

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT
CASE TYPE: CIVIL

Destiny Dusosky,

Court File No. 62-CV-18-2348

Plaintiff,

v.

**PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

Michelle Fischbach,

Defendant.

I. INTRODUCTION

The Minnesota Constitution divides the powers of government into three separate branches and prohibits persons belonging to one branch from exercising the powers properly belonging to another. Notwithstanding this clear separation of powers, Lieutenant Governor Michelle Fischbach has continued to exercise the legislative powers of a state senator after filling a vacancy in the executive office of lieutenant governor as provided in Minn. Const. art. V, § 5. Lieutenant Governor Fischbach's unauthorized exercise of the legislative powers has denied Plaintiff Destiny Dusosky and all of the constituents of Senate District 13 of their right to equal, valid representation in the Minnesota Senate.

The time has come to end this continuing violation of the separation of powers. This Court should grant Plaintiff's motion for summary judgment, declare that Lieutenant Governor Fischbach no longer holds the office of state senator, and thereby ensure the equal representation in the Senate by allowing the vacancy in the office of state senator for Senate District 13 to be filled through a special election.

II. STATEMENT OF THE ISSUE

Does Lieutenant Governor Fischbach continue to hold the legislative office of state senator for Senate District 13 after filling a vacancy in the office of Lieutenant Governor pursuant to Minn. Const. art. V, § 5?

III. STATEMENT OF THE RECORD

Plaintiff's motion for summary judgment is based on the Declaration of Destiny Dusosky, the Declaration of Charles N. Nauen and the exhibits thereto, and the pleadings, files, and submissions in this matter.

IV. STATEMENT OF UNDISPUTED FACTS

On January 2, 2018, United States Senator Al Franken resigned from the Office of United States Senator for Minnesota creating a vacancy in that office. In the event of a vacancy in the Office of United States Senator for Minnesota, the Governor may appoint a successor to fill the seat until a special election is held to fulfill the remainder of the term. Minn. Stat. §204D.28, subd. 11. In accordance with that section, on January 3, 2018, Governor Mark Dayton appointed then-Lieutenant Governor Tina Smith to fill the vacancy created by Senator Franken's resignation. Smith resigned from the office of lieutenant governor effective at 11:59 p.m. on January 2, 2018, thus creating a vacancy in that office.

Minn. Const. art. V, § 5 states that the "last elected presiding officer of the senate *shall become* lieutenant governor in case a vacancy occurs in that office." (emphasis added). At the time of now-United States Senator Smith's resignation from the office of lieutenant governor, Michelle Fischbach was the President of the Minnesota Senate and, thus, the "last elected presiding officer of the senate." Pursuant to Minn. Const. art. V, § 5, state Senator Fischbach became lieutenant governor on January 3, 2018 to fill the vacancy created by Smith's resignation. Declaration of Charles N. Nauen ("Nauen Decl.") Exhibit A.

Article III, Section 1 of the Minnesota Constitution provides: “The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.” The Minnesota Constitution *does not* expressly provide that an individual who ascends to the executive branch office of lieutenant governor to fill a vacancy pursuant to art. V, § 5 may continue to exercise the powers properly belonging to the legislative branch. The prohibition on holding multiple offices is reaffirmed in Article IV, Section 5 which states that “No senator or representative shall hold any other office under authority of the United States or the state of Minnesota, except that of postmaster or of notary public.” Both provisions compel the same result: Lieutenant Governor Fischbach no longer holds the office of state senator for Senate District 13.

On January 12, 2018, prior to the start of the 2018 legislative session, Plaintiff Destiny Dusosky commenced litigation in the Ramsey County District Court. Dusosky sought a declaration that the Minnesota Constitution bars Lieutenant Governor Fischbach from holding both the position of state senator and lieutenant governor and enjoining Lieutenant Governor Fischbach from continuing to hold the office of state senator for Senate District 13 and exercising the powers of such office, including voting on matters before the Minnesota Senate. On February 12, 2018, Chief Judge John H. Guthmann dismissed Dusosky’s complaint without prejudice on the grounds that: (1) Dusosky did not suffer a particularized injury sufficient to confer standing; (2) the action was not ripe; and (3) the complaint presents a non-justiciable political question regarding Lieutenant Governor Fischbach’s eligibility. *Dusosky v. Fischbach*, Court File No. 62-CV-18-254, slip op. at 5, (Ramsey County Dist. Ct., Feb. 12, 2018).

Following the February 12, 2018 Order, Lieutenant Governor Fischbach has taken numerous actions exercising the legislative powers of a state senator. For example, Lieutenant Governor Fischbach is chair of Senate Higher Education committee and, in that role, controls the agenda for the committee and presides over committee hearings. *See* Nauen Decl. Ex. B. Additionally, Lieutenant Governor Fischbach has voted on matters before the Senate and has signed bills which have been passed by the Senate. Nauen Decl. Ex. C at 6801-02 and Ex. D. In fact, Lieutenant Governor Fischbach cast the decisive thirty-fourth vote needed to pass the Senate Supplemental Finance Bill, S.F. 3656, and the Omnibus Tax Bill, H.F. 4385.¹ Nauen Decl. Ex. E at 8459 and F at 8725. Lieutenant Governor Fischbach has taken all of these legislative actions without the Minnesota Senate ever addressing the question of whether she continued to hold the office of state senator for Senate District 13 after she filled the vacancy in the office of lieutenant governor.

V. ARGUMENT

This is the right case, Destiny Dusosky is the right plaintiff, and the courts are the proper venue to end Lieutenant Governor Fischbach's continued violation of the separation of powers guaranteed by Minnesota Constitution. First, Minnesota courts have jurisdiction to hear all civil actions including those involving the interpretation and application of the Minnesota Constitution. *See* Minn. Const. art. VI, § 3. The fact that the Senate serves as the judge of "the election returns and eligibility of its own members" does not deprive the courts of their power to determine the legal effect of Lieutenant Governor Fischbach's assumption of her executive office. Second, Dusosky—a politically active resident of Senate District 13—has been deprived of her right to equal, valid representation in the Minnesota Senate and is entitled to redress from the courts.

¹ A majority of all members elected to each house of the legislature must vote in favor of passing any law. Minn. Const. art. IV, § 22.

Finally, there is no longer any doubt that Lieutenant Governor Fischbach has exercised the legislative powers of a state senator while holding an office in the executive branch. Now is the right time to resolve this dispute.

Before addressing these jurisdictional issues, however, it is necessary to have a clear understanding of the constitutional provisions which control the outcome of this case and to recognize the precise contours of Plaintiff's claims. Therefore, to avoid repetition, this brief begins with the ultimate question of whether Lieutenant Governor Fischbach continues to hold the office of state senator before addressing the issues of ripeness, standing, and subject matter jurisdiction.

A. Lieutenant Governor Fischbach No Longer Holds the Office of State Senator for Senate District 13.

When a vacancy occurs in the office of lieutenant governor, the Minnesota Constitution provides that the last elected presiding officer of the senate shall become lieutenant governor. Minn. Const. art. V, § 5. The Constitution does not contemplate any intermediate steps. The ascension to the office of lieutenant governor occurs immediately and automatically upon the occurrence of the triggering condition—in this case, the creation of a vacancy as a result of now-United States Senator Smith's resignation.

The ultimate question for this court is whether Michelle Fischbach continues to hold the office of state senator. The Constitution provides the answer: Fischbach ceased holding the office of state senator immediately upon becoming Lieutenant Governor.

1. **The Minnesota Constitution Prohibits the Holding of Offices in Two Branches of Government.**

The separation of powers is mandated by art. III, § 1 of the Minnesota Constitution:

The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or person belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.

This principle is echoed in art. IV, § 5 which provides:

No senator or representative shall hold any other office under the authority of the United States or the state of Minnesota, except that of postmaster or of notary public. If elected or appointed to another office, a legislator may resign from the legislature by tendering his resignation to the governor.

With these two provisions and Article V, Section 5 in mind, the following are clear:

(1) Michelle Fischbach became lieutenant governor immediately upon Senator Smith's resignation; (2) Michelle Fischbach, as lieutenant governor, cannot exercise any of the powers properly belonging to the legislative department unless expressly allowed to do so by the Minnesota Constitution; and (3) so long as she remains a state senator, Michelle Fischbach is prohibited from holding any other state or federal office except that of postmaster or of notary public.

The question of whether Lieutenant Governor Fischbach continues to hold the office of state senator depends, first, upon the whether the Constitution "expressly provides" that she may continue to exercise the powers belonging to the legislative department. It does not. Nothing in the Minnesota Constitution expressly authorizes Lieutenant Governor Fischbach to exercise the powers of a state senator regardless of whether she was elected to the office or ascended to the office to fill a vacancy by operation of art. V, § 5.

The analysis then turns to the interaction between the fact that Fischbach became lieutenant governor upon Senator Smith's resignation and the prohibition on legislators holding another federal or state office. This second issue, while somewhat more complicated, also admits of only one outcome.

It is helpful to begin the analysis with the more typical circumstance where a legislator is elected or appointed to a new office. In order to assume the new office, the legislator must first resign from the legislative office. *See* Minn. Const. Art. IV, § 5. That is, the legislator must make

a choice. She can resign from the legislature and assume the new office or she can retain the legislative office and forego the new office; she cannot do both. This was illustrated by Paul Thissen's recent appointment to the Minnesota Supreme Court. Prior to holding the judicial office, former-Representative Thissen was required to resign from the Minnesota House which he did on April 20, 2018. Nauen Decl. Ex. G.

The situation before the Court in this case is different. Art. IV, § 5 provides for the voluntary resignation of a legislator if she is "*elected or appointed* to another office." (emphasis added). Lieutenant Governor Fischbach was neither elected nor appointed to the office; she became lieutenant governor to fill a vacancy pursuant to in art. V, § 5. The Constitution does not provide for the possibility of resignation when a legislator ascends to a new office by operation of law. This failure to provide for the possibility of a resignation means either (1) that Lieutenant Governor Fischbach can continue to hold the office of state senator while serving in an executive office or (2) that her resignation is unnecessary. Only the latter option can be reconciled with the express provisions of the Minnesota Constitution.

Concluding that Lieutenant Governor Fischbach continues to hold her senate office would require the court to recognize an implied exception to both art. III, § 1, providing that no one belonging to one department of government may exercise powers belonging to another department except where "*expressly provided* in this constitution," and art. IV, § 5, providing that legislators may not hold any other federal or state office other than postmaster or notary public. This is untenable. The court cannot recognize an *implied exception* to a constitutional provision which states on its face that the only exceptions are those which are *expressly provided*. The better conclusion—the one which harmonizes and gives effect to all the constitutional provisions—is that Lieutenant Governor Fischbach ceased holding the office of state senator automatically upon

becoming lieutenant governor and, thus, is not required to resign from the Senate in order to avoid a violation of either art. III, § 1 or art. IV, § 5.

2. The *Stearns* Decision No Longer is Good Law.

The Minnesota Supreme Court reached a different conclusion in its 1898 decision in *State ex rel. Marr v. Stearns*, 75 N.W. 210, 211 (Minn. 1898) when it concluded that a senator who became lieutenant governor by operation of art.V, § 5 could retain his senate seat. Every constitutional provision discussed in *Stearns* has been amended since the 1898 decision. See Nauen Decl. Ex. H. The question before this Court is whether the **current** text of the Constitution allows Lieutenant Governor Fischbach to continue to hold her senate office after becoming lieutenant governor by operation of art. V, § 5. The Court is not bound by the Supreme Court's decision in *Stearns* which did not, and could not, address the Constitution as it exists today.²

a) *The office of lieutenant governor now is solely executive in nature.*

At the time of the *Stearns* decision, the lieutenant governor's "sole constitutional duties" as the ex-officio president of the senate were to "preside over the senate" and to "authenticate by his signature bills passed by the senate." *Stearns*, 75 N.W. at 213. The court found that these duties were legislative in nature and did not "properly belong" to the executive department. *Id.* Constitutional amendments since 1898 removed these legislative duties from the office of lieutenant governor. The lieutenant governor is no longer the "ex-officio president of the senate." See Minn. Const., art. V, § 5. Today, the primary roles of the office are to carry out the powers and duties of the office of governor when the governor is unable to do so and to succeed to the office of governor in the event of a vacancy. Minn. Const. art. V, § 5. Moreover, although the

² When the rationale underlying a decision has been eroded, that decision is no longer in force. See *Johnson v. Piper Jaffray, Inc.*, 530 N.W.2d 790, 801 n.6 (Minn. 1995); *Eng. v. Eng.*, 337 N.W.2d 681, 684-85 (Minn. 1983).

lieutenant governor still calls the senate to order at the beginning of each session, Minn. Stat. § 3.05, the senate now elects its own presiding officer.³ Minn. Const. art. IV, § 15.

The *Stearns* court dismissed the provision prohibiting legislators from holding any other federal or state office concluding that the provision “had little relevancy” to the question before the court because the text could not be read literally—otherwise a senator would be prohibited from holding any other office for the term of four years after becoming elected, *even if he resigned the office of senator*. *Stearns*, 75 N.W. at 214. This provision has been amended and harmonized with the rest of the Constitution and, as noted above, now provides that “[i]f elected or appointed to another office, a legislator *may resign* from the legislature by tendering his resignation to the governor.” Minn. Const. art. IV, § 5. This provision can no longer be disregarded as having “little relevancy” and, together with the prohibition on holding offices in multiple branches of government, compels the conclusion that Lieutenant Governor Fischbach no longer holds the legislative office of state senator.

The *Stearns* court also found persuasive a provision in the Minnesota Constitution which prohibited the lieutenant governor from serving “as a member of the court” during an impeachment trial against the governor. *See* Minn. Const. of 1898, art. XIII, § 4. The *Stearns* court reasoned that only senators can act as members of the court in an impeachment trial and that the provision

³ This conclusion is consistent with the analysis of an Executive Branch Committee Report in November 1972, which stated that if the constitutional amendment was adopted (and it was), “the lieutenant governor would become *a purely executive officer* without legislative functions.” Minnesota Constitutional Study Commission, Executive Branch Committee Report at 3, <https://www.leg.state.mn.us/docs/2012/mandated/120607.pdf> (emphasis added). The Report further stated that “[t]he lieutenant governor would then be in a position to be a full-time member of the executive branch of state government” and “the duties of the office could be substantially increased by the legislature or by the governor through executive order.” *Id.* at 5.

would be wholly unnecessary unless the lieutenant governor could also serve as a state senator.⁴

This provision was removed from the Minnesota Constitution in 1974.

b) *Legislatively Assigned Duties Confirm that the Office of Lieutenant Governor is an Executive Office.*

In addition to the changes to the duties assigned by the Constitution, the lieutenant governor's statutorily assigned duties confirm that it is an executive office. The Capitol Area Architectural and Planning Board ("CAAPB") was created in 1967. Minn. Stat. § 15.50 (1967). The governor was the chair and the lieutenant governor was not a member of the Board. *Id.* In 1974, after the relevant constitutional amendments were enacted, the lieutenant governor replaced the governor as chair of the CAAPB. Minn. Stat. § 15.50, subd. 1(b), (d) (1974). The fact that the lieutenant governor was designated to occupy the governor's seat on the board confirms the executive nature of the office.

Similarly, the State Capitol Preservation Commission and the advisory committee on Capitol Area Security were created in 2011 and 2012 respectively. Minn. Stat. § 15B.32 (2011); Minn. Stat. § 299E.04 (2012). The Commission and advisory committee each include members from all branches of government. Minn. Stat. § 15B.32, subd. 1; Minn. Stat. § 299E.04, subd. 2. Both the governor and the lieutenant governor serve on the State Capitol Preservation Commission and the lieutenant governor is the sole representative of the executive branch on the advisory committee on Capitol Area Security. *Id.*

Additionally, in 1973—again, after the relevant constitutional amendments were enacted—the lieutenant governor was added to the executive council which was created in 1891 and originally included the governor, attorney general, state auditor, and secretary of state. 1973 Minn.

⁴ It would have been equally reasonable for the *Stearns* court to conclude that this provision was intended to make clear that the lieutenant governor's ex-officio role in the Senate did not entitle the lieutenant governor to sit as a member of the court in an impeachment trial against the governor.

Laws ch. 394 § 1, at 858 (codified as Minn. Stat. § 9.011). The role of the lieutenant governor in the executive branch is further evidenced in a law enacted by the Legislature in 1971 which states that “[t]he governor may delegate to the lieutenant governor such powers, duties, responsibilities and functions as are prescribed by law to be performed by the governor” as long as they are not specifically imposed upon the governor by the Constitution. 1971 Minn. Laws ch. 949, § 1m at 1981 (codified as Minn. Stat. § 4.04, subd. 2). So, although the legislature cannot grant the lieutenant governor executive constitutional powers, the statutorily assigned duties confirm that the office of lieutenant governor is now a purely executive office.

c) *The Case Does Not Involve a “Temporary” Vacancy.*

In *Stearns*, the Court reasoned that a vacancy is “necessarily permanent or temporary” according to the facts of each case, and that a “temporary” vacancy would require that the lieutenant governor be able to return to his office as a senator. *Stearns*, 75 N.W. at 213. The Constitution now distinguishes between a permanent “vacancy” (in which case the lieutenant governor becomes the governor and the last elected presiding officer of the senate becomes the lieutenant governor) and a temporary situation where the governor is unable to discharge the duties of the office (in which case the governor’s powers and duties devolve on the lieutenant governor, but the lieutenant governor *does not* assume the office of governor). Minn. Const. art. V, § 5. However, even if it were possible to have a temporary “vacancy” in the office of lieutenant governor, this case unquestionably involves a permanent vacancy. Governor Dayton appointed Lieutenant Governor Tina Smith to the United States Senate and now-United States Senator Smith resigned her position as lieutenant governor effective at 11:59 p.m., January 2, 2018. Her resignation created a permanent vacancy in the office of lieutenant governor for the remainder of the term, which includes the entirety of the 2018 legislative session, and the Constitution provides that the vacancy is filled by last elected presiding officer of the Senate.

3. Lieutenant Governor Fischbach Cannot Avoid this Result by Refusing to Take the Oath of Office or Accept Her Lieutenant Governor Salary.

In an apparent effort to retain her senate office, Lieutenant Governor Fischbach has refused to take the oath of office and has declined her salary as lieutenant governor. Neither action will have the desired effect. First, the Constitution does not require the lieutenant governor or any state officer to accept the salary for their office. Declining the compensation does not change the fact that Fischbach is Minnesota's lieutenant governor.

Second, the Constitution provides only that “each officer created by [Article V] *before entering upon his duties*, shall take an oath or affirmation to support the constitution of the United States and of this state and to discharge faithfully the duties of his office to the best of his judgment and ability.” Minn. Const. Art. V, § 6 (emphasis added). The taking of the oath is a prerequisite to exercising the powers of the office, not a requirement for holding the office in the first instance. This distinction is not sophistic, it is necessary for the orderly conduct of government and transition of power.

The term of office for the governor is “four years and until a successor is chosen and qualified.” If the taking of the oath were a requirement for assuming an executive office, a successor to the office of governor would be chosen at the general election but would not be qualified until the oath had been taken. This creates the possibility that a governor-elect's refusal or failure to take the oath would allow the incumbent governor remain in office because his successor was not “qualified.”

If, on the other hand, the constitution means what it says—that the taking of the oath is a prerequisite to exercising the powers of the office—then the former governor's term would end at the moment when the newly elected governor is qualified to assume the office (i.e., when the

official year for the state of Minnesota commences on the first Monday of January in the year following the election). Minn. Const. Art. VI, § 7.

It could be argued that this situation is worse because the former governor would be replaced by an executive officer who, because he refused to take the oath, is powerless to take any action. That is a fleeting concern. Minn. Stat. § 351.02 provides that “every office shall become vacant on . . . the incumbent’s refusal or neglect to take the oath of office” Accordingly, the newly elected governor’s refusal to take the oath would create a vacancy and trigger the succession provided in art. V, § 5 and the newly elected lieutenant governor would become governor. Importantly, Minn. Stat. § 351.02 refers to the *incumbent’s* refusal to take the oath. An incumbent is “one who holds an official post, esp. a political one.” Black’s Law Dictionary 7th Ed. Accordingly, one must be able to hold the office of lieutenant governor and thus become the incumbent without first having taken the oath or else the provisions of Minn. Stat. § 351.02 addressing the incumbent’s failure to take the oath would be meaningless.

4. Lieutenant Governor Fischbach Made Her Choice.

Any protests that Lieutenant Governor Fischbach should be allowed to choose whether she wants to accept the office of lieutenant governor or to retain her senate seat are misplaced. Since at least the time of the *Stearns* decision, the Minnesota Constitution has provided that the last elected presiding officer of the senate would become lieutenant governor in the event of a vacancy in that office. Lieutenant Governor Fischbach knew, or should have known, of this possibility. She made her choice to accept the office of lieutenant governor when she accepted her position as President of the Minnesota Senate.

B. This Dispute is Ripe for Adjudication.

A claim is ripe for adjudication if it “present[s] an actual, justiciable controversy.” *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 337 (Minn. 2011) (citation omitted). A

possible or hypothetical injury is not sufficient and an issue “is not fit for judicial review when ‘further factual development would significantly advance [the court’s] ability to deal with the legal issues presented.’” *Id.* (citing *Kennedy v. Carlson*, 544 N.W.2d 1, 6 (Minn. 1996); *Nat’l Park Hospitality Ass’n v. Dep’t of the Interior*, 538 U.S. 803, 812 (2003)). Plaintiff presents an actual, justiciable controversy and there is no need for further factual development.

When Dusosky filed her first lawsuit, it arguably was uncertain whether Lieutenant Governor Fischbach would attempt to act as a senator—though she has stated publicly that she intended to keep her senate seat—or whether the legislature would address the question of whether she remained a state senator after ascending to the office of lieutenant governor. All doubts have been removed. The Minnesota Senate has not addressed the question of whether the lieutenant governor continued to hold her senate seat. And Lieutenant Governor Fischbach has continued to exercise the legislative powers of a state senator. She chairs the Senate Higher Education committee, Nauen Decl. Ex. B, and has cast numerous votes; including the decisive thirty-fourth vote in favor of passing the Senate Supplemental Finance Bill and the Omnibus Tax Bill. Nauen Decl. Ex. E at 8459 and Ex. F at 8725. Dusosky’s claim is ripe and now is the time for the court to determine whether Lieutenant Governor Fischbach continued to hold the office of state senator after ascending to the executive office of lieutenant governor to fill a vacancy pursuant to art. V, § 5.

C. Plaintiff Destiny Dusosky has Standing to Bring this Challenge.

To have standing, a party must “have a sufficient stake in a justiciable controversy to seek relief from a court.” *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 624 (Minn. 2007) (citation omitted). To acquire standing, a plaintiff must have either “suffered some ‘injury-in-fact’ or [be] the beneficiary of some legislative enactment granting standing.” *State by Humphrey v. Philip Morris, Inc.*, 551 N.W.2d 490, 493 (Minn. 1996) (quoting *Snyder’s Drug Stores, Inc. v. Minn.*

State. Bd. of Pharmacy, 221 N.W.2d 162, 165 (Minn. 1974)). Injury-in-fact in public interest citizen actions requires “damage or injury to the individual bringing the action which is special or peculiar and different from damage or injury sustained by the general public. *Channel 10, Inc. v. Independent School District No. 709*, 315 N.W.2d 814, 820 (Minn. 1974).

Minnesota courts have not defined the “general public” for purposes of addressing standing in a public interest citizen suit. However, general interests held by diffuse or ill-defined groups will not support standing. *St. Paul Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585, 588 (Minn. 1977) (status as “users of the highways” was insufficient to confer standing where the challenged statute “in no way affect[ed] the plaintiffs more severely than all other persons traveling in or through the Minneapolis-St. Paul area.”); *see also Minn. Ass’n of Pub. Schs. v. Hanson*, 178 N.W.2d 846, 850 (Minn. 1970) (finding no standing based on an interest in promoting good schools, since such an interest is “not dissimilar to that of any other member of the general public”).

This is consistent with the analysis used by the federal courts when dismissing claims under the federal Incompatibility Clause for lack of standing. In *Schlesinger v. Reservists Comm. to Stop the War*, the plaintiffs purported to represent four classes: (1) all persons opposed to the Vietnam War; (2) all members of the reserves who were not Members of Congress; (3) all taxpayers of the United States; and (4) all citizens of the United States. 418 U.S. at 208, 211 (1974). The Supreme Court held that the plaintiffs only alleged an injury to the “generalized interest of all citizens in constitutional governance.” *Id.* at 217. Similarly, in *Rodearmel v. Clinton*, a federal district court held that a foreign service officer lacked standing to challenge the appointment of Secretary of State Hillary Clinton because he could allege no injury beyond his “general interest as a citizen in the constitutionality of Clinton’s appointment.” 666 F. Supp. 2d 123 (D.D.C. 2009).

However, the fact that a plaintiff shares a common interest with the general public will not defeat standing where the plaintiff also has a special and particularized injury. The Minnesota Supreme Court addressed this issue in a case involving a news station's challenge to a school board's violation of the Minnesota Open Meeting Law. *Channel 10, Inc.*, 315 N.W.2d at 817. The court noted that the statute implied that "any member of the public should have standing" but concluded that the news station's interest in reporting news for profit ensured that the "facts and issues will be vigorously, fairly, and adequately presented." *Id.* at 821. This added interest distinguished the news station's particular interest from the shared general public interest in transparency for purposes of the court's standing analysis. *Id.*

Like the news station in *Channel 10, Inc.*, Dusosky shares an interest that is common to the general public: the interest of all Minnesota residents in ensuring that the Constitutionally-mandated separation of powers is maintained. And also like the news station, Dusosky has suffered a special or peculiar injury which ensures that the "facts and issues will be vigorously, fairly, and adequately presented." *Id.* at 821. As the United States Supreme Court recognized in a case involving the apportionment of votes for state legislative offices, "representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies." *See Reynolds v. Simms*, 377 U.S. 533, 565 (1964). Here, Dusosky's right to full and effective participation in the political process is being impinged not by an unfair apportionment of the votes among the state's residents but rather by the

fact that she and all residents of Senate District 13 have been deprived of equal, valid representation in the Minnesota Senate for the entirety of the 2018 legislative session.⁵

The fact that Lieutenant Governor Fischbach continues to exercise the powers of a state senator is no cure. The court, in dismissing Dusosky's first lawsuit, observed that the courts have the power to invalidate a law that was enacted based on legislator's illegal vote. It simply cannot be said that Dusosky has enjoyed valid representation in the Minnesota Senate when every legislative action taken by Lieutenant Governor Fischbach during the 2018 legislative session can be stripped of its effect through subsequent litigation.

Dusosky's injury is sufficient to confer standing even though it is shared by all constituents in Senate District 13. The senate district is a geographically-defined and numerically-limited class of Minnesotans, constituting approximately one sixty-seventh (1.45%) of the state's population. And while all Minnesotans, like the plaintiffs in *Schlesinger* or *Rodearmel*, probably have an interest in upholding the constitution, only the constituents of Senate District 13 have the specific interest in the Senate District 13 seat which provides their voice at the legislature. The mere fact that a large number of people share the same injury does not mean the injury is not specific or particularized. Indeed, if this were the case, there could be no class actions under Rule 23 of the Minnesota Rules of Civil Procedure.

Moreover, Dusosky is uniquely situated among the residents of Senate District 13. Declaration of Destiny Dusosky ("Dusosky Decl.") at ¶ 2. She is politically active and a regular

⁵ Moreover, the fact that Dusosky's claim arises through the Constitutional provisions guaranteeing the separation of powers does not preclude her from maintaining this action to protect her right to equal representation in the Minnesota Senate. As the Supreme Court made clear, "individuals, too, are protected by the operations of separation of powers and checks and balances; and they are not disabled from relying on those principles in otherwise justiciable cases and controversies." *Bond v. United States*, 131 S.Ct. 2355, 2365 (2011).

voter. *Id.* at ¶¶ 3-4. She is the former Co-chair of the Senate District 13 DFL and firmly believes that it is important for the constituents of Senate District 13 to have valid representation in the Minnesota Senate. *Id.* at ¶¶ 5-6. It is difficult to imagine a more appropriate plaintiff to bring this matter before the court.

D. The Court, not the Legislature, Should Resolve this Dispute.

The Court dismissed Dusosky’s first lawsuit due, in part, to the Court’s conclusion that Dusosky’s claim raised a non-justiciable political question. This was an error. A political question arises “where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it’ ...” *Nixon v. United States*, 506 U.S. 224, 228, (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Neither characteristic of a “political question” is present here.

As explained above, the Minnesota Constitution provides a clear, judicially discoverable, and manageable standard for resolving the dispute. Plaintiff presents a pure question of law: whether the Lieutenant Governor Fischbach continued to hold the legislative office of state senator after assuming the executive office of lieutenant governor. The interpretation and application of the Minnesota Constitution, including its provisions guaranteeing the separation of powers, is a core function of the courts. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judiciary department to say what the law is.”).

Second, the provision in the Minnesota Constitution providing that “[e]ach house shall be the judge of the election returns and eligibility of its own members” does not commit the resolution of this matter to the legislative branch. The power to judge the election returns and eligibility of members relates to the determination of whether potential legislators have satisfied the constitutionally prescribed requirements for holding the office (i.e., whether they are qualified Minnesota voters, have resided one year in Minnesota, and have resided in their district for at least

six months preceding the election). Minn. Cons. art. IV, § 6; *Pavlak v. Growe*, 284 N.W.2d 174, 180 (Minn. 1979) (“[T]he House under Article IV, Section 6, may at any time exclude Mr. Pavlak only if he fails to meet the constitutionally prescribed eligibility standards.”). The question here is not whether Lieutenant Governor Fischbach is eligible to hold the office of state senator but rather whether she may continue to hold such office after becoming lieutenant governor. This distinction is crucial.

The U.S. Supreme Court, in *Powell v. McCormack*, noted the difference between Congress’s powers of exclusion and expulsion. 395 U.S. 486 (1969). The *Powell* case arose from a constitutional challenge to the decision to exclude a member-elect from a seat in the House of Representatives. *Id.* The court noted that Powell was excluded from the 90th Congress because he was not administered the oath of office and was prevented from taking his seat. *Id.* at 507, n. 27. Had Powell been allowed to take the oath of office and then required to surrender his seat, the action would have constituted an “expulsion” and would have been taken pursuant to Congress’s authority to expel or otherwise punish a member after he has been seated. *Id.*

Accordingly, the relevant question for determining whether the political question doctrine applies is not whether the legislature enjoys the exclusive authority to determine the eligibility of its members but whether the Constitution commits to the legislature the determination of whether Lieutenant Governor Fischbach continues to hold the office of state senator. It does not.

The Constitution provides two mechanisms for removing a senator from office: a recall election by the voters, Minn. Const. art. VIII, § 6, or expulsion by a two-thirds majority of the Senate. Minn. Const. art. IV, § 7. A clear understanding of the contours of Dusosky’s claims demonstrates that neither mechanism for removal bars the court from exercising its broad jurisdiction in this case. Dusosky is not seeking to have Lieutenant Governor Fischbach removed

from her legislative office. Rather, Dusosky is seeking a declaration that Lieutenant Governor Fischbach surrendered the office of state senator when she became lieutenant governor to fill the vacancy created by now-U.S. Senator Smith's resignation. Accordingly, there is no legislative office from which Lieutenant Governor Fischbach can be recalled or expelled and the provision providing for the same are inapplicable.

Finally, if the question of whether Lieutenant Governor Fischbach continued to hold the office of state senator after becoming lieutenant governor were required to be addressed through a recall election or by the Senate, then the courts would be powerless to invalidate a law passed on a one-vote margin with the deciding vote cast by an individual who, at the time of the vote, did not hold the office of state senator. This is the issue that was before the court in *Stearns* and is precisely the scenario which the Court states would present a justiciable controversy.

The first step in determining the validity of such a law is determining whether the senator who cast the deciding vote had the authority to do so—that is, whether the purported senator actually held the office of state senator. If the political question doctrine prohibited the courts from determining whether Lieutenant Governor Fischbach continues to hold the office of state senator, the court could never reach the threshold question for assessing the law's validity. Obviously, this cannot be correct. Such a narrow interpretation of the court's authority, would leave the people of Minnesota—from whom all powers of government are derived through the Constitution—powerless to correct a clear and present violation of the constitutionally guaranteed separation of powers resulting in the deprivation of Dusosky's right to equal representation in the Senate.

The separation of powers is “intended, in part, to protect each branch of government from incursion by the others.” *Bond*, 131 S.Ct. at 2365. But the dynamic between the branches is not

the exclusive object of concern. “The structural principles secured by the separation of powers protect the individual as well.” Here, it is incumbent upon the court to check the lieutenant governor’s incursion upon the powers of the legislature and secure the rights of the constituents of Senate District 13.

VI. CONCLUSION

The Minnesota Constitution is clear. The powers of government are divided into three separate branches and no one belonging to one branch may exercise the powers belonging to another. Maintaining this separation of powers means that Lieutenant Governor Michelle Fischbach ceased holding the legislative office of state senator when she assumed the executive office of lieutenant governor to fill a vacancy as provided in Minn. Const. art. V, § 5. Accordingly, Plaintiff Destiny Dusosky respectfully requests this Court to grant summary judgment in her favor and enter an order declaring that Lieutenant Governor Fischbach no longer holds the office of state senator for Senate District 13 and enjoining her from exercising the powers of such office.

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Respectfully submitted,

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