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STATE OF MINNESOTA
IN SUPREME COURT

CASE NO. A11-1107

State Senator Warren Limmer, et al.,

Petitioners,

vs.

Lori Swanson, et al.,

Respondents.

RESPONDENT GOVERNOR'S JOINDER IN RESPONDENT ATTORNEY GENERAL'S MOTION TO DISMISS PETITION FOR WRIT OF *QUO WARRANTO*

Governor Mark Dayton ("the Governor") joins the Attorney General's Motion to Dismiss Petition for Writ of *Quo Warranto*. The Petition is premature and is utterly inconsistent with Petitioners' position in the District Court.

To date, no Respondent has spent any funds not appropriated. Nor has the District Court ordered the expenditure of any funds not appropriated. At this point, the only judicial relief the Governor has sought as Respondent in the proceeding captioned *In re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota*, Court File No. 62-cv-11-5203 ("*Executive Branch Proceeding*") is that the District Court appoint a mediator promptly to facilitate negotiations between and among the parties. *See* Minn. Stat. § 484.76 (alternative dispute resolution is mandatory in all civil cases not excluded by statute or rule "except for good cause shown by the presiding judge"); Minn. Gen. R. Prac. 114.01 (same).

Separately, the Attorney General has requested that the District Court authorize continued executive department funding if the legislature fails to pass appropriation bills before July 1, 2011 that will be signed or that have the support of two-thirds of each house. Other than scheduling a hearing, the District Court has not taken any action on the Petition of the Attorney General.

Unless and until the District Court grants any part of the relief requested, the Governor's request to mediate is just that -- a request -- and cannot be alleged to be the usurpation or misuse of any power or right justifying the issuance of a writ of *quo warranto*. *See State ex rel. Danielson v. Village of Mound*, 234 Minn. 531, 542-44, 48 N.W.2d 855, 863-64 (1951) (quashing writ to the extent that it sought relief based upon petition for annexation that had not been acted upon by village council).

In addition, the Supreme Court should dismiss the Petition because Petitioners possess, and have exercised, the right to seek a remedy in the District Court. *See State ex rel. Burnquist v. Village of North Pole*, 213 Minn. 297, 302, 6 N.W.2d 458, 460 (1942) (the writ of *quo warranto* is "an extraordinary legal remedy" that "is not granted where another adequate remedy is available"). On the very same day they filed their Petition for Writ of *Quo Warranto*, the same four State Senators filed a Notice of Intervention in the *Executive Branch Proceeding*, seeking a writ of *mandamus*. *See* Respondent Attorney General's Memorandum in Support of Motion to Dismiss Petition, Attachment 1.

A thorough review of the Petition and the Appendix thereto shows that Petitioners failed to mention their simultaneous Notice of Intervention in the District Court. Perhaps Petitioners did not see fit to disclose that filing because it is utterly inconsistent with the constitutional positions Petitioners assert in this proceeding. Petitioners' allegations here and in the District Court could not be more at odds with one another.

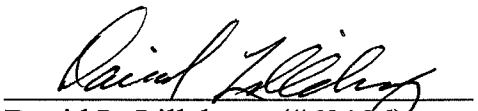
In the District Court, the four State Senators have expressly invoked the District Court's authority and urge the Court to intervene in the appropriations process. They request that the District Court compel the Governor by *mandamus* to call a special session of the legislature to enact appropriations legislation. *See* Respondent Attorney General's Memorandum in Support of Motion to Dismiss Petition, Attachment 1 at pp. 3-5.

By contrast, in this proceeding, Petitioners -- the same State Senators -- allege that the Minnesota Constitution allows "for the executive to call a special session, but it is his *sole constitutional prerogative* to do so." Petition at p. 25, ¶ 31 (emphasis added). Petitioners further allege that a District Court order for mediation would be "akin to calling a special session requiring lawmakers to Saint Paul to work on a political solution," which would be unconstitutional. *See id.* The legal position of Petitioners here, in stark contrast to their position in District Court, is unequivocal: "The lower court has *no role* in the budget dispute between the legislative and executive branches of Minnesota's government." *Id.* at p. 49, ¶ 70 (emphasis added).

In other words, the same four State Senators, in pleadings filed on the same day, have taken diametrically opposed positions on the most fundamental constitutional issue. Petitioners' judicial admissions in the District Court, and their unclean hands in this Court,[1] are additional reasons why the Petition should be dismissed.

Dated: June 22, 2011

Respectfully submitted,



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[1] As Petitioners themselves contend in the District Court: "A fundamental precondition to receiving any equitable relief from a Court under Minnesota law is the requirement is [sic] centered on the old equitable axiom that 'those seeking equity, **do** equity.'" Exhibit 1 at p. 4 (Emphasis in original).

[2] On June 10, 2011, the Governor retained Special Counsel solely on the matter of the potential government shutdown. Special Counsel represents only the Office of the Governor, and does not represent the State of Minnesota generally, the Attorney General, or the State's other constitutional officers, departments, entities, or subdivisions, whether executive, regulatory, legislative, or judicial.

STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT
Case Type: Civil
Case Number:

In Re: Temporary Funding of
Core Functions of the Executive
Of the State of Minnesota

MEMORANDUM OF LAW OF INTERVENING STATE SENATORS WARREN LIMMER, SCOTT NEWMAN, ROGER CHAMBERLAIN AND SEAN NIENOW

INTRODUCTION:

This action arises as a Petition of the Attorney General of the State of Minnesota, joined in large part by Minnesota Governor Mark Dayton, to circumvent, for political reasons, the provisions of the Minnesota Constitution allowing for expenditure of state money only by way of a properly passed appropriation bill.

No one disputes here, nor could they, the plain statement in Article XI, Section 1 of the Minnesota Constitution: ***"No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law."***

No one disputes here, nor could they, that the Governor has the duty, under Article IV, Section 12, to call a special session of the legislature on "extraordinary occasions." Both the Attorney General and the Governor in this matter spare no breathless detail of the crises that will occur if, in fact, funds are not appropriated by the legislature in the next two weeks and the result is a government shutdown in Minnesota.

EXHIBIT
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This is a looming constitutional crisis largely of the Governor's own making. By the Governor's admission, it is both "unprecedented" and clearly, an "extraordinary occasion" within the plain meeting of the constitution.

While it is constitutionally self-evident that funds cannot be spent without a legislative appropriation and that the Governor must call them into session for that purpose, in this case both the Attorney General and the Governor would call on this Court to ignore the plain meaning of the language of the Minnesota Constitution and add two "interpretations": ***First***, that the Governor can delay calling a special session of the legislature during an emergency such as this one if he does not believe, ***in advance***, he will be satisfied with whatever appropriation or other action the legislature may lawfully enact; and ***Second***, if the Governor's decision not to call the legislature into special session to appropriate funds results in a shutdown of state government, he can effectively---and unilaterally--- circumvent the Minnesota Constitution by means of expenditures done under the guise of a "judicial master" or other court action.

This second point, in particular, is both breathtaking and dangerous in the magnitude of the increase in executive power it represents. It is axiomatic that Minnesota's government is tripartite in nature and that the legislative and executive branches are co-equal, each with checks and balances available to limit the power of the other. The only check available to the Governor over legislative action in this case is the veto, which by its very nature occurs after the fact of any legislative action.

Here, both the Governor and Attorney General are arguing that the Governor can obtain something he repeatedly describes as a "compromise" ***before*** any legislation, always subject to his veto, is even adopted. Moreover, although the Minnesota Constitution contemplates no direct participation by the Governor in the legislative process except via his veto power, he is

arguing that he has the authority to continue funding from the State treasury indefinitely until he is satisfied in advance with what he believes the legislature will accomplish.

There is no Minnesota authority to support this extraordinary and brazenly unconstitutional position.

Neither the Governor nor the Attorney General can argue here that the legislature has failed to act when that "failure" lies at the Governor's feet for simply refusing to call them into session. To use a more colorful analogy: the Governor can't complain about someone not milking the cows if he's locked the doors of the barn.

The efforts of the Attorney General, in particular, to suggest that prior events in 2005 and 2001 are, somehow, analogous, are misplaced. In 2005, in particular, the legislature had been in special session for nearly a month and agreed to a partial funding appropriation. In neither case had the legislature, as here, already passed appropriation bills well in excess of emergency levels needed to keep government functions going and then were subsequently prevented from performing their duties to appropriate funds by the failure of the Governor to call them into session. The similarities that do exist from those periods to this should serve to remind this Court that this process is, at its core, political and, in the end, the parties can be expected to fulfill their constitutional duties.

THE REMEDY:

The solution to the problem presented in this case is simple: the Governor can call the legislature into session to deal with the issue of a possible emergency shutdown of Minnesota Government. The legislature can fulfill its constitutional obligation to appropriate funds to see to it that, at the very least, core functions of that government are funded. And the parties can

continue their politically contentious dispute about increased funding and taxes for as long as they choose to do so, voters permitting.

These Interveners, State Senators Warren Limmer, Scott Newman, Sean Nienow and Roger Chamberlain, are all duly elected members of the Minnesota Senate. They have all voted for appropriation bills in the just-ended regular session of the Minnesota Legislature that were vetoed by the Governor. As State Senators, they have the constitutional duty to vote on any appropriations of funds from the Minnesota State Treasury. The failure by the Governor in this case to call a special session of the legislature to appropriate funds needed on an emergency basis effectively deprives these Interveners of their ability to perform the duties required of them by law. Because of this, they have standing in this matter not only to intervene, but to demand of the Governor that he perform his own necessary duties under the law and call a Special Session of the Legislature.

The remedy being sought ***by*** the Attorney General and Governor is fundamentally ***equitable*** in nature. They are asking this Court to put into place a structure and procedure which is both outside any ordinary legal remedy and any current constitutional framework.

A fundamental precondition to receiving any equitable relief from a Court under Minnesota law is the requirement is centered on the old equitable axiom that "those seeking equity, ***do*** equity." In this case, this means that the Governor must, in good faith, do whatever is reasonably in his power to do to avoid the need for actual judicial intervention. Here, that means calling the legislature into session and demanding they fund the government. He has failed to do so. He is not entitled to the equitable relief he seeks until he does so.

A more proactive remedy may also exist for these Interveners, however, in the form of a Writ of Mandamus under Minnesota Statutes Section 586. They have included in their intervention a Petition for such a writ.

A Writ of Mandamus, as a general proposition, exists for the purpose of compelling a public official, including an elected public official like the Governor, to perform a duty he is required to do, but refuses to perform. A key to determining whether such a Writ can be issued centers on the question of whether the action sought is in the nature of a ministerial (non-discretionary) duty or not. While there is virtually no recent authority on the question, ancient case law does show the clear reluctance of the Courts to compel Governors to take action, even constitutionally mandated ones, if there is room for discretion as to the performance, or non-performance of the duty. See, e.g.: Chamberlain v. Sibley, 4 Minn.309, 4 Gil. 228 (1860); Rice v. Austin, 19 Minn. 103 (1872); But see: Cooke v. Iverson, 108 Minn.388 (1909) (while mandamus could not be used to control the head of the executive department of the state in the exercise of discretion, where the duties are purely ministerial in character, he may be compelled to act).

Nevertheless, in this case, there is no debate as to the need of a special session. Further, there is no debate as to the urgent situation, indeed the emergency, faced by the State unless appropriations are made to pay for key funding of services. There can be no debate that these Interveners will not be able to exercise their right to participate in the needed appropriations process as legislators until they are called into session. The only way in which the crises currently pointed to by the Governor and the Attorney General can be avoided is by the simple exercise of his duty in this emergency to call a special session of the legislature. This is not discretionary and must be, if necessary, compelled by the Court.

CONCLUSION:

Respectfully, these Interveners, based on the foregoing, ask the Court to deny the Governor and Attorney General's premature and unconstitutional requests for the creation of a non-legislative procedure for the appropriation and expenditure of funds for any period and in any manner.

In addition, and in the alternative, prior to the award of any such extraordinary remedy, the Court require as a precondition the calling of a special session of the legislature to address the need for interim appropriation.

In addition, and in the alternative, grant to these Interveners their own Petition for a Writ of Mandamus compelling the Governor to call a special session of the legislature to address the issue of appropriations.

Finally, these Interveners ask the Court to grant them intervention in the above-captioned matter as parties.

Dated: June 20, 2011

Signed:

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Acknowledgement: Frederic W. Knaak, as attorney for the aforesaid individuals, states that they acknowledge and are aware that the inappropriate use of legal proceedings, including in this case if so found, could result in sanctions, including attorneys fees, being awarded by the Court.

Frederic W. Knaak (Mn. Lic. 0056777)