2d at 365 (citing MINN. CONST. art. III, § 1). "The Legislature has the primary responsibility to establish the spending priorities for the state through the enactment of appropriation laws. The executive

[3] "No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of receipts and expenditures of all public money shall be published from time to time." U.S. CONST. art. I, § 9, cl. 7.

[4] Minnesota statutes impose additional restrictions on expenditures from the treasury. *See* Minn. Stat. § 16A.57 (prohibiting spending without an appropriation); Minn. Stat. § 16A.14, subd. 3 (state agencies prohibited from spending until spending plan is approved); Minn. Stat. § 16A.14, subd. 4 (an agency's spending plan must be "within the amount and purpose of the appropriation."). Some statutes even impose criminal and civil liability, and establish cause for removing state employees from office who spend without an appropriation. *See* Minn. Stat. § 16A.15, subd. 3(a) (personal liability and removal for knowingly spending in excess or absence of appropriation); Minn. Stat. 16A.138 (criminal liability and removal for incurring indebtedness in excess or absence of appropriation); Minn. Stat. § 16A.139 (criminal liability and removal for spending for purpose contrary to purpose of appropriation).

branch has a limited, defined role in the budget process." *Id.* The Governor shares the power of purse through his authority to approve or veto a bill and line-item veto items of appropriation. MINN. CONST. art. IV, § 23. In *In re Clerk of Lyon County Courts' Compensation*, this Court held that it has inherent judicial authority to approve limited funding "necessary to preserve and improve the fundamental judicial function of deciding cases." 241 N.W.2d 781, 786 (Minn. 1976); *State v. Randolph*, 800 N.W.2d 150, 160–162 (Minn. 2011) (inherent authority to order state payment of indigent defense).[5] The Judiciary may have inherent authority to fund itself in the absence of an appropriation, but the Judiciary's powers of self-preservation cannot logically extend to funding legislative operations.

The express language of Article XI, section 1 and the Separation of Powers Clause of the Minnesota Constitution prohibit the Judiciary from ordering expenditures from the treasury to support the operation of the Legislature in the absence of an appropriation. Emergency core-function funding of the Legislature, as it has been ordered at various times by the Ramsey County District Court over the last sixteen years, therefore exceeds any power granted to the Judiciary.

The Legislature cannot perform its constitutionally-mandated core functions without funding. *Add. 3 ¶10*. Legislators cannot receive their constitutionally-mandated pay without funding. MINN. CONST. art. IV, § 9. As the district court noted, "the Governor concedes that his veto is invalid unless the court institutionalizes the extra-constitutional remedy of emergency funding by the Judicial Branch." *Add. 16*; *see also Apps.' Br. 18*. Unlike the limited

[5] *See also* Andrew W. Yates, *Using Inherent Judicial Power in a State-Level Budget Dispute*, 62 Duke L.J. 1463 (2013) (discussing inherent judicial authority, its limitations, and the concerns the power raises).

circumstances where this Court has considered funding judicial functions such as providing counsel to indigent defendants or paying clerks of court, prescribing funding for legislative operations requires an inherent exercise of discretion. Article IV, section 9, adopted by the voters at the 2016 general election, specifies the amount of compensation that must be paid to legislators. But every other funding decision—i.e., which functions to provide and how robustly to do so—involve the exercise of varied and often extensive levels of discretion. These are precisely the types of decisions that the political question doctrine cautions the courts against making, as discussed more fully below.

Since court-ordered funding is not constitutionally permitted, the Governor's line-item vetoes effectively prevent the Legislature from functioning and deprive the People of Minnesota of their constitutional right to a functioning Legislature. As a result, the Governor's line-item vetoes violate the Separation of Powers Clause and are unconstitutional. Limits to the Governor's "general authority to negative legislative action" exist when "the exercise of such authority by the chief executive would offend some other basic constitutional principle[.]" *Duxbury v. Donovan*, 138 N.W.2d 692, 698 (Minn. 1965). This Court must override the Governor's line-item vetoes to vindicate the people's right to a functioning legislature. Given the constitutional limitation precluding judicial appropriations to the Legislature, the district court recognized that core-function funding is not an acceptable, alternative remedy.

C. Other Potential Judicial Remedies and the Separation-of-Powers Concerns They Raise.

The Legislature has determined three other potential judicial remedies exist under the circumstances of this case. All three violate the Minnesota Constitution. The first option is judicially-ordered core-function funding as imposed by the Ramsey County District Court in

2001, 2005, and 2011. The second option is to direct the Governor to call a special session. The third option is for the Court to order continued funding of "necessary" legislative operations, not to exceed the appropriations enacted for the fiscal year 2017 by the Eighty-Ninth Legislature. All three options are discussed below along with their respective separation-of-powers implications.

1. The Ramsey County rule: core-function funding.

The Ramsey County District Court ordered temporary emergency funding of state government in 2001, 2005, and 2011. This Court has never reviewed, much less approved, this process. In each instance, the district court was forced to reconcile Article XI, section 1 with the requirement that some public services continued to be provided under the Minnesota Constitution.

The analysis in all three cases is virtually identical. The courts reconciled those provisions of the constitution by applying *State ex. rel. Mattson v. Kiedrowski*, 391 N.W.2d 777 (Minn. 1986), and Article I, section 1 of the Minnesota Constitution. The courts relied on *Mattson* for the proposition that each branch of government and every constitutional office perform core functions which may not be abridged. Findings of Fact, Conclusions of Law and Order at Conclusion ¶ 4, *In re Temp. Funding of Core Function of the Exec. Branch*, Ramsey Cnty. No. 62-C0-05-6928, 2005 WL 6716704 (Minn. Dist. Ct. June 23, 2005) (Johnson, C.J.). "Failure to fund these independent core functions, even temporarily, nullifies these constitutional offices, which in turn contravenes the Minnesota Constitution." *Add. 29 at Conclusion ¶3 (the 2011 temporary funding order)* (citing MINN. CONST. art. III, § 1; *Mattson*, 391 N.W.2d at 782; *In re Clerk of Lyon Cnty. Courts' Comp.* 241 N.W.2d at 784 (recognizing that if

one branch of government could "effectively abolish" another, the "separation of powers becomes a myth").

The core functions of each branch of government and constitutional office are delineated in the Minnesota Constitution. The Legislature's authority resides in Article IV. In 2011, the district court concluded the Legislature "must be funded sufficiently to allow them [*sic*] to carry out critical core functions necessary to draft, debate, publish, vote on and enact legislation." *Add. 30 at Conclusion* ¶*6*.

After determining the core functions of the various branches and constitutional offices, the district court appointed a special master to "hear and make recommendations" to the court on the core-function analysis. The special master held evidentiary hearings and determined which functions were necessary and what level of funding was required. The district court adopted the special master's recommendations and ordered expenditures from the treasury to pay for core government functions.

Justice Alan Page voiced concerns over the Ramsey County District Court's core-function funding approach, citing separation-of-powers issues, in his dissent in *Limmer v. Swanson*, 806 N.W.2d 838, 841–43 (Minn. 2011) (Page, J., dissenting). Core-function funding raises two significant constitutional concerns. First, it results in the Judiciary ordering expenditures from the treasury without an appropriation. This violates Article XI, section 1, of the Minnesota Constitution since the power to appropriate funds rests within the exclusive province of the Legislature, subject to the Governor's veto authority. As discussed above, core-function funding indisputably usurps the Legislature's power of the purse.

Second, core-function funding demands that the Judiciary determine the "core" functions of coordinate branches and the requisite amount of funding required to perform those functions. This usurps the Legislature's power of the purse, and violates the political question doctrine. A political question arises "where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.' " *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Core-function funding, as it was ordered in the foregoing cases, requires the Judiciary to determine which of the Legislature's and Executive Branch's myriad functions are necessary. Thereafter, the Judiciary must determine funding levels for each such function. This has happened despite the lack of any judicially manageable standards to guide the court's determination.

Emergency core-function funding does not become constitutional because it happened before or because the parties request it. *See State ex rel. Gardner v. Holm*, 62 N.W.2d 52, 60 (Minn. 1954) ("No unchallenged exercise of a power not granted to a branch of our government can serve to confer upon it such power when the clear language of the constitution either denies to it such power or confers such power upon another branch of government."). The justification for judicially-authorized funding of government appears to be as follows: somebody needs to step up and do it, so it might as well be the courts. That justification, while convenient to avoid government shutdowns, lacks textual support in the constitution.

2. Issuing a writ of mandamus requiring a special session.

This Court has stated it has the responsibility to safeguard the rights of citizens and the power to issue writs and processes necessary for the execution of the laws and furtherance of justice. *Randolph*, 800 N.W.2d at 159 (citations omitted). As with the authority to order spending, the Judiciary's inherent powers are limited to the "authority necessary to preserve and improve the fundamental judicial function of deciding cases." *In re Clerk of Lyon Cnty. Courts' Comp.*, 241 N.W.2d at 786. If the Court finds that its powers exceed those claimed in *Lyon County*, then it must decide its available powers and determine which power is the least invasive.

In assigning itself extra-constitutional powers, the Court emphasized that its inherent power "may not be asserted unless . . . reasonable legislative-administrative procedures are first exhausted. Intragovernmental cooperation remains the best means of resolving financial difficulties . . . ." *In re Clerk of Lyon Cnty. Courts' Comp.*, 241 N.W.2d at 786. This Court's Order directing the parties to mediation recognizes the importance of intragovernmental cooperation. However, another procedure exists through which the parties could resolve this dispute—a special session.

The Legislature must meet in regular session, but the constitution explicitly limits the duration of that session. MINN. CONST. art. IV, § 12. The Constitution gives the Governor the authority to call a special session on extraordinary occasions. *Id.* The Governor has refused to call a special session unless the Legislature agrees to his demands. *Add. 43–45.*

Negotiations between the Legislature and Governor are an integral part of the legislative process. Those disputes are best resolved when the Legislature is in session where

each branch has a full set of tools available to reach a compromise, and the interests of the citizens can be presented by their representatives. Ordering a special session re-starts the political process. Ordering core-function funding requires a detailed analysis of employee duties and internal budgets. Ordering a special session invades the Governor's authority. Ordering core-function funding invades the constitutional authority of both the Legislature and the Governor. A writ directing the Governor to call a special session without any conditions would be a lesser invasion of the powers entrusted to the other branches than judicial determination of core funding, but would still violate the separation-of-powers doctrine.

The Governor's power to call a special session is discretionary. MINN. CONST. art. IV, § 12. The Court cannot order the Governor to "exercise . . . an official power or duty conferred by the Constitution, or by valid law, involving the exercise of discretion." *State ex rel. Birkeland v. Christianson*, 229 N.W. 313, 314 (Minn. 1930).

3. Court-ordered funding of necessary legislative operations under prior appropriations.

Counts II and III of the Legislature's Complaint, which have not been decided by the district court or appealed to this Court, requested that the court order Appellants to allot "such funds as necessary to pay" for the Legislature carrying out its official and constitutional powers. Under this process, the Court would direct each body of the Legislature to spend only the amounts each determines are necessary to its continued operation. The process could be subject to review and precertification by a special master—in particular, for new items or to items with increased costs—before the court order applies to allotments. But the Court would not engage in determining what is "core" or what constitutes some undeterminable minimum

amount of legislative operations. Contrary to the core funding approach, this process minimizes interference with the independence of the Legislature and the potential encroachments on the separation of powers. The Legislature itself would determine what is necessary, and would be limited by the appropriations for fiscal year 2017 enacted by the Eighty-Ninth Legislature. How the process should be administered may be best left to the district court with general guidance from this Court. This option still requires court-ordered funding without an appropriation in violation of Article XI, section 9 of the Minnesota Constitution.

II. THE SHUTDOWN OPTION AND THE SEPARATION-OF-POWERS CONCERNS RAISED THEREBY.

Another option available to the Court is to uphold the Governor's line-item vetoes and force the Legislature to spend all remaining funds and then shut down until it is able to pass new appropriations for its operations. This may occur if the Court declares it does not have the authority to order funding in the absence of an appropriation or because the Court does not reach the issue of court-ordered funding without an appropriation. Either way, this option would trigger a cascade of negative consequences for the Legislature and the People of Minnesota. The harm will be acute in the short term and will alter the balance of power between the Governor and the Legislature in the long term.

If the Court upholds the Governor's vetoes and does not provide funding to the Legislature, the Senate and House will be forced to survive off their limited carryforward funds. The Senate will survive for no more than 60 days. The House will survive for no more than 120 days. When funds are exhausted, the Senate and House will have to furlough hundreds of employees. These projections do not take into account the substantial additional

costs necessitated by the shutdown (e.g., the employer portion of health insurance costs, anticipated unemployment insurance costs, and accrued paid-time-off for certain employees). *See ROA 25 ¶15; ROA 26 ¶18*. When these additional shutdown costs are included, the Senate and House carryforward funds will be exhausted much sooner. Of course, the length of time the carryforward funds will last depends on choices the Senate and House will have to make about prioritizing their obligation to staff, to vendors under contract, and to state agencies.

The impact of a shutdown will bleed into the regular session. Once carryforward funds are exhausted, the Senate and House will be unable to prepare for the session. There will be no staff to research and prepare bills, advise legislators, staff committees, and prepare memos for legislators about legislation that will be considered during the session. Legislators will not have funding to respond to the needs of their constituents. Once the session begins, the Legislature will have to attempt to function without staff and resources until it can pass new appropriations, subject to the Governor's line-item veto power.

Upholding the Governor's line-item vetoes will have a meaningful impact on the balance of powers in the long run as well. The Legislature's ability to enact a budget will be diminished by giving the Governor the power to unilaterally dictate the terms of appropriation bills (or potentially any bill), through the threat of line-item vetoing the appropriations to the Legislature.

III. AGA'S MOTION TO INTERVENE.

The Association for Government Accountability's (AGA's) attempt to intervene at this late stage of the appeal should be rejected for multiple reasons. It is untimely in the extreme. The parties agree that AGA has no place in this case. AGA lacks standing to assert its claims,

and cannot demonstrate grounds for intervention under Minnesota Rules of Civil Procedure 24.01 or 24.02. Furthermore, AGA's substantive legal arguments regarding subject matter jurisdiction are meritless. AGA's intervention, if permitted, will cause undue delay and prejudice to the parties and the people of the State of Minnesota. The Legislature respectfully requests this Court deny AGA's motion to intervene.

A. The Procedural Posture and Circumstances Surrounding AGA's Attempted Intervention.

AGA predicates its motion to intervene on an *ex parte* communication between its counsel's law office and some unidentified person at the district court, other than Judge Guthmann, that supposedly happened on September 6, 2017. (Decl. Erick G. Kaardal ¶ 9–10.) This individual allegedly said "Judge Guthmann believed he did not have jurisdiction over the motion to hear the matter" and "suggested any motion to intervene be directed to the Supreme Court." (Kaardal Decl. ¶ 10.) Judge Guthmann has not ruled on AGA's motion to intervene, or made any finding respecting the district court's jurisdiction. Given this backdrop, the Court should reject AGA's attempt to circumvent the district court's jurisdiction and catapult itself into the instant proceedings based on a vague, hearsay, and extra-record, *ex parte* communication.

AGA effectively seeks an extraordinary or emergency writ allowing it to intervene based on its own self-imposed exigency. AGA has been well aware of this case since it was initiated on June 13, 2017. AGA had already filed its own case challenging legislators' right to increased salaries authorized by Article IV, section 9 of the Minnesota Constitution.

("Legislative Salary Case").[6] AGA could have made its newfound arguments there, but it did not. AGA could have attempted to intervene then, but it did not. On June 26, 2017, Judge Guthmann held show-cause hearings in AGA's Legislative Salary Case and this case. Mr. Kaardal argued on behalf of AGA and was present for the entire argument in this case. He was well aware of the Legislature's and Governor's stated intention to seek accelerated review and an expedited briefing and argument schedule in this case, all of which was thoroughly discussed in open court. AGA could have sought to intervene then, but did not. Instead, AGA waited to file its notice to intervene in the district court until July 17, 2017. *ROA 32*.

Two days later, Judge Guthmann issued orders in this case declaring Governor Dayton's line-item vetoes unconstitutional and dismissing AGA's petition in the Legislative Salary Case for lack of standing and ripeness.[7] AGA could have refiled its suit or appealed the district court's order. It has not. The time for appeal expires on September 18, 2017. Minn. R. Civ. App. P. 104.01.

On July 26, 2017, this Court granted the parties' joint petition for accelerated review and motion for expedited briefing and oral argument. AGA could have sought to intervene and to relax relevant time limits then, but it did not. Minn. R. Civ. App. P. 126.02.

On August 2, 2017, this Court granted the Center of the American Experiment leave to file an amicus brief. AGA could have attempted to participate in this case as an amicus, but it did not.

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[6] *See Association for Government Accountability v. Myron Frans et al.*, Ramsey Cnty. No. 62-CV-17-3396 (Guthmann, C.J.) (dismissing AGA's claims for lack of standing and ripeness).

[7] *Order Dismissing Pet. Writ of Mandamus Without Prejudice*, Legislative Salary Case, Ramsey Cnty. No. 62-CV-17-3396 (Minn. Dist. Ct. July 19, 2017).

On August 15, 2017, the Legislature filed its principal brief, the amicus filed its brief, and both parties filed their objections to AGA's notice of intervention in the district court. *ROA 44*; *ROA 45*. AGA could have filed its motion to intervene then, but it did not. Instead, AGA inexplicably waited until 6:06 p.m. on August 25, 2017, the Friday before oral argument in this case the next Monday, to file its motion to intervene and relax the time limits. *ROA 46*; *ROA 47*. AGA had ample warning and time to file its motion to intervene or ask to participate as an amicus, but it waited until the eve of oral argument. Based on AGA's lack of diligence and the questionable circumstances surrounding its motion to intervene, this Court should not allow it to participate in this important matter at this late stage of the proceedings.

B. AGA Lacks Standing and Cannot Demonstrate Grounds for Intervention in any Event.

AGA does not have standing. *See Snyder's Drug Stores, Inc. v. Minnesota State Bd. of Pharmacy*, 221 N.W.2d 162, 165 (Minn. 1974) (standing required to intervene); *Town of Chester, N.Y. v. Laroe Estates, Inc.*, __ U.S. __, 137 S. Ct. 1645 (2017) (holding that "an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing."); *see also State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996) (discussing standing requirements generally). In order to have standing, a party must have suffered some "injury-in-fact" or be the "beneficiary of some legislative enactment granting standing." *Phillip Morris, Inc.*, 551 N.W.2d at 493 (citation omitted).

AGA's lack of standing here mirrors its lack of standing in the Legislative Salary Case. *See Order Dismissing Pet. Writ of Mandamus Without Prejudice*, Legislative Salary Case, Ramsey Cnty. No. 62-CV-17-3396 (Minn. Dist. Ct. July 19, 2017). AGA cannot demonstrate it has suffered some injury-in-fact "which differs from injury to the interests of other citizens generally." *In*

re Complaint Against Sandy Pappas Senate Comm., 488 N.W.2d 795, 797 (Minn. 1992). Additionally, AGA is not the beneficiary of a law granting standing and does not allege otherwise. AGA has not demonstrated standing to intervene, and this Court should therefore deny its motion.

Even if AGA had standing, it cannot demonstrate grounds for intervention under Minnesota Rule of Civil Procedure 24.01 or 24.02. A party must establish the following to intervene as a matter of right: "(1) a timely application for intervention, (2) an interest relating to the property or transaction which is the subject of the action; (3) circumstances demonstrating that the disposition of the action may as a practical matter impair or impede the party's ability to protect that interest; and (4) a showing that the party is not adequately represented by the existing parties." *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 207 (Minn. 1986) (citing Minn. R. Civ. P. 24.01; *State ex rel. Bilder v. Township of Delavan*, 334 N.W.2d 252 (Minn. 1983)). In determining whether to allow permissive intervention, "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Minn. R. Civ. P. 24.02.

AGA's motion to intervene should be denied because it is unjustifiably untimely under the circumstances of this case. "The factors to be considered in determining timeliness include how far the suit has progressed at time of intervention, the reason for the delay, and the possible prejudice of the delay to the existing parties." *SST, Inc. v. City of Minneapolis*, 288 N.W.2d 225, 230 (Minn. 1979) (citing *NAACP v. New York*, 413 U.S. 345, 366-69 (1973)). AGA's intervention motion is untimely given the advanced procedural posture of this case and AGA's inexplicable delay. The parties and amicus filed their briefs, oral argument is

complete, and this Court took the case under advisement. AGA had every opportunity to attempt to participate along the way and chose to wait until now to seek entry into the case. *See State Auto. & Cas. Underwriters v. Lee*, 257 N.W.2d 573, 576 (Minn. 1977) (intervention untimely where judgment was entered and satisfied, party was aware of commencement of action, and no just reasons for delay given). This case has progressed too far to allow belated intervention, especially since AGA cannot demonstrates no just reason for its delay.

AGA's motion to intervene is also untimely because it would "unduly and adversely affect the rights of the existing parties." *Engelrup v. Potter*, 224 N.W.2d 484, 489 (Minn. 1974). As the Court is well aware, the district court's order granting temporary funding expires on October 1, 2017. *ROA 41*. Every day that passes without resolution of this case increases the prejudice to the parties and the people of Minnesota. The impending harm and risks are not imaginary or hypothetical. Furloughs and layoffs will occur and the state's credit rating may be substantially downgraded. *See ROA 25*; *ROA 26*. To avoid these hardships, the parties sought accelerated review and an expedited schedule for this appeal. AGA's intervention, if allowed, will interject new issues previously not a part of this case, not raised or decided by the district court, and not before this Court. AGA's intention to appeal the district court's temporary funding order will ensnare the parties and the courts in additional litigation. The resulting delay will increase the prejudice to the parties and the all Minnesotans.

AGA's motion to intervene also fails because the existing parties adequately represent any claimed interest AGA actually might have in this action.

For all these reasons, this Court should deny AGA's motion to intervene.

C. AGA's Substantive Claims Are Meritless.

Normally, the court does not reach the merits of the pleadings when considering a motion to intervene. *Snyder's Drug Store*, 221 N.W.2d at 164. The Court has asked the parties to address AGA's substantive claims regarding subject matter jurisdiction. AGA contends the Court lacks subject matter jurisdiction because: (1) this case presents a nonjusticiable political question based on AGA's interpretation of *State v. Hoppe*, 215 N.W.2d 797 (Minn. 1974);[8] and (2) the Uniform Declaratory Judgments Act does not provide a private cause of action. AGA's claims are meritless.

1. AGA's political question argument.

AGA argues this case presents a nonjusticiable political question because the Legislature can still attempt to override Governor Dayton's line-item vetoes because "it *has not* entered into final adjournment of the session." (AGA's Mem. 6.) This argument fundamentally misunderstands both the facts of this case and legislative procedure generally.

AGA's argument rests on the false premise that the 2017 First Special Session is part of the 2017–2018 regular session.[9] A special session by nature is a distinct, self-contained legislative session. A special session is entirely separate from the regular session. Procedurally speaking, the legislative process starts over from scratch at the beginning of a special session.

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[8] *Hoppe* is a highly technical discussion of legislative procedure in the aftermath of the 1972 constitutional amendment that changed the time during which the Legislature may meet. 215 N.W.2d 797. It does not discuss the effect of the 1972 amendment on special sessions or the line-item veto power.

[9] The regular session is a single, two-year legislative session. MINN. CONST. art. IV, § 12. The current regular session began in 2017 and ends in 2018. We are currently in the interim of the 2017–2018 regular session. In practice, however, each year of the biennial session is informally referred to as a regular session.

The end of every special session results in final adjournment.[10] Final adjournment prevents the return of legislative bills vetoed by the Governor. *Hoppe*, 215 N.W.2d at 804; MINN. CONST. art. IV, § 23. The Legislature cannot attempt to override a veto or line-item veto after it has adjourned a special session *sine die*.

Here, the Legislature was in special session when it adjourned *sine die* and presented the Omnibus State Government Appropriations bill to Governor Dayton. The Governor then line-item vetoed the appropriations to the Legislature. The Legislature cannot ever attempt to override the Governor's line-item vetoes. These facts are indisputable. AGA's argument therefore fails. As the district court concluded and the Legislature addressed in its principal brief, this case does not present a nonjusticiable political question.

2. The Uniform Declaratory Judgments Act.

AGA further claims the district court lacks subject matter jurisdiction because the Minnesota Constitution does not provide a private cause of action under the Uniform Declaratory Judgments Act. Minn. Stat. ch. 555. The AGA suggests the Legislature should have filed a petition for a writ of quo warranto. This Court's precedent refutes AGA's contention. *See Seventy-Seventh Minnesota State Senate v. Carlson*, 472 N.W.2d 99 (Minn. 1991) (dismissing petition for writ of quo warranto and holding that proper procedure to challenge effectiveness of veto power was to seek declaratory judgment); *Inter Faculty Organization v. Carlson*, 478 N.W.2d 192, 193 (Minn. 1991) (reiterating the holding in *Seventy-Seventh Minnesota*

[10] In *Hoppe*, this Court defined "adjournment" as used in what is now MINN. CONST. art. IV, ¶§ 23 to mean "final adjournment" or "adjournment *sine die*." 215 N.W.2d at 800; *accord State ex rel. Putnam v. Holm*, 215 N.W. 200, 203 (Minn. 1927). While final adjournment and adjournment *sine die* are synonymous, the latter term is used more often in practice.

State Senate, and "recasting" petition for writ of mandamus as declaratory judgment action challenging line-item vetoes); *see also Johnson v. Carlson*, 507 N.W.2d 232 (Minn. 1993) (reviewing declaratory judgment action challenging line-item vetoes).

In each of these previous cases, members of the Legislature brought an action challenging the Governor's veto or line-item veto authority under MINN. CONST. art. IV, § 23. It is clear from this Court's precedent that the Minnesota Constitution provides a cause of action to challenge the validity of a veto or line-item veto under the Uniform Declaratory Judgments Act. The only difference here is that Governor Dayton's line-item vetoes ran afoul of both MINN. CONST. art. IV, § 23, and the Separation of Powers Clause. The fact that the Legislature challenges the Governor's line-item veto under an additional provision of the constitution does not somehow deprive the Court of jurisdiction. The Legislature's challenge to Governor's Dayton's line-item vetoes under the Uniform Declaratory Judgments Act was proper.

CONCLUSION

During the 2017 regular and special sessions, the Legislature debated and adopted comprehensive legislation on behalf of the citizens of Minnesota. Legislative leaders and the Governor negotiated changes to the bills in several give-and-take sessions during the final days and hours of the Special Session. None of the major pieces of legislation had yet become law, and nearly every point of policy and dollar of appropriation was a potential bargaining chip. By the end of the 2017 special session, legislative leaders and the Governor agreed on the final

components of the comprehensive legislative framework.[11] Many provisions important to virtually every legislator lay on conference room floors at the end of that process but the Legislature and Governor were able put together a complex web of legislation that would enable the government to function over the next biennium. The Legislature revised the bills as modified in the negotiations, the Governor's staff reviewed them, and the Legislature passed the bills before adjourning *sine die*, as it has done under control of both parties for decades, and the Governor signed them into law.

However, despite his agreements, the Governor changed his mind about five individual provisions in that comprehensive package of legislation. He chose not to veto the bills containing the provisions he wanted to renegotiate and call a special session, but instead used his line-item veto power to strike the appropriations for the Legislature's biennial budget in an unconstitutional, post-session attempt to extort the Legislature to agree to a special session conditioned on the Governor's terms.

The district court found as a matter of fact that the elimination of funding for the Legislature for the next biennium effectively eliminated its ability to perform the functions delegated to it by Article IV of the Minnesota Constitution. That violated the Separation of Powers Clause of the Minnesota Constitution. The district court correctly concluded the Separation of Powers Clause operates as a limit on the line-item veto authority of the

[11] The Governor has made much of the insurance provision the Legislature included in the Omnibus State Government Appropriations that would have denied appropriations to the Department of Revenue if the Governor refused to honor his agreement to sign the Omnibus Tax bill—the so-called "poison pill." This "insurance" provision was intended to become operative *only if* the Governor reneged on his agreement with the Legislature to sign the Omnibus Tax bill.

Governor. A line-item veto that substantially interferes with the functioning of a coordinate branch of government violates the Separation of Powers Clause, and is therefore null and void. Because the line-item vetoes were unconstitutional, the appropriations were included in the Omnibus State Government Appropriations bill. These appropriations remain available to fund the Legislature. This Court need go no further to speculate on funding issues that are not fairly presented by the district court decision.

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