

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT
CASE TYPE: OTHER CIVIL

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

Court File No. 62-CV-17-3601
Chief Judge John H. Guthmann

Plaintiffs,

v.

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR A
STAY OF ENFORCEMENT OF THE
JUDGMENT PENDING APPEAL**

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.

INTRODUCTION

The Governor exercised his line-item veto authority to re-open negotiations on five important items. Rather than finding a political solution, Plaintiffs decided to spend taxpayer money on costly and needless litigation. Plaintiffs filed this unnecessary lawsuit based on the false premise that the Governor's line-item vetoes abolished them by "starving" them of funding. The facts that have come to light throughout the course of this litigation have established that nothing could be further from the truth: Plaintiffs have access to over \$45 million. And, since filing this lawsuit, they have spent their allegedly scarce resources on luxury apartments and travel reimbursements for legislators who are not even in session.

Although Plaintiffs agreed to accelerated review by the Minnesota Supreme Court, rather than waiting for the Supreme Court ruling, Plaintiffs continue to needlessly spend tax dollars by moving for enforcement of the Judgment. Defendants have no choice but to counter by filing this Motion to stay the Judgment.

This Court should stay enforcement of the Judgment because events occurring in the three months since entry of judgment have significantly eroded the Judgment's underpinnings, factually, legally and procedurally.

The Supreme Court process has expanded the factual record and revealed that the House and Senate have access to substantially more resources than they represented to this Court prior to the entry of Judgment. Plaintiffs filed this lawsuit under the false pretense that the Governor's line-item veto of the House and Senate FY 18-19 appropriations "abolished" the Legislature. We now know that they have access to over \$45 million in carryforward and Legislative Coordinating Commission ("LCC") funds. This Court should stay the enforcement of the Judgment that was procured by Plaintiffs' lack of candor with this Court.

Additionally, the Court should order a stay because the Supreme Court has invalidated key legal underpinnings of the Judgment. The Supreme Court has issued a preliminary Order that contradicts the Judgment by holding, "the Governor's exercise of

his line-item veto power over the appropriation for the Legislature’s biennial budget was constitutional under [Minn. Const. art. IV, § 23].” (Add. 1-2).¹

Finally, the case has been fully submitted to the Supreme Court and its final decision may be imminent. This Court should exercise restraint out of respect for the Supreme Court’s process, and stay enforcement of the Judgment to await a final decision of the Supreme Court. In the unique context of this case, the harm of granting a stay is significantly outweighed by the harm of enforcing the Judgment.

ARGUMENT

I. The District Court Has Jurisdiction to Hear Defendants’ Motion.

Although an appeal deprives the district court of jurisdiction over many matters, the appellate rules make exception for motions to stay enforcement of a judgment pending appeal. Appellate Rule 108.02, subd. 1, expressly provides:

A party seeking any of the following relief must move first in the trial court:

(a) a stay of enforcement of the judgement or order of the trial court pending appeal; ...

See also, Minn. R. Civ. P. 62.03 (an appellant may obtain a stay pending appeal when authorized by appellate rules 107 and 108); Minn. R. Civ. P. 62.02 (district court may suspend an injunction during the pendency of an appeal); *Perry v. Perry*, 749 N.W.2 399, 404 (Minn. Ct. App. 2008) (district court has substantial latitude to exercise its discretion to stay a decision pending appeal); *State by Cooper v. Mower County Social Servs.*, 428

¹ The attached Addendum contains Orders issued by and pleadings filed with the Minnesota Supreme Court, cited as “Add. ____”.

N.W.2d. 491, 492 (Minn. Ct. App. 1988) (governmental entity is entitled to a stay pending appeal without posting a supersedeas bond).

To the extent that this Motion relies on newly discovered evidence and pre-judgment misrepresentations made by the Senate and House (which might otherwise support a motion to vacate the judgment under Civil Rule 60.02), it does so only in the context of the request for a stay, because the Supreme Court appeal deprives this Court of jurisdiction to consider a motion for relief from a judgment under Rule 60.02. *See, e.g.*, Minn. R. Civ. App. P. 108.01, subd. 2 (an appeal supersedes the trial court's authority to make any order that affects the judgment appealed from, except as to "matters independent of, supplemental to, or collateral to the order or judgment appealed from"); *Spaeth v. City of Plymouth*, 344 N.W.2d. 815, 824-825 (Minn. 1984).

II. The Balancing of Interests Warrants A Stay Pending Appeal.

Although this Court possesses the power to enforce a judgment pending appeal, it also has the power to decline to do so. *State v. N. Pac. Ry Co.*, 221 Minn. 400, 409-410, 22 N.W.2d 569, 574-575 (1946). A motion to stay enforcement of a judgment pending appeal requires a balancing of competing interests. The Court is to weigh such factors as (1) the likelihood of appellants' success on appeal, (2) the comparative harms if a stay is granted with those if a stay is not granted, (3) the possible impact of enforcing the judgment on the appellate court's jurisdiction, and (4) the need to avoid multiple or inconsistent decisions. *Id.* In deciding whether to grant a stay pending appeal, a court should "identify the relevant factors, weight each factor, and then balance them, applying

the court's sound discretion." *Webster v. Hennepin County*, 891 N.W.2d 290, 293 (Minn. 2017).

Similarly, the United States Supreme Court in *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987), suggested that the district court should consider all aspects of the case in ordering a stay pending appeal, including the possibility of irreparable harm to the parties, whether the appellant has demonstrated the likelihood of success on the merits, and the public interest. *Accord Webster*, 891 N.W.2d at 293 (citing *Hilton*, listing factors).

Whether to grant a stay should be determined by weighing all of the interests and deciding whether the better outcome is to defer enforcement until appellate review has been completed. "[A] trial court has broad discretion in deciding which of the various factors are relevant in each case." *Webster*, 891 N.W.2d at 293. Here, the relevant circumstances support a stay.²

A. Legal and Factual Developments Since Entry of the Judgment Demonstrate the Likelihood of Appellants' Success on Appeal.

The foundations of the Judgment have eroded, both legally and factually, and enforcement of the Judgment should be stayed until there is a final decision by the Supreme Court.

² The Minnesota Supreme Court has said that, in cases where a supersedeas bond is needed but has not been provided, the power to stay should be used sparingly. *See, e.g., No Power Line, Inc. v. Minn. Environmental Quality Council*, 262 N.W.2d 312, 330-331 (Minn. 1977). But that standard is not applicable here because a supersedeas bond is not required in cases involving a State appellant. Minn. R. Civ. P. 62.04 (where an appeal is taken by an officer of the state and the operation or enforcement of the judgment is stayed, "no bond, obligation, or other security shall be required from the appellant.").

1. The Supreme Court Order found that the vetoes were constitutional, effectively reversing Conclusion of Law 2.c.

By Order dated September 8, 2017, the Supreme Court decided:

The Governor's line-item veto authority is conferred by Article IV, Section 23 of the Minnesota Constitution, which allows the executive to veto "one or more" of "several items of appropriations of money." Minn. Const. Art. IV, § 23. As the district court found, the Governor vetoed items of appropriated funds that were deducted to a specific purpose. See *Johnson v. Carlson*, 507 N.W.2d 232, 235 (Minn. 593). Based on the plain language of Article IV, Section 23 of the Minnesota Constitution, we hold that the Governor's exercise of his line-item veto power over the appropriation for the Legislature's biennial budget was constitutional under that provision.

(Add. 1-2; emphasis added).

This Court, in Conclusion of Law 2.C, determined that the vetoes were "unconstitutional, null, and void." That conclusion was supported by several legal propositions that the Supreme Court's Order necessarily reversed: (1) that the line-item veto cannot be used to "induce policy changes that are unrelated to the vetoed appropriation" (Order granting Declaratory Judgment, p. 18); (2) that the court may consider the Governor's motive (*Id.* at 20); and (3) that the line-item veto may only be used for "purposes of cost containment" (*Id.* at 21).

Moreover, because the vetoes are constitutional, there is no legal basis to declare them "null and void." And if the vetoes are not null and void, there is no legal basis to order that the appropriations be reinstated. That remedy, as implemented in *Interfaculty Organization v. Carlson*, 478 N.W.2d. 192 (Minn. 1991), can only be used where the

vetoed are unconstitutional and can be disregarded as never having been effectively exercised.³

2. Factual Developments Since Entry of Judgment Establish that Finding 10 of the Judgment Was Based On Misinformation by Plaintiffs Regarding their Financial Situation.

The Judgment relied on Plaintiffs' sworn representations about their ability to operate without the vetoed appropriations. (Judgment , p. 3, ¶10.) Factual developments since the Judgment, however, have unequivocally established that those representations were wrong.

The affidavit of Cal Ludeman stated that:

In the absence of a general fund appropriation to the Senate for the fiscal biennium commencing on July 1, 2017, the only funds appropriated to the Senate will be the unexpended balance of previous appropriations to the Senate carried forward for use in 2018-2019 biennium under the authority provided in Minnesota Statutes, Section 16A.281. These funds, commonly known as the carryforward, are estimated to be approximately \$3,000,000 as of July 1, 2017.

(p. 7, ¶16; emphasis added.) Although Mr. Ludeman's statement may have been technically correct (because it studiously limited its reference to funds "appropriated" to the Senate), it was at best misleading because it implied that these were the only funds

³ Even if the Supreme Court were to ultimately determine that the constitutionally authorized vetoes produced an unconstitutional result of depriving the Senate and House of funding for their critical, core functions, the remedy would not be to reinstate the appropriations, but to judicially authorize core function funding until the next legislative session. Otherwise, the reinstatement of the appropriations by the court would violate the separation of powers because it would require the court to enact them, which is within the exclusive authority of the Legislature and Governor.

that were available to the Senate to cover its expenses in the absence of a new appropriation.

Mr. Ludeman further incorrectly stated that the Senate would be out of business in less than a month without a biennial appropriation: “In the absence of an operating budget for the Senate, all Senate operations will cease at the close of business on July 27, 2017.” (p. 8, ¶17). We now know this statement was untrue: the Senate has been without Temporary Injunction funding since October 2, and still is in operation, with more than \$3,932,636 in its carryforward account. (Affidavit of Eric Hallstrom in Support of Motion to Stay Judgment (“Second Hallstrom Aff.”) ¶¶ 2 and 9).

The affidavit of James Reinholdz wrongly stated:

As of July 1, 2017, the only funds available to the House will be the unexpended balances carried forward for use in the fiscal year 2018-2019 biennium under the authority provided in Minnesota Statutes, Section 16A.281. These funds, commonly known as the carryforward, are estimated to be approximately \$11.3 million as of July 1, 2017.

(p.7, ¶17; emphasis added). Mr. Reinholdz’s statement was not even technically correct because it said that the only funds “available” to the House were its own carryforward funds.

After the appeal was filed, the Senate and House revealed for the first time that substantial additional funds were available to meet their expenses, even without a FY18-19 appropriation to the House and Senate, by use of funds held by the Legislature Coordinating Commission (“LCC”). The Governor pointed out to this Court that the Legislature was not “abolished” because the appropriations to the LCC had not been vetoed. Based on Plaintiffs’ representations, the Governor did not contemplate, however,

that the House and Senate would use the LCC funds to pay for House and Senate operating costs. Also based on Plaintiffs' representations, this Court determined, we now know incorrectly, "funding of the Legislative Coordinating Commission does not cover legislative salaries, staff, building rental, or office administration." (Order Granting Declaratory Judgment, p. 15, n.4).

After the parties participated in court-ordered mediation, the Governor learned for the first time that the Senate and House had obtained a legal opinion that they could access LCC carryforward funds and the LCC's FY 18-19 appropriation, and intended to do so. (Appellants' Amended Statement on Carryforward Funds; Add. 18). As a result, contrary to the Senate and House affidavits, and this Court's determination, we now know that the Senate and House have access not only to their own carryforward funds, but also to funds of the LCC. The LCC has carryforward funds (Minn. Stat. § 16A.281) and an appropriation for the next biennium, which can be used in either year of the biennium (*Id.*) In addition, the LCC has broad authority to transfer LCC carryforward and biennial appropriation funds to the House and Senate (Minn. Stat. § 3.305, subd. 2). (*See* Appellants' Informal Memorandum in Response to Order of September 28, 2017; Add. 28-31).

Prior to the revelation of this access to LCC funds, the Governor had reported to the Supreme Court his belief that the only funds available to the Senate and House were their specific carryforward funds. (Add. 18-20). Based on that understanding, the Governor estimated that those funds would be exhausted if spending continued at historical levels, by February 1, 2018 for the House and December 1, 2017 for the Senate.

(Add. 20). After being apprised of the availability of LCC funds, the Governor recognized that those funds would be sufficient to cover expenses until well into the 2018 Legislative Session. (Add. 21).

The Judgment was based, at least in part, on the assumption that the Senate and House could not access the LCC funds through the time needed for the appeal or to pass new appropriations in the 2018 Session. That assumption has now been shown to be incorrect. The Senate and House can access these funds. More specifically, the Senate and House could draw down over \$3.6 million of LCC carryforward funds and over \$35 million from LCC appropriations. (See Appellants' Informal Memorandum in Response to Order of September 28, 2017; Add. 27-28). To avoid any impact on the LCC for Fiscal Year 2018, the Senate and House could still draw over \$17 million from the LCC appropriation for Fiscal Year 2019; use the funds through the 2018 Session; and pass a new appropriations bill that restores the Fiscal Year 2019 appropriations to the LCC. (Add. 30-31).

In other words, a solution to this dispute has always been available to the Legislature without any need for intervention by the judiciary. The Legislature has sufficient funds to take it to the 2018 Legislative Session, when it can pass new appropriations and, if needed, will have full opportunity to override any future vetoes of them.⁴

⁴ Plaintiffs have argued that their ability to access LCC funds relies on a discretionary decision by the LCC. While that is the case, it is false for Plaintiffs to claim an artificial distinction between themselves and the LCC. The LCC consists of the leadership of the

This information supports a stay because it shows that the Governor is likely to succeed on the merits of the claim, and shows the lack of harm to Plaintiffs if the Court stays the Judgment.

B. The Parties' Stipulations Override the Judgment

The June 23, 2017 Stipulation was intended to govern the parties' relationships through appellate review of any decision by the district court. The Stipulation's purpose was to "streamline the issues for decision and appellate review." It requested that this Court decide the issues raised by Count I of the Complaint in a way that best assures appealability. Specifically, it asked the Court to grant or deny an injunction (¶1); make a Rule 54.02 recitation for the immediate entry of judgment (¶2); and stay Counts II and III until all appellate review has been completed (¶3). The parties agreed to jointly seek accelerated review by the Minnesota Supreme Court (¶4) and to "maintain the status quo pending appeal" (¶5).

The Order granting Temporary Injunctive Relief of June 26, 2017 adopted and incorporated the June 23, 2017 Stipulation, treating it as a petition to provide temporary funding of the core governmental functions of the Senate and House. (Findings, ¶¶13, 14). Importantly, the Injunction based the temporary funding not on the vetoed appropriations, but on the fiscal 2017 levels that had been approved by both the Legislature and the Governor. (Conclusion of Law ¶18). Moreover, the parties submitted

House and the Senate. Minn. Stat. § 3.303, subd. 2. Any effort to distinguish between the House and Senate and the LCC is disingenuous, particularly in light of the fact that it was the LCC that voted to appoint counsel for the House and Senate in this case. (See Complaint ¶¶ 4, 22 & Ex. 2, LCC Resolution relating to legal counsel, June 2, 2017).

a further Stipulation of July 31, 2017, to avoid unnecessary litigation of the very issue now presented – whether the Judgment should be enforced during appellate review. The stipulations were intended to supersede the Judgment, even after the temporary funding expired on October 1, 2017.

The Senate and House have made representations to the Supreme Court that assume that these stipulations control. In Respondents’ Statement of Legislative Finances, submitted to the Supreme Court on September 18, 2017, the Senate and House addressed the date when their carryforward funds were anticipated to be exhausted. (Add. 13). The Senate and House estimated that date “assuming the House and Senate spend as anticipated through October 1, 2017, and only begin using their carryforward funds thereafter.” This assumption recognizes that, pursuant to the Stipulation, the Senate and House no longer have access to the Temporary Injunction funds and will actually begin spending carryforward funds on October 2, 2017. This is consistent with the parties’ stipulations, and shows a lack of harm to Plaintiffs if the Judgment is stayed.

C. The Senate and House will not suffer irreparable injury if the Judgment is Stayed.

The Senate and House have access to sufficient funds to perform their core functions until either the Supreme Court issues a final decision on the appeal or the Senate and House can pass a new appropriation bill during the 2018 Legislative Session.

If the Judgment is ultimately affirmed, the appropriations to the Senate and House will be reinstated retroactive to July 1, 2017. If the Judgment is reversed, the Senate and

House will still have the opportunity in the 2018 Legislative Session to pass new appropriations and make them retroactive to July 1, 2017.

Plaintiffs will not be prejudiced by a stay, because funds are fully available in the State Treasury to provide appropriations if the Judgment is affirmed. The Senate and House have ample funds until the Supreme Court's decision is issued, and any enforcement of the Judgment would have to be undone if the Judgment is reversed. (*See* Second Hallstrom Aff. ¶ 9).

D. The Comparative Harm If a Stay is Denied Weighs In Favor Of A Stay.

If the Judgment is enforced pending appeal but is reversed on by the Supreme Court, the draws made by the Senate and House under the Judgment will need to be reclassified as draws against their carryforward funds, and potentially against the LCC carryforward funds and appropriations. Facilitating the reclassification of the draws against LCC funds after the fact would be unreasonably complicated and should be avoided by a stay. (*See* Second Hallstrom Aff. ¶¶ 4-6).

If the district court ordered the Senate and House be given access to their FY18-19 appropriations, MMB would create appropriation accounts in the accounting system from which Plaintiffs could make expenditures. The Senate and House would then be able to draw from the entire biennium's appropriations (minus the amounts spent from the Temporary Injunction funding), not just the fractional share for each month. (*See id.* at 4).

If, on the other hand, the Supreme Court then holds the appropriations were lawfully vetoed and reverses the Judgment, unspent funds from the appropriation

accounts must be canceled in order to comply with the Supreme Court holding. Since the House and Senate will have spent amounts from non-appropriated funds, and it is unlawful for any State official to incur a debt on behalf of the State without an appropriation, or to intentionally use money for a purpose other than the purpose for which it was appropriated, Plaintiffs will be required to repay to the general fund amounts they spent from the appropriation accounts. *See* Minn. Stat. §§ 16A.138, 16A.139. (*See id.* at ¶¶ 5-6). Repayment could be accomplished by using other appropriated funds, such as the House and Senate carryforward account funds. (*See id.* at ¶ 5). However, if the Senate and House have spent more than the amounts in their carryforward accounts, they would be required to repay the general fund from other available funds, such as through a funds transfer from the LCC. (*See id.* at ¶ 6). If the Senate and House have spent more than the available LCC funds, or if the LCC does not vote to transfer funds, and there are no other available appropriated funds from which to repay the general fund, an unlawful and unconstitutional result will occur: money will have been paid out of the state treasury without any lawful appropriation. (Minn. Const. art. XI, § 1; Minn. Stat. § 16A.138). (*See id.*).

The balance of harms favors a stay since it is substantially more complex to cure enforcement of the Judgment if the Supreme Court rules on behalf of Defendants, than to cure non-enforcement of the Judgment if the Supreme Court rules on behalf of Plaintiffs.

E. Enforcement of the Judgment Will Interfere with the Jurisdiction and Processes of the Supreme Court.

As noted, the appeal has been fully submitted to, and already partially decided by, the Supreme Court. Enforcement of the Judgment at this time will cause unnecessary confusion and uncertainty. The Supreme Court has addressed the constitutionality of the vetoes. The Supreme Court is addressing the questions concerning the funds available to the Senate and House, both through their access to LCC funds and the availability of court-ordered funds for critical, core governmental functions. Any decisions by this Court on those matters would be temporary at most, and could actually interfere with the Supreme Court's jurisdiction. Accordingly, this Court should exercise restraint and stay enforcement of the Judgment pending the Supreme Court's decision.

CONCLUSION

Based on a balancing of these interests, the appropriate decision is to stay the enforcement of the Judgment and await the final decision of the Supreme Court.

Respectfully submitted,

Dated: November 1, 2017

BRIGGS AND MORGAN, P.A.

By: /s/ Sam Hanson

Sam Hanson (#41051)

Scott G. Knudson (#141987)

Scott M. Flaherty (#0388354)

Emily M. Peterson (#0395218)

2200 IDS Center

80 South Eighth Street

Minneapolis, Minnesota 55402-2157

Telephone: (612) 977-8400

Fax: (612) 977-8650

Email: shanson@briggs.com

sknudson@briggs.com

sflaherty@briggs.com

epeterson@briggs.com

Kristyn Anderson (#0267752)

General Counsel

Minnesota Management and Budget

400 Centennial Office Building

658 Cedar Street

St. Paul, Minnesota 55155

Telephone: (651) 259-3648

Fax: (651) 296-8685

Email: Kristyn.m.anderson@state.mn.us

ATTORNEYS FOR DEFENDANTS

ACKNOWLEDGMENT

The undersigned acknowledges that sanctions may be imposed pursuant to Minn. Stat. § 549.211, subd. 3.

/s/ Sam Hanson

Sam Hanson

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT
CASE TYPE: OTHER CIVIL

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

Court File No. 62-CV-17-3601

Chief Judge John H. Guthmann

Plaintiffs,

v.

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

**ADDENDUM TO DEFENDANTS'
MEMORANDUM IN SUPPORT OF
MOTION FOR A STAY OF
ENFORCEMENT OF THE
JUDGMENT PENDING APPEAL**

Defendants.

KELLEY, WOLTER & SCOTT, P.A.

Douglas A. Kelley (#54525)
Steven E. Wolter, (#170707)
Kevin M. Magnuson (#306599)
Brett D. Kelley (#397526)

Centre Village Offices, Suite 2530
431 South Seventh Street
Minneapolis, MN 55415
(612) 371-9090

and

MASLON LLP

David F. Herr (#44441)
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55401
(612) 672-8200

Attorneys for Respondents

BRIGGS AND MORGAN, P.A.

Sam Hanson (#41051)
Scott G. Knudson (#141987)
Scott M. Flaherty (#388354)
Emily M. Peterson (#0395218)

2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2157
(612) 977-8400

Attorneys for Appellants

MOHRMAN, KAARDAL & ERICKSON, P.A.

Erick G. Kaardal (#229647)
150 South Fifth Street, Suite 3100
Minneapolis, MN 55402
(612) 341-1074

*Attorneys for Association for Government
Accountability (AGA)*

ROSS & ORENSTEIN, LLC
Harry N. Niska (#0391325)
222 South Ninth Street, Suite 470
Minneapolis, MN 55402
(612) 436-9804

and

CENTER OF THE AMERICAN
EXPERIMENT
Kimberly Reynolds Crockett
(#0388309)
8421 Wayzata Boulevard, Suite 110
Golden Valley, MN 55426

*Counsel for Amicus Curiae
Center of the American Experiment*

ADDENDUM

1. Supreme Court Order of September 8, 2017 Add. 1

2. Supreme Court Order of September 28, 2017 Add. 7

3. Respondents’ Statement of Legislative Finances, September 18, 2017..... Add. 11

4. Appellants’ Amended Statement on Carryforward Funds, September 25,
2017 Add. 17

5. Appellants Informal Memorandum in Response to Order of September
28, 2017, September 25, 2017 Add. 22

FILED

September 8, 2017

**OFFICE OF
APPELLATE COURTS****STATE OF MINNESOTA****IN SUPREME COURT****A17-1142****The Ninetieth Minnesota State Senate, et al.,****Respondents,**

vs.

**Mark B. Dayton, in his official capacity as
Governor of the State of Minnesota, et al.,****Appellants.****ORDER**

On May 25, 2017, the Ninetieth Minnesota State Senate and the Ninetieth Minnesota State House of Representatives each adjourned *sine die*, thus ending the special session that began on May 23, 2017. On May 30, 2017, the Governor vetoed the line-item appropriation for the Legislature's biennial budget. This case presents the issue of whether the Governor has the constitutional power to line-item veto the Legislature's appropriations for itself.

The Governor's line-item veto authority is conferred by Article IV, section 23 of the Minnesota Constitution, which allows the executive to veto "one or more" of "several items of appropriation of money." Minn. Const. art. IV, § 23. As the district court found, the Governor vetoed items of appropriated funds that were dedicated to a specific purpose. *See Johnson v. Carlson*, 507 N.W.2d 232, 235 (Minn. 1993). Based on the plain language of Article IV, section 23 of the Minnesota Constitution, we hold that the Governor's exercise

of his line-item veto power over the appropriation for the Legislature's biennial budget was constitutional under that provision.

This conclusion does not, however, end the matter. Our Constitution requires "three distinct departments: legislative, executive and judicial." Minn. Const. art. III, § 1. The particular circumstances here, where the Legislature adjourned before its appropriation became law, the Governor vetoed the Legislature's appropriation, and the two Branches have remained at an impasse since then, raise doubts about the continuing functioning of the Legislative Branch.

The other Branches should resolve these doubts through the political process. Thus far, they have not done so. As a result, Minnesotans may soon be deprived of their constitutional right to three independent branches of government, *see* Minn. Const. art. III, each functioning at a level sufficient to allow the exercise of the constitutional powers committed to each branch for the "security, benefit and protection of the people, in whom all political power is inherent." Minn. Const. art. I, § 1. Constitutional powers may not be used "to accomplish an unconstitutional result." *Starkweather v. Blair*, 71 N.W.2d 869, 876 (Minn. 1955).

Perhaps recognizing the combined impact of their separate decisions on the people they serve, the Legislature and the Governor entered into a Stipulation, agreeing that the Commissioner of Management and Budget could take "all steps necessary to provide continuing funding to the [Legislature]" during the appeal or until October 1, 2017, based on its "fiscal year 2017 base general fund funding." *The Ninetieth Minn. State Senate, et al. v. Mark B. Dayton, et al.*, No. 62-CV-17-3601, Stipulation at 2 (filed June 23, 2017). The

district court approved this stipulation, despite acknowledging that a “literal reading of Article XI of the Minnesota Constitution prohibits the relief requested by the parties,” but deciding that the “rigidity of Article XI” must yield to the constitutional rights of Minnesota’s citizens. *The Ninetieth Minn. State Senate, et al. v. Mark B. Dayton, et al.*, No. 62-CV-17-3601, Findings of Fact, Conclusions of Law and Order Granting Temporary Injunctive Relief, at 8 (Ramsey Cty. Dist. Ct. filed June 26, 2017). Again on July 31, 2017, the parties stipulated to a funding proposal, and the district court ordered the Commissioner of Management and Budget to continue to provide funding to the Legislature during this appeal allowing the Legislature to “petition the court for funding” for “extraordinary and unanticipated expenses” that might be incurred during the appeal. *The Ninetieth Minn. State Senate, et al. v. Mark B. Dayton, et al.*, No. 62-CV-17-3601, Stipulation and Order at 2 (Ramsey Cty. Dist. Ct. filed July 31, 2017).

We agree with the district court that it is the people of Minnesota whose interests are at stake, but we do not see in the language of Article XI authority for a judicial funding remedy simply because those interests are at risk. Article XI provides: “No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law.” Minn. Const. art. XI, § 1. We are unaware of any authority that allows the Judicial Branch to authorize spending simply because parties ask a court to do so. *See, e.g., State ex rel. Gardner v. Holm*, 62 N.W.2d 52, 60 (Minn. 1954). In fact, our cases suggest that the Judicial Branch does not have the inherent power to appropriate money. *See, e.g., County of Beltrami v. Marshall*, 135 N.W.2d 749, 754 (Minn. 1965); *State v. Dahlgren*, 107 N.W.2d 299, 303 (Minn. 1961). Particularly in the area of appropriations, over which both the Legislature and

the Governor hold constitutional powers, the Judicial Branch must proceed cautiously and with respect for the plain language of the constitution. *See Clerk of Ct. for Lyon Cty. v. Lyon Cty. Comm'rs*, 241 N.W.2d 781, 786-87 (Minn. 1976). Further, a proper respect for our co-equal branches of government counsels that we intervene in their dispute only when absolutely necessary.

Apart from the judicial funding remedy used here, the exhibits in the record and the parties' positions at oral argument suggest that carryover funds from previous appropriations are available. But the extent of the funding available to the Legislature without the parties' stipulations and the district court's June 26 and July 31 funding orders is unclear, as is the date by which that funding will be exhausted given actual expenditures after the start of this fiscal year and anticipated expenses before the next regular legislative session convenes.

Finally, on September 6, 2017, a motion to intervene in this appeal was filed by the Association for Government Accountability. The Association seeks to intervene in order to challenge the judiciary's subject-matter jurisdiction over this dispute.

The issues identified above require additional input from the parties in order to assist the court in deciding this case.

Based upon all the files, records, and proceedings in this matter,

IT IS HEREBY ORDERED THAT:

1. Prior to Judicial Branch vindication of the people's constitutional right to three independent, functioning branches of government, the other Branches should have the opportunity to resolve this dispute. We therefore require the parties to participate in good-faith efforts to resolve this dispute through mediation. The parties shall notify this court by

4 p.m. on Tuesday, September 12, 2017, of the mediator they have agreed to use. If the parties are unable to agree on a mediator, we will designate one. On or before September 30, 2017, the parties shall file a joint statement with this court that reports on the status of these efforts, and if the matter is not resolved, provides a date by which the mediation will be concluded.

2. On or before September 15, 2017, the parties shall file and serve informal memoranda that address the constitutionality of the Judicial Branch ordering funding to the Legislature after June 30, 2017. The memoranda shall also specifically address all other potential judicial remedies, if any, for the vindication of the people's constitutional right to three independent, functioning, branches of government, and discuss any separation-of-powers concerns raised thereby. The parties shall also respond to the motion to intervene filed by the Association of Government Accountability, specifically to address the challenge to the judiciary's subject-matter jurisdiction over this matter. Informal memoranda shall be limited to 25 pages. No reply briefs will be permitted, and no further briefing will be permitted by the Association of Government Accountability.

3. On or before September 15, 2017, the parties shall file a joint statement that provides: (a) updated calculations on the amount of carryover funds available to the Minnesota House of Representatives and the amount of carryover funds available to the Minnesota State Senate as of July 1, 2017 and as of September 1, 2017; and, (b) the date by which carryover funds will be exhausted by the House and by the Senate, based on updated information on the actual monthly expenses of the House and Senate from July 1, 2017

through September 1, 2017, and the anticipated expenses of the House and Senate from September 1, 2017 through January 31, 2018.

Dated: September 8, 2017

BY THE COURT:



Lorie S. Gildea
Chief Justice

STRAS, J., took no part in the consideration or decision of this case.

FILED

September 28, 2017

**OFFICE OF
APPELLATE COURTS****STATE OF MINNESOTA
IN SUPREME COURT****A17-1142****The Ninetieth Minnesota State Senate, et al.,****Respondents,****vs.****Mark B. Dayton, in his official capacity as
Governor of the State of Minnesota, et al.,****Appellants.****ORDER**

On September 8, 2017, we directed the parties to file statements that identified the amount of carryover funds available to the Legislature and the date by which the Legislature will exhaust those funds. In statements filed on September 18, 2017, the parties agreed that the Minnesota State Senate has available to it \$6,004,325.94, which at current estimated monthly spending levels would be exhausted by December 1, 2017, and the Minnesota House of Representatives has available to it \$10,681,438.14, which at current estimated monthly spending levels would be exhausted by February 1, 2018.

On September 25, 2017, the Governor filed an amended statement regarding carryover and appropriated funds available to the Legislative Coordinating Commission (LCC), which funds, the Governor asserts, the Legislature may intend to access for its funding needs. If the Legislature does access the LCC carryover and appropriated funds, the

Governor contends that the funds available to the Minnesota State Senate and the Minnesota House of Representatives would not be exhausted until after the start of the next legislative session on February 20, 2018.

On September 26, 2017, the Legislature filed a response to the Governor's amended statement. The Legislature disagrees with the "numbers" provided by the Governor for the funds available to the LCC, but did not state whether it intends to access the LCC's carryover funds and appropriations for the 2018-2019 biennium. The Legislature noted that its ability to "move funds from the LCC" to either legislative chamber is "untested" and would require "numerous decisions and procedural steps."

"The Legislature Coordinating Commission may transfer unobligated balances among general fund appropriations to the legislature." Minn. Stat. § 3.305, subd. 2 (2016). Funds carried forward "into the next biennium" may be used for purposes defined by statute, including "to pay expenses associated with sessions, interim activities, public hearings or other public outreach efforts and related activities." Minn. Stat. § 16A.281 (2016). Further, "[t]he approval of the commissioner of management and budget" is not required to use carryover funds held by the Legislature. *Id.*

We previously expressed concern that the "extent of the funding available to the Legislature . . . is unclear, as is the date by which that funding will be exhausted." *Ninetieth Minn. State Senate v. Mark B. Dayton*, No. A17-1142, Order at p. 4 (Minn. filed Sept. 8, 2017). The parties' submissions regarding the funds available to the Legislature and the date by which that funding will be exhausted clarified some of this uncertainty, but have not addressed the Legislature's authority to spend any of the funds that have been disclosed

in these submissions. In addition, it is unclear whether funds from the LCC appropriations and the LCC carryover funds may be available to the Legislature and whether those funds may extend the exhaustion dates previously identified (December 1, 2017 for the Senate and February 1, 2018 for the House). *See* Minn. Stat. § 3.305, subd. 2 (allowing the LCC to transfer “unobligated balances”); Minn. Stat. § 16A.281 (limiting the purposes for which carryforward funds may be expended). *Cf.* Minn. Stat. § 16A.15, subd. 3 (2016) (explaining that a “payment may not be made without prior obligation” and an obligation cannot be incurred without “a sufficient unencumbered balance in the fund, allotment, or appropriation to meet it.”).

Additional submissions are therefore necessary to assist us in deciding the parties’ dispute regarding the Governor’s line-item veto of the Legislature’s biennial appropriation. To be clear, the court requires specific statements that identify *all* funds the Legislature may use to fund its operations in the absence of an appropriation for the FY2018-2019 biennium, whether current appropriations or carryover fund balances, and the legal authority that permits the Legislature to use these funds.

Based on all files, records, and proceedings in this matter,

IT IS HEREBY ORDERED that on or before October 5, 2017, the parties shall file informal memoranda that specifically identify (a) the amount of funds held by the Minnesota House of Representatives, the Minnesota State Senate, the Legislative Coordinating Commission, and any other legislative committee or commission as of September 1, 2017 that are available to or can be used by the Minnesota House of Representatives or the Minnesota State Senate to fund the operations of the House or the Senate in the absence of

an appropriation for the FY2018-2019 biennium; and (b) the specific statute or constitutional provision that allows the Minnesota House of Representatives or the Minnesota State Senate to use any of those funds to pay any expenses or costs incurred.

Dated: September 28, 2017

BY THE COURT:



Lorie S. Gildea
Chief Justice

STRAS, J., took no part in the consideration or decision of this case.

FILED

September 18, 2017

**OFFICE OF
APPELLATE COURTS**STATE OF MINNESOTA
IN SUPREME COURT
A17-1142

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

Respondents,

v.

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

Appellants,

**RESPONDENTS' STATEMENT OF
LEGISLATIVE FINANCES**

In Paragraph 3 of its September 8, 2017 Order, this Court required the parties to submit a joint statement regarding the carryforward funds available to the Minnesota House of Representatives ("House") and the Minnesota State Senate ("Senate"). Specifically, the Court required information regarding: (1) the amount of carryforward funds available to the House and Senate as of July 1, 2017 and September 1, 2017; (2) actual monthly expenses of the House and Senate from July 1, 2017 to September 1, 2017; (3) the anticipated expenses of the House and Senate from September 1, 2017 through January 31, 2018; and (4) the date by which carryforward funds are anticipated to be exhausted. The parties used their best efforts and were able to agree on Paragraphs 1 and 2. The parties were not able to agree on Paragraphs 3 and 4. Consequently, the parties must file separate statements.

1. **The amount of carryforward funds available to the House and Senate as of July 1, 2017 and September 1, 2017.**

The amounts in the carryforward accounts as of July 1, 2017, reflect unspent amounts from fiscal years prior to the 2017 fiscal year. The fiscal year ends June 30 and the financial books are reconciled and closed in August. As a result of this reconciling process, the September carryforward account balance is higher as of September 1 than July 1, and includes amounts that were unspent from the House and Senate fiscal year 2017 appropriations.

Carryforward funds available	July 1, 2017 Balance	Plus: Unspent Funds from FY17 Appropriation	Less: Expenses Paid During FY18 from Carryforward Account	September 1, 2017 Balance
House	\$8,330,623.75	\$2,789,198.86	(\$438,384.47)	\$10,681,438.14
Senate	\$2,921,676.59	\$3,201,744.29	(\$119,094.94)	\$6,004,325.94

2. **Actual expenses of the House and Senate from July 1, 2017 to September 1, 2017.**

These include some expenses that were incurred in FY17 but that were paid during FY18.

House	July 1 – 31	August 1 – 31	September 1
Total	\$2,438,571.25	\$2,764,972.72	\$756,843.91

Senate	July 1 - 31	August 1 – 31	September 1
Total	\$2,520,715.41	\$3,228,384.34 ¹	\$423,795.31

¹ While the parties agree that total spending for August was \$3,228,384.34, the Senate believes this number overstates its actual expenses for August. The Senate received the invoice for the July lease payment for the Minnesota Senate Building from the Department of Administration in August. Because the Senate paid both this invoice and

3. Anticipated expenses from September 1, 2017 until January 31, 2018.

The House and Senate estimate their monthly expenses from September 1, 2017 until January 31, 2018 will be as follows:

House estimate: \$2,500,000

Senate estimate: \$2,562,000

These amounts are not materially different from those in the existing record. *See Add. 59 at Finding ¶4; ROA 25 ¶15 (Senate's average monthly operating costs are approximately \$2,558,000); ROA 26 ¶16 (House's average monthly operating costs are approximately \$2,700,000).*

4. Anticipated date carryforward funds will be exhausted.

Assuming the House and Senate spend as anticipated through October 1, 2017, and only begin using their carryforward funds thereafter, the anticipated date carryforward funds will be exhausted is as follows:

House: After payment of payroll on February 1, 2018

Senate: After payment of payroll on December 1, 2017

These dates assume the House and Senate will continue spending at the level in Paragraph 3 above. The parties disagree on what the effect would be if spending levels are changed when only carryforward funds are used. The Governor believes that spending would be reduced and the exhaustion period extended. The Legislature disagrees. The anticipated future expenses listed in Paragraph 3 do not account for additional costs necessitated by a shutdown (e.g.,

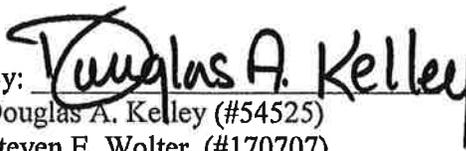
the August lease payment in August, the Senate believes the figure of \$3,228,384.34 supplied by the Governor overstates the Senate's actual August expenses by \$669,342.49. The Senate therefore believes the correct total for the total actual expenses of the Senate in August of 2017 is \$2,616,505.27.

employer portion of health insurance costs, accrued paid-time off for certain employees, and anticipated unemployment insurance costs). When these additional costs are included, the House and Senate carryforward funds will be exhausted much sooner than anticipated.

Attorneys for Respondents

KELLEY, WOLTER & SCOTT, P.A.

Dated: September 18, 2017

By: 
Douglas A. Kelley (#54525)
Steven E. Wolter, (#170707)
Kevin M. Magnuson (#306599)
Brett D. Kelley (#397526)
Centre Village Offices, Suite 2530
431 South Seventh Street
Minneapolis, MN 55415
(612) 371-9090

and

MASLON LLP
David F. Herr (#44441)
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55401-4140
(612) 672-8350

FILED

September 18, 2017

**OFFICE OF
APPELLATE COURTS**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1142The Ninetieth Minnesota State Senate
and the Ninetieth Minnesota State House
of Representatives,

Respondents,

v.

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

Appellants.

AFFIDAVIT OF SERVICE

Stephanie A. Rued, being first duly sworn upon oath, states that on the 15th day of September 2017, she caused the following documents to be filed with the Clerk of Appellate Court through the Appellate E-filing system, E-MACS:

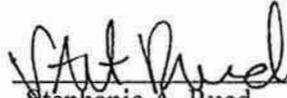
1. Respondents' Statement of Legislative Finances in response to Order of September 8, 2017

I further state that I caused copies to be served upon the following individuals, by first class mail, postage paid, to the following:

BRIGGS AND MORGAN, P.A.Sam L. Hanson
Scott G. Knudson
Scott M. Flaherty
Emily M. Peterson2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402**ROSS & ORENSTEIN, LLC**Harry N. Niska
222 South Ninth Street, Suite 470
Minneapolis, MN 55402**CENTER OF THE AMERICAN
EXPERIMENT**Kimberly Reynolds Crockett
Wayzata Boulevard, Suite 110 Golden
Valley, MN 55426

MOHRMAN, KAARDAL & ERICKSON, P.A.

Erick G. Kaardal
150 South Fifth Street, Suite 3100
Minneapolis, MN 55402

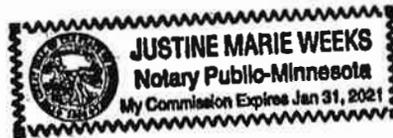


Stephanie A. Rued

Subscribed and sworn to before
me this 18th day of September, 2017.



Notary Public



FILED

CASE NO. A17-1142

September 25, 2017

**STATE OF MINNESOTA
IN SUPREME COURT**

**OFFICE OF
APPELLATE COURTS**

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

Respondents,

vs.

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

Appellants.

**APPELLANTS' AMENDED STATEMENT ON
CARRYOVER FUNDS**

In Paragraph 3 of its September 8, 2017 Order, this Court required the parties to submit a joint statement regarding the carryover funds available to the Minnesota House of Representatives ("House") and the Minnesota State Senate ("Senate"). Specifically, the Court required information regarding: 1) the amount of carryover funds available to the House and Senate as of July 1, 2017 and September 1, 2017; 2) actual monthly expenses of the House and Senate from July 1, 2017 to September 1, 2017; 3) the anticipated expenses of the House and Senate from September 1, 2017 through January 31, 2018; and 4) the date by which carryover funds are anticipated to be exhausted. The parties were able to agree on questions (1) and (2), but after considerable effort were not able to agree on questions (3) and (4), for the reasons stated below.

After submitting Appellants' original statement on September 18, 2017, Appellants learned that the Senate and House may intend to access additional funds held by the Legislative Coordinating Commission ("LCC"). The LCC has both carryover funds and appropriated funds for the 2018-2019 biennium. This Amended Statement identifies those LCC funds. (Exhibits omitted; new text underlined.)

1. The amount of carryover funds available to the House and Senate as of July 1, 2017 and September 1, 2017.

The amounts in the carryover accounts as of July 1, 2017 reflect unspent amounts from fiscal years prior to the 2017 fiscal year. The fiscal year ends June 30 and the financial books are reconciled and closed in August. As a result of this reconciling process, the September carryover account balance is higher as of September 1 than July 1, and includes amounts that were unspent from the House and Senate fiscal year 2017 appropriations.

Carryover funds available	July 1, 2017 Balance	Plus: Unspent Funds from FY17 Appropriation	Less: Expenses Paid During FY18 from Carryover Account	September 1, 2017 Balance
House	\$8,330,623.75	\$2,789,198.86	(\$438,384.47)	\$10,681,438.14
Senate	\$2,921,676.59	\$3,201,744.29	(\$119,094.94)	\$6,004,325.94

The LCC's carryover funds are as follows:

<u>LCC carryover funds*</u>	<u>July 1, 2017 Balance</u>	<u>Plus: Unspent Funds from FY17 Appropriation</u>	<u>Less: Expenses Paid During FY18 from Carryover Account</u>	<u>September 1, 2017 Balance</u>
	<u>\$2,095,174.95</u>	<u>\$1,546,872.43</u>	<u>(\$1,090.47)</u>	<u>\$3,640,956.91</u>

2. Actual expenses of the House and Senate from July 1, 2017 to September 1, 2017.

These include some expenses that were incurred in FY17, but that were paid during FY18.

House	July 1 – 31	August 1 – 31	September 1
FY 18 Temp Injunction	\$1,023,118.59	\$2,728,907.76	\$756,843.91
Carryover	\$438,384.47		
FY17 Appropriation	\$977,068.19	\$36,064.96	
Total	\$2,438,571.25	\$2,764,972.72	\$756,843.91

Senate	July 1 - 31	August 1 – 31	September 1
FY18 Temp Injunction	\$1,309,661.86	\$3,109,289.40	\$423,795.31
Carryover	\$68,665.43	\$119,094.94	
FY17 Appropriation	\$1,142,388.12		
Total	\$2,520,715.41	\$3,228,384.34	\$423,795.31

* The use of LCC carryover funds is governed by Minn. Stat. § 16A.281.

3. Anticipated expenses from September 1, 2017 until January 31, 2018.

The Appellants have reviewed the estimates provided by the House and Senate of their monthly expenses. Appellants believe these estimates assume continued spending at the same levels as since July 1, 2017. But Appellants have determined that the actual spending in that period included substantial discretionary amounts that are not likely to be continued if the Senate and House were proceeding on carryover funds.

Exhibit A attached hereto shows House expenditures using the temporary injunction funds since July 1, 2017. Exhibit B attached hereto shows the House expenditures from the carryover and FY 2017 appropriation accounts since July 1, 2017. Exhibit C attached hereto shows Senate expenditures using the temporary injunction funds since July 1, 2017. Exhibit D attached hereto shows Senate expenditures from the carryover and FY 2017 appropriation accounts since July 1, 2017.

Based on the information from those Exhibits, Appellants believe that the monthly expense estimated by the Senate and House are overstated.

4. Anticipated date carryover funds will be exhausted.

Assuming the Senate and House spend at their estimated monthly rate, the Senate and House carryover funds would be exhausted on February 1, 2018 for the House and December 1, 2017 for the Senate. However, based on the discretionary spending identified in the attached Exhibits, Appellants believe that the monthly spending will be less than estimated and the date the carryover funds will be exhausted therefore will be later.

In addition to its carryover funds, the LCC received an appropriation for FY 2018 of \$17,511,000 and for FY 2019 of \$17,681,000. (Laws 2017 Spec. Sess. c. 4, art. 1 §2, subd. 4.) If the Senate and House use LCC funds, the date the Senate and House carryover funds and the LCC carryover and appropriated funds, will be exhausted will be well after the next legislative session begins on February 20, 2018.

Dated: September 25, 2017

Respectfully submitted,

BRIGGS AND MORGAN

/s/ Sam Hanson

Sam Hanson (#41057)

2200 IDS Center

80 So. 8th Street

Minneapolis, MN 55402

(612) 977-8400

Attorneys for Appellants

CASE NO. A17-1142

FILED

October 5, 2017

**STATE OF MINNESOTA
IN SUPREME COURT****OFFICE OF
APPELLATE COURTS**

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

Respondents,

vs.

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

Appellants.

**APPELLANTS' INFORMAL MEMORANDUM AND
ADDENDUM IN RESPONSE TO ORDER OF
SEPTEMBER 28, 2017**

KELLEY, WOLTER & SCOTT, P.A.

Douglas A. Kelley (#54525)
Steven E. Wolter, (#170707)
Kevin M. Magnuson (#306599)
Brett D. Kelley (#397526)

Centre Village Offices, Suite 2530
431 South Seventh Street
Minneapolis, MN 55415
(612) 371-9090

and

MASLON LLP

David F. Herr (#44441)
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55401
(612) 672-8200

Attorneys for Respondents

BRIGGS AND MORGAN, P.A.

Sam Hanson (#41051)
Scott G. Knudson (#141987)
Scott M. Flaherty (#388354)
Emily M. Peterson (#0395218)

2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2157
(612) 977-8400

Attorneys for Appellants

MOHRMAN, KAARDAL & ERICKSON, P.A.

Erick G. Kaardal (#229647)
150 South Fifth Street, Suite 3100
Minneapolis, MN 55402
(612) 341-1074

*Attorneys for Association for Government
Accountability (AGA)*

ROSS & ORENSTEIN, LLC
Harry N. Niska (#0391325)
222 South Ninth Street, Suite 470
Minneapolis, MN 55402
(612) 436-9804

and

CENTER OF THE AMERICAN
EXPERIMENT
Kimberly Reynolds Crockett
(#0388309)
8421 Wayzata Boulevard, Suite 110
Golden Valley, MN 55426

*Counsel for Amicus Curiae
Center of the American Experiment*

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INTRODUCTION

In the Order dated September 28, 2017, this Court requested two separate items:

1) the identification of “*all* funds the Legislature may use to fund its operations in the absence of an appropriation for the FY2018-2019 biennium, whether current appropriations or carryover funds,” and 2) “the authority that permits the Legislature to use these funds.” Order dated September 28, 2017, pp. 3-4. In response to the Order, the Governor will first explain how Respondents have failed to be forthright in their court filings, and next will provide his answers to the Court’s request.

RESPONDENTS HAVE NOT BEEN CANDID WITH THE COURT ABOUT THE AVAILABILITY OF FUNDS

Clearly important to the Court’s constitutional analysis is the availability of funding to Respondents in the absence of an appropriation. (*See* Sept. 8, 2017 Order, p. 4 (“But the extent of the funding available to the Legislature without the parties’ stipulations and the district court’s June 26 and July 31 funding orders is unclear, as is the date by which that funding will be exhausted given actual expenditures after the start of this fiscal year and anticipated expenses before the next regular legislative session convenes.”).) Nevertheless, Respondents attempted to create a constitutional crisis by repeatedly stating in their filings, without factual support, that the Governor’s vetoes have “abolished” the Legislature or that the Legislature faces imminent shutdown. In addition to the false claim of abolishment, Respondents have failed to candidly disclose *all* available resources to the Court.

Respondents reported in their September 18, 2017 filing entitled, “Statement of Legislative Finances,” on the status of only the House and Senate carryover accounts.

We now know that Respondents obtained legal advice that they could access Legislative Coordinating Commission (“LCC”) carryover and FY 18-19 biennial appropriated funds, and they have stated they intend to use both. Only Respondents can explain why they failed to call these funds to the Court’s attention. In fact, it was the Governor in his September 15, 2017 filing who provided details about the existence of the LCC funds. (Appellants’ September 15, 2017 Informal Mem., p. 9 n.2.)

Consistently throughout their lawsuit, Respondents have insisted that the Governor’s line-item vetoes “abolished” them, even though they had access to (1) over \$16 million in Temporary Injunction funds from July 1 through October 1¹, (2) over \$16 million in carryover funds, (3) over \$3.8 million in LCC carryover funds, and (4) up to as much as over \$31 million in LCC FY 18-19 biennial general fund appropriations. Even as recently as their September 26, 2017 filing, Respondents declared that they are facing “imminent shutdown” and that the Governor has “forced the entire Legislature into survival mode.” (See Resp. to Appellants’ Amended Statement on Carryover Funds, p. 1.) These claims of abolishment are simply false.

RESPONSE TO THE COURT’S SPECIFIC QUESTIONS

The Court has requested briefing on the legal authority and amounts of any funds that can be used to finance Senate and House operations in the absence of an appropriation.

¹ October 1, 2017 was the last date that funding was available to Respondents under the district court’s Temporary Injunction. The date used herein to address availability of funds is October 2, 2017, the date after expiration of the Temporary Injunction funding.

I. The Legislature Has Granted Itself Significant Flexibility In Law To Access Funds.

The Legislature has enacted several laws that give itself special access to funds. These statutes apply uniquely to the Legislature—neither the Executive nor Judicial branches have the same access to funding. As a result of these statutes, the House and Senate have access to significant funds that can finance their operations well into the beginning of the next legislative session, at which point they can pass new appropriations.

A. The House and Senate Have Access to Their Carryover Accounts.

Unlike the Executive branch or the Courts, the Legislature—including the House, Senate, and legislative committees and commissions—has authority to carry over into the next biennium unexpended appropriated balances from prior years. Minn. Stat. § 16A.281. The Legislature does not require approval from the Commissioner of Management and Budget to carry over or spend these funds. *Id.* These carryover accounts, which are accounts in the general fund, can be used to pay operational expenses. *Id.* (carryover funds can be used “to pay expenses associated with sessions, interim activities, public hearings, or other public outreach efforts and related activities”).

B. The LCC Also Has Carryover Funds.

Minnesota Statutes section 16A.281 provides authority to carry over funds not only to the House and Senate, but also to the LCC. As of October 2, 2017, the LCC’s carryover balance in the general fund is approximately \$3,871,375.

C. Appropriations Are Available to The Legislature in Either Year of the Biennium.

Also unlike Executive branch agencies, the Legislature can spend biennial appropriated funds “in either year of the biennium.” Minn. Stat. § 16A.281. This means that the LCC, for example, is entitled to use all or a portion of its FY 19 appropriation in FY 18.

D. The LCC May Transfer LCC Carryover And Biennial Funds To The House And Senate.

The State Government Appropriations bill, passed during the 2017 Special Session, made general fund appropriations to the LCC of \$17,383,000 for FY 18 and \$17,553,000 for FY 19. (Laws 2017 Spec. Sess. c. 4, art. 1 § 2, subd. 4.) As of October 2, 2017, the LCC has approximately \$14,162,967 remaining of its FY 18 general fund appropriation, and the entire \$17,553,000 of its FY 19 general fund appropriation. These appropriations to the LCC are identified in session law as appropriations that may be used for staff to support listed offices and commissions (*e.g.*, Legislative Auditor, Revisor of Statutes, Legislative Reference Library), and some listed amounts for specified activities (*e.g.*, \$130,000 in the first year for transit financial activity reviews required by statute).
Id.

However, Minnesota Statutes section 3.305, subd. 2 provides: “The Legislative Coordinating Commission may transfer unobligated balances among general fund appropriations to the legislature.” This broad transfer language provides the authority for

the LCC² to transfer LCC general fund appropriations—both carryover and biennial appropriations—for use by the House and Senate.³

In their Response to Appellants' Amended Statement on Carryover Funds, Respondents suggest that Minnesota Management and Budget ("MMB") has the discretion to limit the LCC's transfer authority. (Resp. to Appellants' Am. Statement on Carryover Funds, p. 2.) Appellants are not aware of any such discretionary authority on the part of MMB. Respondents may be referring to Minn. Stat. § 16A.285, which places general conditions on appropriation transfers of an "agency" in the executive, legislative, or judicial branch. Minn. Stat. § 16A.285 (allows appropriation transfers between programs in the same fund (*e.g.*, the general fund) if the agency first notifies MMB, the transfer is consistent with legislative intent, and "[i]f an amount is specified for an item within an activity, that amount must not be transferred or used for any other purpose"). This provision, to the extent it applies to the LCC, does not require MMB approval, only notice to MMB.

In addition, section 16A.285 does not appear to prevent the transfer of LCC general fund balances, the legislative intent for which is codified in section 3.305, subd. 2. However, to the extent there is a conflict between these two provisions, section 3.305,

² The LCC members are: Rep. Kurt Daudt (R); Rep. Lyndon Carlson (DFL); Rep. Melissa Hortman (DFL); Rep. Joe Hoppe (R); Rep. Deb Kiel (R); Rep. Joyce Peppin (R); Sen. Michelle Fischback (R); Sen. Tom Bakk (DFL); Sen. Michelle Benson (R); Sen. Gary Dahms (R); Sen. Paul Gazelka (R); and Sen. Sandy Pappas (DFL).

³ As a result of the Governor's line-item vetoes, the House and Senate do not have FY18-19 appropriations. However, under its section 3.305, subd. 2 authority to transfer balances "among general fund appropriations," the LCC could transfer funds from the LCC general fund carryover and biennial appropriations, to the House and Senate carryover accounts, which are also general fund appropriation accounts.

subd. 2, the more specific statute expressly addressing LCC transfer authority, should govern over the general provisions of section 16A.285.⁴ The Legislature has not expressed any manifest intent that section 16A.285 should limit the LCC's broad authority under section 3.305, subd. 2 to transfer a significant amount of its general fund funds to the House and Senate carryover accounts.

Thus, by operation of both section 3.305, subd. 2 and section 16A.281, the LCC may transfer to the House and Senate: 1) LCC carryover funds; 2) LCC FY 18 and/or FY 19 biennial appropriated general fund funds; and/or 3) all of the above. *See* Minn. Stat. §§ 3.305, subd. 2 (LCC may transfer unobligated balances among legislative general fund appropriations); 16A.281 (carryover funds may be used for operations, and legislative appropriations can be used in either year of the biennium).

In their September 26, 2017 filing, Respondents protest that their use of LCC funds would impede the operations of the LCC. Respondents could consider, however, transferring only the LCC's carryover funds and FY 19 general fund funds to the House and Senate. By doing so, the LCC could continue, business as usual, using its FY 18 appropriations, without "par[ing] back significantly" the LCC's functions or imperiling the LCC's 140 employees, as Respondents portend. (Resp. to Appellants' Am. Statement

⁴ *See State v. Kalvig*, 296 Minn. 395, 401, 209 N.W.2d 678, 681 (1973) ("[O]ur statutory and case law history clearly indicate a support for the doctrine that the specific statute controls the general statute, unless the legislature manifestly indicates its intention that the latter shall be controlling."); *Nathan v. St. Paul Mut. Ins. Co.*, 243 Minn. 430, 438-39, 68 N.W.2d 385, 391 (1955) ("[W]here, as here, two statutes contain general and special provisions which seemingly are in conflict, the general provision will be taken to affect only such situations within its general language as are not within the language of the special provision."); Minn. Stat. § 645.26, subd. 1 (in irreconcilable conflict, specific provision controls over general unless general provision is enacted later and legislative intent is manifest that the general provision shall prevail).

on Carryover Funds, p. 2.) Then, in the next legislative session, the Legislature could pass an appropriations bill that restores to the LCC any funds that Respondents have used.

II. General Fund Amounts Available To The House And Senate

The parties agree that the House and Senate can use their carryover accounts to fund operations in the absence of an appropriation for the FY 18-19 biennium. As of October 2, 2017, the House carryover account contains approximately \$10,681,438 and the Senate carryover account contains approximately \$5,582,050.⁵

Additionally, assuming that under its section 3.305, subd. 2 authority, the LCC authorizes a transfer of its carryover funds, the amounts available to the House and Senate would increase by approximately \$3,871,375.

Finally, assuming the LCC authorizes a transfer of its FY 18-19 general fund appropriated funds, the amounts available to the House and Senate could increase by up to as much as \$31,715,967.⁶

⁵ Appellants previously identified a Senate carryover account balance of \$6,004,375.94 as of September 1, 2017 (Appellants' Statement on Carryover Funds, p. 2). During MMB's annual reconciliation of cash balances, it was discovered that expenditures of \$416,691.61 made by the Senate during fiscal year 2017 were not recorded in the accounting system. This has since been corrected, and the Senate carryover account balance has been reduced accordingly.

⁶ Of the general fund appropriation to the LCC, \$567,000 in FY 18 and \$10,000 in FY 19, are earmarked for specific items. (Laws 2017 Spec. Sess. c. 4, art. 1 § 2, subd. 4.) It is unclear whether those amounts could be used for other purposes. *Compare* Minn. Stat. § 16A.285 ("If an amount is specified for an item within an activity, that amount must not be transferred or used for any other purpose.") *with* Minn. Stat. 3.305, subd. 2 ("The Legislative Coordinating Commission may transfer unobligated balances among general fund appropriations to the legislature.").

In sum, the House and Senate could have access to up to as much as approximately \$51,850,830. (*See* Addendum, p. 1.) With this amount, even using Respondents' statement of anticipated monthly expenses, their funds potentially would not be exhausted until approximately into August 2018. If Respondents chose to use only their carryover funds, the LCC carryover funds, and the LCC's FY 19 general fund appropriation, funds would be exhausted approximately into May 2018.

The discussion above assumes that the House and Senate begin to use their carryover funds on October 2, 2017, with the expiration of the Temporary Injunction. This is the same assumption the House and Senate made when they calculated the exhaustion date for carryover funds in their September 18, 2017 Respondents' Statement of Legislative Finances, at p. 3. Recently, however, Respondents have indicated they may challenge that assumption. Appellants believe the Temporary Injunction funding is no longer in effect as of October 2, 2017. Accordingly, MMB will not process payments from the Temporary Injunction funding. If future draws were permitted to be made from Temporary Injunction funding, this obviously would delay further the exhaustion of the carryover funds.

III. Other Accounts

The House, the Senate, and the LCC all also have funds in other accounts. (*See* Addendum, p. 2.) It is not clear whether authority exists that would allow the House and Senate to use these other appropriations to finance their operations in the absence of a biennial appropriation.

CONCLUSION

In vetoing the House and Senate appropriations, the Governor satisfied all of the prerequisites set forth in Article IV, section 23 of the Constitution. Additionally, given the availability to the House and Senate of significant funds, as shown herein, as well as the potential for court-ordered funds if necessary to fund their critical, core functions, the Governor's vetoes did not accomplish an unconstitutional result. The Governor's May 30 line-item vetoes of the House and Senate appropriations are constitutional. The Court should reverse the district court's decision and dismiss Count I of the Complaint. As to Counts II and III, the Court should remand them to the district court to either dismiss them as not ripe because of the availability of funds, or to determine whether the House or Senate will have any need for funding of their critical, core functions when all available funds have been spent.

Dated: October 5, 2017

Respectfully submitted,

BRIGGS AND MORGAN

/s/ Sam Hanson

Sam Hanson (#41057)
Scott G. Knudson (#141987)
Scott M. Flaherty (#388354)
Emily M. Peterson (#0395218)
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400

Attorneys for Appellants