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Ramsey County, MN

**STATE OF MINNESOTA** **DISTRICT COURT**

**COUNTY OF RAMSEY** **SECOND JUDICIAL DISTRICT**

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

Plaintiffs,

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,

Defendants,

and

Association for Government Accountability,

Defendant-in-Intervention.

Case Type: Civil Other
File No. 62-CV-17-3601
Chief Judge John H. Guthmann

**MEMORANDUM IN SUPPORT OF INTERVENTION OF THE ASSOCIATION FOR GOVERNMENT ACCOUNTABILITY and FOR THE RELAXATION OF TIME LIMITS UNDER RULE 115.07**

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## INTRODUCTION

The Association for Government Accountability sought to intervene in the instant action through the filing of a Notice of Intervention under Rule 24.03 of the Minnesota Rules of Civil Procedure. Intervention would have been deemed accomplished but for objections filed by both the Defendants and the Plaintiffs on the eve of the 30 day expiration time period allowed under the rules for the AGA's intervention to be automatic. Hence, under Rule 24.03, motion practice must be engaged to allow the AGA to join the underlying action. The motion for intervention should be granted under either Rule 24.01 as a matter of right or under Rule 24.02 as permissive.

The AGA's main contentions relate to the failure of either party to note or otherwise address the fundamental issue regarding whether the district court has subject matter jurisdiction. The AGA contends that the district court does not because the legislature retained the authority to override the Governor's line-item veto regarding legislative appropriations and because Minnesota's Declaratory Judgment Act does not provide the Plaintiffs with a private cause of action to sue. Thus, because the AGA's underlying challenge relates to subject matter jurisdiction, an issue that can not be waived, intervention is justified.

Moreover, the AGA meets the criteria for intervention despite the inexplicable objection by the Defendants Governor Mark Dayton and Myron Frans (for whom the arguments would be of assistance to them since they failed to explore or present the reasoning why the district court did not and does not have jurisdiction) and the expected objection of the Plaintiffs, the Ninetieth Minnesota State Senate and the Ninetieth

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Minnesota State House of Representatives ("the Ninetieth Legislature"). The AGA's motion should be granted.

Meanwhile, the AGA also moves for leave to relax the time limits under Rule 115.07 of the Minnesota General Rules of Civil Procedure concerning the hearing date of the instant motions and briefing schedule. Once intervention is granted, it is the AGA's intention to appeal the underlying decision of this Court which granted partial final judgment to the Ninetieth Legislature. The time to appeal ends on September 17, 2017.

## FACTUAL BACKGROUND

Few, if any, facts are in dispute. On May 30, 2017, the Defendant Governor Mark Dayton signed into law the Omnibus State Government Appropriations bill, but line-item vetoed the appropriations to the Senate and House of Representatives for the 2018-2019 fiscal biennium. The Plaintiffs, the Ninetieth Minnesota State Senate and the Ninetieth Minnesota State House of Representatives ("the Ninetieth Legislature"), passed the appropriation bill during the first year of the biennium of the Ninetieth Legislature during a special session that commenced on May 23, 2017.

Following the passage of the bill, the legislature would *sine die* adjourn the special session. Because the legislature was in its first year of the biennium, there has been *no final adjournment of the Ninetieth session.*[1] That could occur only at the end of the second biennium legislative year. The agreed to date of adjournment, May 24, 2017, was under a *political*

[1] The Governor, in his Minnesota Supreme Court brief, incorrectly stated a fact that "[t]he Senate and the House chose to adjourn *sine die* just after presenting the bills to the Governor, *relinquishing their right to remain in session to override a possible veto."* Gov. Princ. Brief 6 (emphasis added). The Legislature cannot relinquish the right to override because final adjournment of the Ninetieth biennium session has not yet occurred.

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*agreement* of the Ninetieth Legislature's and Governor's own making.[2] After adjournment, the Governor line-itemed the appropriations regarding the legislature.

The Ninetieth Legislature sued the Governor and Myron Frans, Commissioner of the Minnesota Department of Management and Budget. The complaint sought injunctive relief under Minnesota's Declaratory Judgment Act[3] asserting a claim under the "Separation of Powers Clause" of the Minnesota Constitution."[4] The district court issued an order on June 14, 2017 to show cause asking why the relief sought in the Complaint should not be granted. A day after the Governor answered the Complaint on June 22nd, the parties entered into a stipulation narrowing the issues before the district court and further requested the issuance of a temporary injunction for Management and Budget Commissioner Frans to continue funding to the Senate and House at a monthly rate of the fiscal year 2017 base general fund appropriation bill until all appellate court proceedings were completed or until October 1, 2017.

Three days later on June 26th, the district court issued the requested temporary injunction and stated that the "issues presented to the court in [the declaratory judgment count] of the Complaint are ripe and require a ruling from the court."[5]

On July 19, 2017, the district court granted declaratory judgment to the Ninetieth Legislature.[6] The court found the Governor's line-item vetoes to have violated the

[2] Ninetieth Legis. and Gov. Agreement, App. 1.
[3] Ninetieth Legis. Compl. 8-9 (Claim I), ¶¶31-35 (June 13, 2017).
[4] *Id.* ¶33.
[5] Or. Granting Temp. Inj. (June 26, 2017).
[6] *Id.*

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Separation of Powers Clause of the Minnesota Constitution found under Article III, and thus, were unlawful and void.[7]

The Governor has since appealed the district court order. On expedited review, the issue is now before the Minnesota Supreme Court.

## ARGUMENT

### I. The failure to identify and address two questions regarding subject matter jurisdiction of the district court in the first instance undermines any premise that either the Governor or the Ninetieth Legislature are representing the interests of citizens adequately without the presence of the AGA.

We first start with a simple premise that the Ninetieth Legislature has not been finally adjourned and that it can still override the Governor's line-item vetoes:

> Adjournment short of final adjournment will not prevent the return of legislative bills by the governor. While the legislature in the present case was not actually in session to receive the bill upon possible return, it was … in existence at all times relevant. Indeed, despite temporary and interim adjournments the legislature is in existence until the final adjournment of its biennial regular session.[8]

In *State v. Hoppe,* the Minnesota Supreme Court was presented with a question regarding whether an adjournment of the legislature on May 21, 1973, within three days after presentment of a bill to the governor, prevented the return of the bill to override a so-called "pocket veto" because the governor failed to sign the bill and, thus, the bill failed to become law.[9] Here, the Minnesota Constitution, under Article IV, section 12, states the legislature is in regular session for "each biennium:"

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[7] *Id.*
[8] *State v. Hoppe,* 215 N.W.2d 797, 804 (Minn. 1974).
[9] *Hoppe,* 215 N.W.2d at 803.

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> The legislature shall meet at the seat of government in regular session in each biennium at the times prescribed by law for not exceeding a total of 120 legislative days.

There is no dispute the Ninetieth Legislature is in its *first year* of the biennium session. Thus, it *has not* entered into a final adjournment of the session. As the Minnesota Supreme Court has opined, the legislature in the present case has not been deprived of its preserved right to override the line-item vetoes of the Governor. Here, the Ninetieth Legislature has successfully induced the district court to believe the court has the authority to interject itself in an incomplete or incompleted political process. Moreover, the Legislature has done so through Minnesota's Declaratory Judgment Act—a remedial act—based upon the Minnesota Constitutional separation of powers clause even though the Constitution does not provide for a private cause of action. If there is any process or procedure that could have provided the district court with subject matter jurisdiction, it would have been through a common law petition for quo warranto. Neither party provided the vehicle necessary for this court to assert that jurisdiction; jurisdiction cannot be found under the Declaratory Judgment Act.

When both parties to the underlying litigation fail to understand basic or fundamental principles of their own government, it can hardly be said either or both can adequately represent the interests of the citizen-taxpayers for which the AGA seeks to represent in its motion to intervene.

As we stated in our Notice of Motion and Motion, there are two questions that should have been presented to this Court:

> A. Article IV, § 24 of the Minnesota Constitution provides for the presentation of bills passed by both houses of the legislature to the governor for his consideration and "is subject top his veto

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as prescribed in case of a bill." If a veto occurs, by two-thirds vote of each house of the legislature, the veto can be overridden. Likewise, a line-item veto can be overridden, despite the legislature's *sine die* adjournment of a special session commenced after the first biennium year of the legislature. *See State v. Hoppe,* 298 Minn. 386, 215 N.W.2d 797 (1973).

> Whether the district court had subject matter jurisdiction to determine a political question involving the approval of and line-item veto authority exercised concerning appropriations when the legislature continues to have the authority to override the line-item veto of an appropriation bill by the governor.

B. The Minnesota Declaratory Judgment Act "cannot create a cause of action that does not otherwise exist." And the Minnesota Constitution does not provide for a private cause of action for violations of the Minnesota Constitution.

> Whether the district court had subject matter jurisdiction over a declaratory judgment action complaint when the Minnesota Constitution provides no private cause of action or common law right to resolve issues between the legislative and executive branches of government over the enactment of law.

These questions were not presented before this Court; yet, they are the basic formulations to discuss and for this Court to have adjudicated regarding whether it had subject matter jurisdiction in the first instance in the underlying action.

## II. Because subject matter jurisdiction cannot be waived, a motion to intervene cannot be untimely.

The rule for intervention as of right provides:

> Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to

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> protect that interest, unless the applicant's interest is adequately represented by existing parties.[10]

"[T]he spirit behind ... Rule 24—that of encouraging all legitimate interventions—requires a liberal application of the rule."[11] To intervene as of right, a nonparty must satisfy a four-part test:

> (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.[12]

Because the AGA's intervention asserts claims relating to subject matter jurisdiction, the matter cannot be considered untimely. Subject matter jurisdiction has been defined as

> not only authority to hear and determine a particular class of actions, but authority to hear and determine the particular questions the court assumes to decide.[13]

"Because subject matter jurisdiction goes to the authority of the court to hear a particular class of actions, lack of subject matter jurisdiction may be raised at any time, including for the first time on appeal."[14] Moreover, "parties may not waive lack of subject matter

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[10] Minn. R. Civ. P. 24.01.
[11] *Engelrup v. Potter,* 302 Minn. 157, 166, 224 N.W.2d 484, 489 (1974).
[12] *Minneapolis Star & Tribune Co. v. Schumacher,* 392 N.W.2d 197, 207 (Minn.1986); *accord State Mut. Fund. Ins. Co.,* 691 N.W.2d at 499.
[13] *Cochrane v. Tudor Oaks Condo. Project,* 529 N.W.2d 429, 432 (Minn. App. 1995) quoting *Duenow v. Lindeman,* 223 Minn. 505, 511, 27 N.W.2d 421, 425 (Minn. 1947) (quoting *Sache v. Wallace,* 101 Minn. 169, 172, 112 N.W. 386, 387 (Minn. 1907)).
[14] *Id.* citing Minn.R.Civ.P. 12.08(c) ("[w]henever it appears * * * that the court lacks jurisdiction of the subject matter, the court shall dismiss the action"); *Berke v. Resolution Trust Corp.,* 483 N.W.2d 712, 714 (Minn.App.1992) (claimed lack of subject matter jurisdiction raised for the first time on appeal), *pet. for rev. denied* (Minn. May 21, 1992).

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jurisdiction and may not consent to a court acting when it has no subject matter jurisdiction."[15]

Since subject matter jurisdiction cannot be waived and can be asserted at any time during the proceedings, intervention based upon subject matter jurisdiction cannot be deemed "untimely" as both the Governor and the Ninetieth Legislature assert.[16] Regardless of the Minnesota Supreme Court's accelerated review of the underlying dispute, neither party has considered the argument of subject matter jurisdiction and did not bring the issue before this Court nor the Supreme Court.

Notably, the Supreme Court *has not* adjudicated the basis for the presentment of the issues in this case brought before this Court and the Supreme Court as jurisdictionally sound through the vehicle of a declaratory judgment action since the Uniform Declaratory Judgments Act is not an express independent source of jurisdiction.[17] The fact that Justice Keith in the *Seventy-Seventh Minnesota Senate v. Carlson*,[18] asserted that the Supreme Court would decline to exercise original jurisdiction and in dicta stated that a declaratory judgment action should be commenced in district court to resolve disputed facts, the Supreme Court did not opine whether the district court actually had subject matter jurisdiction under the Declaratory Judgment Act.

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[15] *Gummow v. Gummow,* 356 N.W.2d 426, 428 (Minn. App. 1984) citing Minn. R. Civ. P., Rule 12.08(3).
[16] Ninetieth Legis. Obj. Memo. 3 and Gov. Obj. Memo. 2.
[17] *All. for Metro. Stability v. Metro. Council,* 671 N.W.2d 905, 915–16 (Minn. App. 2003) citing *Brown v. State,* 617 N.W.2d 421, 425 (Minn. App. 2000), *review denied* (Minn. Nov. 21, 2000), *cert. denied,* 532 U.S. 995 (2001); *Vrieze v. New Century Homes, Inc.,* 542 N.W.2d 62, 67 (Minn. App. 1996), underlying cause of action based on a common-law or statutory right. *See Brown,* 617 N.W.2d at 425; *Vrieze,* 542 N.W.2d at 67.
[18] *Seventy-Seventh Minnesota Senate v. Carlson,* 472 N.W.2d 99 (Minn. 1991).

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Notably, "[a] party seeking a declaratory judgment must have an independent, underlying cause of action based on a common-law or statutory right."[19] Here, since the Ninetieth Legislature is asserting a violation of the Separation of Powers Clause under the Minnesota Constitution, the claim cannot be adjudicated under the Declaratory Judgment Act. As Minnesota courts have ruled, the Minnesota Constitution does not provide for a private cause of action:

> "[T]here is no private cause of action for violations of the Minnesota Constitution."[20]

Moreover, "it is not the function of this court to establish new causes of action."[21]

The Declaratory Judgment Act itself does not allow for a person, entity, or a branch of government the basis for initiating an action for the deprivation of a Minnesota constitutional right. In contrast, the federal government has waived immunity for violations of the U.S. Constitution through the Civil Rights Act, 42 U.S.C. § 1983. Minnesota has no similar statute. Under § 1983, which in providing for a separate cause of action, a person may also seek injunctive relief under the federal declaratory judgment act. There is no parallel Minnesota statute that allows for the basis of a cause of action against the government or the governor based solely on a claim under the Minnesota Constitution. Only

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[19] *All. for Metro. Stability,* 671 N.W.2d at 916.
[20] *Eggenberger v. W. Albany Tp.,* 820 F.3d 938, 941 (8th Cir. 2016), *cert. denied sub nom. Eggenberger v. W. Albany Tp., Minn.,* 137 S. Ct. 200 (2016) citing *Guite v. Wright,* 976 F.Supp. 866, 871 (D.Minn.1997), aff'd on other grounds, 147 F.3d 747 (8th Cir.1998); *see also Mlnarik v. City of Minnetrista,* No. A09–910, 2010 WL 346402 at *1 (Minn. App. Feb. 2, 2010) (explaining "no private cause of action for a violation of the Minnesota constitution has yet been recognized" and "[t]herefore appellant's complaint fails to state a claim"); *Danforth v. Eling,* No. A10–130, 2010 WL 4068791 at *6 (Minn. App. Oct. 19, 2010) (noting "there is no private cause of action for violations of the Minnesota Constitution" and plaintiff's claims were properly dismissed as frivolous).
[21] *Stubbs v. N. Mem'l Med. Ctr.,* 448 N.W.2d 78, 81 (Minn. App. 1989).

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the legislature can grant that authority. No statute allows for such under the circumstances of this case. Further, the separation of powers clause is a principle not a right.

What Justice Keith in *Seventy-Seventh Minnesota Senate* and again later in *Inter Faculty Organization v. Carlson,*[22] probably was referring to concerned the Supreme Court's previous announcements that the purpose of the Declaratory Judgment Act is to afford an alternative remedy that can be used whether or not further relief is or could be claimed.[23] Nevertheless, the Act still requires an underlying basis for a private cause of action to sue; otherwise neither the district court nor the Supreme Court has jurisdiction to decide the dispute: "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."[24] But here, a declaratory judgment action is not appropriate because there is no proclaimed statutory or common-law right asserted under the Ninetieth Legislature's Claim I which, instead, in contrast is embedded in a separation of powers clause doctrinal dispute. There is no statutory or common law right asserted.

The Minnesota Constitution delineates the division of powers necessary among the three branches of government. The Separation of Powers Clause reads:

> The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of

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[22] *Inter Faculty Organization v. Carlson,* 478 N.W.2d 192, 193 (Minn. 1991); *see* Or. Granting Declaratory Judm. 6 (July 19, 2017). The Minnesota Supreme Court case in *Johnson v. Carlson,* 507 N.W.2d 232 (Minn. 1993), although was based on a declaratory judgment action, there is *no discussion* regarding the validity of the court's jurisdiction or challenge.
[23] *Connor v. Chanhassen Tp.,* 81 N.W.2d 789, 794 (Minn. 1957).
[24] *Id.* quoting *Barron v. City of Minneapolis*, 212 Minn. 566, 569, 4 N.W.2d 622, 624 (1942).

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> the others except in the instances expressly provided in this constitution.[25]

As our courts recognized, the separation of powers doctrine "has roots deep in the history of Anglo–American political philosophy."[26] In *Wulff v. Tax Court of Appeals,* the Minnesota Supreme Court has acknowledged that:

> [w]hile * * * the actual workings of such a balanced government has been altered through the years, the basic principle remains; too much power in the hands of one governmental branch invites corruption and tyranny. Notwithstanding the separation of powers doctrine, there has never been an absolute division of governmental functions in this country, nor was such even intended.[27]

Here, the Ninetieth Legislature has convinced this Court to inject itself into a legislative process that has not yet been completed. As noted above, the legislature can still overturn the Governor's line-item vetoes; the biennium legislative session has not ended. The vetoed appropriations have not yet, but must be returned to the legislature for action.

While at the present time each party has committed itself to a political position on the issue of legislative appropriations, futility cannot be asserted by the Ninetieth Legislature at this stage.[28] Futility would occur only if the line-item vetoes occurred at the end of the *second*

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[25] Minn. Const. art. III, § 1.
[26] *Wulff v. Tax Court of Appeals,* 288 N.W.2d 221, 222 (Minn. 1979).
[27] *Id.* at 223.
[28] *Cf. N.W. Airlines, Inc. v. Metro. Airports Commn.,* 672 N.W.2d 379, 383 (Minn. App. 2003). If for instance, the exhaustion of remedies is mandatory, it must be pursued. *E.g. Zaluckyj v. Rice Creek Watershed Dist.,* 639 N.W.2d 70, 75 (Minn.App.2002) *review denied* (Minn. Apr. 16, 2002). However, as we noted, Minnesota courts do not require exhaustion of remedies when the validity of the legislative statute is challenged such as to its constitutionality. In *Connor v. Township of Chanhassen,* 249 Minn. 205, 81 N.W.2d 789 (1957), the plaintiffs brought a declaratory judgment action seeking to have the Zoning Ordinance for the Township of Chanhassen declared unconstitutional. *Id,* 249 Minn. at 206, 81 N.W.2d at 792. The district court found for the plaintiffs, and the township appealed arguing that the plaintiffs should

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*year* of the biennium legislative session when adjournment *sine die* would be final as the Minnesota Supreme Court has previously ruled in *State v. Hopp.*

Had this been the final adjournment of the biennium Ninetieth Legislature, an alternative argument could be made for judicial intervention; but the issue of judicial action should be made through the alternative procedural avenue of quo warranto, but not now, not here and not through a declaratory judgment action.

## III. The AGA has standing since the stipulation between the Governor and the Ninetieth Legislature authorized the expenditures of taxpayers moneys, it is an appropriation which cannot be accomplished without the enactment of law as constitutionally mandated; hence, the stipulation spending violates the Constitution.

The AGA is a group of taxpayers that have an interest in the accountability of the government and the legality of public officials actions. Thus, the AGA has an interest in the transactions which have occurred in this proceeding.[29]

On June 23, 2017, the Governor and the Ninetieth Legislature entered into a stipulated agreement to appropriate taxpayers moneys without an enacted law.

Article XI, section states that "No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law." In the June stipulation, the parties

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have exhausted their administrative remedies by seeking a review by writ of certiorari of the town board's action in failing to grant a petition to rezone the plaintiff's property. *Id.* at 209, 81, 81 N.W.2d 789 N.W.1d at 793. The Minnesota Supreme Court began by noting that the purpose of the Declaratory Judgments Act is to afford an alternative remedy that can be used whether or not further relief is or could be claimed. *Id.* The court stated that in a suit to test the validity of a municipal ordinance, the rule is "[T]he existence of another adequate remedy does not preclude a judgment for a declaratory relief in cases where it is appropriate." *Id.,* 81 N.W.2d at 793-94 (quoting *Barron v. City of Minneapolis,* 212 Minn. 566, 569, 4 N.W.2d 622, 624 (1942)).

[29] *See* Minn. R. Civ. P. 24.01(2).

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agreed that this Court enter an order directing the "Commissioner of Management and Budget [to] take all steps necessary to provide continued funding to the Senate and the House not to exceed the fractional share of their fiscal year 2017 base general funding…."[30] The stipulation further requested this Court to issue an order for the Commissioner to pay taxpayer funds "from its fiscal year 2017 appropriation the amount of $683,954 to the Minnesota Department of Administration for the June 2017 rental for the Senate Office Building…"[31] and again for the July payment in the amount of $669,332 "and monthly thereafter during the Injunction Period …."[32] We note that the 2017 fiscal year appropriation reference in the agreement had been line-itemed vetoed by the Governor. Under what authority can these two branches of government agree to appropriations of taxpayer moneys *without an enactment of law*?

In an eloquent dissent in *Limmer v. Swanson*,[33] where a petition for quo warranto was dismissed as moot, former Minnesota Supreme Court Associate Justice Allan Page recognized the issue presented regarding the authority of the judiciary to cause moneys to be paid out of the State treasury without an appropriation by law which the quo warranto petition challenged. Moreover, Justice Page in passing noted the quo warranto petition process, which in our view *is* the proper vehicle to pursue the claims and noted that the Supreme Court ultimately dismissed the action *because* the budgetary impasse should be resolved by the very branches that created the conundrum in the first instance, as it presently exists in this case:

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[30] Senate-House Stip. 2, ¶5 (June 23, 2017).
[31] *Id.* 3, ¶7(a).
[32] *Id.* 3. ¶ 9(b).
[33] *Limmer v. Swanson,* 806 N.W.2d 838, 841–43 (Minn. 2011).

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In 2011, as in 2005 and 2001, a single district court judge was required to decide fundamental questions about the structure of our state government and to reconcile two competing provisions of the Minnesota Constitution. On one hand, article III, section 1, of the Minnesota Constitution provides:

> The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.

On the other hand, 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.

The district court's reconciliation of these provisions required that it answer the very questions this court declines to answer today: whether the Minnesota Constitution permits the judiciary to authorize state agencies to operate and to determine the functions those state agencies may perform in the absence of legislative appropriations*;* whether the Minnesota Constitution *permits* expenditures of state funds in the absence of legislative appropriation; whether a *failure* to fund certain governmental functions contravenes the Minnesota Constitution; and whether the federal Constitution or federal law can authorize the expenditure of state funds in the absence of legislative appropriation.[34]

The court acknowledges that this case is functionally justiciable and that the issues it presents are "fundamental constitutional questions about the relative powers of the three branches of our government." The court nevertheless dismisses the petition for writ of quo warranto because it deems it preferable that the other branches of government resolve their budget issues, rather than that we resolve the fundamental constitutional questions.[35]

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[34] We note that the district court did not answer the constitutional questions posed by Justice Page. *See In re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota,* 2011 WL 2556036 (Minn. Dist. Ct. Tr. Or. June 29, 2011).

[35] *Limmer v. Swanson,* 806 N.W.2d 838, 841–43 (Minn. 2011).

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"[I]t is well settled that a taxpayer may, when the situation warrants, maintain an action to restrain unlawful disbursements of public moneys; to recover for the use of the public subdivision entitled thereto money that has been illegally disbursed, as well as to restrain illegal action on the part of public officials."[36] "[I]t has been generally recognized that a taxpayer has sufficient interest to enjoin illegal expenditures of both municipal and state funds."[37] [T]axpayers have the right "to maintain an action in the courts to restrain the unlawful use of public funds."[38] As the Minnesota Supreme Court has declared, "the right of a taxpayer to maintain an action in the courts to restrain the unlawful use of public funds cannot be denied. Taxpayers are legitimately concerned with the performance by public officers of their public duties."[39]

The Court in *McKee v. Likins,*[40] recognized the well-settled doctrine that taxpayer standing existed to challenge illegal expenditures. The issue in *McKee* was whether taxpayer standing -- "injury in fact"—existed where the expenditure of taxpayer moneys was made under a rule which the plaintiff taxpayer alleged was adopted by a state official without compliance with the statutory rule-making procedures. The court held that taxpayer standing existed and that the expenditures were illegal for lack of following statutory procedure:

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[36] *McKee v. Likins***,** 261 N.W.2d 566, 571 (Minn. 1977) (citation omitted) "[I]t generally has been recognized that a state or local taxpayer has sufficient interest to challenge illegal expenditures." *Id.* 261 N.W.2d at 570-71 (citing *State v. Weld*, 39 Minn. 426, 428, 40 N.W. 561, 562 (1888) (Mitchell, J.) and *Oehler v. City of St. Paul*, 174 Minn. 410, 417-418, 219 N.W. 760, 763 (1928) ("it is well settled that a taxpayer may, when the situation warrants, maintain an action to restrain unlawful disbursements of public moneys")).
[37] *Arens v. Village of Rogers*, 240 Minn. 386, 392, 61 N.W.2d 508, 513 (1953).
[38] *Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.***,** 603 N.W.2d 143, 146 (Minn. App. 1999).
[39] *Id.* at 571.
[40] *McKee v. Likins***,** 261 N.W.2d 566 (Minn. 1977).

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> An important political issue like public financing of abortions ought to, ideally, be decided by the legislature where everyone can have his say. If the legislature has placed the issue in the hands of an administrative official that official's decision ought to be based on a careful expression of all interested viewpoints . . . Therefore, it logically follows that if the legislature delegates authority to an administrative agency and if the administrative agency elects to adopt rules pursuant to that authority, the procedure outlined in the Administrative Procedure Act should be followed in promulgating those rules.[41]

The taxpayer standing exception, reaffirmed in *McKee*, has been "limited . . . closely to its facts."[42] The underlying basis for the AGA's position that this Court has no jurisdiction is the illegalities of the stipulation which is the unlawful use of public funds. In other words, the challenged conduct must actually involve an alleged unlawful use of public funds.

The Ninetieth Legislature suggests in its objection memorandum that taxpayer standing exception should be strictly limited to the facts of *McKee*. However, a strict application of *McKee* is not as onerous as the Ninetieth Legislature would surmise. The threshold test is simply whether an alleged unlawful expenditure of taxpayer funds is truly at stake. Illustrative of this proposition is found in *Hageman v. Stanek*,[43] where the plaintiffs challenged the constitutionality of an appropriation specifically authorized by statute on equal protection grounds.[44] The taxpayer standing exception was inapplicable because the

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[41] 261 N.W.2d at 578.
[42] *Citizens for Rule of Law v. Senate Committee on Rules & Administration*, 770 N.W.2d 169, 175 (Minn. Ct. App. 2009) (citations omitted).
[43] *Hageman v. Stanek*, A03-2045, 2004 WL 1563276 at *2 (Minn. Ct. App. July 13, 2004) *rev. denied* (Minn. Sept. 21, 2004) (unpublished).
[44] *Id.* at *1.

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funds were spent as the statute authorized and there was no allegation that a public official or rule making body acted in a manner that led to an illegal expenditure.[45]

But here, there is no statute; there is no appropriation by law. The stipulation suggestions that the legislature and the governor can expend taxpayer moneys whenever there is a disagreement as long as they get the approval of a court *mid-legislative session* for any impasse regardless of the controversy from which the impasse occurred.

Furthermore, the Ninetieth Legislature's concern is unfounded and inconsistent with taxpayer standing jurisprudence. For example, in *Citizens for Rule of Law*, the Minnesota Court of Appeals held that a taxpayer had standing to raise a constitutional challenge to the actions taken by committees in both houses of the Minnesota Legislature to raise the per diem allowance for legislators' living expenses.[46] An association of taxpayers challenged the raise on grounds that it violated Article IV, Section 9 of the Minnesota Constitution, which provides that "[n]o increase of compensation shall take effect during the period for which the members of the existing house of representatives may have been elected."[47] The court held that although "Minnesota courts have limited *McKee* closely to its facts . . . this action falls within the narrow confines of taxpayer standing. As in *McKee*, appellants challenge a specific disbursement of money, alleging that it was wrongful."[48] In *Channel 10, Inc. v. Independent School District No. 709*,[49] the Minnesota Supreme Court stated that the

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[45] *Id.* at *2.
[46] *Citizens for Rule of Law*, 770 N.W.2d at 169.
[47] *Id.* at 171.
[48] *Id.* at 175.
[49] *Channel 10, Inc. v. Independent School District No. 709*, 298 Minn. 306, 313, 215 N.W.2d 814, 821 (1974).

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> Minnesota Open Meeting Law was obviously designed to assure the public's right to be informed," and that even though no member of the public would have an injury unique or different from one another, "a right to attend open public meetings having been given to the general public . . . they should have standing to enforce that right.[50]

There should be no doubt that the moneys identified in the stipulation are taxpayer funds and are being used without an appropriation by law. Thus, the AGA's jurisdictional arguments are based upon the illegalities of the existing parties—the Governor and the Ninetieth Legislature.

For these reasons, the AGA has standing as its members are taxpayers.

**IV. Jurisdictional issues are always ripe for adjudication.**

The Governor's objection memorandum suggests that the AGA claims are not ripe for intervention.[51] However, issues regarding subject matter jurisdiction,[52] as previously discussed above, cannot be waived and may be brought to the court's attention at anytime during the proceedings, including during an appeal. Therefore, the issue of subject matter jurisdiction is ripe for adjudication.

**V. The illegalities of unlawful expenditures of moneys without an appropriation by law giving rise to the AGA's subject matter jurisdictional concerns do not protect the AGA's interests.**

While this Court has accepted the Declaratory Judgment Act as an avenue for the remedy sought, this Court did not adjudicate the underlying cause of action to provide the jurisdictional basis for the Court to rule. We do not wish to be repetitive of arguments already presented to the Court regarding this issue; but, in an abbreviated version, the

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[50] *Id.*
[51] Gov. Objection Memo. 5.
[52] Minn. R. Civ. P. 24.01(1).

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underlying declaratory judgment action did not give this Court subject matter jurisdiction because the Ninetieth Legislature's Claim I regarding a separation of powers clause conflict is *not* a private cause of action under the Minnesota Constitution. The Minnesota Constitution does not provide for private causes of action. Furthermore, there is no statute or common law right to adjudicate a doctrinal dispute.

On the other hand, a petition for quo warranto, which does not have the limitations of a declaratory judgment action, *is a proper legal avenue* to adjudicate the claims asserted at the end of the biennium session (which is not the case here—the biennium of the Ninetieth Legislature remains in mid-session). Quo warranto is proper for a continuing course of action by a governor's veto at the adjournment of the biennium legislative session (year two, here we have the Ninetieth Legislature in mid-session); the late of funding of the legislature is the continuing course of conduct. As the Minnesota Supreme Court has opined in *State ex rel. Sviggum v. Hanson,*[53]

> *Mattson* involved a challenge to a continuing course of conduct—the transfer of functions from the state treasurer to the commissioner of finance. … Had the writ not issued, the commissioner of finance would have continued to exceed the powers of his office by exercising the functions of the state treasurer. *Mattson* thus weighs against the argument that quo warranto is available to adjudicate past violations that have expired.[54]

As stated, the Ninetieth Legislature remains in mid-session; it can override the Governor's line-item vetoes. These are constitutionally protected mechanisms that the

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[53] *State ex rel. Sviggum v. Hanson,* 732 N.W.2d 312, 320 (Minn. App. 2007) (comparing when quo warranto is proper) citing *State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777, 778 (Minn. 1986).

[54] *Id.* (citation omitted).

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legislature at the present time seeks to and has chosen not to use. But the legislature must. By allowing the parties to continue in the belief that the declaratory judgment action is the proper procedure, lends to inconsistencies of process already exasperated by the instant action and the inconsequential dicta of previous Minnesota Supreme Court cases such as *Seventy-Seventh Minnesota Senate v. Carlson*[55] where the specific issue of requiring a private cause of action to exist before granting relief under Minnesota's Declaratory Judgment Act was never adjudicated.

Instead, the parties have engaged in unlawful processes to expend taxpayers moneys through a court approved stipulation without an appropriation by law.

## VI. The lack of a private cause of action to assert a declaratory judgment action reveals that neither the Governor nor the Ninetieth Legislature can adequately represent the AGA's interests.

There is no basis for neither the Governor nor the Ninetieth Legislature to suggest either or both can adequately represent the AGA's interests:[56] "[T]he existing parties adequately represent *any interest* AGA may claim in this action."[57] Without the grant of intervention, the AGA cannot present its arguments regarding the subject matter jurisdiction. It would not be in the Governor's nor the Ninetieth Legislature's interest to suggest that the underlying declaratory judgment action has no basis for this Court or the Supreme Court to adjudicate the claim asserted. Moreover, the objectives of the AGA stand diametrically different than the Governor or the Ninetieth Legislature as explained above.

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[55] *Seventy-Seventh Minnesota Senate v. Carlson,* 472 N.W.2d 99 (Minn. 1991).
[56] Minn. R. Civ. P. 24.01(4).
[57] Ninetieth Legis. Obj. Memo. 4.

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## VII. Permissive intervention should be granted to allow for the adjudication of the AGA's subject matter jurisdiction assertion.

The AGA also moved for permissive intervention under Minnesota Rules of Civil Procedure, Rule 24.02. The AGA as an association of taxpayers has an interest regarding the accountability of government and the legality of public officials in performing their respective duties. Permissive intervention only requires that the intervening party has a claim or defense that shares a common question of law or fact with the main action.[58] Here, the AGA shares with the Governor and the Ninetieth Legislature a common question of law and fact with the underlying action. The common question of law is whether the district court has subject matter jurisdiction to adjudicate a declaratory judgment action when the parties failed to identify a cause of action that would allow the relief requested under the Declaratory Judgment Act. Likewise, the issue arises from a common fact: the line-item veto of the Governor of appropriations of the legislature and the resulting stipulation to expend taxpayer funds without an appropriation by law. Hence, permissive intervention should be granted.

## VIII. The AGA's motion to relax time limitations to allow a timely filing of an appeal should be granted.

The AGA also seeks relief from the time limitations under Rule 115.07, relating to the briefing schedule and hearing on the motion for intervention. The motion should be granted. As this Court knows, it first issued the underlying decision in this matter on July 19, 2017, filed on July 20, 2017. The Governor appealed the district court's decision and the

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[58] *Westfield Ins. Co. v. Wensmann, Inc.,* 840 N.W.2d 438, 445 (Minn. App. 2013) citing Minn. R. Civ. P. 24.01, 24.02; *see also Heller v. Schwan's Sales Enters., Inc.,* 548 N.W.2d 287, 292 (Minn.App.1996), *review denied* (Minn. Aug. 6, 1996).

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matter is currently on an expedited schedule; a hearing before the Minnesota Supreme Court is set for August 28th. Nevertheless, how this Court decides this motion, will nevertheless allow an appeal of the underlying partial final judgment before the appellate time period ends on September 17, 2017. Under rule 115.07, however, this time limit can be relaxed:

> If irreparable harm will result absent immediate action by the court, or if the interests of justice otherwise require, the court may waive or modify the time limits established by this rule.

In the interest of justice, this Court and the appellate courts should have an opportunity to declare whether the district court—or the appellate court—has or had subject matter jurisdiction under the Declaratory Judgment Act to adjudicate Claim I of the Ninetieth Legislature's complaint. As the Act is remedial and not an independent source of jurisdiction (there is no declaratory judgment claim), neither party nor this Court has declared under what cause of action, statute, or common-law right is the basis for subject matter jurisdiction. Moreover, the fact that the Legislature may not have a claim presently, as we stated before, because it has a constitutional mechanism in place and at this juncture of the mid-session of the Ninetieth biennium to override the Governor's line-item vetoes. If after final adjournment, the Governor rips appropriations from the Legislature through the exercise of a veto or vetoes, then a different legal avenue can rectify that action.

Meanwhile, justice requires that the courts provide the parameters to these type of litigation matters to bring a sense of order and expectation of all parties for future and inevitable disputes. The motion to relax motion practice time limitations should be granted.

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Dated: August 25, 2017.

/s/ Erick G. Kaardal

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**ACKNOWLEDGMENT**

The undersigned hereby acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. §549.211, Subd. 3, to the party against whom the allegations in this pleading are asserted.

Dated: August 25, 2017

/s/ Erick G. Kaardal
Erick G. Kaardal