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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT
CASE TYPE: OTHER CIVIL

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

Plaintiffs,

v.

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

Defendants.

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

MEMORANDUM IN RESPONSE TO ORDER TO SHOW CAUSE AND IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

This Memorandum responds to this Court's June 14, 2017 Order to Show Cause and supports Defendants' Motion for Judgment on the Pleadings. Defendants will show cause that:

1. Count I of the Complaint, seeking in paragraph 35 a declaratory judgment to invalidate the Governor's line-item vetoes, should be dismissed with prejudice. Defendants do not contest that this Count is ripe for judicial decision but will show that the vetoes were valid as expressly authorized by the Constitution and were exercised to maintain separation of powers, not to violate it. Although Defendants reserve the defenses of justiciability and political question, they do so not as a barrier to the Court's jurisdiction to decide the legality of the veto and dismiss Count I, but as bearing on the

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narrow scope of judicial review of the vetoes as being political decisions that are within the exclusive province of the Executive branch.

2. Counts II and III of the Complaint, seeking in paragraphs 39 and 46 injunctive and mandamus relief requiring the Commissioner of the Department of Management and Budget ("MMB") to "allot" funds to pay the obligations of the Legislature, should be dismissed with prejudice insofar as they seek an "allotment" from the vetoed appropriations. To the extent these Counts seek funding only for critical, core functions, they should be stayed as not yet justiciable, to allow for immediate appeal of the issues raised in Count I. Alternatively, if the Court concludes that the Plaintiffs' claims for funding of the critical, core functions are justiciable, the Court should establish a process for determining the necessity for and cost of these critical, core functions.

INTRODUCTION

The Governor has explicit and unqualified authority under the Minnesota Constitution to veto any line item of appropriation: "If a bill presented to the governor contains several items of appropriation of money, he may veto one or more of the items while approving the bill." Minn. Const. art. IV, § 23.

It is by the Governor's veto power that the Legislative and Executive branches of Minnesota government share responsibility for enacting laws. As described in *Brayton v. Pawlenty*:

> The Legislature has the primary responsibility to establish the spending priorities for the state through the enactment of appropriation laws. Minn. Const. art. IV, § 22; *id.* art. XI, § 1. The executive branch has a limited, defined role in the budget process. The Governor may propose legislation, including a budget that includes appropriation amounts, which proposals

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> the Legislature is free to accept or reject. *But the only formal budgetary authority granted the Governor by the constitution is to approve or veto bills passed by the Legislature*. *See* Minn. Const. art. IV, § 23. With respect to appropriation bills, *the constitution grants the Governor the more specific line-item veto authority, through which an item of appropriation can be vetoed without striking the entire bill*. *Id.* If the Governor exercises the veto power, the Legislature may reconsider the bill or items vetoed, and if approved by a two-thirds vote, the vetoed bill or item becomes law. *Id.*

781 N.W.2d 357, 365 (Minn. 2010) (emphasis added).

In the 2017 legislative special session, the Minnesota Senate and House attempted to suppress the Governor's constitutional veto authority by placing into the Omnibus State Government Appropriations bill a "poison pill" that would have denied appropriations to the Department of Revenue if Governor Dayton vetoed the Omnibus Tax bill. (Answer, Ex. A (First Special Session 2017, Senate File No. 1, art. 1, § 14 ("This section is not effective until the day following enactment of First Special Session 2017, House File No. 1." [the tax bill])). This presented the Governor with a Hobson's Choice—if he vetoed the tax bill, there would be no appropriation for the Department of Revenue, but if he signed it, it would imperil the State's fiscal stability and three provisions to which he had serious public policy objections would become law.

Governor Dayton signed the tax bill so the Department of Revenue could continue to provide service to taxpayers and collect much needed revenues to fund the operations of the State. But, because of concerns about the impact the tax bill would have on the financial stability of the State, and to seek renegotiation of three policy issues of concern to the Governor contained in the tax bill and two issues contained in two other bills, Governor Dayton used his constitutionally prescribed power to line-item veto two of

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three legislative appropriations—that of the Senate and the House. Because the Senate and the House had chosen to adjourn *sine die* just after presenting the bills to the Governor, the Governor offered to call a second special session to revisit these five policy issues and the Senate and House appropriations. (Answer, Ex. C; Compl., Ex. 1 and Attachment ("Your job has not been satisfactorily completed, so I am calling on you to finish your work.")). The leaders of the Senate and House have thus far declined to discuss any changes to the five policy issues and, by bringing this legal action, seek to avoid further engagement in the ongoing political process.

The Minnesota Constitution authorizes the Governor's line-item vetoes, without any qualification as to the Governor's subjective intent or purpose. *See* Minn. Const., art. IV, § 23. The Governor's vetoes do not "unfund" the Legislature. The $35 million appropriation for the Legislative Coordinating Commission ("LCC") has become law. (Answer, Ex. B (First Special Session 2017, Senate File No. 1, art. 1, § 2, subd. 4)).[1] The Legislature also has carry-over funding totaling potentially more than $21 million that it can use to fund its operations pending political negotiations. (Answer, Ex. D (Affidavit of Deputy Commissioner Eric Hallstrom ("Hallstrom Aff."), ¶¶ 7-8)). Although the vetoes eliminated the separate appropriations for the Senate and House, the vetoes did not, and could not, eliminate the constitutional right of those bodies to obtain court-ordered funding for their critical, core functions. The Senate and House do not have a constitutional right to obtain the appropriations of their choice.

[1] The two line items for the Senate and House are only shown as lump sums. The Legislature's practice is to submit its budget without providing details to the public on the nature of its expenditures. (*See* Answer, Ex. B).

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BACKGROUND

For Defendants' Motion for Judgment on the Pleadings, and for Defendants' response to this Court's Order to Show Cause, these allegations of Plaintiffs' Complaint may be taken as true:

1. On May 30, 2017, after the adjournment of a special session, Governor Dayton signed all of the appropriations bills and the tax bill, but vetoed two items of appropriation in the Omnibus State Government Appropriations bill, Chapter 4, article 1, section 2, subdivisions 2 and 3—the appropriations to the Senate and the House. (Compl. ¶¶ 3, 19).

2. The Legislature adjourned the special session *sine die*. As a result, the special session has ended and the Legislature cannot override the Governor's vetoes. (Compl. ¶¶ 3, 20).

3. In his letter to the Speaker of the House and Senate Majority Leader explaining these vetoes, Governor Dayton offered to call another special session if they would agree to remove five provisions (three in the tax bill and two in two other bills) that the Governor stated "are extremely destructive to Minnesota's future." (Compl. ¶ 19, Ex. 1 and Attachment).

4. The Minnesota State Constitution protects the Legislature's authority to perform the core functions of "drafting, debating, publishing, voting on, and enacting legislation." (Compl. ¶ 24).

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5. The Senate and House have not asked Defendants to fund these core functions or provided any itemization of the cost to maintain core functions. (Compl. ¶ 25).

For purposes of responding to Plaintiffs' request for injunctive relief under Minn. R. Civ. P. 65, Defendants have also provided the Affidavit of MMB Deputy Commissioner Eric Hallstrom. That Affidavit provides documents showing public data relevant to Plaintiffs' claims of imminent or irreparable injury from their alleged inability to perform core functions:

1. Exhibit A to that Affidavit is a document entitled "Recommended Statewide Objectives." MMB submitted it to the Ramsey County District Court in connection with the anticipated 2011 State government shutdown and, in large part, the court used it to determine critical, core functions of the Executive agencies.

2. Neither legislative body provided itemized details regarding their operating budgets in the appropriation process. Exhibit B to Deputy Commissioner Hallstrom's Affidavit is the Senate Budget for FY 2016-17 that the Senate provided to MMB in connection with the financing of the Senate Office Building. That budget includes numerous items that do not qualify as critical, core functions.

3. Unlike the Executive or Judicial branches, the Legislative branch may carry forward general fund appropriations that have not been spent at the end of a biennium. Exhibit C shows the amounts currently held in the carry forward accounts and additional unspent amounts from FY 2017. The carry forward account holds more than $2.9 million

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for the Senate and $8.3 million for the House. In addition, the unspent amounts from the current biennium are more than $5 million for the Senate[2] and $4.8 million for the House.

ARGUMENT

I. The Governor's Line-Item Veto Was Lawful—Count I Should Be Dismissed.

The Governor has clear, unqualified constitutional authority to line-item veto items of appropriation to the Senate and House. Despite Plaintiffs' argument that the Governor violated separation of powers by exercising this power to eliminate the appropriations for the House and the Senate, the veto complied with the clear text of the Constitution, which does not exempt legislative appropriations from the Governor's veto power. The Court should declare that the Governor's veto was lawful.

A. The Minnesota Constitution expressly grants the Governor the power to veto items of appropriation.

Plaintiffs' Complaint alleges that the Governor's "vetoes impermissibly control, coerce, and restrain the action of the Legislature in the exercising of its official and constitutional powers and duties." (Compl. ¶ 28). To the contrary, the Governor's veto authority is provided in the Constitution to check the Legislature's authority and create a balance of powers. The veto is the Governor's most important tool when the Legislature ignores the Governor's proposals, objections or other input. Although the Governor cannot "control" the Legislature, the Governor may use the veto power to influence, discourage, or constrain legislative actions with which the Governor disagrees.

[2] This amount should decrease by $683,954, which is the amount the Senate owes the Minnesota Department of Administration for its June 2017 lease payment for the Senate Office Building and parking garage. (Compl. ¶ 18).

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The Minnesota Constitution explicitly provides the Governor a broad veto power. Indeed, this power was extended in 1876 to add the even more precise tool of the line-item veto. *See* 1876 Minn. Laws ch. 1 § 1.[3] Article IV, § 23 grants the Governor this sweeping veto authority:

> If a bill presented to the Governor contains several items of appropriation of money, he may veto one or more of the items while approving the bill. At the time he signs the bill the Governor shall append it to a statement of the items he vetoes and the vetoed items shall not take effect.

The Constitution does not qualify the Governor's line-item veto power. The text of Article IV, § 23 is explicit:[4] the Governor may veto one or more appropriation items in a bill. If he does so, "the vetoed items shall not take effect." *Id.*

Given the veto power's breadth and specificity, the Minnesota Supreme Court has recognized that judicial review of a veto's legality is extremely limited. The court has said: "When the Governor vetoes a bill, he exercises a political power ...." *In re McConaughy*, 106 Minn. 392, 415, 119 N.W. 408, 417 (1909). Indeed, "[t]he Governor may exercise the powers delegated to him, free from judicial control, so long as he observes the laws and acts within the limits of the power conferred." *Id*. In *Duxbury v. Donovan*, the Minnesota Supreme Court explained that the purpose of executive veto

[3] The 1876 amendment was approved through a referendum, with over 90 percent voter approval. *See* Joel Michael, HISTORY OF THE ITEM VETO IN MINNESOTA, (Information Brief, House Research Staff, September 2016).

[4] The Minnesota Constitution is interpreted according to its plain language. *See Clark v. Pawlenty*, 755 N.W.2d 293, 304 (Minn. 2008) ("When examining constitutional provisions, our task is 'to give effect to the clear, explicit, unambiguous and ordinary meaning of the language.' ") (citing *Rice v. Connolly*, 488 N.W.2d 241, 247 (Minn. 1992)).

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power is to maintain the balance of powers between the branches of government. *See* 272 Minn. 424, 429, 138 N.W.2d 692, 696 (Minn. 1965). The veto power exists because of the belief that "there is a tendency in free governments for the legislative branch to absorb all governmental power," and that the veto "was considered to be an integral part of the system of checks and balances designed to prevent constitutional abuses by a legislative majority." *Id.*; *see also State v. Bates*, 96 Minn. at 117, 104 N.W. at 712 (noting that while the founders recognized the separation of powers principle in constructing the framework of the government, they feared those principles would be violated in practice and "so distributed the powers as to create a system of checks and balances").

When Governor Dayton vetoed two of three legislative appropriations, he exercised a political power granted to him by the Minnesota Constitution—to encourage the Republican leadership of the two houses to return to the negotiating table to revisit five public policy issues of great importance to the citizens of Minnesota.

Plaintiffs do not dispute that the Governor vetoed "items of appropriation." (Compl. ¶ 3 ("Governor Dayton vetoed two items of appropriation ….")). Nor can they dispute that the Governor would have been within his power to veto the entire budget bill. *See* Minn. Const., art. IV, § 23 ("Every bill passed in conformity to the rules of each house and the joint rules of the two houses shall be presented to the Governor. … If he vetoes a bill, he shall return it with his objections to the house in which it originated."). So the narrow question before the Court is whether separation of powers limits the Governor's exercise of his admittedly authorized line-item veto power to eliminate two of

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the three appropriations for the Legislature. It clearly does not. To the contrary, the Governor's line-item veto reflects the very checks and balances the principle of separation of powers was designed to ensure.

Plaintiffs' claim of invalidity would not only eviscerate the Governor's line-item veto authority, it would give the Legislature unfettered power over its budget. Given that the Legislature sets its own appropriation amount, a holding in favor of Plaintiffs would mean that, in the future, if the Legislature were to appropriate an exorbitant amount of money to itself, crippling the State's finances, the other branches of government would be powerless to intervene in the face of such an abuse. This cannot be the intention of the drafters of the Constitution, which does not exempt the Legislature's own appropriations from the requirement that "[e]very bill … shall be presented to the Governor." *See* Minn. Const., art. IV, § 23. It would circumvent the constitutional requirement that the Legislature can only override the Governor's vetoes with a two-thirds vote of both houses, which ensures that only legislation with broad legislative support will survive a veto. Thus, with Count I, the legislative majority is seeking a judicial override of the Governor's veto and would be arrogating unto itself unchecked power over its own appropriations.

The case before the Court is distinguishable from any Minnesota case in which a court has overruled the Governor's exercise of a line-item veto.[5] In those cases, courts

[5] In Count I of their Complaint, Plaintiffs cite three Minnesota Supreme Court decisions to support their allegation that Governor Dayton acted illegally. These cases are readily distinguishable. *In re Civil Commitment of Giem*, 742 N.W.2d 422 (Minn. 2007) and *Limmer v. Richie*, 819 N.W.2d 622 (Minn. 2012) both were decided by construing

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held the Governor lacked constitutional authority to exercise his line-item veto power because the vetoes' target was not an appropriation of money or was a part of, but not the whole, "item of appropriation." *See Johnson v. Carlson*, 507 N.W.2d 232, 233 (Minn. 1993) ("The issue before us … is whether this veto was constitutional, or to put it another way, was the veto of Section 5 the veto of an 'item of appropriation of money' "); *Inter Faculty Org. v. Carlson*, 478 N.W.2d 192 (Minn. 1991) ("The three subject gubernatorial vetoes are declared null and void and without legal effect as they were directed at other than 'items of appropriation.' "). As the Senate and House concede, the items vetoed here were "items of appropriations." (Compl. ¶ 3). Consequently, the Governor acted within his express constitutional authority when making his line-item vetoes.

B. The Legislature's constitutional remedy for displeasure with the vetoes was to seek to override them.

The same provision of the Minnesota Constitution that grants the Governor the authority to veto bills and appropriation line-items also grants the Legislature the ability

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statutes in a manner that avoided separation of powers issues. They are not applicable here. Further, the separation of powers issue that concerned the court in those cases is resolved here by the core function principle, meaning the Senate and House are not entitled to an appropriation, but only to funds necessary to pay for their core functions. The third cited case is *State ex rel Birkeland v. Christianson*, 179 Minn. 337, 229 N.W. 313 (1930), which concerned a petition for a writ of mandamus to compel the Governor to remove the Hennepin County Attorney from office for malfeasance and nonfeasance. The court's separation-of-powers discussion did not address the Governor's line item veto power. Rather, the court noted that the judiciary cannot compel the legislature to "enact any law," but once the Legislature has done so, the "courts may determine its constitutionality and whether it in fact became a law." *Id.* at 340, 229 N.W. at 314. Likewise, while the Governor cannot force the legislature to pass a bill, once it does so, Art. IV, § 23 of the Minnesota Constitution empowers the Governor to veto the bill.

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to override the Governor's vetoes. *See* Minn. Const., art. IV, § 23. If the Governor exercises his authority to veto a specific appropriation, Section 23 provides:

> If the legislature is in session, he shall transmit to the house in which the bill originated a copy of [a statement of the items he vetoes], and the items vetoed shall be separately reconsidered. If on reconsideration any item is approved by two-thirds of the members elected to each house, it is a part of the law *notwithstanding the objections of the governor*.

Id. (emphasis added). Thus, any argument by the Legislature that a ruling in the Governor's favor results in no check on the Governor's authority over its appropriations rings hollow.

Here, the Legislature chose to adjourn *sine die* immediately following presentation of the appropriations bills and tax bills to the Governor. (*See* Complaint ¶ 20). It was not required to do so. The Legislature could have remained in session while the Governor considered whether to sign the appropriations and tax bills, reserving its right to override any gubernatorial veto. The Legislature instead decided to adjourn *sine die*, depriving *itself* of the right to override any vetoes. It was the Legislature's own parliamentary tactic that left it without an override remedy.

C. The Governor's veto did not violate separation of powers.

The proper analytical framework for applying Article III, Section 1, of the Minnesota Constitution was best described years ago in *State v. Bates*:

> Analyzing the constitutional provision, we find it consists of (1) a distributive clause, "The powers of government shall be divided into three distinct departments, legislative, executive and judicial;" (2) a prohibitive clause, "No person or persons belonging to, or constituting one of these departments shall exercise any of the power properly belonging to any of the others;" and (3) an exception clause, "Except in the instances expressly provided in this Constitution."

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96 Minn. 110, 117, 104 N.W.709, 712 (1905).

As applied here, the Governor's express veto authority necessarily fits into the exception clause—it permits the Governor to participate in and, to that degree, interfere with the functions otherwise distributed to the Legislature. Because of the exception clause, the veto does not implicate the prohibitive clause. Hence, the exercise of the Governor's veto power cannot in any sense be seen to violate separation of powers—it is expressly authorized to protect separation of powers by checking the Legislature's otherwise unlimited power. Stated another way, the exercise of the veto power is expressly excepted from the prohibitive clause.

The prohibitive clause has relevance here, however, as limiting the Judiciary's authority to exercise the powers of the Legislative or Executive departments. As noted earlier, judicial review of the legality of a veto is extremely limited. Thus, Plaintiffs' allegations in paragraph 33 of the Complaint, that the vetoes were intended to "coerce" the Legislature, both ignore the exception clause in the separation of powers article and ask the Court to exercise Executive powers.

The motive or intent behind a veto is not legally relevant to a veto's validity. In fact, because judicial inquiry into the Governor's motives for a veto would require it to exercise powers of the Executive, that inquiry would itself violate separation of powers.

In *Johnson v. Carlson*, the Minnesota Supreme Court considered the constitutionality of a line-item veto that had the effect of increasing government spending. 507 N.W.2d 232, 234 (Minn. 1993). The Court noted that "[t]he state constitution, recognizing the Governor's oversight responsibilities for the state's budget,

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provides a gubernatorial line item veto to enable the state's chief executive officer to engage in cost-containment, subject, of course, to the possibility of the veto being overturned. … *It is not for this court to judge the wisdom of a veto, or the motives behind it, so long as the veto meets the constitutional test.*" *Id.* at 235 (emphasis added). The court upheld that veto.

Appellate courts in other states similarly refuse to consider a governor's motives as long as the text of the constitution permitted the veto. The Supreme Judicial Court of Massachusetts, for example, has noted that it has "never inquired into a Governor's motives in the use of the line item veto power." *See Barnes v. Sec'y of Admin.*, 586 N.E.2d 958, 961 (Mass. 1992). It held, "[t]he language of the constitutional amendment clearly authorizes the Governor's reduction; his action was wholly lawful, and our inquiry ends there." *Id.* Similarly, in upholding a veto the Texas Court of Criminal Appeals noted that "[o]ther state courts of last resort have held that the Governor's veto power is absolute if it is exercised in compliance with the state constitution and that courts may not examine the motives behind a veto or second-guess the validity of a veto." *See Ex Parte Perry*, 483 S.W.3d 884, 901 (Tex. Crim. App. 2016) ("When the only act that is being prosecuted is a veto, then the prosecution itself violates separation of powers."). The Court of Special Appeals in Maryland, in considering "whether judicial investigation into the Governor's motives for exercising his veto power so encroaches upon the executive's essential functions as to be forbidden by the separation of powers doctrine," held that "the answer to this question can only be yes." *O'Hara v. Kovens*, 606 A.2d 286, 292-93 (Md. Ct. Spec. App. 1992). In short, the principle of separation of

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powers precludes courts from inquiring into a governor's motives for exercising a power granted under the constitution.[6]

Finally, even if a governor's intent were legally relevant, Governor Dayton's line-item vetoes were legitimate and politically proper. He used the only tool available to encourage the Legislature to revisit key public policy issues. As the State's chief executive, he believed these issues were crucial to the financial health, public safety and well-being of the citizens of Minnesota. As noted above, in *Brayton v. Pawlenty*, Plaintiffs and the Governor each have "distinct roles and powers allocated by the constitution to the two branches in the budget-creation process." 781 N.W.2d 357, 365, 366 (Minn. 2010) ("The executive branch has a limited, defined role in the budget process. The Governor may propose legislation, including a budget that includes appropriation amounts, which proposals the Legislature is free to accept or reject."). The Governor has express constitutional permission to negotiate with the Legislature as it considers legislation, whether new proposals or changes to existing laws. *See Brayton*, 781 N.W.2d at 366. No case law supports the argument that this constitutionally prescribed back-and-forth among co-equal branches of government amounts to impermissible coercion. And the idea that the Governor is somehow prohibited from using his constitutionally provided tools to negotiate changes to existing law is wrong.

[6] No Minnesota decisions address the specific issues of a veto of an appropriation to the Legislature. The Defendants also cannot locate any cases addressing this precise point from other U.S. jurisdictions. The New Mexico Supreme Court was recently asked to decide this issue when the governor vetoed appropriations for the legislature and the higher education system, but the court held that the controversy was not justiciable because the governor had called a special session. *See* Order Denying Petition at 2, *New Mexico Legislative Council v. Martinez*, Order in S-1-SC-36422 (N.M. May 11, 2017).

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D. The Governor's veto did not "defund" the Senate or House or prevent them from operating.

Plaintiffs allege that, "on July 1, 2017, the Senate and House will not have operating appropriations for fiscal years 2018 and 2019." (Compl. ¶ 21). Further, they allege that, "[d]ue to the Governor's line-item vetoes, the Legislature will have insufficient funds to exercise its official and constitutional powers and duties beginning on July 1, 2017." (Compl. ¶ 26). Although presently the Senate and House have no *appropriation*, it is not true that the "Legislature will have insufficient funds to exercise its official and constitutional powers and duties," for several reasons:

1. Governor Dayton approved appropriations to the LCC. The Governor did not veto the $17 million in annual funding for the LCC, which "coordinate[s] the legislative activities of the senate and house of representatives." *See* Minn. Stat. § 3.303. This appropriation already 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. (Answer, Ex. B).

2. Plaintiffs have substantial carry-over funds they can use to continue to operate. *See* Minn. Stat. § 16A.281 (Answer, Ex. D; Hallstrom Aff. ¶¶ 7-8). The Senate maintains more than $2.9 million in carry-over funds, a number that could jump by another $4.3[7] million at the end of fiscal year 2017. (*Id.*). The House has more than $8 million remaining in its carry forward account, a number that could jump by another $4.8

[7] The Senate currently has $5 million in unspent funds for FY2017, but owes a lease payment on the Senate Office Building and parking garage of $683,954 in June 2017. (Compl. ¶ 18).

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million at the end of fiscal year 2017. (*Id.*). These carry-over amounts will provide funding well beyond July 1, 2017.

3. Most importantly, Plaintiffs do not have a constitutional right to operate at the level of their preferred appropriations. If Plaintiffs can demonstrate that the effect of the vetoes is to prevent the Legislature from exercising its critical, core functions, their legal remedy is not to invalidate the veto or revive the appropriation—both of these would require the Court to, in effect, exercise the veto power distributed to the Governor or the appropriation power distributed to the Legislature. Each would be a violation of the prohibitive clause of separation of powers. Instead, Plaintiffs may petition this Court to order that the State provide funds sufficient to cover their critical, core functions. *See Clerk of Court's Comp. for Lyon Cty. v. Lyon Cty. Comm'r*, 308 Minn. 172, 180-81, 241 N.W.2d 781, 786 (1976) [hereinafter *Lyon County*].

Plaintiffs allege that each house of the Legislature is entitled to an appropriation of approximately $32 million a year for fiscal years 2018 and 2019. (Compl. ¶¶ 3, 28). But they cite no authority in support of the proposition that the Senate or House is constitutionally entitled to be funded at the level of their entire desired appropriation. Rather, the government shutdown case law instructs that any branch of government that has not been provided with an appropriation for its operating needs is to obtain court-ordered funding limited to the costs necessary to perform its critical, core functions.

In fact, this case presents the same issues that were addressed in the 2001, 2005 and 2011 government shutdown cases, only with the roles reversed. *See* Findings of Fact, Conclusions of Law and Order, *In re Temp. Funding of Core Functions of the Exec.*

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Branch, No. 62-CV-11-5203, 2011 WL 2556036 (Ramsey Cty. D. Ct. filed June 29, 2011) (Gearin, C.J.) [hereinafter *2011 Shutdown Order*]; Findings of Fact, Conclusions of Law and Order, *In re Temp. Funding of Core Functions of the Exec. Branch*, No. 62-CO-05-6928, 2005 WL 6716704 (Ramsey Cty. Dist. Ct. filed June 23, 2005) (Johnson, C.J.) [hereinafter *2005 Shutdown Order*]; Findings of Fact, Conclusions of Law and Order, *In re Temp. Core Funding of Core Functions of the Exec. Branch*, No. 62-C9-01-5725 (Ramsey Cty. Dist. Ct. filed June 29, 2001) (Cohen, C.J.) [hereinafter *2001 Shutdown Order*].[8]

In each case, the shoe was on the other foot. The Legislature failed to appropriate any funds for the Executive branch. There was no suggestion at the time that the Legislature's failure to do so violated separation of powers. More importantly, there was no suggestion that a court could compel funding at the level of a requested appropriation. Instead, the court ordered that the Executive branch must continue performing the critical, core functions as distributed to it in the Minnesota Constitution, and that the Commissioner of MMB must pay for those critical, core functions until a political solution to the non-appropriation could be reached. The constitutional right to core funding was not based on the prohibitive clause—the legislative failure to appropriate was not the result of the Legislature exercising the power of the Executive. Instead, the

[8] None of the orders discusses the core functions of the Legislature at length. The 2011 order notes only that 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." *2011 Shutdown Order*, Conclusions of Law ¶ 6.

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right was based on the distributive clause—the grant of power to the Legislature implied a right to the funding necessary to exercise that power.

The only difference between those cases and this case, outside of the reversal of roles, is that, unlike the Executive and Judicial branches, which must return unspent appropriations to the general fund, the Legislature may carry unspent amounts into carry forward accounts. As a result, the Senate and House will not run out of funds on July 1.

Of course, Plaintiffs cannot demonstrate that the entire appropriation is needed to perform the critical, core functions of the Legislative branch. Although the Legislature's budget is (by its own design) opaque,[9] some information that was made public demonstrates that not every penny it spends is in furtherance of its core functions, much less "critical" to those functions. (Answer, Ex. E). For example, a Senate budget for the 2016-2017 biennium identifies annual 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.*).

If Plaintiffs 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. It does not include invalidating the Governor's veto or reviving the appropriation (each of which are outside of the Court's jurisdiction as exclusively Executive or exclusively Legislative), but only allows recovery of the cost of critical, core functions. *Id.* at 181, 241 N.W.2d at 786. The proceeding to make that

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

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recovery 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).

II. No Injunction or Mandamus Should Issue—Counts II and III Should be Dismissed or Stayed.

Plaintiffs ask the Court to order injunctive and mandamus relief, requiring MMB Commissioner Myron Frans to "allot" funds to pay the obligations of the Legislature. Such relief is inappropriate for a host of reasons. First, Plaintiffs' request is not ripe as no redressable injury exists: they have made no showing that they will be unable to fund their critical, core functions while a ruling on the constitutionality of the Governor's vetoes is pending. Second, the political question doctrine prevents the Court from ordering Plaintiffs' requested relief because the right to veto items of appropriation is textually committed to the Governor and there are no judicially manageable standards for limiting that right. Third, mandamus is inappropriate because Plaintiffs have not established that Commissioner Frans has a clear, official duty imposed by law to allot funds to the Legislature absent an appropriation,[10] or that there is no adequate legal remedy. Finally, given that Plaintiffs cannot demonstrate the possibility of irreparable

[10] Indeed, the Legislature exempted itself from the encumbrance and allotment requirements that govern the Executive branch. Minn. Stat. § 16A.14, subd. 2a.

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injury absent an injunction and they are not likely to succeed on the merits of their constitutional claim, injunctive relief is inappropriate.

A. Counts II and III are not ripe for adjudication because no redressable injury exists.

The ripeness doctrine reflects the general principle that Minnesota courts consider only redressable injuries. *State ex rel. Friends of the Riverfront v. City of Minneapolis*, 751 N.W.2d 586, 592 (Minn. Ct. App. 2008), *review denied* (Minn. Sept. 23, 2008). The ripeness doctrine bars suits brought "before a redressable injury exists." *Id.* To establish the existence of a justiciable controversy, a litigant must show a direct and imminent injury. *Leiendecker v. Asian Women United of Minn.*, 731 N.W.2d 836, 841 (Minn. Ct. App. 2007) (stating that ripeness is a justiciability doctrine), *review denied* (Minn. Aug. 7, 2007).

Plaintiffs' funding claims are not yet ripe for adjudication because Plaintiffs have not shown that a redressable injury exists. *See Friends of the Riverfront*, 751 N.W.2d at 592. As noted *supra*, the Legislature has funding to continue operations past July 1 while a ruling on the constitutionality of the Governor's vetoes is pending. Unless the Legislature can show imminent danger of not being able to perform its critical, core functions under the Constitution, the writ of mandamus and temporary injunction it seeks are premature.

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B. The political question doctrine prevents the Court from ordering mandamus or injunctive relief because the right to veto items of appropriation is the Governor's and there are no judicially manageable standards for limiting that right.

In *Baker v. Carr*, the United States Supreme Court confirmed that a set of "political questions" exist that are nonjusticiable or inappropriate for judicial resolution. 369 U.S. 186 (1962). Whether a question falls within the political question doctrine is a case-by-case inquiry. *Id.* at 210. The political question doctrine is one prudential mechanism for protecting the separation of powers. *See Citizens for Rule of Law v. Senate Comm.*, 770 N.W.2d 169, 173-74 (Minn. Ct. App. 2009) (citing *Allen v. Wright*, 468 U.S. 737, 750, (1984), *abrogated on unrelated grounds by Lexmark Int'l, Inc. v. Static Control Components*, ___ U.S. ___, 134 S. Ct. 1377 (2014), as explaining that the political question doctrine arises from separation-of-powers principles). The political question doctrine comes into play when a court is asked to make a decision that the Constitution has committed to another branch of government, and when a court is asked to decide whether another branch's action exceeds the authority committed to it. *Baker*, 369 U.S. at 210.

Nonjusticiable political questions are identified by one or more of the following factors: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind meant for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate

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branches of government; or (5) the potential of embarrassment from differing pronouncements by various departments on one question. *Id.* at 216.

Each of these factors show the nonjusticiability of Plaintiffs' requests to circumvent the line-time vetoes via court order. (Compl. ¶¶ 39, 46). First, the right to veto items of appropriation is textually committed to the Governor in Minn. Const. art. VI, § 23. Second, there are no judicially manageable standards for qualifying that right. Indeed, when Plaintiffs invite the judiciary to probe the subjective intent of a vetoing governor, they thereby seek the judiciary's interference with the Executive branch, described *supra*.

Plaintiffs want the judiciary to take their side in a political controversy between the two political branches. Even if the judiciary should enter frays such as this one, a court cannot take sides without first making an initial policy determination of the proper appropriation for the Senate and the House. Plaintiffs suggest their proposed appropriation is best. Yet that very question is left to the enactment process that, under the Constitution, requires actions by both the Legislature and the Governor. For a court to choose either side would both disrespect the losing side, and would require a policy judgment that does not belongs to the judiciary.

Finally, the political question doctrine likewise forecloses Plaintiffs' claim under Art. IV, § 4, of the United States Constitution, under which the United States guarantees a republican form of government to every state (the Guaranty Clause). "[T]his court has followed the Supreme Court's lead in holding that Guaranty Clause claims present a political question not to be adjudicated by the courts." *Clayton v. Kiffmeyer*, 688 N.W.2d

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117, 126 (Minn. 2004) (citing *State ex rel. Peterson v. Quinlivan*, 198 Minn. 65, 74, 268 N.W. 858, 863 (1936)).

C. Mandamus is inappropriate because Plaintiffs have not established that Commissioner Frans has a legal duty to allot funds to the Legislature absent an appropriation or that there is no adequate legal remedy.

Plaintiffs have not established that Commissioner Frans has a clear, official duty imposed by law to allot funds to the Legislature absent an appropriation that is both passed by the Legislature *and* signed into law by the Governor. Even if Plaintiffs could establish that Commissioner Frans has this duty, he is limited to authorizing only those funds that are necessary for the Legislature to perform its critical, core functions. And, even assuming that Plaintiffs have established that the Governor's exercise of the line-item veto power violated the state or federal constitutions (and they have not), Plaintiffs have adequate remedies at law to rectify the alleged improper veto and are not entitled to extraordinary mandamus relief against Commissioner Frans.

The Court may only issue a writ of mandamus to "compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." Minn. Stat. § 586.01 (2016). A writ of mandamus may not be issued "in any case where there is a plain, speedy, and adequate remedy in the ordinary course of law." Minn. Stat. § 586.02 (2016). To obtain a writ of mandamus against Commissioner Frans, Plaintiffs must show that he: "(1) failed to perform an official duty clearly imposed by law; (2) that, as a result, the petitioner suffered a public wrong specifically injurious to the petitioner; and (3) that there is no other adequate legal remedy." *N. States Power Co. v.*

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Minn. Metro. Council, 684 N.W.2d 485, 491 (Minn. 2004) (internal citations omitted). As a threshold matter, the availability of declaratory relief under Minn. Stat. § 555.01, *et. seq.* precludes relief under Count III. *See Houck v. E. Carver Cty. Schs.*, 787 N.W.2d 227, 234 (Minn. Ct. App. 2010).

The Commissioner's duties as to any appropriations are set out in Minnesota Statutes § 16A.055, subd. 1.[11] In Section 16A.055, subdivision 1(a)(1), the Commissioner is to "receive and record all money paid into the state treasury and safely keep it until lawfully paid out."[12] The Commissioner's ability to pay out funds from the state treasury is limited to making lawful payments, *i.e.*, payments that have been appropriated in a bill that is passed by the Legislature and approved (and not vetoed) by the Governor.

In *Brayton v. Pawlenty*, the Supreme Court reviewed the role of the Legislature, Governor, and the Commissioner in the appropriation and payment processes. 781 N.W.2d 357, 365-66 (Minn. 2010). Only after an appropriation becomes law does the Commissioner have a duty to lawfully pay out money from the state treasury for that appropriation. *Id.*; *see* Minn. Stat. § 16A.055, subd. 1(a)(1). Here, absent an appropriation

[11] Section 16A.055, subdivision 1(b) also states that the Commissioner has the duties set forth in Minnesota Statutes Chapter 43A, which related to state personnel management. Nothing in Chapter 43A addresses the Legislature's claim that Commissioner Frans is required to allot funds to the Senate or the House.

[12] Other duties generally include managing the State's financial affairs, keeping appropriate books and records, and using "generally accepted government accounting principles." *See* Minn. Stat. § 16A.055, subd. 1(a)(2)-(6). Minnesota Statutes Sections 16A.06 and 16A.40 also set forth various duties of the Commissioner, none of which establish the duty to authorize funds to the Legislature absent an appropriation passed by the Legislature and approved by the Governor.

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that was both passed by the Legislature and approved by the Governor, Commissioner Frans is not clearly and officially obligated to fund the Legislature according to the appropriations in the Omnibus State Government Appropriations bill. (*See* Complaint ¶ 3 (identifying the appropriations for the Senate and House of Representatives). Moreover, Commissioner Frans has no responsibility to allot funds to the Legislature, given that the Legislature is statutorily exempt from the allotment process. Minn. Stat. § 16A.14, subd. 2a (stating that the allotment system does not apply to appropriations for the legislature).

To the extent that Commissioner Frans has any duty to provide unappropriated funds to the Legislature, that duty would only extend to providing sufficient funding for the Legislature to perform critical, core functions as ordered by a court.

D. Injunctive relief is inappropriate.

Plaintiffs also seek injunctive relief directing Commissioner Frans to allot funds for the Legislature. (Compl. ¶¶ 1, 38). The Complaint is inconsistent in specifying the scope of the injunctive relief Plaintiffs seek: in paragraph 1, Plaintiffs ask that Commissioner Frans be ordered to "allot funds that were appropriated to the Legislature for the 2018-19 fiscal biennium." (Compl. ¶ 1). In paragraphs 38 and 39, however, Plaintiffs allege that the Legislature "must be allowed to exercise its official and constitutional powers and duties," and that Plaintiffs seek injunctive relief compelling Commissioner Frans to "allot such funds as necessary to pay for such obligations of the Legislature." (Compl. ¶¶ 38-39). Defendants do not dispute that the Legislature is entitled to sufficient funding to perform its critical, core functions. But to the extent Plaintiffs are

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arguing Commissioner Frans should be ordered to provide the Legislature with the entire appropriation vetoed by the Governor, they are clearly not entitled to that relief.

A party seeking an injunction must first establish that a legal remedy is inadequate and that the injunction is necessary to prevent great and irreparable injury. *City of Mounds View v. Metro. Airports Comm'n*, 590 N.W.2d 355, 357 (Minn. Ct. App. 1999). Once a party has established irreparable harm, the district court must consider five factors before issuing an injunction to prevent injury. *Id.* at 357-58. These factors include: (1) the relationship of the parties; (2) the relative harm to the parties if the injunction is or is not granted; (3) the likelihood of success on the merits; (4) public policies expressed in statutes; and (5) the administrative burdens in supervising and enforcing the decree. *Dahlberg Bros., Inc. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 322 (1965). Although each of the five *Dahlberg* factors are important, the probability of success in the underlying action is a "primary factor" in determining whether to issue a temporary injunction. *See Minneapolis Fed'n of Teachers Local 59 v. Minneapolis Pub. Schs., Special Sch. Dist. No. 1*, 512 N.W.2d 107, 110 (Minn. Ct. App. 1994), *review denied* (Minn. Mar. 31, 1994).

Plaintiffs cannot satisfy the *Dahlberg* factors. First, Plaintiffs cannot establish that they will suffer irreparable harm absent an injunction. To be granted an injunction, the moving party must offer more than a "mere statement that it is suffering or will suffer irreparable injury." *Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203, 209 (Minn. 1993). But Plaintiffs' assertion of irreparable harm is just that—a conclusory assertion that they will suffer irreparable injury, with no specific injury articulated. (*See*

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Compl. ¶ 27 ("Plaintiffs will suffer immediate and irreparable harm on and after July 1, 2017 without injunctive relief.")). Given the availability of carry-forward funds, this assertion lacks merit.

Second, the Legislature cannot establish that it is likely to succeed on the merits of its claim that it is constitutionally entitled to the entire appropriation. *Sanborn Mfg. Co. v. Currie*, 500 N.W.2d 161, 164-65 (Minn. Ct. App. 1993) (a court need not grant a temporary injunction where that party has demonstrated no likelihood of success on the merits). The issue is discussed at length above.

Given that Plaintiffs cannot establish either irreparable harm or that they are likely to succeed on the merits of their claim that they are constitutionally entitled to the entire appropriation, the Court need not consider the other *Dahlberg* factors. *See Morse v. City of Waterville*, 458 N.W.2d 728, 729 (Minn. Ct. App. 1990) (failure to show irreparable harm is, by itself, a sufficient ground for denying a temporary injunction); *Sanborn Mfg. Co.*, 500 N.W.2d at 164-65 (a court need not grant a temporary injunction where that party has demonstrated no likelihood of success on the merits).

E. Alternatively, the Court Should Appoint a Special Master to Determine Funding for Critical, Core Functions.

If the Court decides that Counts II and III are justiciable, the 2001, 2005 and 2011 shutdown orders provide a blueprint for this Court to follow.[13]

[13] The 2001 shutdown was averted at the last minute. In 2005, there was a partial government shutdown that lasted for almost two weeks. In 2011, a government shutdown began on July 1, 2011 and lasted for 20 days. Minnesota Legislative Reference Library, *Minnesota Issues Resource Guides: State Government Shutdowns* (May 2015), *available*

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In each case, the Minnesota Legislature ended its regular session in May without approving appropriations for many Executive branch officers and agencies. In 2001 and 2005, the Governor called a special session and the Legislature and the Governor were still unable to reach agreement on a budget. *2001 Shutdown Order* Findings of Fact ¶ 2; *2005 Shutdown Order*, Findings of Fact ¶ 3.

In all three cases, the Court appointed a Special Master to assist in resolving disputes about the need for and cost of certain functions. *See 2011 Shutdown Order*, Findings of Fact ¶¶ 16, 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. *See id.* 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)). 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 U.S. Constitution should limit itself to *only the most critical functions of government* involving the security, benefit, and protection of the people." *2011 Shutdown Order*, Findings of Fact ¶ 29 (emphasis added); *see also id.* ¶ 32 ("The Court finds that 'core functions' that are critical enough to require court-ordered funding

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at https://www.leg.state.mn.us/lrl/guides/guides?issue=shutdown (last visited June 18, 2017).

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despite Article XI are far less in number and [breadth] than proposed by the Attorney General and those seeking amicus curiae status."). Judge Gearin highlighted that in light of Article XI of the Minnesota Constitution, which deals with appropriations, "the Court must construe any authority it has to order government spending to maintain critical core functions in a very narrow sense," noting that "[d]iscretionary appropriations are the province of the legislature, not the courts." *Id.* ¶ 30.

If the Court finds it is necessary to engage in a critical, core functions analysis, Defendants ask that the Court follow the procedure set out during the 2001, 2005 and 2011 government shutdowns, each of which was precipitated by a failure of the Legislature to appropriate funding for the Executive branch.

CONCLUSION

Defendants request an Order of this Court as follows:

1. Count I of Plaintiffs' Complaint is dismissed with prejudice. The Court declares that the line-item vetoes are valid as being expressly authorized by Minn. Const. art. IV, § 23. Pursuant to Minn. R. Civ. P. 54.02, the Court determines that there is no just reason for delay and directs the entry of final judgment dismissing Count I.

2. Counts II and III of Plaintiffs' Complaint are dismissed with prejudice to the extent they seek "allotment" of funds from the vetoed appropriations.

3. To the extent Counts II and III seek funds necessary to support critical, core functions of the Senate and House, further proceedings concerning those Counts are stayed pending final appellate review of the dismissal of Count I.

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3.A. Alternatively as to Counts II and III, the Court finds the Constitution imposes obligations on the Senate and House to perform the critical, core legislative functions of drafting, debating, publishing, voting on and enacting legislation while in session. Accordingly, the parties are hereby ordered to perform the following:

a. The Senate and House shall continue to perform their critical, core functions.

b. The Senate and House shall determine which of their functions are critical, core functions, and shall provide itemized proof of the necessity and cost of those functions to Commissioner Frans in his official capacity as Commissioner of the Minnesota Department of Management and Budget.

c. The parties are directed to meet and confer and propose to the Court the identity of a special master who will be appointed pursuant to Minn. R. Civ. P. 53 to hear and resolve disputes between the parties when a disagreement arises between the parties as to the critical, core functions of the Senate or the House, or the funding thereof. Any party may seek review of the special master's orders, reports, or recommendations as provided by Minn. R. Civ. P. 53.07 or as otherwise provided by law.

d. Commissioner Frans shall issue, make and receive payment of such funds that the parties agree or the Court determines are necessary for the performance of the critical, core functions of the Senate and the House.

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Respectfully submitted,

Dated: June 22, 2017

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ACKNOWLEDGMENT

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

/s/ Sam Hanson
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