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FILED

STATE OF MINNESOTA
IN SUPREME COURT
Case No. All-1222

State Senator Warren Limmer, State Senator Scott J. Newman, State Senator Sean R. Nienow, State Senator Roger C. Chamberlain, State Representative Glenn H. Gruenhagen, and State Representative Ernest G. Leidiger,

Petitioners,

vs.

Lori Swanson in her official capacity as Attorney General, Mark Dayton in his official capacity as Governor, Jim Schowalter in his official capacity as Commissioner of Department of Management and Budget, and Kathleen R. Gearin in her official capacity as Chief Judge of the Ramsey County District Court,

Respondents,

vs.

Minnesota Voters Alliance,

Intervenor-Respondent.

Motion to Intervene and Memorandum Challenging Authority of the Ramsey County District Court to Order Expenditures of State Moneys

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Dated: July 15, 2011

Counsel for Intervenor-Respondent Minnesota Voters Alliance

MOTION TO INTERVENE

This Court's July 11, 2011, order provided "[a]ny other person who wishes to intervene" an opportunity to move accordingly with their response to the Limmer Petition for a writ of *quo warranto*. Minnesota Voters Alliance is a Minnesota taxpayer as are its executives and contributors who support this motion.

While Minnesota Voters Alliance's position is similar to the Limmer Petitioners in that it does not agree with either the Attorney General's actions or the lower court's jurisdiction and orders, important legal and policy differences offered or likely to be offered by the present Petitioners and Respondents exist. As such, the Petitioners and the identified Respondents do not adequately represent the interests of the member-association Minnesota Voters Alliance. Granting this motion to intervene will bring to this Court an additional perspective regarding the constitutional legalities and public-policy implications of the present political and constitutional crisis.

Dated: July 18, 2011

Respectfully submitted,

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Intervenor-Respondent Minnesota Voters Alliance Memorandum Supporting Petition and Further Challenging Authority of the Ramsey County District Court to Order Expenditures of State Moneys

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INTRODUCTION AND ARGUMENT SUMMARY

The Minnesota Voters Alliance seeks to intervene in the present case in order to preserve and protect the rights of Minnesota voters, taxpayers and citizens against the actions of rogue government officials acting without Constitutional authority. Although the Limmer Petitioners have admirably presented the legislative case opposing the *ultra vires* acts of the Minnesota Governor, Attorney General and Judiciary, the Limmer Petitioners accept an unreviewed, lower court decision as authority for the proposition that the State may continue to fund judicially-created "core functions" and "essential services" without express legislative funding approval.

The Minnesota Voters Alliance, a Minnesota taxpayer whose taxpayer contributors support and join in this effort, takes a more literal view of the Minnesota Constitution. The Minnesota Voters Alliance regards the Minnesota Constitution as an inviolable covenant between Minnesota citizens and Minnesota State government. Article XI, section 1 of the Minnesota Constitution provides that no monies shall be spent without legislative approval. There is no exception to this rule. Further, article III, section 1 of the Minnesota Constitution very clearly prohibits one branch of government from usurping or exercising *ultra vires* power over another branch. The Minnesota Voters Alliance therefore joins in the Limmer Petitioners' request that this Court identify "by what authority" two branches of government, the executive through the attorney general and the judiciary, can exercise power—the power of the purse—over which the third branch (the legislature) has exclusive Constitutional power.

The Minnesota Voters Alliance does not accept the Attorney General's disingenuous and self-serving argument that the governor, judiciary, legislature, secretary of state and attorney general are in the business of protecting Minnesotan's "constitutional" rights. Next to life and liberty, the most fundamental right of all Minnesotans is the right to private property. Sections 7, 11 and 13 of Article I of the Minnesota Constitution emphasize the importance and inviolability of private property.

The Minnesota Voters Alliance recognizes the charade that the executive branch has played on the Minnesota citizenry over the last fortnight. The executive's left hand (the attorney general) petitioned the district court for "core function" funding while its right hand (the governor) ostensibly objected to the petition. The result, however, is that the executive continues to tax and spend on its political constituencies without Constitutional authority but now has the district court cover for its actions. The executive cleverly manipulated the judiciary onto the horns of an unconstitutional dilemma: (1) order an unconstitutional mediation between executive and legislative; or (2) unconstitutionally order funding for "core functions" and "essential services" in a procedure dominated by the executive and devoid of meaningful opportunity for rebuttal or cross-examination. The result is that for two weeks the executive and judiciary have operated Minnesota State government, collected tens of millions of dollars and spent hundreds of millions of dollars without any Constitutional authority.

The Minnesota Voters Alliance believes that the executive has lured the district court into unconstitutional waters. The district court, with the aid of the Special Master,

has not only usurped the legislature's exclusive spending power, the district court is deciding non-justiciable issues and is ruling on political questions.

While a "kick the can" budgetary agreement between the executive and the legislature appears near, this issue is not moot and this Court must resist any temptation to avoid addressing this issue. Three out of the last six Minnesota budgets have resulted in a state shutdown. The economic issues and budgetary imbalances will not go away. Neither, therefore, will the Constitutional issues. The Minnesota Voters Alliance and Minnesota taxpayers humbly request that their "public servants" actually serve the public and abide by the rules that govern them.

The first step in securing a better future for all of our children is to determine that the executive and judicial branches have violated the Constitution by operating State government without legislative authority or funding. The second step is to order an accounting of all funds that have been spent during the state shutdown. The Minnesota taxpayers have been unconstitutionally harmed and deserve to know the truth regarding the scope of unauthorized spending.

STATEMENT OF FACTS

The 2011 legislative regular session ended on May 23, 2011. Prior to May 23, the legislature passed appropriation bills. The Governor vetoed all of these bills. The legislature did not override any of the Governor's vetoes before the end of the regular session. Therefore, no bills were enacted into law for the funding of state programs and agencies.[1] In addition, although recommended by Minnesota's appellate court in 2007 after the 2005 government shutdown,[2] the Legislature did not pass and the governor did not sign a "lights on" bill that would continue state funding.[3] With the state's fiscal year ending on June 30 and no funds authorized to support either state programs or agencies, the state government effectively shut down.

The so-called "budget impasse" continues. Although recent reports suggest a compromise, the scheduling of a special session has not occurred and no appropriation

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[1] Exceptions however, do exist: appropriation bills were enacted into law for the Department of Agriculture, the Board of Animal Health and the Agricultural Utilization Research Institute. *In Re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota,* Or. Granting Atty. Gen. Pet. 3 (Ramsey Cty. Dist. Ct. June 29, 2011), Pet. App. 3 (For the convenience of the Court, Minnesota Voters Alliance obtained a copy of the Limmer Petitioners' Appendix dated July 8, 2011, and will use that appendix for citations unless otherwise noted).

[2] *Id.* at 4, Pet. App. 4; *State ex rel. Sviggum v. Hanson,* 732 N.W.2d 312 (Minn. App. 2007) ("The legislature could prevent another judicially mandated disbursement of public funds without an authorized appropriation by, for example, creating an emergency fund to keep the government functioning during a budgetary impasse ....").

[3] *Id.* at 3-4.

bill can pass and be enacted into law until the legislature meets. The Governor has the sole constitutional authority to call the legislature into a special session.[4]

On June 23, 2011, in anticipation of the government shutdown, the Minnesota Attorney General filed a petition in Ramsey County District Court alleging "*parens patriae*" (parent of the state) capacity for an order directing that "core functions" of the State continue to operate and be funded on a temporary basis after June 30, 2011.[5] She also requested the appointment of a Special Master to make reports and recommendations for the Chief Judge of the District Courts to consider what "core functions" should be funded.[6] "Core functions" is not a phrase used in the Minnesota Constitution. The Governor opposed the Attorney General's Petition.[7]

The District Court granted the Attorney General's petition, including the appointment of a Special Master.[8] The Order issued on June 29, 2011, and became effective on July 1, 2011.[9] Since July 1, 2011, the Special Master has been holding hearings on petitions relating to "core functions" or "essential services," making reports and recommendations to the Chief Judge who, in turn, has issued various court orders affirming and

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[4] Minn. Const. art. IV, § 12 ("A special session of the legislature may be called by the governor on extraordinary occasions.").
[5] *Id.* at 2, Pet. App. 2.
[6] *Id.*
[7] *Id.* at 1, Pet. App. 1.
[8] *Id.* at 1-31, Pet. App. 1-31.
[9] *Id.* at 18, Pet. App. 18.

commanding the Commissioner of Management and Budget to disburse state funds for identified "core functions" or "essential services."[10]

The present budget impasse and government shutdown is not an anomaly. It is a recent and repetitive event. The present governmental shutdown is the third in 10 years, the first occurring in 2001 and the last in 2005.[11] Because the events of 2001 and 2005 were short-lived and in 2005 the enactment of a law retroactively rectifying the court-ordered disbursements, the constitutional issues raised during the 2005 impasse litigation for instance, were deemed moot.[12] Thus, none of the constitutional or public policy issues raised below have been addressed by this Court.

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[10] *See, e.g.,* Pet. App. 622, 631.
[11] Or. Granting Atty. Pet. 5, App. 5.
[12] *State ex rel. Sviggum,* 732 N.W.2d at 322.

ISSUE PRESENTED

Do the Executive and the Judiciary Have Constitutional Authority to tax, spend and operate the Minnesota State government without express legislative approval?

LEGAL ARGUMENT

I. The Minnesota Voters Alliance Has Standing To Intervene

To have the right to challenge the Executive and Judiciary spending and taxing, the Minnesota Voters Alliance must have standing. Standing is essential to a court's exercise of jurisdiction.[13] Standing is the legal requirement that a party have "a sufficient stake in a justiciable controversy to seek relief from a court."[14] Standing can be acquired in two ways: "either the plaintiff has suffered some injury-in-fact or the plaintiff is the beneficiary of some legislative enactment granting standing."[15] "An injury-in-fact is a concrete and particularized invasion of a legally protected interest."[16]. A standing analysis focuses on whether a plaintiff is the proper party to bring a particular lawsuit[17].

The Minnesota Voters Alliance is a taxpayer. Its executives and contributors who have joined in the filing of the brief are also taxpayers.

As a taxpayer and representative of taxpayers, the Minnesota Voter's Alliance has suffered an injury in fact resulting from the actions of the Executive and the Judiciary.

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[13] *Enright v. Lehmann*, 735 N.W.2d 326, 329 (Minn. 2007).
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Olson v. State*, 742 N.W.2d 681, 684 (Minn. App. 2007).

As Minnesota citizens, the Minnesota Voters' Alliance is entitled to the protections of the Minnesota State Constitution. The Executive and Judiciary have plainly engaged in taxing and spending specifically prohibited by the Minnesota State Constitution. Their actions have invaded the Minnesota Voters Alliance's constitutional rights by collecting revenue and spending without Constitutional authority.

Because the central issue involves the unlawful collection and disbursement of public moneys, Alliance members have standing as taxpayers. This Court has recognized that when there is an allegation of illegal disbursements of state moneys, taxpayers have standing to challenge those disbursements:

> "[I]t is well settled that a taxpayer may, when the situation warrants, maintain an action to restrain unlawful disbursements of public moneys; to recover for the use of the public subdivision entitled thereto, money that has been illegally disbursed, as well as to restrain illegal action on the part of public officials".[18]

Minnesota courts have generally recognized that because a taxpayer has sufficient interest to enjoin illegal expenditures of both municipal *and* state funds,[19] they have the right "to maintain an action in the courts to restrain the unlawful use of public funds."[20] Here, the Alliance and its members allege that because the Ramsey County District Court proceedings unconstitutionally usurp the constitutional authority of both the Executive and Legislative branches of government under the sole hand of the judiciary, ordering

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[18] *Rukavina,* 684 N.W.2d at 531, *quoting McKee v. Likins,* 261 N.W.2d 566, 571 (Minn.1977) (citation omitted).

[19] *Arens v. Village of Rogers*, 240 Minn. 386, 392, 61 N.W.2d 508, 513 (1953).

[20] *Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143, 146 (Minn. App. 1999).

disbursements of state funds without the Legislature and Executive branches having exercised their constitutional powers the court-ordered disbursements of state funds are illegal. The Respondents are violating Articles III, IV and XI of the Minnesota Constitution. For these reasons, Minnesota Voters Alliance has standing to intervene and assert its claims against the Respondents to this Court. Simply put, the Respondents are violating Articles III, IV and XI of the Minnesota Constitution. [21]

II. The Executive And Judiciary Have Violated The Minnesota Constitution And Breached The Covenant Between The State And Its People

The Minnesota Constitution expressly prohibits one branch of government from usurping the powers of another branch:

> No person or persons belonging to or constituting one of these three departments [the legislative, executive, and judicial] shall exercise any of the powers belonging to either of the others except in instances expressly provided in this constitution.[22]

The Minnesota Constitution further provides that "no money" shall be paid out of the state treasury except through legislative appropriation:

> No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law.[23]

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[21] Neither is Petitioners' standing negated by the doctrine of laches or waiver by failure to somehow undo the state funds unconstitutionally expended by the Respondent. *See Pataki v. New York State Assembly*, 7 A.D.3d 74, 774 N.Y.S.2d 891, 2004 N.Y. Slip Op. 02980 (N.Y.A.D. 3 Dept. Apr 22, 2004) (NO. 91757) (Governor's failure to exercise veto power did not deprive him of standing or effect waiver of his right to challenge constitutionality of defendants' actions).

[22]

[23]

Article IV of the Constitution very clearly gives the legislature power over the State purse. Sections 18, 22 and 23 of Article IV provide that all funding bills must originate with the House of Representatives, bills must pass by majority vote and, to become law, bills must be either signed by the governor or passed by 2/3rds vote following veto. In sum, the legislature passes bills that are enacted into law if the Governor signs it or vetoes it and the legislature overrides the veto after which "it becomes law," or "any bill not returned by the governor within three days ... after it is presented to him becomes a law as if he signed it...."

The Constitution does not allow the judiciary to assume taxing and spending powers if the legislature and the governor cannot pass a law that maintains state government operations. Further, a court order commanding the Commissioner of Management and Budget is not "a law" passed by the legislature and enacted by the Governor. Under the Minnesota Constitution, the only manner in which an appropriation by law can occur is by a bill originating in the legislature. It is a mandatory provision that contains no exception.

The Minnesota Supreme Court has "repeatedly observed that it is [its] task to give effect to the clear, explicit, unambiguous and ordinary meaning of the language" when interpreting constitutional provisions.[24] If the language of the provision is unambiguous, it must be given its literal meaning—there is neither the opportunity nor the responsibility to engage in creative construction. The Court's canons for interpretation of constitutional

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provisions that are unambiguous leave "no room for construction;" the language must be interpreted as it reads.

The rules governing the courts in construing articles of the State Constitution are well settled. The primary purpose of the courts is to ascertain and give effect to the intention of the Legislature and people in adopting the article in question. If the language used is unambiguous, it must be taken as it reads, and in that case there is no room for construction. The entire article is to be construed as a whole, and receive a practical, common sense construction. It should be construed in the light of the social, economic, and political situation of the people at the time of its adoption, as well as subsequent changes in such conditions.

Articles III, IV, and XI of the Minnesota Constitution are unambiguous regarding the exclusive legislative prerogative to appropriate state funds. Because these provisions are unambiguous, the Court should give them their literal and plain meaning: the lower court cannot order the Commissioner to disburse funds from the state treasury. Likewise, the Commissioner cannot violate the State Constitution by disbursing funds without an enacted appropriation by law. The legislature's power over the purse is non-delegable and is not assumable.

III. During The Shutdown, The Judiciary Has Unconstitutionally Decided Non-Justiciable Matters And Engage In Political Questions

A. The lower court orders are advisory opinions for non- justiciable controversies violating time-honored constitutional principles resulting in judicial authoritarian overreach.

The lower court suggested that its appointment of a Special Master created an "orderly process to resolve requests for, or objections to, funding, thereby preventing the necessity for multiple individual lawsuits to be filed and adjudicated."[25] But the process did not adjudicate any case or controversy. As the lower court acknowledges, the petitions before the Special Master were "requests for, or objections to, *funding.*"[26] First, state agency requests for funding from the state treasury are a legislative political function. Second, objections to funding are also a legislative political function. Neither the executive nor the judiciary has any authority to determine what is or is not a "core function" and no authority to determine whether any particular state agency or instrumentality should receive funds from the state treasury.

At the prompting of the executive, the lower court has entered into the prohibited area of issuing advisory opinions: "The existence of a justiciable controversy is prerequisite to adjudication. The judicial function does not comprehend the giving of advisory opinions."[27]

Justiciability demands not only adverse interests and concrete assertions of rights, but also a controversy that allows for specific relief by a decree or judgment of a specific character.[28] The redressable-injury requirement—and the corollary rule against advisory

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[25] Or. Granting Atty. Gen. Pet. 12, Pet. App. 12.
[26] *Id.* (emphasis added).
[27] *Izaak Walton League of Am. Endowment, Inc. v. State, Dept. of Nat. Resources*, 252 N.W.2d 852, 854 (Minn. 1977).
[28] *Holiday Acres No. 3 v. Midwest Fed. Sav. & Loan Ass'n of Minneapolis,* 271 N.W.2d 445, 447 (Minn.1978).

opinions—are rooted within this State's constitutional text and expressly limit the judiciary from encroaching on the powers of the other co-equal branches of government:

> "The constitutional function of Minnesota courts is to resolve disputes and to adjudicate private rights. *See Montgomery v. Minneapolis Fire Dep't Relief Ass'n,* 218 Minn. 27, 29-30, 15 N.W.2d 122, 124 (1944) (interpreting predecessor of Minn. Const. art. VI, § 3, to require that "the subject matter of the suit is a justiciable one and therefore within the competence of the district court to hear and determine"); *In re Application of the Senate,* 10 Minn. 78 (1865) (noting that separation-of-powers provision in Minn. Const. art. III, § 1, limits court to "judicial" acts) .... And, as part of our tripartite constitutional structure, the judiciary must act prudentially to abstain from encroaching on the power of a coequal branch. *See Sharood v. Hatfield,* 296 Minn. 416, 423, 210 N.W.2d 275, 279 (1973) (cautioning courts to exercise restraint in dispute over "what is a legislative prerogative and what is a judicial function")".[29]

The petitions presented to the Special Master are not material disputes and are not intended to adjudicate private rights. Every petition has sought court-ordered disbursement of funds from the state treasury. The executive, through the Commissioner, has not refused any court-ordered disbursement. Further, the Special Master process provides no opportunity for meaningful rebuttal or cross-examination to allow the Special Master, and therefore the district court, to critically evaluate alleged "core functions" and "essential services." The district court is therefore issuing advisory opinions relating to non-justiciable matters.

The court, on its own accord, has determined for the Commissioner, for the legislature, and for the executive whether to disburse funds. This is an overreach of the judicial function. The district court has no authority to order the expenditure of funds from

[29] *State ex rel. Sviggum v. Hanson,* 732 N.W.2d 312, 321 (Minn. App. 2007).

the state treasury, no matter how narrow it sought to be: "the Court must construe any authority it has to order government spending to maintain critical core functions in a very narrow sense."[30]

This Court must therefore defer to "province of the legislature"[31] regarding appropriations, determine that the district court has no constitutional authority to authorize the funding of any state agency and order the district court to immediately cease issuing funding orders.

B. As a matter of public policy, the Executive's and Legislature's decision not to enact appropriation bills into law is a purely political question that cannot require court-ordered funding for contracts.

The Attorney General, asserting *parens patriae* authority over the health, safety, and welfare of Minnesota citizens, has involved the lower court in policy-making decisions that are plainly outside the court's constitutional limitations of Minnesota's tripartite representative republic form of government. The Attorney General claims that her intervention is on behalf of Minnesota citizens and is necessary to protect the health, welfare and safety of Minnesota citizens. Yet her actions betray a political calculation that has upset the Constitutional balance of powers not only between the three branches of government, but between the citizens and self-government. Professor Lawrence Tribe has written about the constitutional guarantee of representative democracy:

> "No doubt many options exist ... for implementing the ideals of representative democracy through the requirement of 'republican' form. But ... the

30 Or. Granting Atty. Gen. Pet. 10, Pet. App. 10.
31 *Id.*

> authority to decide, consistent with the equal protection of the laws how one's people will represent themselves and take part in their own governance seems the very essence of all self government." [32]

In other words, the elected officials have spoken by their respective actions in deciding not to fund government programs and agencies by passing bills during the regular legislative session the Legislators knew or should have known would be vetoed and by having not overridden those vetoes. During the regular session, the legislature could also have passed a continued funding bill, but choose not to. Likewise, the Governor used his veto power and with the closing of the regular session decided not to use his constitutional authority to call a legislative special session to consider any appropriation bill—a political decision and constitutionally proper.

Here, the District Court actions since July 1, 2011, have violated the "political question" doctrine. Having acknowledged the province of monetary appropriations as that of the legislature,[33] the lower court nevertheless interfered with the exercise of the textually demonstrable provisions of the Constitution reserved for the other departments.[34] As previously stated, the court may not seek to resolve an issue for which it lacks judicially discoverable and manageable standards.[35]

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[32] Tribe, *American Constitutional Law,* 3rd *Ed.*, vol. 1, pp. 908-09 (200_) (emphasis in original).
[33] *Id.*
[34] *Baker v. Carr,* 369 U.S. 186, 210 (1962).
[35] *Vieth v. Jubelirer,* 541 U.S. 267, 276 (2004); *Powell v. McCormack,* 395 U.S. 486, 518 (1969).

The Attorney General, in her petition to the District Court, sought and obtained advisory opinions of what is and what is not a so-called "core function" to command the Commissioner to disburse state treasury moneys to fund a request accordingly. But what constitutes an essential service or "core function" depends largely on political, social and economic considerations, not legal ones.[36] These are nonjusticiable political questions. The courts simply are not equipped to decide these political questions. Therefore, the power to appropriate funds is confided to the competency of the legislative branch and the questions regarding disbursing state funds are nonjusticiable from the constitutionally imposed judicial limitation of power.[37]

The petitions to the lower court for state treasury moneys may have reflected serious and possibly immediate needs, but they were nevertheless political questions. In acting on what would otherwise be biennial budget requests, the district court did *per se* inject itself into the political side of the legislative and executive branches of government. The wisdom of fiscal policy and appropriation of revenue is outside the purview of judicial authority—the court had no role in the efficacy or necessity of a particular disbursement as a substitution for an appropriation, even if temporary.

IV. The District Court's "Core Function" Reasoning Is Erroneous And Unconstitutional

Articles III, IV and XI of the Minnesota Constitution are clear: it is the exclusive legislative prerogative to appropriate state funds. There is no authority for the proposition

[36] *Fletcher v. Commonwealth*, 163 S.W.3d 852, 860 (Ky. 2005).
[37] *See State ex rel. Swiggum v. Hanson*, 732 N.W.2d 312, 322-23 (Minn. App. 2007).

that these provisions of the Minnesota Constitution are pre-empted by Federal law. The federal government cannot mandate payments for federal programs under the Supremacy Clause during a state government shutdown without violating state sovereignty.

The Alliance does not agree with the principle that the State, in a government shutdown, is obligated under the federal Supremacy Clause to fund federal programs within the state. The federal government cannot force the state, under a government shutdown scenario, to fund federal programs or contracts.

The Supremacy Clause of the United States Constitution does not authorize any invasion of the State Legislature's constitutional authority to pass appropriation bills that reflect the discretion to determine funding or to eliminate funding. This position is born of the principle of "dual sovereignty." The U.S. Supreme Court in *Prinz v. U.S.* noted it is "incontestable" that "the [federal] Constitution established a 'dual sovereignty."[38] "Although the States surrendered many of their powers to the Federal Government, they retained a 'residuary and inviolable sovereignty.'"[39] Because of this dual sphere of sovereignty, which is a limitation of the federal government upon the state government (for example, the prohibition on the involuntary reduction of the state's territory, the Judicial Power Clause, the Privileges and Immunities Clause, the requirement of the states to ratify constitutional amendments, and the Guarantee Clause), both governments co-exist

[38] 521 U.S. 898 (1997) ("The federal government may not commandeer the states' cooperation in administering or enforcing federal mandates.").
[39] *Id.*

with concurrent authority over the people without diminishing the role or the existence of the state sovereign with each sphere accountable to their respective citizens.

Dual sovereignty preserves the right of the state sovereign over its own executive officers and legislative elected representatives from any Federal claim to commandeer their respective state constitutional authority to enforce, burden, or compel payments to it from the state treasury without an appropriation by law during a government shutdown. To do so would destroy state sovereignty. The federal government cannot interfere with the state Executive and Legislature's constitutional authority to pass appropriation bills (or not) as law, or interfere with their discretion to determine full, partial, or elimination of funding. There is no law that suggests the Supremacy Clause of the United States Constitution acts as authority to invade State constitutional powers of appropriation.

Likewise, the choice of the state government to breach any contract, for instance, for lack of funding is a choice with consequences. Again, the breach is a decision politically induced. It is neither justiciable nor ripe for review and any court order forcing funding is an anticipatory policy-decision of what the Governor or Legislature should have done or might do. It is not within the authority of the judiciary to force the payment of funds obligated through a contract between the state and another party during a government shutdown. The non-funding is a policy decision by the Executive and Legislative branches knowing it will lead to a breach and the subsequent legal consequences, however harsh. It is not the role of the court to force payment or prevent future liability when the parties at fault know of the legalities of their non-action. (Compare a person facing

bankruptcy. If he has no money to pay on a contractual debt—the promissory note—he cannot be forced to do so. However, he may later be held liable for the breach as a tort and pay on the judgment.)

Residual state sovereignty was implicit in the United States' Constitution's conferral upon Federal Congress of not all governmental powers, but only discrete, enumerated ones. Article I, § 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[40] "[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."[41] This design insured that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other"—"a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."[42] The United States Constitution thus contemplates that a State's government will represent its people and remain accountable.

V. This Case Is Not Moot And Cannot Be Rendered Moot By A Budget Agreement

[40] United States Constitution, 10th Amend.
[41] *New York v. United States,* 505 U.S. 144, 166 (1992).
[42] *U.S. Term Limits, Inc. v. Thorton,* 514 U.S. 779. 838 (1995).

The political compromise recently reached but not yet enacted into law does not detract from any of the constitutional issues before this Court (nor, as the Limmer Petitioners identified, does it tame the exigent circumstances). The underlying issues remain. The political compromise suggested merely suppresses the debt issue, delaying the inevitable political debt crisis through borrowing that must be repaid at some future point. As the appellate court recognized in 2007 regarding the 2005 impasse, affirming the impasse and issues as political in anticipation and prophetically correct, "the legislature and not the judiciary that has the institutional competency to devise a prospective plan for resolving future political impasses."[43] It did not in 2005, and it has not in 2011. Therefore, the budgetary crisis remains for another day and a budgetary impasse, more likely than not, will occur again at some point in the future.

Even if, as in 2001 and 2005, the budgetary impasse is resolved before this Court's scheduled hearing on July 27, the instant case is not moot, but rather. Instead it falls within the jurisdictional principle of "capable of repetition, but evading review" —an exception to mootness.[44] This Court has found that it will not deem a case moot if it implicates issues capable of repetition, yet likely to evade review.[45]

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[43] *State ex re. Sviggum,* 732 N.W.2d at 322.

[44] *Jasper v. Comm'r of Pub. Safety,* 642 N.W.2d 435, 439 (Minn. 2002), *citing State v. Rud,* 359 N.W.2d 573, 576 (Minn. 1984) (Mootness is "a flexible discretionary doctrine, not a mechanical rule that is invoked automatically.").

[45] *Kahn v. Griffin,* 701 N.W.2d 815(Minn. App. 2005). The U.S. Supreme Court has held a similar view. In *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975), the Court determined that the "capable of repetition yet evading review" doctrine is "limited to the situation where two elements are combined: (1) the challenged action was in its duration

In a case factually similar to the instant matter, the Kentucky Supreme Court applied the "capable of repetition yet evading review" doctrine in a perennially deadlocked budgeting process case:[46]

> "On three occasions within a ten-year period, the General Assembly convolved itself into a partisan deadlock and adjourned *sine die* without enacting an executive department budget bill. ... *Having no assurance that similar partisan brinkmanship will not recur in the General Assembly, resulting in future gubernatorially promulgated budgets, we conclude that this issue is capable of repetition, yet evading review, and will address its merits".*[47]

The Minnesota Supreme Court has stated that it will not deem a case moot and will retain jurisdiction if the case is "functionally justiciable" and is an important public issue "of statewide significance that should be decided immediately."[48] The instant case is justiciable. The constitutional issues raised and its implications are of statewide significance. The law must be clarified regarding the allocation of powers between the legislative, executive, and judicial branches. Neither branch has learned from its history and the political follies,with judicial assistance, will no doubt continue.

VI. Request For Relief

The Minnesota Voter's Alliance respectfully requests that this Court: (1) find that the District Court's June 29, 2011, order has no authority in the Minnesota Constitution; (2) that all acts of State government officials who did not have legislative funding author-

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too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again."

[46] *Fletcher v. Commonwealth of Kentucky,* 163 S.W.3d 852 (Ky. May 19, 2005).

[47] *Id.* at 859.

[48] *State v. Brooks,* 604 N.W.2d 345, 347-48 (Minn. 2000).

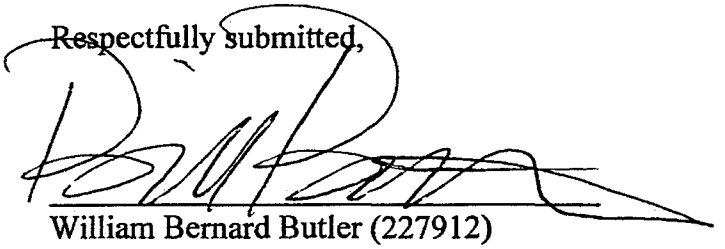
ity from July 1, 2011, forward have no authority in the Minnesota Constitution; and (3) that the executive provide the Minnesota Voters Alliance with a full and complete accounting of all funds that have been disbursed from the State treasury since July 1, 2011.

CONCLUSION

Respondent Minnesota Voters Alliance respectfully requests that this Court grant its motion to intervene to adequately protect the interests of Minnesota citizens in this matter.

Dated: July 18, 2011

Respectfully submitted,



William Bernard Butler (227912)
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Suite 4100
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Minneapolis, Minnesota 55402
(612) 630-5177

STATE OF MINNESOTA
IN SUPREME COURT
Case No. 11-1222

State Senator Warren Limmer, et al.

Petitioners,
vs.

Lori Swanson in her capacity as Attorney General, et al.

Respondents,

vs.

Minnesota Voters Alliance,

Intervenor-Respondent.

Affidavit of Andy Cilek

I, Andy Cilek, having read the following statements, do affirm that they are true to the best of my knowledge:

1. I am familiar with the purpose of my Affidavit, which is made support of The Minnesota Voters Alliance motion to intervene.

2. I am the executive director of The Minnesota Voters Alliance. Therefore, I am familiar with the organization and its purpose.

3. The Minnesota Voters Alliance, an activist association since 2003, is now a non-profit 501(c)(4), organized under Minnesota laws, chapter 317A (since 2005). The Minnesota Voters Alliance is an association of citizens formed in the interest of liberty, transparency, and accountability in government, and a well-informed electorate. The citizens involved with the activities of and contributions to The Minnesota Voters Alliance are Minnesota taxpayers. In addition, the Alliance pays taxes to the state for purchases to sustain it as an organization.

4. The Minnesota Voters Alliance has been before this Court concerning other constitutional issues, individual rights, and government regarding Instant Runoff Voting. The name of that case, decided in 2009 is *The Minnesota Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683 (Minn. 2009). Therefore, its participation in this case is consistent with the purpose of the association.

Dated: July 18, 2011.

Andy Cilek

Sworn and signed before
me this 18 July 2011,
in the County of Hennepin,
State of Minnesota.

Notary Public

MICHAEL SCHMIDT
Notary Public
Minnesota
My Commission Expires 1/31/2015

OFFICE OF
APPELLATE COURTS

JUL 19 2011

FILED

STATE OF MINNESOTA
IN SUPREME COURT

STATE SENATOR WARREN LIMMER, et al

Petitioners,

v.

LORI SWANSON, ATTORNEY GENERAL, et al

Respondents

vs

Minnesota Voters Alliance,

Intervenor-Respondent.

CERTIFICATE OF SERVICE

Case No: A11-1222

I hereby certify that on July 18th, 2011, I deposited for service in the U.S. Mail and also sent by facsimile and e-mail the following documents: (1) Motion to Intervene; (2) Memorandum in Support; and Affidavit of Andy Cilek, addressed to the following individuals:

The Honorable Kathleen R. Gearin

Chief Judge – Ramsey County

District Court

Ramsey County Courthouse

15 West Kellogg Blvd. Suite 1210

St. Paul, MN 55102

Governor Mark Dayton

c/o David L. Lillehaug

Fredrickson & Byron, P.A.

200 South Sixth Street, Suite 4000

Minneapolis, MN 55402

Attorney General Lori Swanson

Alan I. Gilbert

Solicitor General

75 Rev. Dr. Martin Luther King Jr. Blvd.

102 Capitol

St. Paul, MN 55155

Commissioner Jim Schowalter

Department of Management and Budget

445 Minnesota Street, Suite 1100

St. Paul, MN 55101

Frederick K. Grittner

Clerk of Appellate Courts

Minnesota Supreme Court

305 Minnesota Judicial Center

25 Rev. Dr. Martin Luther King Jr. Blvd.

Saint Paul, MN 55155

Rae Couch

Subscribed to before me this 18th
day of July, 2011

NOTARY PUBLIC

TALITHA M. DAVEY
Notary Public
Minnesota
My Commission Expires January 31, 2013

BUTLER LIBERTY LAW, LLC

612-630-5177
33 SOUTH SIXTH STREET • SUITE 4100 • MINNEAPOLIS, MN 55402
WEBSITE: BUTLERLIBERTYLAW.COM

July 18th, 2011

VIA U.S. MAIL, FACSIMILE AND EMAIL DELIVERY

OFFICE OF
APPELLATE COURTS
JUL 19 2011
FILED

Clerk of Court
The Minnesota Supreme Court
Minnesota Judicial Center
25 Reverend Martin Luther King Jr Blvd
St Paul
MN 55155

Re: **Limmer v. Swanson, Case No. A11-1222, Petition for Writ of Quo Warranto**

Dear Clerk of Court:

Enclosed for filing please find, Intervenor Minnesota Voter's Alliance's:

(1) Motion to Intervene;
(2) Memorandum in Support; and
(3) Affidavit of Andy Cilek.

By copy of this letter, counsel of record are also being served.

These documents ~~are being~~ filed and served via U.S. Mail, Facsimile and e-mail.

Sincerely,

Bill Butler

Enclosures

Cc: Judge Kathleen Gearin (via U.S. Mail, fax and email)
Governor Mark Dayton, (via U.S. Mail, fax and email)
Commissioner Jim Schowalter (via U.S. Mail, fax and email)
Attorney General Lori Swanson (via U.S. Mail, fax and email)
Joseph J. Cassioppi (via U.S. Mail, fax and email)
Erick G. Kaardal (via U.S. Mail, fax and email)