CASE NO. A17-1142

STATE OF MINNESOTA
IN SUPREME COURT

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 8, 2017

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INTRODUCTION

Appellants (the "Governor") understand the Court's Order of September 8, 2017, to request briefing on three issues:

1. The constitutionality of the Judicial branch ordering funding to the Legislature after June 30, 2017. The Governor will address two aspects of this request:

   (a) The constitutionality of ordering funding for the critical core functions of the Legislature in the absence of appropriations.

   (b) The constitutionality of the district court's Temporary Injunction, ordering funding pending appeal.

2. The existence of other potential judicial remedies for vindication of the people's constitutional right to three functioning branches of government. The Governor will cover this in part under 1(a) above, but will explore another variation of the judicial remedy.

3. A response to AGA's motion to intervene, with specific discussion of subject matter jurisdiction. Although this is a threshold issue and could be addressed first, the Governor will discuss it last because it has no merit. The motion to intervene should simply be denied.

ARGUMENT

I. JUDICIAL REMEDIES EXIST TO VINDICATE THE PEOPLE'S RIGHT TO THREE FUNCTIONING BRANCHES OF GOVERNMENT.

A. In the Absence of an Appropriation, Judicially Ordered Critical, Core Funding Is Available.

Judicial remedies are available in the event of a failure of appropriation to one or more constitutional branches of government. The citizens of Minnesota are entitled to certain rights and privileges under both the United States and Minnesota Constitutions, including three branches of government that each function at a constitutionally minimum level. Based on the Minnesota Supreme Court decisions in *State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777 (Minn. 1986), and *Clerk of Court's Comp. for Lyon Cty. v. Lyon Cty. Comm'rs* [*Lyon County*], 308 Minn. 172, 241 N.W.2d 781 (1976), as well as a proper construction of the Minnesota Constitution, the critical, core functions of each branch of government must continue to be funded even in the absence of an appropriation. The enforcement of the constitutional rights of citizens falls necessarily to the Judiciary, as the safety net when the appropriations process has failed.

The Judiciary does not have the power to appropriate, since that power is given to the political branches. However, when a failure to appropriate occurs, the constitutional commitments of Articles I (government is instituted for the benefit of the people) and III (guaranteeing three branches of government), provide the Judiciary the implied power to order funding for critical functions, in order to vindicate these constitutional rights of the citizens of Minnesota. *See id.* at 180-81, 241 N.W.2d at 787 (explaining that "practical necessity" can require judicially ordered payments).

The need for court-ordered funding is justiciable. The Court is authorized and obligated to adjudicate the respective powers and obligations of the branches of government. *See, e.g.*, *State v. Askerooth*, 681 N.W.2d 353, 362 (Minn. 2004) (recognizing the court's responsibility "to independently safeguard for the people of Minnesota the protections embodied in our constitution."); *In re McConaughy*, 106 Minn. 392, 416, 119 N.W. 408, 417 (1909) ("[T]he judiciary is the department which is charged with the special duty of determining the limitations which the law places upon all official action.").

The Court must give the Minnesota Constitution a practical, common sense construction so as to harmonize its various parts. *See State ex rel. Mathews v. Houndersheldt*, 151 Minn. 167, 170-71, 186 N.W. 234, 236 (1922) ("The constitution must be read as a whole so as to harmonize its various parts."); *State ex rel. Chase v. Babcock*, 175 Minn. 103, 107, 220 N.W. 408, 410 (1928) (recognizing that constitution must "receive a practical, common sense construction.").

Where, as here, a lack of an appropriation as the result of the legitimate exercise of constitutional power, could prevent a branch from performing its core constitutional duties, an inconsistency exists in the constitutional provisions. The Court must therefore construe the Constitution to ascertain the framers' intent and to harmonize competing constitutional provisions. In so doing, it must be presumed that the framers of the Minnesota Constitution did "not intend a result that is absurd, impossible of execution, or unreasonable." Minn. Stat. § 645.17(15); *see, e.g.*, *Minnesota Baptist Convention v.*

Pillsbury Acad., 246 Minn. 46, 57, 74 N.W.2d 286, 294 (1955) (rejecting an "absurd" construction of the Minnesota Constitution).

1. The Court may order funding where necessary to enforce the constitutional rights of citizens.

It is well-settled that states cannot abridge or ignore the constitutional rights of their citizens simply because funding has not been appropriated to meet those constitutional obligations. In *Watson v. City of Memphis*, 373 U.S. 526 (1963), the Court reviewed a decision permitting the City of Memphis additional time to desegregate some of its public recreational facilities. The city claimed that it should be given more time to desegregate because of the inadequacy of the present budget. *Id.* at 537. The Court rejected this justification for delay, stating "it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Id.* at 537; *see also Abbott v. Burke*, 206 N.J. 332, 342, 20 A.3d 1018, 1024 (2011) (state must fund a state constitutional right to education and "may not use the appropriations power as a shield from its responsibilities").

An absence of funding has been rejected in other contexts involving the constitutional rights of citizens. *See, e.g.*, *Harris v. Champion*, 15 F.3d 1538, 1562-63 (l0th Cir. 1994) (neither lack of funding for public defender system nor mismanagement of resources by public defender constitute acceptable excuses for lengthy delays in adjudicating direct criminal appeals); *Liddell v. Missouri*, 731 F.2d 1294, 1320 (8th Cir. 1984) (court has authority to order funding of desegregation measures); *Williams v. Bennett*, 689 F.2d 1370, 1387-88 (11th Cir. 1982) ("Defendants clearly may not escape

liability [for an Eighth Amendment violation] solely because of the legislature's failure to appropriate requested funds").

Where there is a conflict between a lack of funds and the constitutional rights of the people, the latter wins. The Minnesota Constitution was drafted to effectuate the operation of government, and it empowers the Judiciary to order funding to achieve that end. A contrary construction is not only inconsistent with the *Mattson* and *Lyon County* decisions, but is also unsupported by basic principles of constitutional interpretation.

2. The Judicial branch has relied on the core funding mechanism to ensure continued operations despite an absence of appropriations.

Although none of the prior core funding cases reached final, appellate review, it is noteworthy that the Judicial branch availed itself of the core funding mechanism. In both 2001 and 2011, the Judicial branch found itself without any appropriation when the legislative sessions ended. In 2001, it was due to the inaction of the Legislature in failing to pass an appropriation bill. In 2011, it was due to the Governor's veto of nearly all appropriations.

In 2001, at the request of the Minnesota Attorney General on behalf of the people of Minnesota, the Chief Justice appointed retired Chief Justice Douglas Amdahl to hear the request for core funding of the Judiciary. Judge Amdahl determined that the "core functions of the judicial branch must be funded adequately for it to meet its obligations under the United States and Minnesota Constitutions." (Add. 17.) Judge Amdahl also determined that the court "has the inherent judicial power to order payment of such funds as are necessary to enable the judicial branch to carry out its core functions." (*Id.*)

In 2011, the Judicial branch took an even more active role in seeking core funding pending an appropriation. In that case, the Minnesota Judicial Council was a petitioning party, represented by the Attorney General. The Judicial Council's petition alleged that the Judicial branch is obligated by both the Minnesota and United States Constitutions to perform a variety of core functions and that the "judiciary has authority on its own to order the other departments of government to provide sufficient resources for the judiciary to function." (Add. 58.)

In its Memorandum of Law, the Judicial Council argued that "the judicial branch of government is entitled to continue even in the absence of appropriated funds." (Add. 64.) The Council recognized that there are competing constitutional provisions—comparing Articles XI, § 1 to Article I and Article VI. The Council argued that harmonizing those inconsistencies required the court to order the state to continue funding the Judiciary. (Add. 73-75.) Judge Bruce Christopherson, whom the Chief Justice appointed to preside over that case, concluded that the "rigidity of Article XI, when the traditional processes of government have failed, must temporarily give way to the safety and protection of Minnesotans." (Add. 54.) Judge Christopherson ordered the State to continue to fund the Judicial branch. (*Id.*)

3. The Ramsey County core funding decisions were correct.

Although the two cases discussed above dealt with the core funding of the Judicial branch, the other three core funding decisions came to the same conclusion regarding the funding of the Executive branch and, in 2011, the Legislative branch. (*See* Add. 4-13, 20-29, and 30-48.) There is no rational basis to differentiate among the three co-equal

branches as to their need for core funding or the Judiciary's inherent authority to order core funding.

Indeed, there could be dire consequences now and in the future if the Court were to rule that the judiciary does not have implied authority to order funding of core functions in the absence of an appropriation. If there is another budget impasse in the future, and the Judiciary is temporarily left without an appropriation, it surely would be left with no remedy and be required to close its courthouses. A similar scenario would follow if the Executive branch, which operates the prisons and patrols the highways, was left without an appropriation.

Taken together, two attorneys general (Hatch and Swanson), five district judges (including a former Chief Justice), and the Judicial Council have all concluded that the Judiciary has the constitutional authority to order funding for the critical, core functions of any constitutional body that is left without an appropriation. The dictates of the Minnesota Constitution demonstrate that this conclusion is correct.

4. The process for determining critical, core funding.

If the Legislature can establish that the failure of an appropriation has the effect of interfering with the Legislature's ability to perform its critical, core functions, *Lyon County* identifies the remedy: court-ordered funding for critical, core functions. 308 Minn. at 181, 241 N.W.2d at 786. Unlike the appropriations process, which provides the Legislature with the funding it wants, the core function funding process is limited to providing the Legislature only with the funding it needs to exercise its constitutionally-mandated functions.

a. The Nature of the Proceeding.

The proceeding to obtain that funding must include "a full hearing on the merits in an adversary context," and the Court "shall make findings of fact and conclusions of law" and may grant appropriate relief. *See id.* The test to be applied is "whether the relief requested by the … aggrieved party is necessary to the performance of the [legislative] function as contemplated in our state constitution. *The test is not relative needs or [legislative] wants, but practical necessity in performing the [legislative] function.*" *See id.* (emphasis added).

b. The Burden of Proof.

The process contemplates that the body seeking core funding bears the burden of proving what its core functions are and which expenses are critical to performing those core functions. In this case, the Senate and House would be obliged to provide the itemized detail underlying their budgets and to identify which expense items are essential to their core functions and which, although desirable, are not essential. The Executive could then object to the Legislature's proposal and disputes would be decided by the court, or a court-appointed Special Master, as was the case in prior core funding cases.

c. The Core Functions of the Legislature.

The core functions of the Legislature were discussed in the 2011 order—the "Senate and House … must be funded sufficiently to allow them to carry out critical core functions necessary to *draft, debate, publish, vote on and enact legislation*." (Add. 45, ¶ 6 (emphasis added).)

d. The Critical Expenses.

Of course, the Senate and House cannot demonstrate that their entire appropriations are needed to perform their critical, core functions. Although the House and Senate's budget are (by their own design) opaque,[1] some information that was made public demonstrates that not every penny they spend is in furtherance of their core functions, much less "critical" to those functions. (Ex. E to Answer [Doc. No. 19].) For example, a Senate budget for the 2016-2017 biennium identifies biennial expenditures of $3,000 for chaplains, $1,000 for dry cleaning, $4,000 in membership fees, $30,000 for water coolers and $200,000 for out-of-state travel. (*Id.*).[2]

The salaries of legislators and the cost of legislative facilities are no doubt critical to the Legislature's core functions. The potential issues would include which staff are essential and which are not essential. The criteria used in the 2011 core funding case to differentiate between essential and non-essential costs are identified in the "Recommended Statewide Objectives," described in the Affidavit of Deputy Commissioner Eric Hallstrom and attached in the Addendum to this Memorandum as Add. 1-3.

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[1] The Legislature, for example, has exempted itself from the Minnesota Government Data Practices Act. *See* Minn. Stat. §§ 13.01-13.02.

[2] It is important to note that significant funds were in fact appropriated to the Legislature to facilitate its administration of its core functions. Governor Dayton approved a $35 million appropriation to the Legislative Coordinating Commission (Ex. B to Answer [Doc. No. 19]), which "coordinate[s] the legislative activities of the senate and house of representatives." *See* Minn. Stat. § 3.303. This appropriation funds many of the critical, core functions of the Legislature, such as the Office of the Revisor of Statutes, the Legislative Reference Library, and the Legislative Budget Office. (*Id.*) The existence of this appropriation for much of the Legislature's core work should reduce the amount of core funding the House and Senate will require from the court.

In the 2011 proceedings, Judge Gearin distinguished between "core functions" and "critical core functions," noting that "[a]ny order of this Court allowing the Commissioner of the Department of Management and Budget to issue checks and process funds to pay for core functions and obligations that the State has pursuant to the Supremacy Clause of the United States Constitution should limit itself to *only the most critical functions of government* involving the security, benefit, and protection of the people." (Add. 38-39, ¶ 29 (emphasis added); *see also* Add. 40, ¶ 32 ("The Court finds that 'core functions' that are critical enough to require court-ordered funding despite Article XI are far less in number and [breadth] than proposed by the Attorney General and those seeking amicus curiae status.").) Judge Gearin correctly highlighted that in light of Article XI of the Minnesota Constitution, "the Court must construe any authority it has to order government spending to maintain critical core functions in a very narrow sense." (Add. 39, ¶ 30.)

e. The Exhaustion of Carry-Over Funds.

One major difference between the prior core funding cases and this case is that, unlike the Executive and Judicial branches, which must return unspent appropriations to the general fund, the Legislature may carry unspent amounts over into the next fiscal year in carry forward accounts. The Senate and House had combined carry-over funds on June 30, 2017 of more than $11 million, and on September 30, 2017 will have more than $16 million in carry-over funds. The Legislature should be required to use its carry-over funds before receiving any additional court-ordered funding for its core functions.

f. The Use of a Special Master.

In all five prior cases, three Executive (one of which included the Legislature) and two Judicial, the district court appointed a Special Master to assist in resolving factual disputes about whether particular expenditures should be considered for core funding. (*See e.g.* Add. 33-34, ¶ 16; Add. 41, ¶ 35.) As Judge Gearin noted in 2011, a Special Master "creates an orderly process to resolve requests for, or objections to, funding, thereby preventing the necessity for multiple individual lawsuits to be filed and adjudicated." (Add. 41. at ¶ 35 (citing Minn. R. Civ. P. 1 (rules of civil procedure shall be administered to secure just, speedy, and inexpensive determination of every action); Minn. R. Civ. P. 53.01 (authorizing appointment of Special Master).))

B. The Constitution Permits the Stipulated-to Judicial Funding of the Legislature After June 30, 2017.

The Order appears to invite the parties to address the authority for the district court to enter the Temporary Injunction that provided interim funding to the Legislature pending this appeal.

1. The Court need not rule now on the propriety of interim court-ordered funding.

It is premature to determine the propriety of the district court's injunction. The Legislature has the power to retroactively ratify as an appropriation any judicially ordered spending, following the resolution of whatever political impasse caused a lack of appropriation. *See Limmer v. Swanson*, 806 N.W.2d 838, 839 (Minn. 2011) (explaining that following the 2011 government shutdown, the Legislature passed appropriation bills that were retroactive and that "supersede[d] and replace[d]" the court-ordered funding,

and dismissing as moot a judicial challenge to the retroactively approved court-ordered funding); *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 324 (Minn. Ct. App. 2007) (similar for 2005 shutdown, and referring to "the legislature's constitutionally significant decision to retroactively appropriate public funds that effectively and expressly superseded the commissioner's temporary actions of distributing funds under a court order without an appropriation").

2. The Temporary Injunction does not violate separation of powers.

The district court grounded its authority to grant the injunction in part on the constitutional right of the people to have a functioning Legislature and the court's implied power to provide funding to allow the Legislature to continue to perform its core functions (although the court did not actually use the core functions methodology). (Order Granting Temporary Injunctive Relief [Doc. No. 30], p. 8 Conclusion 12.) Another ground the district court mentioned as authority to grant the injunction was its equitable power "to preserve the rights of the parties pending determination of the litigation." (Order Granting Temporary Injunctive Relief [Doc. No. 30], p. 8-9, Conclusions 13 and 14).

The district court was authorized to enter an injunction pursuant to the stipulation of the Legislative and Executive branches. Precedent from the United States Supreme Court and from this Court recognizes that within areas of joint responsibility, the branches may seek assistance from one another without running afoul of the separation of powers. *See Wulff v. Tax Court of Appeals*, 288 N.W.2d 221, 223 (Minn. 1979)

("Notwithstanding the separation of powers doctrine, there has never been an absolute division of governmental functions in this country, nor was such even intended."); *cf. New England Div. of the Am. Cancer Soc'y v. Comm'r of Admin.*, 437 Mass. 172, 183, 769 N.E.2d 1248, 1256 (2002) (recognizing that passing laws authorizing spending is legislative and that spending state revenue is executive).

There are many instances in the operation of government where the function at issue requires responsible effort from more than a single branch. Such "cooperative ventures" do not violate the separation of powers. *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989) (holding that congressional creation of United States Sentencing Guidelines Commission did not violate separation of powers); *Wulff*, 288 N.W.2d at 223.

Specifically, this Court has held that "the legislature may authorize others to do things (insofar as the doing involves powers which are not exclusively legislative) which it might properly, but cannot conveniently or advantageously, do itself." *Lee v. Delmont*, 228 Minn. 101, 112-13, 36 N.W.2d 530, 538 (1949). Such legislative authorization does not offend the separation of powers as long as the Legislature provides a sufficient check in the form of a "reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies." *Id.* at 113, 36 N.W.2d at 538. If this check exists on the Executive branch's exercise of authority, the "discretionary power delegated to the [executive branch] is not legislative," and there is no separation of powers violation. *Id.*, 36 N.W.2d at 538-39.

Here, the stipulated-to spending is *only* what the Legislature has specifically agreed to. Under the stipulation, no spending occurs except that which is approved both by the Legislature and the Governor.

II. OTHER POTENTIAL JUDICIAL REMEDIES.

In the prior core funding cases, the parties proposed, and the district court implemented, a process whereby the court would determine what functions were core and what expenses were critical to those functions. In all cases, the district court used a Special Master process to determine disputed items.

Another alternative process could allow the Judiciary to play a less active, and more traditional, role. That process would be to direct the Executive branch (specifically Management and Budget) to determine the critical, core functions of the Legislature, involving the Judiciary only to decide disputes where the Legislature objects to any of the Executive's determinations.

The Executive's authority to fund the Legislature's core functions, in the absence of an appropriation, rests on the take-care clause—the Executive branch "shall take care that the laws be faithfully executed." Minn. Const. Art. V, § 3. As part of the faithful execution of the law, the Executive branch implements the appropriation laws through the spending of state revenue. *See Bowsher v. Synar*, 478 U.S. 714, 732-33 (1986) (describing "authority to determine the budget cuts to be made" to balance the federal budget "as plainly entailing execution of the law in constitutional terms"); *Opinion of the Justices to the Senate*, 375 Mass. 827, 835, 376 N.E.2d 1217, 1222 (1976) (noting that "the activity of spending money is essentially an executive task").

Most courts conclude that the Executive branch has some inherent authority and discretion over spending, within the scope of legislatively enacted spending priorities. *E.g.*, *id.*, 375 Mass. at 836, 376 N.E.2d at 1223 ("The constitutional separation of powers and responsibilities, therefore, contemplates that the Governor be allowed some discretion to exercise his judgment not to spend money in a wasteful fashion, provided that he has determined reasonably that such a decision will not compromise the achievement of underlying legislative purposes and goals."); *Hunter v. State*, 177 Vt. 339, 347-49, 865 A.2d 381, 390-91 (2004) (adopting rationale of *Opinion of the Justices* in noting that the governor has some discretion in deciding whether to spend appropriated funds, "[i]f the Governor has a free hand to refuse to spend any appropriated funds, he or she can totally negate a legislative policy decision that lies at the core of the legislative function"); *Rios v. Symington*, 172 Az. 3, 12, 833 P.2d 20, 29 (1992) (explaining that the legislature "establishes state policies and priorities and, through the appropriation power, gives those policies and priorities effect" and the Executive branch then retains discretion to prevent wasteful spending while still effectuating legislative goals); *Colo. Gen. Assembly v. Lamm*, 700 P.2d 508, 520, 522 (Colo. 1985) (recognizing executive "authority to administer the budget" but holding that the authority does not extend so far as to "directly contravene major objectives or purposes sought to be achieved" by the legislature). The Governor has constitutional authority to ensure that the Legislature receives sufficient core funding to protect the rights of Minnesota's citizens to a functioning Legislature.

When the political process fails to provide sufficient funding for one branch to perform these core functions, a district court may step in and order such funding. *Id.* Likewise, under the Executive's power to take care that the laws be faithfully executed, the Executive branch may order the provision of sufficient funding for one branch to perform its critical core functions. *See United States v. Tingey*, 30 U.S. 115, 122 (1831) (explaining that the executive's duty to take care means he may "avail himself of every appropriate means not forbidden by law" to ensure faithful execution).

III. OBJECTIONS TO AGA'S MOTION TO INTERVENE: THIS COURT HAS SUBJECT MATTER JURISDICTION.

A. AGA's Motion To Intervene Should Be Denied.

1. The AGA cites no applicable legal authority.

The AGA's motion lacks legal authority. It moves this Court to allow it to intervene under the Minnesota Rules of Civil Procedure. (*See* AGA Mot., Sept. 6, 2017, p. 1, citing Minn. R. Civ. P. 24.01 and 24.02. (AGA Mot. p. 1.)) Those rules do not apply here. The sole appellate rule that AGA cites—Minn. R. Civ. App. 127—does not provide for joinder of parties on appeal.

2. The AGA seeks the wrong relief from the wrong court.

The true substance of the AGA's motion is a challenge to the district court's alleged out-of-court statement that it is no longer considering the AGA's request to intervene. (Declaration of Erick G. Kaardal, Sept. 6, 2017, ¶ 10.) If that statement is accepted as true—despite being uncorroborated by the docket below—then relief to the AGA, if any, should come from the court of appeals via a petition for extraordinary writ.

3. AGA lacks standing.

If the Court reaches the merits of the AGA's motion, that motion should be denied for lack of standing, as detailed in pp. 2-5 of the Governor's objection to intervention in the district court. (Kaardal Decl. Ex. 3, App. 22-25.) The AGA's motion and memorandum confirm that it is concerned with the reasoning of a decision, rather than the effect a decision will have on the AGA. AGA simply wants the Court to issue a ruling on jurisdictional grounds, rather than on the merits.

4. AGA's motion is untimely.

AGA's motion to intervene in the district court was untimely, as detailed on p. 2 of the Governor's objection in the district court. (Kaardal Decl. Ex. 3, App. 22.) Its attempt to intervene on appeal is even more untimely. AGA was aware of this case for weeks; knew of the district court's decision and the Governor's appeal; and knew of the expedited briefing schedule and oral argument. Its delays are inexcusable.

This untimeliness "unduly and adversely" affects the rights of existing parties, because all parties to the appeal have briefed and argued it. *Engelrup v. Potter*, 224 N.W.2d 484, 489 (Minn. 1974). Moreover, Minn. R. Civ. P. 24.02 states that a court "shall consider" whether a permissive intervention would "unduly delay" adjudication of the rights of the original parties. Another round of briefing would be needed to fully address the inaccuracies in the AGA's 27-page memorandum, which deals with the arguments that AGA would make if allowed to intervene. Allowing these arguments to proceed now, after full briefing and argument, would cause needless delay.

5. AGA's claims are not ripe.

The AGA's claims are not ripe, again as detailed in the district court. (Kaardal Decl. Ex. 3, App. 25.) Additionally, the parties to the appeal adequately represent the interests that the AGA hopes to vindicate. (*Id.* at App. 27.) Indeed, the AGA's motion admits that had it been allowed to intervene, "the AGA's position would have been helpful to the Appellants (Governor Mark Dayton and Commissioner Myron Frans)…." (AGA Mot. p. 2.)

B. AGA's Argument on Subject Matter Jurisdiction Is Without Merit.

AGA asserts the Court lacks subject-matter jurisdiction because no private cause of action exists for violations of the Minnesota Constitution. AGA's argument fails for several reasons. First, this Court has repeatedly ruled on the constitutionality of a governor's veto in the context of a declaratory judgment action, implicitly confirming its subject-matter jurisdiction. Second, this Court has the duty to interpret the contours and limitations of the Minnesota Constitution, especially as it relates to disputes between the co-equal branches of government. Third, AGA appears to be confusing the issues of subject-matter jurisdiction and failure to state a claim. The Court clearly has subject-matter jurisdiction over this case.

Subject-matter jurisdiction is the Court's authority to hear the type of dispute at issue and to grant the type of relief sought. *See Robinette v. Price*, 214 Minn. 521, 526, 8 N.W.2d 800, 804 (1943). The question of whether subject-matter jurisdiction exists is a question of law for the Court. *Seehus v. Bor-Son Constr., Inc.*, 783 N.W.2d 144, 147

(Minn. 2010). Defects in subject-matter jurisdiction may be raised at any time, and cannot be waived by the parties. *Id.*

Minnesota district courts are courts of "general jurisdiction" that have the power to hear all types of civil and criminal cases. Article VI, § 3 of the Minnesota Constitution expressly states that "'[t]he district court has original jurisdiction in all civil and criminal cases.'" *See State v. Schnagl*, 859 N.W.2d 297, 301 (Minn. 2015) (citing Minn. Const. art. VI, § 3 and *In re Civil Commitment of Giem*, 742 N.W.2d 422, 429 (Minn. 2007) ("Our state constitution provides a broad grant of subject matter jurisdiction to the district court ….")). The only prerequisite for a court's exercise of jurisdiction in a declaratory judgment action is the presence of a "justiciable controversy." *Seiz v. Citizens Pure Ice Co.*, 207 Minn. 277, 290 N.W. 802 (1940).

To be justiciable, a controversy must (a) involve definite and concrete assertions of right by parties with adverse interests, (b) involve a genuine conflict in tangible interests of opposing litigants, and (c) be capable of relief by a decree or judgment. *St. Paul Area Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585, 587-88 (1977); *Seiz*, 207 Minn. at 281, 290 N.W. at 804). The question in each case is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issue of a declaratory judgment." *See Holiday Acres No. 3 v. Midwest Fed. Sav. & Loan, Assn. of Minneapolis,* 271 N.W.2d 445, 448 (Minn. 1978).

Regarding the "substantial controversy" requirement, the Court noted in *State ex rel. Smith v. Haveland*, that a party seeking declaratory relief "need not necessarily

possess a cause of action (as that term is ordinarily used) as a basis for obtaining declaratory relief, nevertheless he must, as a minimum requirement, possess a bona fide legal interest which has been, or with respect to the ripening seeds of a controversy is about to be, affected in a prejudicial manner." 223 Minn. 89, 92, 25 N.W.2d 474, 477 (1946); *see also Holiday Acres*, 271 N.W.2d at 448. This "ripening seeds of an actual controversy" test is met here.

This case involves definite and concrete assertions of right by parties with adverse interests. The Legislature believes the Governor violated the separation-of-powers as described in the Minnesota Constitution by vetoing the appropriation line items for the Senate and the House. The Governor believes his veto was a valid exercise of his authority. It also clearly involves a genuine conflict in tangible interests of opposing litigants: the parties agreed that they had reached an impasse in negotiating for a special session to be called, and that there was no reasonable possibility for more negotiation until the parties' dispute over the validity of the veto was decided. Finally, the case presents a controversy that is capable of relief by a decree or judgment.

This Court has previously ruled on the constitutionality of the Governor's exercise of his line-item veto authority. *See Johnson v. Carlson*, 507 N.W.2d 232, 232 (Minn. 1993) (hearing action for declaratory judgment challenging the constitutionality of Governor Arne H. Carlson's line-item veto); *Inter Faculty Org. v. Carlson*, 478 N.W.2d 192, 193-94 (Minn. 1991) (holding that challenge to the constitutionality of governor's exercise of his line-item veto authority should have been brought as declaratory judgment action and that governor's veto was invalid); *Seventy-Seventh Minnesota State Senate v.*

Carlson, 472 N.W.2d 99, 99-100 (Minn. 1991) (ruling that challenge to governor's exercise of his veto should have been brought as declaratory judgment action). In none of those cases was the Court's subject-matter jurisdiction in doubt.

Moreover, "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803). It would be an abdication of responsibility for this Court not to rule on this case (including, for example, by determining that the case involves a nonjusticiable political question), which deals with the rights and responsibilities of the Legislative and Executive branches—the Court's co-equal branches of government—under the Minnesota Constitution. *See State v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991) (recognizing the duty of the Court to protect the integrity and independence of the state constitution and respond to the needs of Minnesota citizens); *Petition for Integration of Bar of Minn.*, 216 Minn. 195, 199, 12 N.W.2d 515, 518 (1943) ("The supreme court is … the final authority and last resort in the protection of the human, political, and property rights guaranteed by the constitution ….").

In fact, AGA's challenge to this Court's subject-matter jurisdiction—that no private right of action exists for a violation of the Constitution—is not a jurisdictional challenge at all. It is, instead, a challenge to whether the Senate and the House have stated a claim upon which relief could be granted. *See* Minn. R. Civ. P. 12.02(e). Whether the Senate and the House have stated a valid cause of action is a different question from whether a Minnesota court of general jurisdiction lacks subject-matter jurisdiction. *See Int'l Union, Security, Police & Fire Professionals of Am. v. Faye*, 828 F.3d 969, 972

(D.C. Cir. 2016) ("[T]he question whether the plaintiff has a cause of action is distinct from the question whether a district court has subject matter jurisdiction") (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, ___ U.S. ___, 134 S. Ct. 1377, 1388 n.4 (2014) and *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510-16 (2006)).

In short, this Court clearly has the power and the duty to decide the matter before it. It involves concrete assertions of right from the Court's co-equal branches of government and a dispute about the meaning and effect of the Minnesota Constitution, a dispute that has profound implications for the citizens of Minnesota.

CONCLUSION

The district court's judgment should be reversed. The case should be remanded with directions to dismiss Count I of the Complaint with prejudice and to appoint a Special Master to consider Counts II and III to the extent that they request funding for the critical, core functions of the Senate and House, once the Senate and House carry forward funds are exhausted.

Respectfully submitted,

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