Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

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-18-254 Chief Judge John H. Guthmann **DEFENDANT'S MEMORANDUM OPPOSING PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION AND CONSOLIDATION**

INTRODUCTION

Senator Michelle Fischbach has served in the Minnesota Senate for nearly 22 years. Senator Fischbach represents the over 80,000 residents of Senate District 13 which includes Benton and Stearns Counties. She is also the president of the senate. Three years remain in her current term. By operation of law, Senator Fischbach became lieutenant governor when Tina Smith resigned to take Al Franken's seat in the United States Senate.

Minnesota Supreme Court precedent unequivocally allows Senator Fischbach to be both a senator and lieutenant governor. *State ex rel. Marr v. Stearns.* 75 N.W. 210, 214 (Minn. 1898), *rev'd on other grounds*, 179 U.S. 223 (1900). Senator Fischbach is the eighth senator to simultaneously serve as lieutenant governor. Neither the Minnesota Constitution nor the lieutenant governor's duties have materially changed since *Stearns* was decided. *Stearns* remains controlling.

Plaintiff demands this Court assume the role of the supreme court and overrule the *Stearns* decision. The doctrine of stare decisis directs that the Court follow the *Stearns* decision. Plaintiff demands the Court remove Senator Fischbach from the senate. The constitution forbids the Court from doing so. MINN. CONST. art. III, § 1; *id*. art. IV, § 6; *e.g.*, *Scheibel v. Pavlak*, 282 N.W.2d

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

843, 847–48 (Minn. 1979). The senate is the sole judge of "the eligibility of its own members." MINN. CONST. art. IV, § 6. Plaintiff demands the Court usurp the senate's constitutional right without joining it as a party to this lawsuit despite Minnesota law requiring that the senate be afforded an opportunity to defend its constitutional interests. Minn. R. Civ. P. 19.01; Minn. Stat. § 555.11. The purpose of a temporary injunction is to preserve the status quo until the case can be decided on its merits. Plaintiff demands the Court throw a duly-elected, eight-term senator out of the senate. That would certainly upset the status quo and also deny the people of Senate District 13 representation in the senate for potentially all of 2018. The constitution was intended to prevent that very scenario. *Stearns*, 75 N.W. at 212.

The *Dahlberg* factors weigh heavily against granting injunctive relief. Plaintiff is unlikely to prevail on the merits of the case because the supreme court has decisively ruled on the very issue before the Court. Granting Plaintiff's motion will cause substantial, irreparable harm to the people of Senate District 13, Minnesotans generally, and Senator Fischbach personally. This Court should deny Plaintiff's motion and allow Senator Fischbach to continue serving the people of Senate District 13 while the available constitutional remedies play out.

FACTS

The Political Battle for Control of the Minnesota State Senate

Senator Fischbach was first elected to the Minnesota State Senate in 1996. (Aff. of Brett D. Kelley ¶ 7, January 30, 2018). On January 3, 2017, Senator Fischbach was sworn into office and began her eighth consecutive term in the senate. (Kelley Aff. ¶ 7.) She represents Senate District 13, which includes Benton and Stearns Counties. (Kelley Aff. ¶ 7.) Senate District 13 has 80,639 residents. (Kelley Aff. ¶ 7.) Senator Fischbach's current senate term expires in January 2021. (Kelley Aff. ¶ 7.)

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

On January 2, 2018, United States Senator Al Franken resigned from office. (Compl. ¶ 5.) Governor Mark Dayton called a special election to fill the seat vacated by Senator Franken. Minn. Stat. § 204D.28, subd. 6. The special election will occur on November 6, 2018. (Kelley Aff. ¶ 10.) Governor Dayton appointed his lieutenant governor, Tina Smith, to temporarily fill former Senator Franken's seat in the interim. (Compl. ¶ 7.) Lieutenant Governor Smith resigned from office on January 2, 2018, and was sworn into the United States Senate on January 3, 2018. (Compl. ¶ 7.) This created a vacancy in the lieutenant governor's office.

Under the Minnesota Constitution, "[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. Since Senator Fischbach was the last elected senate president when former Lieutenant Governor Smith resigned, Senator Fischbach became acting lieutenant governor by operation of law. (Kelley Aff. ¶ 7, 12.) Her term as acting lieutenant governor expires in January 2019 contemporaneously with the end of Governor Dayton's term.

The 2018 yearly session of the Minnesota Legislature begins on February 20, 2018. (Kelley Aff. ¶ 14.) Governor Dayton could call a special session earlier, but has chosen not to do so. MINN. CONST. art. IV, § 12. Once in session, the senate could elect a new president who would become lieutenant governor if another vacancy occurred in that office. MINN. CONST. art. IV, § 15; *id*. art. V, § 5.

On February 12, 2018, there will be a separate special election to fill a senate office formerly held by Democratic Senator Dan Schoen.[1] (Kelley Aff. ¶ 9.) Senate Republicans

[1] On December 15, 2017, Senator Schoen resigned from the senate. (Kelley Aff. ¶ 9.) Governor Dayton was required to call a special election to fill the vacant seat. Minn. Stat. § 204D.17, subd.1.

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

currently hold a 34 to 32 majority in the senate. (Kelley Aff. ¶ 13.) The outcome of that special election and this Court's decision may dramatically alter the balance of power in the senate.

Historical Precedent Supports Senator Fischbach Simultaneously Serving as Senator and Lieutenant Governor

Senator Fischbach became the 49th lieutenant governor of Minnesota. (Kelley Aff. Ex. 2.) She is the tenth senator to become lieutenant governor by reason of a vacancy in that office. (Kelley Aff. Ex. 2.) Seven of the nine previous senators who become lieutenant governor did not resign their senate seat and acted as both senator and lieutenant governor. (Kelley Aff. Ex. 2.) The other two voluntarily resigned from the senate.[2] (Kelley Aff. Ex. 2.) Litigation resulted in only one of these nine instances. *Stearns*, 75 N.W. 210. In *Stearns*, the supreme court unequivocally held that the affected senator "did not cease to be a senator when he became lieutenant governor." *Id*. at 214. That decision remains controlling.

The Minnesota Attorney General's Office has issued three published opinions discussing whether the last elected presiding officer of the senate ceases to be a senator after becoming lieutenant governor due to a vacancy.[3] Minn. Op. Atty. Gen. 280h (June 24, 1939); Minn. Op. Atty. Gen. 280k (May 3, 1943); Minn. Op. Atty. Gen. 280k (Dec. 17, 2017).[4] The 1939 and 1943 opinions affirmed the *Stearns* holding. The December 2017 opinion also reaffirmed that *Stearns* remains controlling. Minn. Op. Atty. Gen. 280k at 6 (Dec. 17, 2017). The current attorney general

[2] The two senators who voluntarily resigned were Archie H. Miller in 1943 and Alec G. Olson in 1976. (Kelley Aff. Ex. 2.)

[3] Plaintiff submitted a 1976 legal memorandum from the attorney general's office. (Aff. of Charles N. Nauen Ex. D, Jan. 19, 2018.) That memorandum is not a published, formal opinion. Regardless, it is well-settled that "[o]pinons of the Attorney General are not binding on the court." *Star Tribune Co. v. Univ. of Minn. Bd. Of Regents*, 683 N.W.2d 274, 289 (Minn. 2004).

[4] The 1939 and 1943 attorney general opinions are attached to the Kelley Affidavit as Exhibits 3 and 4.

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

opined, however, that a "strong **argument** can be made that the 1898 decision of the Minnesota Supreme Court in *Marr* does not control the outcome of this dispute in light of the subsequent changes to the duties of the lieutenant governor." *Id*. at 6 (emphasis added).[5]

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THIS POLITICAL DISPUTE, PLAINTIFF HAS AN ADEQUATE REMEDY AT LAW, AND THE *DAHLBERG* FACTORS WEIGH HEAVILY AGAINST GRANTING THE TEMPORARY INJUNCTION.

A temporary injunction is an "extraordinary remedy," the purpose of which is to preserve the status quo of the case until the matter can be adjudicated on its merits. *Morse v. City of Waterville*, 458 N.W.2d 728, 729 (Minn. Ct. App. 1990), *rev. denied* (Sept. 28, 1990) (citations omitted). Thus, "an injunction will be granted only when the party's legal remedies are inadequate and only to prevent great and irreparable injury." *Hideaway, Inc. v. Gambit Invs., Inc.*, 386 N.W.2d 822, 824 (Minn. Ct. App. 1986) (citation omitted). "An injunction will not be granted to prevent a mere assumption of a possible result; rather, some irremediable damage must be shown." *Id*. (citing *Indep. Sch. Dist. No. 35, Marshall Cnty. v. Engelstad*, 144 N.W.2d 245, 248 (Minn. 1966)). To prevail, the moving party must show irremediable damage and that the threatened injury is "real and substantial." *Id*. Failure to show irreparable harm is, by itself, a sufficient basis to deny injunctive relief. *Morse*, 458 N.W.2d at 729. The decision to grant or deny a temporary injunction rests within the discretion of the court. *Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203, 209 (Minn. 1993).

[5] The supreme court refers to *State ex rel. Marr v. Stearns* in short form as "*Stearns*" rather than "*Marr*." *See, e.g., League of Women Voters Minnesota v. Ritchie*, 819 N.W.2d 636, 647 (Minn. 2012); *Breza v. Kiffmeyer*, 723 N.W.2d 633, 636 (Minn. 2006).

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

A. The Court Lacks Subject Matter Jurisdiction over this Political Dispute Because the Controversy Involves Nonjusticiable Political Questions and Is Unripe for Adjudication.[6]

1. This controversy involves two nonjusticiable political questions.

The Minnesota Constitution provides two clear remedies to this political dispute which deprive the Court of subject matter jurisdiction. First, only the senate may determine whether Senator Fischbach may remain a senator. MINN. CONST. art. IV, § 6. Second, the power to recall Senator Fischbach from office belongs exclusively to the voters of Senate District 13. *Id*. art. VIII, § 6. Each of these constitutional remedies renders this case nonjusticiable under the political question doctrine. The Court should exercise judicial restraint and allow these remedies to play out.

Although "the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid[,]' there is a narrow exception to that rule, known as the 'political question doctrine.' " *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194–95 (2012) (quoting *Cohens v. Virginia*, 19 U.S. 264, 404 (1821)). 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)). Although "[i]t is the 'province and duty' of the Judiciary to 'say what the law is,' . . . principles of judicial restraint dictate that [the Judiciary] defer to the constitutional remedies that are available to the other branches." *Ninetieth Minnesota State Senate v. Dayton*, 903 N.W.2d 609, 625 (Minn. 2017) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

[6] This section falls within the "likelihood of success on the merits" factor of the *Dahlberg* analysis. It was moved to the forefront of this discussion for organizational purposes and because subject matter jurisdiction is a threshold issue.

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

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; *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). "This legislative prerogative has been universally adopted in America, and now every state constitution contains a provision similar to Minnesota's Article IV, Section 6." *Scheibel*, 282 N.W.2d at 847. The senate holds the sole power to determine Senator Fischbach's eligibility to hold her senate seat. That determination lies entirely within the senate's constitutional prerogative. *Id.* "[T]here is no question of the Legislature's final authority in this matter." *Id.* The senate could ignore any judicial determination of Senator Fischbach's eligibility to remain a senator. The resulting tension is precisely what the political question doctrine seeks to avoid.

Plaintiff demands that the Court declare that Senator Fischbach's seat became vacant automatically when she became lieutenant governor. In order to declare Senator Fischbach's senate seat vacant, the Court must determine that Senator Fischbach is ineligible to remain a senator. *See* Minn. Stat. § 351.02 (listing the circumstances where a public office becomes vacant). That determination belongs to the senate. MINN. CONST. art. IV, § 6.

The second constitutional remedy is a recall petition. MINN. CONST. art. VIII, § 6. The power to recall a legislator belongs exclusively to Minnesota's voters: "A member of the senate or the house of representatives . . . is subject to recall from office by the voters." MINN. CONST. art.

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

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 a recall petition renders this case nonjusticiable.

At its roots, this case represents a political fight between Democrats and Republicans over control of the Minnesota Senate for the 2018 yearly session. It poses clear political questions. Both the senate and Minnesota's voters possess constitutional authority to resolve this dispute through the political process. "The impasse that led the parties to the courtroom stems from disputes that are ill-suited for judicial resolution." *Ninetieth Minnesota State Senate*, 903 N.W.2d at 623. Senator Fischbach respectfully requests the Court exercise judicial restraint and allow these clear constitutional remedies to run their course.

2. This controversy is unripe for adjudication.

"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). "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)).

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

"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). Likewise, an issue is not justiciable when "further factual development would 'significantly advance [the court's] ability to deal with the legal issues presented.' " *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 812 (2003) (quoting *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 82 (1978)).

"[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).

Plaintiff alleges harm from Senator Fischbach being both senator and lieutenant governor and exercising the duties of each office. Plaintiff's claim that Senator Fischbach is exercising the duties of both offices is purely hypothetical. To date, Senator Fischbach has not exercised a single duty as lieutenant governor. Indeed, she has not taken the oath of office of lieutenant governor and therefore cannot exercise any of the duties of that office. MINN. CONST. art. V, § 6. Additionally, the legislature is not yet in session. Thus, Senator Fischbach cannot exercise her constitutional duties as a senator until the legislature convenes in session. Plaintiff cannot argue that Senator Fischbach is exercising conflicting constitutional powers until (1) Senator Fischbach takes the oath of office of lieutenant governor and exercises some duty as lieutenant governor; and (2) the legislature convenes in session. The case will not ripen until both those conditions are met.

Further factual development will also help the Court deal with the legal issues. *Nat'l Park Hospitality Ass'n*, 538 U.S. at 812; *McCaughtry*, 808 N.W.2d at 338. This political dispute will continue to unfold over the coming weeks and months. Key events will directly affect the outcome

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

of this case. The first is the February 12, 2018 special election for former Senator Schoen's seat. If a Republican wins, Senate Republicans will enjoy a 35 to 32 majority. The Senate Democrats would be unable to deadlock the senate at 33 to 33, and the political impetus for this case may dissipate. The second significant event will happen on or shortly after February 20, 2018, when the legislature returns to session and the senate votes on Senator Fischbach's eligibility to hold office. The result of that vote cannot be predicted. The Court should allow these events to play out before considering the extraordinary measure of judicially enjoining a duly-elected, eight-term senator from representing her district.

B. Plaintiff Has an Adequate Remedy at Law Which Bars Injunctive Relief.

"Injunctions ought not to be granted in any case except where it is clear that any legal remedy the party may have is inadequate." *AMF Pinspotters, Inc. v. Harkins Bowling, Inc.*, 110 N.W.2d 348, 351 (Minn. 1961). As discussed above, Plaintiff may petition to recall Senator Fischbach from office. MINN. CONST. art. VIII, § 6; Minn. Stat. §§ 211C.01–211C.09. The purpose of Plaintiff's lawsuit is to remove Senator Fischbach from office. A successful recall petition accomplishes that result.

Plaintiff hopes for a supreme court decision overruling *Stearns*. Her hope lacks merit since the courts do not "decide cases merely to establish precedent." *Jasper*, 642 N.W.2d at 439. Plaintiff has an adequate remedy at law. The Court should therefore deny her motion.

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

C. The *Dahlberg* Factors Weigh Heavily Against Granting the Injunction.

The Court need not consider the *Dahlberg* factors since Plaintiff has an adequate legal remedy. Nonetheless, the *Dahlberg* factors weigh against granting an injunction. After a party demonstrates irreparable harm, the Court must consider the following five factors:

1) The nature and background of the parties' relationship prior to the dispute;
2) The harm to be suffered by the moving party if the temporary injunction is denied compared to that inflicted on the other party if an injunction is granted;
3) The probability that the moving party will succeed on the merits;
4) The public policy considerations involved; and
5) The administrative burden involved in judicial supervision and enforcement of the temporary decree.

Dahlberg Bros., Inc. v. Ford Motor Co., 137 N.W.2d 314, 321–22. (Minn. 1965). "A primary factor in determining whether to issue a temporary injunction is the proponent's probability of success in the underlying action." *Minneapolis Fed'n of Teachers, AFL-CIO, Local 59 v. Minneapolis Pub. Sch., Special Sch. Dist. No. 1*, 512 N.W.2d 107, 110 (Minn. Ct. App. 1994) (citation omitted), *rev. denied* (Mar. 31, 1994).

1. Plaintiff fails to demonstrate a likelihood of success on the merits.

"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 precise issue before this court was unequivocally decided in *Stearns*, 75 N.W. at 214. Because there is no compelling reason to disturb that decision, the doctrine of state decisis compels the Court to adhere to the decision in *Stearns*.

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

Stearns remains controlling and will be examined below. In light of Plaintiff's reliance on the attorney general's December 2017 opinion, we will discuss the relevant constitutional amendments since 1898, and the lieutenant governor's constitutional and statutory duties since 1857 to refute any suggestion they undercut the reasoning in *Stearns*.

a. The *Stearns* decision.

Senator Frank Day was elected by the senate as president *pro tempore*. *Stearns*, 75 N.W. at 210. The governor resigned six days later and the lieutenant governor became the governor. *Id*. Senator Day "performed the duties of, and acted as, lieutenant governor" for the remainder of the legislative session. *Id*. Senator Day continued to "act and vote as a senator" until the close of session. *Id*. Subsequently, a lawsuit sought to invalidate a law that Senator Day had voted to pass. *Id*. The lawsuit contended that Senator Day ceased to be a senator when he became lieutenant governor. *Id*. The supreme court disagreed, concluding that the president *pro tempore* does not cease being a senator after succeeding to the office of lieutenant governor by reason of a vacancy in that office. *Stearns*, 75 N.W. at 214. In reaching this conclusion, the court construed and harmonized the following provisions of the constitution: MINN. CONST. art. III, § 1 (1857); *id*. art. IV, §§ 1, 3, 5, 9; *id*. art. V, §§ 1, 6; *id*. art. XIII, §§ 1, 3, 4.

The court began its analysis with the Separation of Powers Clause of the constitution which divides the government into the legislative, executive, and judicial departments, and prohibits any "person or persons belonging to or constituting one of these departments from exercise[ing] any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution." MINN. CONST. art. III, § 1 (1857). The court then discussed the various constitutional duties required of the lieutenant governor and the president *pro tempore*. *Stearns*, 75 N.W. at 210–212. The lieutenant governor served as *ex officio* president of the senate, and "in

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

case a vacancy shall occur, from any cause whatever, in the office of governor, he shall be governor during such vacancy." *Id*. at 210. The lieutenant governor was the only executive constitutional officer who was not subject to impeachment. *Id*. at 212; MINN. CONST. art. XIII, § 1 (1857). The lieutenant governor was also prohibited from sitting on the impeachment trial of the governor. *Stearns*, 75 N.W. at 212; MINN. CONST. art. XIII, § 4. The senate was required to elect a president *pro tempore* before the close of each session, MINN. CONST. art. IV, § 5 (1857), "who shall be lieutenant governor in case a vacancy shall occur in that office." *Stearns*, 75 N.W. at 210 (citing MINN. CONST. art. V, § 6 (1857)) (other citations omitted). All impeachments were tried by the senate. *Id*.; MINN. CONST. art. IV, § 14 (1857).

The court emphasized that "[t]he constitution was intended to provide a complete and harmonious scheme of state government, and to provide against the possibility of any interregnum in the office of governor, or interruption in the exercise of the functions and powers of that office." *Stearns*, 75 N.W. at 212.

The first provision construed was Article V, section 6, which provided for the succession to offices of governor and lieutenant governor. *Stearns*, 75 N.W. at 212. The court characterized the nature of a vacancy in the office of governor as follows:

> It is clear that the vacancy in the office of governor provided for by the constitution may arise from a variety of causes, such as his death, resignation, impeachment, illness, or absence from the state, that it is necessarily permanent or temporary according to the facts of each case, that the lieutenant governor is governor only during such vacancy, and that in case of a temporary vacancy he is governor only for the time being, and, when the temporary vacancy ends, the governor returns to his office, and the lieutenant governor to his.

Id. at 213. Thus, the court opined, "the office of lieutenant governor does not become absolutely and permanently vacant, as to that officer, as soon as he is called upon to act as governor during a

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

temporary vacancy." *Id*. The court characterized the nature of a vacancy in the office of lieutenant governor the same as a vacancy in the office of governor:

> The vacancy in the office of lieutenant governor may be permanent or temporary, depending on the character, cause, and duration of the vacancy in the office of governor. Such being the case, the president pro tempore, when he becomes lieutenant governor for the time being, during such vacancy, ought not to be held to be no longer a senator, **unless the express words of the constitution imperatively require such a construction**. There are no such words or provisions in the constitution, and such a construction cannot be given to it, and at the same time give effect to other provisions of that instrument.

Id. at 213 (emphasis added).

The court then discussed the nature of a vacancy in the office of the president *pro tempore*. *Stearns*, 75 N.W. at 213. The court stated that the policy reasons for avoiding an interregnum in the office of lieutenant governor "apply with greater force to the president pro tempore of the senate." *Id*. Significantly, the court observed that if the president *pro tempore* were forced to permanently vacate his seat in the senate upon becoming the lieutenant governor, "the president pro tempore [would] be out of office entirely, and the people of his district deprived of the right to be represented in the senate until his successor [could] be elected." *Id*. "**There is no language in the constitution requiring or justifying the conclusion that the senatorial office of the president pro tempore becomes vacant when he becomes lieutenant governor by reason of, and during, a vacancy in the office of governor**." *Id*. (emphasis added). Therefore, "there is no escape from the conclusion that the president pro tempore does not cease to be a senator when he becomes lieutenant governor by reason of a vacancy in the governor's office." *Id*. The court made no distinction between a permanent and temporary vacancy in the lieutenant governor's office.

In dicta, the court supported its conclusion by comparing the constitutional duties of the lieutenant governor and president *pro tempore*: "This conclusion is **further supported** by the character of the duties of lieutenant governor and of the president pro tempore. They are identical.

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

Neither of them has any power or duty properly belonging to the executive department." *Stearns*, 75 N.W. at 213 (emphasis added). Although the lieutenant governor is classified as an executive branch officer, "his classification is simply one of convenience . . . he is not authorized to exercise a single power or perform a single duty, as lieutenant governor, properly belonging to the executive department." *Id*. The lieutenant governor's "sole constitutional duties" at the time were to preside over the senate and to "authenticate by his signature bills passed by the senate." *Id*. Those duties properly belonged to the legislature. *Id*. It was clear to the court that the constitution did not intend "to confer executive powers upon the lieutenant governor." *Id*. This conclusion, the court noted, was confirmed by the fact that the lieutenant governor is the only executive officer who is not subject to impeachment. *Id*.; MINN. CONST. art. XIII, § 1 (1857). Since the lieutenant governor has no executive powers, the president *pro tempore* "is not called upon to discharge any executive duties" when he becomes lieutenant governor by reason of a vacancy in that office. *Stearns*, 75 N.W. at 213. The two offices were not constitutionally incompatible.

The court then construed Article IV, section 9 of the constitution, which prohibited a legislator from holding "any office under the authority of the United States, or the State of Minnesota, except that of Postmaster[.]" MINN. CONST. art. IV, § 9 (1857 Republican version).[7]

> It is obvious that this section of the constitution does not, explicitly or otherwise, make the offices of lieutenant governor and senator incompatible, or a senator ineligible to the office of lieutenant governor during the term for which he was elected; for it is otherwise **expressly provided** by the constitution,—that a senator who is president pro tempore shall become lieutenant governor in case of a vacancy.

[7] Retrieved from: http://www.mnhs.org/library/constitution/pdf/republicanversion.pdf ("1857 Republican version"). There are no substantive differences between the Republican and Democratic versions of the constitution. The Republican version is being used here because Governor Ramsey's proclamation ratifying the first three amendments of the constitution appeared on the Republican version.

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

Id. (emphasis added). This provision "had little relevancy" to the court's analysis. *Stearns*, 75 N.W. at 214.

The last constitutional provision examined was Article XIII, section 4, which provided: "On the trial of impeachment against the Governor, the Lieutenant Governor shall not act as a member of the Court." MINN. CONST. Art. XIII, § 4 (1857 Republican version). This provision was "an express recognition of the fact that a senator may be a lieutenant governor[,]" and that "the constitution provides for cases where the lieutenant governor is also a senator, and would, except for this express prohibition, be entitled to act as a member of the court, as a senator." *Stearns*, 75 N.W. at 214. That "prohibition would be wholly unnecessary, except upon the assumption that a senator did not vacate his office on becoming a lieutenant governor." *Id*.

After construing each of these constitutional provisions, the court concluded Senator Day "did not cease to be a senator when he became lieutenant governor." *Stearns*, 75 N.W. at 214.

b. Constitutional amendments since *Stearns* was decided.

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). It is therefore presumed that the legislature fully understood the constitutional constructions in *Stearns* when it drafted each of the proposed amendments discussed below, and intended to place those constructions upon the language in each amendment.

Every constitutional provision discussed in *Stearns* has been amended since 1898. Most of those changes occurred during the constitution's 1974 rewrite.[8] *See* 1974 MINN. LAWS, ch. 409. A

[8] 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.

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

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*.

i. The Separation of Powers Clause (MINN. CONST. art. III, § 1).

The Separation of Powers Clause remains substantively unchanged since its adoption in 1857.[9]

ii. Article V, section 6 and Article IV, section 5 (1857) (currently MINN. CONST. art. V, § 5; *id*. IV, § 15).

In 1898, Article V, section 6 provided the following:

> The Lieutenant Governor shall be ex-officio President of the Senate, and in case a vacancy should occur, from any cause whatever, in the office of Governor, he shall be Governor during such vacancy. The compensation of the Lieutenant Governor shall be double the compensation of State Senator. **Before the close of each session of the Senate, they shall elect a President pro tempore, who shall be Lieutenant Governor in case a vacancy should occur in that office.**

MINN. CONST. art. V, § 6 (1857 Republican version) (emphasis added). In 1960, Article V, section 6 was amended to provide for "the succession of the office of and for continuity of government in times of emergency caused by enemy attack." 1959 MINN. LAWS 1268.[10] The 1960 amendment

[9] The Separation of Powers Clause was amended during the 1974 rewrite of the constitution, but the changes were minor and purely stylistic. *See* 1974 MINN. LAWS 790.

[10] The 1960 amendment provided the following:

> The Lieutenant Governor shall be ex officio president of the Senate; and in case a vacancy should occur, from any cause whatever, in the office of Governor, he shall be Governor during such vacancy. The compensation of Lieutenant Governor shall be double the compensation of State Senator. **Before the close of each session of the Senate they shall elect a president pro tempore, who shall be Lieutenant Governor in case a vacancy should occur in that office.** In case the Governor shall be unable to discharge the powers and duties of his office, the same shall devolve

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

did not affect the succession of the president *pro tempore* to the office of lieutenant governor by reason of a vacancy in that office.[11] In 1972, Article V, section 6 was amended to remove the lieutenant governor as *ex officio* president of the senate. 1971 MINN. LAWS 2034.[12] Article V, section 6 was amended again during the 1974 rewrite of the constitution, and renumbered Article V, section 5. 1974 MINN. LAWS 797. The changes were minor and purely stylistic. *Id*.

> on the Lieutenant Governor. The legislature may by law provide for the case of the removal, death, resignation, or inability both of the Governor and Lieutenant Governor to discharge the duties of Governor and may provide by law for continuity of government in periods of emergency resulting from disasters caused by enemy attack in this state, including but not limited to, succession to the powers and duties of public office and change of the seat of government.

1959 MINN. LAWS 1268 (additions indicated by underline) (**bold** emphasis added).

[11] Following the 1960 amendment to Article V, section 6, the legislature enacted a law providing for the succession to the offices of governor and lieutenant governor. Minn. Stat. § 4.06 (1961). Section 4.06 provides succession plans for vacancies in the offices of governor *or* lieutenant governor, as well as for simultaneous vacancies in both offices. *Id*. Section 4.06 does not require that the last elected presiding officer cease to be a senator after becoming lieutenant governor by reason of a vacancy in that office. Minn. Stat. § 4.06(a).

[12] The 1972 amendment provided the following:

> Sec. 6. ~~The Lieutenant Governor shall be ex officio president of the Senate; and~~ In case a vacancy should occur, from any cause whatever, in the office of Governor, ~~he~~ the Lieutenant Governor shall be Governor during such vacancy. The compensation ~~of Lieutenant Governor shall be double the compensation of a State Senator.~~ of the Lieutenant Governor shall be prescribed by law. ~~Before the close of each session of the Senate they shall elect a president pro tempore, who shall be~~ **The last elected presiding officer of the Senate shall become Lieutenant Governor in case a vacancy should occur in that office.** In case the Governor shall be unable to discharge the powers and duties of his office, the same shall devolve on the Lieutenant Governor. The legislature may by law provide for the case of the removal, death, resignation, or inability both of the Governor and Lieutenant Governor to discharge the duties of Governor and may provide by law for continuity of government in periods of emergency resulting from disasters caused by enemy attack in this state, including but not limited to, succession to the powers and duties of public office and change of the seat of government.

1971 MINN. LAWS 2034 (changes or additions indicated by underline, deletions by strikeout) (**bold** emphasis added). The 1972 amendment also provided for joint elections of the governor and lieutenant governor. 1971 MINN. LAWS 2033 (amending MINN. CONST. art. V, § 1 (1857)).

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

Article V, section 5 currently provides the following:

> In case a vacancy occurs from any cause whatever in the office of governor, the lieutenant governor shall be governor during such vacancy. The compensation of the lieutenant governor shall be prescribed by law. **The last elected presiding officer of the senate shall become lieutenant governor in case a vacancy occurs in that office.** In case the governor is unable to discharge the powers and duties of his office, the same devolves on the lieutenant governor. The legislature may provide by law for the case of the removal, death, resignation, or inability both of the governor and lieutenant governor to discharge the duties of governor and may provide by law for continuity of government in periods of emergency resulting from disasters caused by enemy attack in this state, including but not limited to, succession to the powers and duties of public office and change of the seat of government.

MINN. CONST. art. V, § 5 (emphasis added).

The 1972 amendment also modified Article IV, section 5 of the constitution to require that the senate elect its own presiding officer. 1971 MINN. LAWS 2033. This corresponded to the removal of the lieutenant governor as *ex officio* president of the senate. Article IV, section 5 was amended again during the 1974 rewrite and renumbered Article IV, section 15. 1974 MINN. LAWS 793. The language was not substantively changed. *Id.*

The succession plan for filling vacancies in the office of lieutenant governor under the current Article V, section 5 has not changed in any meaningful way since *Stearns* was decided. The last elected presiding officer of the senate still succeeds to the office of lieutenant governor by reason of a vacancy in that office. MINN. CONST. art. V, § 5. There is no express language in either Article V, section 5 or Article IV, section 5 of the constitution providing that the last elected presiding officer of the senate ceases to be a senator after succeeding to the office of lieutenant governor. The legislature was aware of the *Stearns* decision and could have added such language at any point in the last 120 years. It did not. The Court should presume the legislature intended *Stearns* to apply to each of these constitutional provisions. Minn. Stat. § 645.17(4).

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

iii. Article IV, section 9 (1857) (currently MINN. CONST. art. IV, § 5).

In 1898, Article IV, section 9 provided the following:

> **No Senator or Representative shall during the time for which he is elected, hold any office under the authority of the United States, or the State of Minnesota, except that of Postmaster**; and no Senator or Representative shall hold an office under the State which had been created, or the emoluments of which had been increased during the session of the Legislature of which he was a member, until one year after the expiration of his term of office in the Legislature.

MINN. CONST. art. IV, § 9 (1857 Republican version) (emphasis added). In 1968, Article V, section 9 was amended as follows:

> **No senator or representative shall hold any *other* office under the authority of the United States or the State of Minnesota, except that of postmaster *or of notary republic*.** *If elected or appointed to another office, a legislator may resign from the legislature by tendering his resignation to the governor.*

1967 MINN. LAWS 1815 (changes indicated by *italics*) (bold emphasis added).[13] The 1968 amendment added a permissive resignation clause. The permissive resignation clause only applies to elected and appointed offices. It does not apply to a senator who succeeds to the office lieutenant governor. In 1974, Article IV, section 9 was renumbered Article IV, section 5. 1974 MINN. LAWS 791. The language was not changed. *Id*. Again, the legislature was aware of the *Stearns* decision when it drafted these constitutional amendments. If the legislature intended to effectively overrule *Stearns*, it would have done so expressly.

Notably, Minnesota's voters rejected proposed amendments to Article IV, section 9 in 1957 and 1965. *See* 1957 MINN. LAWS 1378; 1965 MINN. LAWS 1032. The 1957 proposed amendment read as follows:

[13] The term "may" as used in the second clause is permissive. *See* Minn. Stat. § 645.44, subd. 15 (1965).

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

> No senator or representative shall during the term for which he is elected, hold any nonelective office under the authority of the State of Minnesota except that of Notary Public or of the United States except that of postmaster. No senator or representative shall be disqualified for election to any elective office, but any senator or representative who is elected to any elective office under the authority of the state or the United States, who shall qualify for the office to which elected, **shall automatically terminate his term of office as senator or representative and create a vacancy therein**, provided, however, that nothing herein contained shall preclude any senator or representative from serving as attorney for any school district or political subdivision of the state except that he shall not serve as county attorney.

1957 MINN. LAWS 1378–79 (changes, additions, and deletions not indicated in original) (emphasis added). The clause requiring automatic termination upon election to an elective office would not have applied to a senator who succeeded to the office of lieutenant governor. The 1965 proposed amendment was very similar. It provided:

> No senator or representative shall during the time ~~for~~ which he ~~is elected~~ *serves*, hold any office under the authority of the United States or the state of Minnesota, except that of postmaster~~,~~. ~~and no senator or representative shall hold an office under the state which has been created or the emoluments of which have been increased during the session of the legislature of which he was a member, until one year after the expiration of his term of office in the legislature.~~ *No senator or representative shall be disqualified for election to any elective office, but any senator or representative who is elected to any elective office under the authority of the state or of the United States, who shall qualify for the office to which elected,* ***shall automatically terminate his term of office as senator or representative and create a vacancy therein***.
>
> *A senator or representative may resign his office before the expiration of the term to which he was elected by submitting his written resignation to the governor.*

1965 MINN. LAWS 1032–33 (changes or additions indicated by *italics*, deletions by ~~strikeout~~) (**bold** emphasis added). As with the 1957 proposed amendment, the automatic termination clause in the 1965 proposed amendment would not have applied to a senator who succeeds to the office lieutenant governor.

The 1957 and 1965 rejected amendments demonstrate that the legislature had contemplated automatic termination and forced resignation from office if a legislator assumed a new office. The

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

legislature could have included similar language in what is now Article IV, section 5, but it did not.

iv. Impeachment and removal from office (currently MINN. CONST. art. VIII).

In 1898, the powers of impeachment by the house of representatives and trial by the senate were located in Article IV, section 14. MINN. CONST. art. IV, § 14 (1857). The actual articles of impeachment and removal from office were in located Article XIII. MINN. CONST. art. XIII (1857). During the 1974 rewrite of the constitution, Article XIII was renumbered Article VIII. 1974 MINN LAWS 800–801. Article IV, section 14 was renumbered Article VIII, section 1. *Id*. at 801. Article XIII, section 1 was renumbered Article VIII, section 2. *Id*. Article XIII, section 2 was renumbered Article VIII, section 5. *Id*. Article XIII, section 3 was renumbered Article VIII, section 3. *Id*. The language of these sections was not substantively changed. *Id*. The changes to what are now Article VIII, sections 1, 2, 3, and 5 do not affect the analysis in *Stearns*.

In 1898, Article XIII, section 4 provided the following: "On the trial of an impeachment against the governor, the lieutenant governor shall not act as a member of the court." MINN. CONST. art. XIII, § 4 (1857 Republican version). During the 1974 rewrite of the constitution, Article XIII, section 4 was deleted entirely. 1974 MINN. LAWS 801. It is irrelevant whether Article XIII, section 4 remains in effect today.[14] The lieutenant governor could not sit on the impeachment trial of the governor in 1898 and cannot today.

[14] The 1974 amendment was not intended to affect substantive change. 1974 MINN. LAWS 819. The ballot question submitted to the voters confirms that the 1974 amendment was only intended to "improve [the constitution's] clarity by removing obsolete and inconsequential provisions, by improving its organization and by correcting grammar and style of language, but without making any consequential changes in its legal effect[.]" *Id*. The severability clause provides that any change "other than inconsequential by litigation . . . shall be without affect and severed from the other changes." *Id*.

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

c. The character of the lieutenant governor's constitutional duties.

In *Stearns*, the court's discussion of the character of the constitutional duties of the lieutenant governor and president *pro tempore* constitutes dicta offered by the court to **further support** the conclusion it had already reached. *Stearns*, 75 N.W. at 213. Even so, the constitutional duties of lieutenant governor and the elected presiding officer of the senate were not incompatible in 1898 and are not today.

The only change to the lieutenant governor's constitutional duties is that the lieutenant governor is no longer the *ex officio* president of the senate. 1971 MINN. LAWS 2034. The 1972 amendment did not impact the lieutenant governor's executive constitutional powers. It simply means the lieutenant governor no longer enjoys any constitutional powers properly belonging to the legislature. *See Stearns*, 75 N.W. at 213. The court in *Stearns* discussed the constitutional duties of the two offices to show that neither the lieutenant governor nor the president *pro tempore* exercised any constitutional powers properly belonging to the executive branch. *Id*. The lieutenant governor had no executive powers under the constitution in 1898, which remains true today. The lieutenant governor's sole constitutional duty today is to succeed to the office of governor. MINN. CONST. art. V, § 5. This duty has not changed since *Stearns* was decided.

d. The lieutenant governor's various historical statutory duties.

The lieutenant governor's "duties are derived from and prescribed by the Constitution." *State ex rel. Palmer v. Perpich*, 182 N.W.2d 182, 183 (Minn. 1971). The legislature may prescribe additional duties by law, but the legislature cannot grant the lieutenant governor executive constitutional power. Only Minnesota's voters possess that authority.

Stearns contains no discussion of the lieutenant governor's statutory duties at the time. The court was only concerned with the lieutenant governor's constitutional duties. Any discussion of the lieutenant governor's current statutory duties remains irrelevant. Even if they were material,

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

the character of the lieutenant governor's statutory duties has not changed in any meaningful way since *Stearns* was decided. The following section provides a historical overview of the lieutenant governor's statutory duties since 1857.

i. The lieutenant governor's statutory duties before 1898.

The lieutenant governor had several statutory duties prior to the supreme court's decision in *Stearns*. In 1858, the legislature made the lieutenant governor, governor, and supreme court justices all "*ex officio* visitors" of the institution for the Education of the Deaf and Dumb. 1858 MINN. LAWS 178. In 1875, the legislature made the lieutenant governor, governor, secretary of state, auditor, and treasurer members of the executive council of the Historical Society. 1875 MINN. LAWS 133. In 1876, the legislature gave the lieutenant governor the power to assign district court judges to the supreme court if a majority of the supreme court justices were disqualified from a case and the governor had an interest in the case. 1876 MINN. LAWS 19–20.

ii. The lieutenant governor's statutory duties from 1898 to 1972.

The legislature granted the lieutenant governor a variety of other duties between 1898 and 1972. *See* 1905 MINN. REVISED LAWS, ch. 3, § 13 (lieutenant governor made responsible for calling the senate, secretary of state, and house of representatives to order when the legislature convenes) (codified at Minn. Stat. § 3.05); 1913 MINN. LAWS 511–12 (lieutenant governor, governor, and speaker of the house appoint a commission to select a school location in northern Minnesota); 1913 MINN. LAWS 916, Joint Resolution 12 (lieutenant governor appoints two senators to a commission on fire prevention and insurance); 1917 MINN. LAWS 763 (lieutenant governor appoints a senator to a commission to revise and codify game laws. The governor, speaker of the house, and attorney general also appoint members to this commission.); 1917 MINN. LAWS 874, Resolution 1 (lieutenant governor appoints five senators to a commission to revise and codify child

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

welfare laws); 1921 MINN. LAWS 1013–14, Resolution 14 (lieutenant governor appoints two senators to the judicial redistricting committee); 1927 MINN. LAWS 620 (lieutenant governor again appoints a senator to a commission to revise and codify game laws); 1933 MINN. LAWS 59 (legislature ratified a bank holiday proclaimed by the lieutenant governor in the governor's absence); 1951 MINN. LAWS 1194 (lieutenant governor appointed to the Civil Defense Advisory Council along with the president *pro tempore*, speaker of the house, secretary of state, auditor, treasurer, attorney general, adjutant general, state director, and mayors of first-class cities); 1951 MINN. LAWS 45 (expanding the power of the executive council of the Historical Society which still included the lieutenant governor). The lieutenant governor performed all these duties while serving as *ex officio* president of the senate. Most if not all of these duties are quasi-legislative in nature.

iii. The lieutenant governor's statutory duties today.

The lieutenant governor continues to call the senate, secretary of state, and house of representatives to order when the legislature convenes. Minn. Stat. § 3.05. That duty has persisted for over 112 years despite the 1972 amendment removing the lieutenant governor as *ex officio* president of the senate. This ceremonial duty is legislative in nature, and does not render the offices of lieutenant governor and the president of the senate incompatible.

In 1971, the legislature amended Minnesota Statues, section 4.04 (1969), granting the governor authority to delegate certain non-constitutional functions to the lieutenant governor:

> Subd. 2. The governor may delegate to the lieutenant governor such powers, duties, responsibilities and functions as are prescribed by law to be performed by the governor, subject to his control, by filing a written order specifying such delegation with the secretary of state; provided, however, that no power, duty, responsibility or function imposed upon the governor by the constitution shall be delegated by such written order or otherwise.

1971 MINN. LAWS 1891 (changes or additions indicated by underline). There have been no substantive changes to Section 4.04 since 1971. Notably, Section 4.04 expressly prohibits the

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

governor from delegating any of the governor's **constitutional** powers, duties, responsibilities, or functions to the lieutenant governor. Section 4.04 does not grant the lieutenant governor any constitutional powers properly belonging to the executive branch.[15]

The lieutenant governor is currently a member of the Executive Council, Capitol Area Architectural and Planning Board (CAAPB), State Capitol Preservation Commission, and advisory committee on Capitol Area Security. Each of these entities is discussed below.

The Executive Council was created in 1891. 1925 MINN. LAWS 756. The original members were the governor, attorney general, state auditor, and secretary of state.[16] *Id*. The governor was the original chair and remains so today. *Id*.; Minn. Stat. § 9.011, subd. 1. The lieutenant governor was added as a member in 1973. Minn. Stat. § 9.011, subd. 1 (1973). The legislature gave the Executive Council four primary duties: Minn. Stat. §§ 9.031 (designating financial institutions as depositories for state funds), 9.041 (settling claims and controversies with the United States), 9.061 (additional powers; emergencies), 9.071 (settling claims; other specified powers).[17]

The CAAPB was created in 1967. Minn. Stat. § 15.50 (1967).[18] The governor was the chair at that time. *Id*. at subd. 1(c). The lieutenant governor was not a member. *Id*. at subd. 1(a). In 1974, the lieutenant governor replaced the governor as both a member and chair of the CAAPB. Minn. Stat. § 15.50, subd. 1(b), (d) (1974). In 1980, one member of the house of representatives and one

[15] It is unclear what duties various governors have delegated to their respective lieutenant governors since Section 4.04 was enacted.

[16] The treasurer was removed from the Executive Council in 2003 when the office of state treasurer was abolished. *See* 1998 MINN. LAWS 965.

[17] The Executive Council has additional authority under the following statues: Minn. Stat. §§ 90.031, 84.027, subd. 10, 85.34, 92.50, 93.17, 93.1925, 93.193, 92.20, 93.25, 93.34. It may have additional statutory authority elsewhere.

[18] The CAAPB was originally called a commission rather than a board. Minn. Stat. § 15.50 (1967). It was renamed a board in 1980. Minn. Stat. § 15.50 (1980).

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

senator were added as members of the CAAPB. Minn. Stat. § 15.50, subd. 1(b) (1980). Today, the CAAPB has twelve members, including the lieutenant governor, two members of the house of representatives, and two senators. Minn. Stat. § 15B.03, subd. 1. The purposes of the CAAPB are listed at Minnesota Statutes, section 15B.01.

The State Capitol Preservation Commission was created in 2011. Minn. Stat. § 15B.32, subd. 1 (2011). The commission includes members from all branches of government, including six legislators, the governor, the lieutenant governor, and a supreme court justice. *Id*. at subd. 2. The duties of the commission are listed at Section 15B.32, subdivision 6.

The advisory committee on Capitol Area Security was created in 2012. Minn. Stat. § 299E.04 (2012). The advisory committee includes four legislators, the lieutenant governor, and a supreme court justice. Minn. Stat. § 299E.04, subd. 1. The lieutenant governor serves as the chair. *Id*. at subd. 3. The duties of the advisory committee are listed at Section 299E.04, subdivision 2.

The Executive Council, CAAPB, State Capitol Preservation Commission, and advisory committee on Capitol Area Security are all statutorily created bodies. The legislature may abolish any of them. The legislature may also modify their respective duties and responsibilities. With the exception of the Executive Council, all of these bodies include members of the legislature and two include members from all three branches of government. The legislature could modify the membership of any of them. The legislature could even add the president of the senate to the Executive Council. The lieutenant governor's membership on these bodies does not render the lieutenant governor's duties incompatible with the president of the senate.

The lieutenant governor's present statutory duties are no different in character than at any other point in Minnesota history. Moreover, these legislative grants of authority cannot affect the

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

lieutenant governor's duties which are "prescribed by the constitution." *State ex rel. Palmer*, 182 N.W.2d at 183. The lieutenant governor has no more executive power today than in 1898.

2. The parties' relationship prior to the dispute.

The parties' status quo relationship is defined by *Stearns*. Under *Stearns*, Senator Fischbach took on the dual role as senator and lieutenant governor after former Lieutenant Governor Tina Smith resigned. Senator Fischbach represents both the people of Senate District 13 in her role as senator and the entire State of Minnesota in her role as lieutenant governor. Plaintiff is a constituent of both Senate District 13 and the State of Minnesota. The Court would upset the parties' status quo relationship by granting Plaintiff's motion and enjoining Senator Fischbach from representing the people of Senate District 13. This factor weighs against granting the motion.

3. Plaintiff cannot demonstrate great and irreparable harm, and the balance of harms weighs heavily against granting the motion.

In balancing the relative harms to the parties, the moving party "must show irreparable harm to trigger an injunction," while the opposing party "need only show substantial harm to bar it." *Pac. Equip. & Irr., Inc. v. Toro Co.*, 519 N.W.2d 911, 915 (Minn. Ct. App. 1994). Senator Fischbach, her constituents in Senate District 13, and the people of Minnesota will suffer several forms of substantial, irreparable harm if the Court grants Plaintiff's motion. First, granting Plaintiff's motion will create an interregnum in Senator Fischbach's office. The 80,000 people of Senate District 13 will be denied representation in the senate throughout the entire 2018 yearly session, any special sessions, and potentially all of 2018. Ironically, Plaintiff, as a resident of Senate District 13, will also be denied representation in the senate if her motion is granted. "The constitution was intended to provide a complete and harmonious scheme of state government, and to provide against the possibility of any interregnum in the office of governor, or interruption in the exercise of the functions and powers of that office." 75 N.W. at 212. Although the court in

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

Stearns only discussed protecting against an interregnum in the governor's office, similar protection must extend to the other co-equal branches of government. MINN. CONST. art. III, § 1. An interregnum in the senate is equally as harmful under the constitution as an interregnum in the governor's office. Granting Plaintiff's motion will disrupt Minnesota's scheme of government and the function of the legislature. That would cause substantial, irreparable harm to all Minnesotans.

Second, Senator Fischbach will be personally harmed if the Court grants Plaintiff's motion. Senator Fischbach was just elected to a four-year term expiring in January 2021. Her term as lieutenant governor expires in January 2019. If the Court grants Plaintiff's motion, that may trigger a special election. Senator Fischbach would then be forced to run for election to the office she just won. If another candidate won the special election, Senator Fischbach would be out of public office entirely at the end of 2018 and would not be able to run for her former seat until the fall of 2020. These harms are substantial and irreparable.

Third, the senate is an indispensable party to this action. Minn. R. Civ. P. 19.01; *see* Minn. Stat. § 555.11. The senate must be allowed to defend its constitutional interests implicated by Plaintiff's motion. Granting Plaintiff's motion would deny the senate this opportunity and cause substantial harm to the senate.

Plaintiff alleges two types of purported harm. Both are equally unavailing. First, Plaintiff claims she will be deprived of "valid representation" in the senate if Senator Fischbach continues to hold and exercise the powers of her senate office.[19] (Pl.'s Mem. 10.) This is simply untrue. If the Court denies Plaintiff's motion, the people of Senate District 13, including Plaintiff, will continue to be represented in the senate at least until the senate votes on Senator Fischbach's

[19] Plaintiff's temporary injunction motion paradoxically seeks to impose the very harm she claims she will suffer if the motion is denied.

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

eligibility to remain a senator or the Court rules on the merits of the case. Plaintiff will only be harmed if the Court grants her motion, which will immediately deprive Plaintiff and the people of Senate District 13 representation in the senate. The constitution was intended to protect against this very harm that Plaintiff so desperately wants. *Stearns*, 75 N.W. at 212.

Second, Plaintiff claims she may suffer harm if the motion is denied because Senator Fischbach will vote on legislation and her votes may be later invalidated. Plaintiff's hypothetical requires that the senate pass a bill by a one-vote margin. If Senator Fischbach's vote was later declared void, a bill that passed by a one-vote margin could be invalidated by a court ruling. This potential harm is therefore reparable.[20] The potential harm from Plaintiff's one-vote-margin scenario is purely hypothetical conjecture at present. If the Senate Republicans maintain a 34 to 32 majority, it is unlikely a bill would pass by only one vote. If the Democrats narrow the margin to 34 to 33 at the February special election, the hypothetical becomes slightly more plausible. There is no predicting what will happen in that special election. Furthermore, Plaintiff cannot point to any specific bill that may affect her interests.

Conversely, enjoining Senator Fischbach from voting will result in far greater harm to the people of Senate District 13 and Minnesotans generally. If the motion is granted, Senator Fischbach will not be allowed to vote, and bills may pass or fail by a one-vote margin. Courts

[20] The same is not true of a bill that is defeated by a one-vote margin. "No law shall be passed unless voted for by a majority of all the members elected to each house of the legislature[.]" MINN. CONST. art. IV, § 22. There are currently 66 senators (accounting for the vacancy in former Senator Schoen's office). In order to pass, a bill requires 34 votes in the senate. If Senator Fischbach votes against a bill that is defeated by a one-vote margin and her vote is later invalidated, the result would be a tie vote and the bill still would not pass. Plaintiff would suffer no harm in this scenario.

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

cannot order the legislature back into session so the senate may re-vote on a bill.[21] Similarly, the courts cannot force the senate to re-vote on a bill. This harm would be substantial and irreparable.

For all these reasons, Plaintiff has failed to demonstrate great and irreparable harm, and the Court should deny her motion. Even if Plaintiff had satisfied this threshold showing, granting her motion would cause substantial and irreparable harm to Senator Fischbach, the people of Senate District 13, and the people of Minnesota that far outweighs any harm alleged by Plaintiff. The balance of harms bars Plaintiff from obtaining injunction relief. *Pac. Equip. & Irr., Inc.*, 519 N.W.2d at 915.

4. Public policy weighs against creating an interregnum in Senator Fischbach's senate seat.

The constitution was intended to safeguard against an interregnum in the legislature or an interruption in the function and powers of the legislature. *See Stearns*, 75 N.W. at 212; MINN. CONST. art. III, § 1. Plaintiff disregards this paramount public policy in seeking an injunction.

Plaintiff argues the Separation of Powers Clause of the Minnesota Constitution constitutes a public policy reason for granting her motion. (Pl.'s Mem. 10.) This ignores that the underlying purpose of temporary injunction is to preserve the status quo. The court in *Stearns* concluded that the Minnesota Constitution, expressly including the Separation of Powers Clause, does not require that the president *pro tempore* of the senate cease being a senator after becoming lieutenant governor by reason of a vacancy in that office. 75 N.W. at 210, 214. Absent a supreme court decision overruling *Stearns*, the Separation of Powers Clause will continue to support the conclusion that Senator Fischbach can hold both offices.

[21] The courts cannot order the legislature to meet outside of session. MINN. CONST. art. IV, § 12; *See State ex rel. Birkeland v. Christianson*, 229 N.W. 313, 314 (Minn. 1930) ("Neither department can control, coerce, or restrain the action or nonaction of either of the others in the exercise of any official power or duty conferred by the Constitution, or by valid law, involving the exercise of discretion."). Similarly, the courts also cannot force the governor to call a special session or the senate to re-vote on a bill. *See Birkeland*, 229 N.W.2d at 314.

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

5. The administrative burden in judicial supervision.

The administrative burden imposed on the Court would be minimal.

D. Security.

No "temporary injunction shall be granted except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Minn. R. Civ. P. 65.03. Although Senator Fischbach is serving as both senator and lieutenant governor, she has opted to take only her senate salary for the duration of her term as lieutenant governor. (Nauen Aff. Ex. A.) Her senate salary for 2018 is $45,000. *See* MINN. CONST. art. IV, § 9; (Kelley Aff. ¶ 8.) If the Court grants Plaintiff's motion, it should require a pro rata share of Senator Fischbach's senate salary as security for the period the injunction is in effect. The Court may also require security to cover reasonable attorneys' fees. *AMF Pinspotters, Inc.*, 110 N.W.2d at 353.

II. PLAINTIFF'S MOTION TO CONSOLIDATE UNDER MINN. R. CIV. P. 65.02(C).

The court may, in its discretion, consolidate a trial on the merits with a hearing on a motion for a temporary injunction. Minn. R. Civ. P. 65.02(c). This Court should deny Plaintiff's motion to consolidate for several reasons. Senator Fischbach intends to file a motion to dismiss before the temporary injunction hearing. The hearing must be at least 28 days after the motion is filed. Minn. R. Gen. Prac. 115.03. The motion to dismiss is due by February 5, 2018, one day before the temporary injunction hearing. There will not be sufficient time before the temporary injunction hearing for a response and reply to the motion to dismiss.

The motion to dismiss will raise the subject matter jurisdiction arguments discussed above in Section I.A, and new grounds which have not been briefed and are not yet before the Court. One of those grounds will be the failure to join an indispensable party. Minn. R. Civ. P. 12.02(f). The

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

senate, as the judge of its own members, must be made a party to defend its constitutional interests. *See* MINN. CONST. art. IV, § 6; Minn. R. Civ. P. 19.01; Minn. Stat. § 555.11. The Court must decide this threshold issue before reaching the merits of this case. If the Court concludes the senate is an indispensable party, Plaintiff's temporary injunction motion would be premature. Plaintiff would need to file and serve an amended complaint on the senate, and then re-notice her temporary injunction motion. Granting Plaintiff's motion to consolidate would deny the parties adequate opportunity to brief and argue this important issue, and deprive the senate from defending its constitutional interests.

Granting the motion to consolidate would also prematurely close the record. The losing party will likely appeal this Court's decision. Further factual development will transpire as political events unfold in February. Only the supreme court can overrule its decision in *Stearns*. The Court should allow the parties to fully develop the record before issuing a final order on the merits of the case to prevent an appellate court from remanding the case for further factfinding or sending interrogatories to the parties as the supreme court did in *Ninetieth Minnesota State Senate v. Dayton*, 903 N.W.2d 609.

For all the foregoing reasons, Senator Fischbach respectfully requests that the Court deny Plaintiff's motion to consolidate under Rule 65.02(c). Alternatively, Senator Fischbach respectfully requests that the Court defer consolidation until the hearing on the motion to dismiss.

Filed in Second Judicial District Court
1/30/2018 2:53 PM
Ramsey County, MN

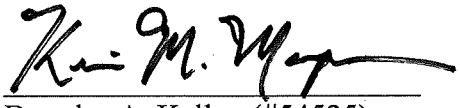
CONCLUSION

Senator Fischbach respectfully requests the Court deny Plaintiff's motion in its entirety.

Respectfully submitted,

Dated: January 30, 2018

KELLEY, WOLTER & SCOTT, P.A.

By: 

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ACKNOWLEDGEMENT

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