State of Minnesota
Ramsey County

District Court
Second Judicial District

Court File Number: **62-CV-18-254**

Case Type: Civil Other/Misc.

Notice of Entry of Judgment

In Re: Destiny Dusosky vs Michelle Fischbach

Pursuant to: The Order of Judge Guthmann dated 2/12/18

You are notified that judgment was entered on February 13, 2018.

Dated: February 13, 2018

cc :Charles N Nauen; Kevin Matthew Magnuson

Michael F. Upton
Court Administrator

By: Linda Draske
Deputy Court Administrator
Ramsey County District Court
15 West Kellogg Boulevard Room 600
St Paul MN 55102
651-266-8253

62-CV-18-254

NOENJUDG

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Case Type: Civil - Other
File No.: 62-CV-18-254
Judge: John H. Guthmann

Destiny Dusosky,

Petitioner,

v.

Michelle Fischbach,

Respondents.

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

The above-captioned matter came before the Honorable John H. Guthmann, Judge of District Court on February 6, 2018. At issue were plaintiff's motion for a temporary restraining order ("TRO") and a motion to consolidate all issues. Charles N. Nauen, Esq., appeared on behalf of plaintiff. Kevin M. Magnuson, Esq., appeared on behalf of defendant. Based upon all of the files, records, submissions and arguments of counsel herein, the court issues the following:

STATEMENT OF UNDISPUTED FACTS

None of the parties suggest or argue that there remains a genuine issue of fact that is material to the legal issues before the court. Accordingly, the court compiled the following Statement of Undisputed Facts from the party submissions:

1. Plaintiff Destiny Dusosky ("plaintiff") is a resident of Senate District 13 and an eligible voter. (Compl. ¶ 1.)

2. Defendant Michelle Fischbach ("defendant") was first elected to the Minnesota State Senate in 1996. (Jan. 30, 2018 Kelley aff. ¶ 7.)

3. On January 3, 2017, defendant was sworn into office to begin her eighth consecutive term in the Minnesota Senate. (*Id.*)

4. Defendant represents Senate District 13, which includes Benton and Stearns Counties. (*Id.*)

5. Senate District 13 has 80,639 residents. (*Id.*)

6. Defendant's current senate term expires in January 2021. (*Id.*)

7. During the 2017 legislative session, defendant was elected President of the Minnesota Senate. (*Id.*)

8. On January 2, 2018, United States Senator Al Franken resigned his seat. (Compl. ¶ 5.)

9. On January 2, 2018, Lieutenant Governor Tina Smith resigned her office. (*Id.* ¶ 7.)

10. On January 3, 2018, Governor Mark Dayton appointed former Lieutenant Governor Tina Smith to fill the vacancy created by Senator Franken's resignation and she was sworn into office the same day. (*Id.*); *see* Minn. Stat. § 204D.28, subd. 11 (2016) (providing for the Governor to fill United States Senate vacancies).

11. Sen. Smith's resignation from the office of lieutenant governor created a permanent vacancy in the office.

12. Article V, section 5 of the Minnesota Constitution addresses how vacancies in the office of lieutenant governor are filled:

> In case a vacancy occurs from any cause whatever in the office of governor, the lieutenant governor shall be governor during such vacancy. . . . The last elected presiding officer of the senate shall become lieutenant governor in case a vacancy occurs in that office. In case the governor is unable to discharge the powers and duties of his office, the same devolves on the lieutenant governor.

MINN. CONST. art. V, § 5.

13. Defendant is the last elected President of the Minnesota Senate. (Jan. 30, 2018 Kelley aff. ¶ 12.)

14. A senate president succeeding the lieutenant governor fills the remaining term of office. Minn. Stat. § 4.06(a) (2016).

15. On January 3, 2018, defendant became Minnesota's lieutenant governor. (Jan. 19, 2018 Nauen aff., Ex. A (defendant's acknowledgment that she became lieutenant governor on January 3, 2018.))

16. However, defendant has not taken the oath of office as lieutenant governor.[1] (Jan. 30, 2018 Kelley aff. ¶ 12.)

17. Defendant decided against taking a salary for the duration of her term as lieutenant governor and is only taking her senate salary. (Jan. 19, 2018 Nauen aff., Ex. A.)

18. The Minnesota Constitution creates the legislative, executive, and judicial branches of government and provides that "[n]o person . . . belonging to . . . 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. MINN. CONST. art. III, § 1.

19. Defendant conceded at the motion hearing that there is no provision in the Minnesota Constitution that expressly provides for a person's simultaneous service as senator and lieutenant governor.

20. According to the Minnesota Constitution: "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." *Id.* art. IV, § 5.

21. Plaintiff alleges that defendant may no longer hold the office of Minnesota Senator and that she has been disenfranchised as a result. (Compl. ¶¶ 18, 34-35.)

[1] Neither party claims that defendant's failure to take her oath as lieutenant governor is relevant to any legal issue before this court.

22. In her lawsuit, plaintiff seeks two things: (1) a "declaratory judgment that now-Lieutenant Governor Fischbach's intention to hold both the position of senator and lieutenant governor is unconstitutional" and (2) "[a]n order enjoining now-Lieutenant Governor Fischbach from continuing to hold the office of state senator for Senate District 13 and continuing to exercise the powers of such office, including voting on matters before the Minnesota Senate." (*Id.*, Prayer for Relief, ¶¶ 1-2.)

23. The Minnesota Senate is scheduled to reconvene on February 20, 2018. (Jan. 30, 2018 Kelley aff. ¶ 14.)

24. Defendant is the 49th lieutenant governor of Minnesota. (*Id.*, Ex. 2.) She is the tenth senator to become lieutenant governor by reason of a vacancy in that office. (*Id.*) Seven of the nine previous senators who become lieutenant governor did not resign their senate seat and acted as both senator and lieutenant governor.[2] (*Id.*) The other two voluntarily resigned from the senate. (*Id.*)

25. The only sitting senator to become lieutenant governor since the November 5, 1974 general revisions to the Minnesota Constitution resigned his senate seat. (*Id.*)

26. The Minnesota Constitution states that "[e]ach house shall be the judge of the election returns and eligibility of its own members. The legislature shall prescribe by law the manner for taking evidence in cases of contested seats in either house." MINN. CONST. art. IV, § 6.

27. The Minnesota Constitution includes a provision providing for voter recall of a legislator: "A member of the senate or the house of representatives . . . is subject to recall from office by the voters." *Id.* art. VIII, § 6. The grounds for recall of a senator are "serious malfeasance

[2] The two senators who voluntarily resigned were Archie H. Miller in 1943 and Alec G. Olson in 1976. (Jan. 30, 2018 Kelley aff., Ex. 2.)

or nonfeasance during the term of office in the performance of the duties of the office or conviction during the term of office of a serious crime." *Id.*

28. The Minnesota Constitution contains a provision permitting the legislature to expel a member: "Each house may determine the rules of its proceedings, sit upon its own adjournment, punish its members for disorderly behavior, and with the concurrence of two-thirds expel a member; but no member shall be expelled a second time for the same offense." *Id.* art. IV, § 7.

CONCLUSIONS OF LAW

1. Petitioner alleged no harm to herself that is different than or unique from the potential harm suffered by all residents of Senate District 13.

2. Petitioner failed to demonstrate that she was injured in a way that is any different than all residents of Senate District 13.

3. It is not yet known whether defendant will try to take her seat when the Senate session begins on February 20, 2018 nor is it known whether defendant will cast any votes.

4. If defendant attempts to take her seat when the Senate session resumes, it is not known whether the Minnesota Senate will agree to seat her as an eligible member.

5. Petitioner demonstrates no more than a hypothetical injury because it is not known whether defendant will take her seat, whether defendant will cast a vote, or whether the Minnesota Senate will allow her to serve.

6. Pursuant to Article IV, Section 6 of the Minnesota Constitution, this court has no jurisdiction to determine whether defendant is eligible to serve as a member of the Minnesota Senate.

7. The Complaint fails to allege a justiciable controversy.

8. This court has no subject matter jurisdiction in connection with plaintiff's claim. The Minnesota Constitution does not provide a means by which citizens may sue in district court either to remove duly elected legislators from office or to prohibit their service.

ORDER

1. The motion for issuance of a temporary restraining order is **DENIED**.

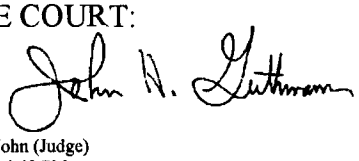
2. Plaintiff's Complaint is **DISMISSED WITHOUT PREJUDICE** because this court has no subject matter jurisdiction and plaintiff fails to present a justiciable controversy.

3. The following Memorandum is made part of this Order.

THERE BEING NO JUST REASON FOR DELAY, LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: February 12, 2018

BY THE COURT:



Guthmann, John (Judge)
Feb 12 2018 4:40 PM

John H. Guthmann
Chief Judge, Second Judicial District

Judgment
I hereby certify the foregoing order constitutes the Judgment of the Court.

Court Administrator
Linda Graske, Deputy Clerk

Graske, Linda
Feb 13 2018 9:21 AM

MEMORANDUM

I. THE INSTANT ACTION MUST BE DISMISSED BECAUSE THE COURT LACKS JURISDICTION

Plaintiff seeks a declaratory judgment preventing defendant, the senator who represents her district in the Minnesota Senate, from continuing to exercise the powers of her office. In so doing, plaintiff cites no provision in the Minnesota Constitution, no statute, and no common-law principle that creates court jurisdiction to consider constituent lawsuits effectively removing a duly elected legislator from office. Accordingly, the court must consider the constitutional issues of subject-matter jurisdiction and justiciability before it may take up the particular constitutional question raised by plaintiff.

A. Subject Matter Jurisdiction.

Civil actions are subject to dismissal if the court lacks subject matter jurisdiction. Minn. R. Civ. P. 12.08(c). Subject matter jurisdiction encompasses both the authority to hear and determine a class of actions and the "authority to hear and determine the particular questions the court assumes to decide." *Irwin v. Goodno*, 686 N.W.2d 878, 880 (Minn. Ct. App. 2004). The existence of subject matter jurisdiction may be raised at any time and may not be established by the parties' consent. *Id.* (citations omitted).

Minnesota's district courts are courts of general jurisdiction with, subject to exceptions, power to hear all civil cases. *Irwin*, 686 N.W.2d at 880 (citing MINN. CONST. art. VI, § 3.) Indeed, plaintiff's Complaint alleges that this court has subject matter jurisdiction pursuant to Minnesota Statutes sections 484.01 and 555.01. (Compl. ¶ 3.) Echoing Article VI, Section 3 of the Minnesota Constitution, the former statute grants the district courts original jurisdiction in "all civil actions." Minn. Stat. § 484.01 (2016). The latter statute, Minnesota's Uniform Declaratory Judgment Act ("UDJA"), gives district courts "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed within their respective districts." Minn. Stat. § 555.01 (2016). Nevertheless, the UDJA is not by itself an independent source of jurisdiction. Rather, there must be an underlying justiciable controversy "regarding claims of statutory or common-law rights."[3] *Anderson v. County of Lyon*, 784 N.W.2d 77, 80 (Minn. Ct. App. 2010) (citation omitted).

[3] One exception to district court authority exists "when a claim that otherwise would be proper in a declaratory-judgment action implicates a quasi-judicial decision by an administrative agency. *Anderson*, 784 N.W.2d at 81. Another exception exists when there is an available administrative remedy. The law requires exhaustion of the administrative remedy before judicial review is permitted. *Northwest Airlines, Inc. v. Metro. Airports Comm'n*, 672 N.W.2d 379, 381-82 (Minn. Ct. App. 2003) (dismissing declaratory judgment action for lack of subject matter jurisdiction: "Courts require exhaustion of administrative remedies to protect the autonomy of administrative agencies and to promote judicial efficiency."), *rev. denied* (Minn. Feb. 25, 2004). Both exceptions have obvious parallels to the constitutional issue presently before the court. It would be ironic indeed for the courts to provide greater deference to the constitutional roles of counties and administrative agencies than to a co-equal branch of government.

In other words, "[a] declaratory judgment is a 'procedural device' through which a party's existing legal rights may be vindicated so long as a justiciable controversy exists." *Weavewood, Inc. v. S & P Home Investment, LLC*, 821 N.W.2d 576, 579 (Minn. 2012). These principles mean that "the applicable substantive law and the basic character of the lawsuit do not change simply because a complainant requests declaratory relief. To the contrary, a complaint requesting declaratory relief must present a substantive cause of action 'that would be cognizable in a nondeclaratory suit.'" *Id.* (quoting *Wilson v. Kelley*, 224 Conn. 110, 617 A.2d 433, 436 (1992) (other citations omitted)).

In both her written submissions and at the motion hearing, plaintiff failed to identify the underlying substantive law creating a cognizable cause of action in her favor. She claims a right to prevent defendant from exercising the power of state senator simply due to her status as a voter in defendant's district and because defendant's "intention to hold both the position of senator and lieutenant governor is unconstitutional." (Compl., Prayer for Relief, ¶¶ 1-2.) For the court to have jurisdiction over plaintiff's claim, there must be a constitutional provision, statute, or common-law principle establishing her substantive right to bring the present litigation. For the reasons that follow, the court concludes that plaintiff's Complaint is at odds with the Minnesota Constitution, important separation of powers principles, and contrary case law.

First, there is no statute creating a cause of action permitting constituent lawsuits to remove or bar from serving a duly elected member of the legislature based on an alleged violation of the Minnesota Constitution. Second, Minnesota's common law does not recognize the validity of a private cause of action to remove or bar from serving a duly elected member of the legislature based on an alleged violation of the Minnesota Constitution. By analogy, Minnesota does not recognize a private cause of action for violations of the Minnesota Constitution. *Laliberte v. State*, No. A13-0907, 2014 WL 1407808, slip op. at *2 (Minn. Ct. App. Apr. 14, 2014) (unpublished)

(citing *Guite v. Wright*, 976 F. Supp. 866, 871 (D. Minn. 1997), *aff'd on other grounds*, 147 F.3d 747 (8th Cir. 1998)); *Davis v. Hennepin Co.*, No. A11-1083, 2012 WL 896409, slip op. at *2 (Minn. Ct. App. Mar. 19, 2012) (unpublished) (citations omitted); *Danforth v. Eling*, No. A10-130, 2010 WL 4068791, slip op. at *6 (Minn. Ct. App. Oct. 19, 2010) (unpublished) (citations omitted); *Mlnarik v. City of Minnetrista*, No. A09-910, 2010 WL 346402, slip op. at *1 (Minn. Ct. App. Feb. 2, 2010) (unpublished) (citations omitted); *see Bird v. Minn. Dept. of Pub. Safety*, 375 N.W.2d 36, 40 (Minn. Ct. App. 1985) (no private cause of action for alleged due process violation).

Finally, only the Minnesota Constitution provides the means and the procedure by which legislators may be removed from office.[4] A legislator may be removed from office following a recall election. MINN. CONST. art. VIII, § 6. The grounds for recall are "serious malfeasance or nonfeasance during the term of office in the performance of the duties of the office or conviction during the term of office of a serious crime."[5] *Id.* In addition, the legislature may expel a member following a two-thirds vote for an undefined "offense." *Id.* art. IV, § 7. Article IV, Section 6 of the Minnesota Constitution provides a third means by which a legislator may be seated or unseated: "[e]ach house shall be the judge of the election returns *and* eligibility of its own members. The legislature shall prescribe by law the manner for taking evidence in cases of contested seats in either house." *Id.* art. IV, § 6 (emphasis added). Defendant argues that plaintiff's lawsuit directly infringes upon the state senate's exclusive prerogative to determine the eligibility of its members.

[4] When interpreting the Minnesota Constitution, "[t]he primary purpose of the courts is to ascertain and give effect to the intention of the Legislature and the people in adopting the article in question." *State v. Babcock*, 175 Minn. 103, 107, 220 N.W. 408, 410 (1928). Just as a statute must be construed as a whole, the constitution "must be taken by its four corners, and effect given to all its language, and the main purpose and object as thus made manifest effectuated." *State v. Twin City Telephone Co.*, 104 Minn. 270, 285, 116 N.W. 835, 836 (1908).

[5] It remains undetermined whether a senator's refusal to resign upon succeeding to the office of lieutenant governor constitutes "serious malfeasance or nonfeasance . . . in the performance of the duties of the office" within the meaning of Article VIII, Section 6.

Article IV, Section 6 has been construed broadly by the Minnesota Supreme Court.[6] In *Phillips v. Ericson*, an election contest case, the court held:

> The right of self-determination under this constitutional provision extends not only to the question of who won the election but eligibility as well. The courts may not interfere with this right, nor have they any jurisdiction over legislative election contests, except such as is expressly conferred upon them by the legislature.

248 Minn. 452, 457, 80 N.W.2d 513, 517-58 (1957).

In a trio of opinions, Minnesota Supreme Court Chief Justice Robert Sheran cemented the broad limitation on judicial authority created by Article IV, Section 6 and clarified the impact the provision has on the relationship between the judicial and legislative branches. In *Scheibel v. Pavlak*, a statutory election contest challenged the election of Mr. Pavlak to the Minnesota House of Representatives. 282 N.W.2d 843, 844 (Minn. 1979). The court found the "constitutional directive" in Article IV, Section 6 "explicit", stating "there is no question of the Legislature's final authority in this matter." *Id.* at 847. After observing that "[t]his legislative prerogative has been universally adopted in America" and that it has existed for centuries, the court found "a necessary implication . . . that it is an absolute grant of constitutional power which may not be delegated to or shared with the courts." *Id.* at 847. Consequently, the court held that "we have no jurisdiction to issue a final and binding decision in this matter, and our opinion by statute will be and by the Minnesota Constitution must only be advisory to the House of Representatives."[7] *Id.* at 848.

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[6] Consistent with the final sentence of Article IV, Section 6, the legislature enacted statutes governing the procedure for handling election contests. Minn. Stat. § 209.01 et. seq. (2016). The parties did not offer any evidence regarding the process each house follows when determining the eligibility of their members regarding eligibility issues other than those involving contested elections.

[7] The court undertook to give a non-binding advisory opinion, despite the general principle calling upon courts to refrain from issuing advisory opinions, for reasons unique to the case that are obviously not present in this case. *Id.* at 848-51.

Even the dissenters in *Scheibel* accepted the constitutional principle that only the legislature may decide who is eligible to sit in the House or Senate. *Id.* at 853 (Peterson, J., dissenting). In dissent, Justice Kelly stated:

> I agree that there is no question of the legislature's final authority in this matter: it is an absolute grant of constitutional power which may not be delegated to or shared with the courts. It follows as pointed out by the majority opinion that we have no jurisdiction to issue a final and binding decision in this matter and any opinion rendered could only be advisory in nature.

Id. at 865 (Kelly, J., dissenting).

The second case in the trio involved the aftermath of the same election dispute. Following *Scheibel*, Mr. Pavlak was excluded from serving after the Minnesota House of Representatives declared that he was not legally elected. *Pavlak v. Growe*, 284 N.W.2d 174, 175 (Minn. 1979). A vacancy was certified and the governor called a special election. *Id.* at 175-76. When Mr. Pavlak attempted to file for the vacancy, the Secretary of State refused to accept his affidavit of candidacy based on section 210A.39 of the Fair Campaign Practices Act ("FCPA"), which prohibited a person found to have violated the FCPA from running for the vacancy. *Id.* at 176. Litigation challenging the constitutionality of section 210A.39 ensued. *Id.*

As part of its ruling, the Supreme Court examined Article IV, Section 6 of the Minnesota Constitution and whether the statute under review constituted "an expression of the legislature's authority to judge the eligibility of its own members." *Id.* at 179. Finding merit to both sides of the issue, the court concluded that Minnesota's Article IV, Section 6 should be given the same interpretation as its federal counterpart. *Id.* at 179-80. Adopting the reasoning and holding of *Powell v. McCormack*, 395 U.S. 486 (1969) (conducting an extensive analysis of federal and state constitutional provisions empowering the legislature to judge the eligibility of its members), the *Pavlak* court found section 210A.39 unconstitutional because it created an additional qualification

for office not expressly found in the Minnesota Constitution. 284 N.W.2d at 180. Under *Powell* and *Pavlak*, a constitutional provision empowering the legislature to judge the eligibility of its members is limited to expressly enumerated constitutional provisions defining a legislator's qualification to hold the disputed office. *Compare Powell*, 395 U.S. at 548[8] *with Pavlak*, 284 N.W.2d at 180.

The final case in the trilogy, *In re Election of Ryan*, discusses the breadth of Article IV, Section 6 from a different perspective. 303 N.W.2d 462 (Minn. 1981). *Ryan* involved a county commissioner election contest. *Id.* at 465. Mr. Ryan attempted to take a seat on the county board pending an election contest appeal because the county auditor issued a certificate of election as authorized by statute. *Id.* at 465. The court revoked the certificate and rejected Mr. Ryan's position. *Id.* Citing Article IV, Section 6 of the Minnesota Constitution, the Minnesota Supreme Court distinguished between court jurisdiction over an election contest involving a county commissioner and actions challenging a legislator's election:

> The statutes evince a legislative intent that contests involving legislative seats be treated differently than other election contests. This is consistent with the principle that '[e]ach house shall be the judge of the election returns and eligibility of its own members.' . . . When an election is contested, no certificate of election may issue until the contest is finally determined in court, except in the case of candidates elected to the Minnesota legislature.

Id. at 465 (quoting MINN. CONST. art. IV § 6). *In re Election of Ryan* reaffirmed the principle that Article IV, Section 6 precludes court jurisdiction over any challenge to a Minnesota legislator's eligibility to serve.

The Minnesota Supreme Court reiterated its prior interpretation of Article IV, Section 6 in *Derus v. Higgins*, 555 N.W.2d 515 (Minn. 1996). In *Derus*, the court held that the election contest

[8] In *Powell*, the United States Supreme Court held that it had subject matter jurisdiction due to the grant of statutory authority set forth in the Force Act. *Powell*, 395 U.S. at 515-16. There is no equivalent Minnesota statute.

statute did not permit a primary election to be challenged based upon the conduct of a third party. *Id.* at 516-18. Significantly, the court distinguished between "the statutorily established procedures for judicial involvement in elections" and "the ultimate qualification of a member—a matter reserved for the legislature." *Id.* at 518. Thus, in dismissing the case for lack of "a justiciable claim for relief", the court suggested that the appellant seek a remedy from the legislature, "for it is the legislature that is the 'judge of the . . . eligibility of its own members.'" *Id.* at 517, 518 (citing MINN. CONST. art. IV, § 6).

In light of *Phillips*, the trio of opinions by Chief Justice Sheran, and *Derus*, it is plain that only the senate may decide to seat or unseat defendant as long as the grounds for doing so involve a question of eligibility that is textually explicit in the Minnesota Constitution. Plaintiff cites no authority supporting an exception to the broad limitation on this court's jurisdiction created by Article IV, Section 6 of the Minnesota Constitution. The court found no authority supporting an outcome other than dismissal for lack of subject matter jurisdiction, justiciability, or both.[9]

When confronted with Article IV, Section 6 and the appellate cases interpreting the provision, plaintiff's counsel simply asserted that Article IV, Section 6 is limited to "the determination of whether potential legislators have satisfied the constitutionally prescribed requirements for holding the office." (Pl.'s Reply Mem. of Law in Supp. of Mot. for Inj. and Rule 65.02(c) Consolidation with a Hearing on the Merits (hereinafter "Pl.'s Reply Mem.") at 2-3.) In several locations, the Minnesota Constitution discusses the eligibility requirements for service as a member of the legislature. First, Article VII, Section 6, entitled "Eligibility to hold office" states:

> Every person who by the provisions of this article is entitled to vote at any election and is 21 years of age is eligible for any office elective by the people in the district

[9] *Schiebel* suggests that Article IV, Section 6 deprives the court of subject matter jurisdiction while *Derus* speaks in terms of justiciability. *Compare Schiebel*, 282 N.W.2d 848, *with Derus*, 555 N.W.2d at 517. Either way, the outcome must be the same—dismissal.

> wherein he has resided 30 days previous to the election, except as otherwise provided in this constitution, or the constitution and law of the United States.

MINN. CONST. art. VII, § 6. According to Article IV, Section 6, "[s]enators and representatives shall be qualified voters of the state, and shall have resided one year in the state and six months immediately preceding the election in the district from which elected." *Id.* art IV, § 6. To be a qualified voter, the person seeking office must be "18 years of age or more who has been a citizen of the United States for three months and who has resided in the precinct for 30 days next preceding an election . . .." *Id.* art. VII, § 1.

Of course, this case does not involve any of the eligibility requirements set forth in the cited provisions. The threshold question at the heart of the jurisdictional issue is whether the constitutional provisions relied upon by plaintiff in this case constitute an eligibility requirement within the meaning of Article IV, Section 6.

Relying on two sections, plaintiff contends that the Minnesota Constitution precludes defendant from holding more than a single office in one branch of government. First, the section creating the legislative, executive, and judicial branches of government states that "[n]o person . . . belonging to . . . 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." *Id.* art. III, § 1. Next, plaintiff cites Article IV, Section 5: "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." *Id.* art. IV, § 5.

Taking on the eligibility issue, plaintiff argues that "[t]he question here is not whether [defendant] is eligible to hold the office of state senator but rather whether she is prohibited from holding the office of state senator after she assumed the office of lieutenant governor." (Pl.'s

Reply Mem. at 3.) Nothing in the text of Article IV, Section 6, the Constitution viewed as a whole, or the Minnesota Supreme Court cases interpreting Article IV, Section 6 suggests that the term "eligibility" is limited only to the eligibility of prospective members of the legislature. Plaintiff's argument departs from the dictionary definition of the word "eligibility" and fails to treat equally each provision in the Constitution addressing a person's legal qualification to hold an office.

The definitions of "eligible" and "eligibility" reveal that plaintiff's argument is nothing more than an exercise in semantics. The word "eligible" means "legally qualified for an office, privilege, or status."[10] BLACK'S LAW DICTIONARY (10th ed. 2014). The Oxford Dictionary defines the term "eligibility" to mean "[t]he state of having the right to do or obtain something through satisfaction of the appropriate conditions." https://en.oxforddictionaries.com/definition/eligibility (last visited on Feb. 12, 2018). It is the essence of plaintiff's argument that defendant lost her legal qualification to serve as a state senator as soon as she became lieutenant governor. Arguing that defendant is "prohibited" from holding the office of state senator is simply another way of saying that she is no longer has the right to do so.

Federal court interpretation of the analogous provisions of the United States Constitution further supports giving the word "eligibility" its plain meaning. The United States Constitution contains an Incompatibility Clause similar to Article IV, Section 5 of the Minnesota Constitution. U.S. CONST. art. I, § 6 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."). In *Signorelli v. Evans*, the court noted that the federal Incompatibility Clause "indirectly functions to add a qualification for Congressional office." 637 F.2d 853, 861 (2d Cir. 1980). Article I, Section 6 of the United States Constitution

[10] The Minnesota Court of Appeals has relied on the dictionary to interpret the plain meaning of undefined terms in the Minnesota Constitution. *E.g., Citizens for Rule of Law v. Senate Comm. on Rules & Admin.*, 770 N.W.2d 169, 176 (Minn. Ct. App. 2009) (quoting Black's Law Dictionary).

also contains an Ineligibility Clause, which "makes Members of Congress ineligible for appointment to certain offices." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 210 (1974) (citing U.S. CONST. art. I, § 6).

The constitutional provisions relied upon by plaintiff restrict defendant's continued eligibility to hold a seat in the legislature. If plaintiff's interpretation of the Minnesota Constitution is correct, defendant's eligibility to be a state senator ended when she became lieutenant governor by operation of Article V, Section 5. Accordingly, the court holds that Article III, Section 1 and Article IV, Section 5 of the Minnesota Constitution are express constitutional provisions that control the continued eligibility of a state legislator to serve. Thus, in accordance with Article IV, Section 6 of the Constitution, as interpreted by *Phillips*, the trio of opinions by Chief Justice Sheran, and *Derus*, it is solely for the legislature to decide whether to seat defendant as an eligible member when it reconvenes on February 20, 2018.

Plaintiff's last effort to sidestep the authority of Article IV, Section 6 is to cite the 1898 Minnesota Supreme Court decision that is at the center of the merits of this case—*State ex rel. Marr v. Stearns*, 72 Minn. 200, 75 N.W. 210 (1898), *rev'd on other grounds sub nom.*, *Stearns v. State of Minn.*, 179 U.S. 223 (1900).[11] Plaintiff argues that this court should accept jurisdiction because the 1898 version of Article IV, Section 6 did not compel the Supreme Court to decline jurisdiction in *Stearns*. (Pl.'s Reply Mem. at 3.) The *Stearns* court did not consider its jurisdiction for reasons that are obvious following a review of the case. *Stearns* presents a good illustration of litigation involving a justiciable issue over which the judicial branch had subject matter

[11] The most recent Minnesota Supreme Court cases citing *State ex rel. Marr v. Stearns* refer to the case in short form as "*Stearns*" rather than "*Marr*." *See, e.g.*, *League of Women Voters Minnesota v. Ritchie*, 819 N.W.2d 636, 647 (Minn. 2012); *Breza v. Kiffmeyer*, 723 N.W.2d 633, 636 (Minn. 2006).

jurisdiction. The legal dispute involved the validity of a statute enacted into law by the legislature—a basic question over which courts have subject-matter jurisdiction. *Id.* at 208-210, 75 N.W. at 210. The law at issue was passed in the senate by a single vote cast by a senator simultaneously holding the office of lieutenant governor. *Id.* Thus, the question of the statute's validity based on a senator's vote that was not legally cast ripened at the time of the bill's enactment because the putative senator's vote was the crucial difference between passage and defeat. Finally, the plaintiff challenging the validity of the statute was personally impacted by the legislation at issue apart from the public at large, which established standing to sue under the traditional justiciability test. *Id.*

None of the jurisdictional attributes of *Stearns* are present in the instant case. Plaintiff claims no harm personal to her as opposed to all of the citizens in her district. Defendant has taken no legally challengeable action. The senate is not in session, defendant has not assumed a senate seat, and she has cast no vote. Finally, the Constitution expresses the means by which legislators may be removed from office. They may be recalled, each house may refuse to seat them, and they may be expelled. Of course, as stated in the last sentence of Article, IV, Section 6, they may resign. There is nothing in the Constitution granting courts the authority to remove legislators from office through citizen lawsuits. In short, granting the relief sought by plaintiff in the context of the instant litigation would disregard the Minnesota Constitution's plain language and overrule cases recognizing the exclusive legislative prerogative to determine the eligibility of its members.

B. Absent Standing there is no Justiciable Controversy and the Court is Without Jurisdiction.

Courts have no jurisdiction over actions that are not justiciable. *See, e.g., State ex rel. Smith v. Haveland*, 223 Minn. 89, 91-92, 25 N.W.2d 474, 476-77 (1946). The *Smith* court set forth the justiciability standard that remains the law in Minnesota:

> It is elementary that the court has no jurisdiction to render a declaratory judgment in the absence of a justiciable controversy. . . . "Proceedings for a declaratory judgment must be based on an actual controversy. The controversy must be justiciable in the sense that it involves definite and concrete assertions of right and the contest thereof touching the legal relations of parties having adverse interests in the matter with respect to which the declaration is sought, and must admit of specific relief by a decree or judgment of a specific character as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Mere difference of opinion with respect to the rights of parties do not constitute such a controversy."

State ex rel. Smith v. Haveland, 232 Minn. 89, 92, 25 N.W.2d 474, 476-77 (1946) (quoting *Seiz v. Citizens Pure Ice Co.*, 207 Minn. 227, 281, 290 N.W. 802, 804 (1940); *accord Onvoy, Inc. v. Allete, Inc.*, 736 N.W.2d 611, 617-18 (Minn. 2007) (citing *Smith* and *Seiz*; recognizing their establishment of a three-part justiciable controversy test).

Standing is essential to the existence of a justiciable controversy and, therefore, a court's exercise of subject matter jurisdiction. *Annandale Advocate v. City of Annandale*, 435 N.W.2d 24, 27 (Minn. 1989) (citing *Izaak Walton League of America Endowment, Inc. v. State Department of Natural Resources*, 312 Minn. 587, 589, 252 N.W.2d 852, 854 (1977)); *see McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 337 (Minn. 2011). "Standing is a legal requirement that a party 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, plaintiff must have either "suffered some 'injury-in-fact' or the [petitioner] is the beneficiary of some legislative enactment granting standing."[12] *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*, 301 Minn. 28, 31-32, 221 N.W.2d 162, 165 (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

[12] Plaintiff makes no claim that standing was conferred on her by statute.

public." *Channel 10, Inc. v. Independent School District No. 709*, 298 Minn. 306, 312, 215 N.W.2d 814, 820 (1974) (citations omitted). The peculiar injury requirement "precludes citizens from bringing lawsuits against governmental agencies based only on their disagreement with policy or the exercise of discretion by those responsible for executing the law." *Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143, 146 (Minn. Ct. App. 1999) (citing *McKee v. Likins*, 261 N.W.2d 566, 571 (Minn. 1977)), *rev. denied* (Minn. Mar. 14, 2000). Instead, to avoid a flood of litigation, public rights are generally enforced by public authorities rather than by individuals. *Channel 10, Inc.*, 298 Minn. at 312, 215 N.W.2d at 820 (citation omitted).

Here, plaintiff fails to allege an actionable injury-in-fact. Plaintiff's suit is premised on the same injury that every person living within Senate District 13 arguably sustained if defendant is ineligible to serve in the Minnesota Senate. The harm sustained by plaintiff is specific to no person. In fact, plaintiff offers no legal authority for the proposition that she has standing.

The matter of standing might be viewed differently if plaintiff were challenging the validity of legislation that passed solely because of a vote cast by defendant as state senator. Depending upon the statute at issue, plaintiff might fall within the taxpayer standing exception.[13] In the instant

[13] The taxpayer standing exception traces its origin to 1888. "[I]t generally has been recognized that a state or local taxpayer has sufficient interest to challenge illegal expenditures." *McKee*, 261 N.W.2d at 570-71 (citing *State v. Weld*, 39 Minn. 426, 428, 40 N.W. 561, 562 (1888) (Mitchell, J.); *see Oehler v. City of St. Paul*, 174 Minn. 410, 417-418, 219 N.W. 760, 763 (1928) ("it is well settled that a taxpayer may, when the situation warrants, maintain an action to restrain unlawful disbursements of public moneys"). Thus, "the right of a taxpayer to maintain an action in the courts to restrain the unlawful use of public funds cannot be denied. Taxpayers are legitimately concerned with the performance by public officers of their public duties." *Id.* at 571. The taxpayer standing exception, as reaffirmed in *McKee*, has been "limited . . . closely to its facts." *Citizens for Rule of Law v. Senate Committee on Rules & Administration*, 770 N.W.2d 169, 175 (Minn. Ct. App.) (citations omitted), *rev. denied* (Minn. Oct. 20, 2009). In other words, the challenged conduct must actually involve an alleged unlawful use of public funds. Thus, in *Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, there was no taxpayer standing because "the challenged moneys [fees paid to attorneys hired by the state to prosecute the tobacco litigation] are not state funds and . . . the law does not require an appropriation for payment of attorney fees for special counsel." 603 N.W.2d 143, 149 (Minn. Ct. App. 1999). Similarly, a return of money from a special mineral fund to the general fund cannot confer taxpayer standing because an unlawful disbursement of funds was not alleged. *Rukavina v. Pawlenty*, 684 N.W.2d 525, 531 (Minn. Ct. App.), *rev. denied* (Minn. Oct. 19, 2004).

case, the taxpayer standing exception is inapplicable because plaintiff does not challenge an alleged improper or unlawful use of taxpayer funds. *See, e.g., St. Paul Area Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585, 588 (Minn. 1977) (taxpayer standing does not extend to the non-expenditure of public funds). Such an argument might be possible if defendant drew two salaries.

Plaintiff alleges no specific injury that is distinct or unique from those potential injuries that would be suffered by all members of Senate District 13. In addition, she fails to fall within any recognized exception to the unique injury requirement. Absent injury-in-fact, plaintiff has no standing.[14] On this ground alone, the Complaint must be dismissed.

C. The Instant Action Lacks Ripeness

"'Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies.'" *Leiendecker v. Asian Women United of Minnesota*, 731 N.W.2d 836, 841 (Minn. Ct. App.) (quoting *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807 (2003)), *rev. denied* (Minn. 2007). Standing "is concerned with 'who' may bring a suit" while ripeness relates to "when" suit may be brought. *McCaughtry v. City of Red Wing*, 808 N.W.2d 338 (Minn. 2011) (quoting *McKee v. Likins*, 261 N.W.2d 566, 569-70 n.1 (Minn. 1977)).

"To establish the existence of a justiciable controversy, the litigant must show a 'direct and imminent injury.'" *Leiendecker*, 731 N.W.2d at 841. In other words, the challenging party must demonstrate "that the law 'is, or is about to be, applied to his disadvantage.'" *McCaughtry*, 808

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[14] Similarly, the federal courts dismissed actions brought under the federal Constitution's analogous Incompatibility and Ineligibility Clauses because the plaintiffs lacked standing. *See, e.g., Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 215-27 (1974) (dismissing suit to declare members of Congress ineligible to serve in the Reserves); *Rodearmel v. Clinton*, 666 F. Supp. 2d 123 (D.D.C. 2009), *appeal dismissed*, 560 U.S. 950 (2010) (dismissing action to enjoin Hillary Clinton from serving as Secretary of State).

N.W.2d at 338 (quoting *Lee v. Delmont*, 228 Minn. 101, 110, 36 N.W.2d 530, 537 (1949)). "Issues which have no existence other than in the realm of future possibility are purely hypothetical and are not justiciable." *Id.* at 339 (quoting *Lee*, 228 Minn. at 110, 36 N.W.2d at 537). For example, a claim challenging a city's land use determination is ripe only when the challenged action occurs and causes damage. *Carlson-Lang Realty Company v. City of Windom*, 240 N.W.2d 517, 521 (Minn. 1976) ("it appears this latter claim will accrue, if at all, only when the new system is constructed and appellant actually loses customers").

Plaintiff's claim is premature and based on speculation. It remains unknown whether the defendant will attempt to take her seat or cast a vote. The legislature is not in session so it is also unknown whether the Minnesota Senate will accept defendant as an eligible member. Even the Complaint recognizes the premature and speculative foundation of the instant suit. In her prayer for relief, plaintiff states that she is entitled to enjoin defendant from serving in the state senate because of her unconstitutional "intention to hold both the position of senator and lieutenant governor." (Compl., Prayer for Relief, ¶¶ 1-2.) Besides the fact that intentions are not unconstitutional, it is impossible to know what defendant will actually do until February 20, 2018. Accordingly, the Complaint is not justiciable for lack of ripeness and it must be dismissed without prejudice.

D. Plaintiff's Complaint Asserts a NonJusticiable Political Issue.

As framed by plaintiff, the Complaint presents a nonjusticiable political issue. The political question doctrine was best framed by the United States Supreme Court in *Baker v. Carr*: "The nonjusticiability of a political question is primarily a function of the separation of powers. . . . Deciding whether a matter has in any measure been committed by the constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been

committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as the ultimate interpreter of the Constitution." 369 U.S. 186, 211 (1962). Citing *Baker*, the court in *Powell v. McCormack*, noted that:

> on the surface of any case held to involve a political question was at least one of the following formulations: "a textually demonstrable constitutional commitment of the issue to a co-ordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due co-ordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

395 U.S. at 518-19 (quoting *Baker*, 369 U.S. at 217). The respondent in *Powell* argued that a non-justiciable political question existed because the "House alone, has power to determine who is qualified to be a member." *Id.* at 519. The court ultimately rejected the argument because, unlike in the instant case, the qualification imposed on appellant was nowhere to be found in the United States Constitution. *Id.* at 548.

Here, Article IV, Section 6 is a "textually demonstrable constitutional commitment of the issue to a co-ordinate political department" and it would be impossible to undertake an "independent resolution without expressing lack of the respect due co-ordinate branches of government." *Baker*, 369 U.S. at 217. The "textual commitment" and "lack of respect" formulations of the political question doctrine bars this court from adjudicating plaintiff's claim as framed in the Complaint.

The court's conclusion closely follows the rationale of the Minnesota Supreme Court in *Ninetieth Minnesota State Senate v. Dayton*, 903 N.W.2d 609 (Minn. 2017). In *Dayton*, the court declined to invalidate the governor's line-item veto of the legislature's appropriation as either a separation of powers violation or an attempt to achieve an unconstitutional result through

constitutional means. *Id.* at 622-26. The court concluded that the vetoes did not effectively abolish the Legislature because sufficient funds are available to permit it to convene in regular session. *Id.* at 622-23. The court also noted that "our constitution does not require that the Judicial Branch referee political disputes between our co-equal branches of government over appropriations and statewide policy decisions when those branches have both an obligation and opportunity to resolve those disputes between themselves. . . . Moreover, our precedent counsels that we avoid reaching constitutional questions if there is another way to resolve the case." *Id.* at 624 (citations omitted).

In *Dayton*, the court exercised restraint in part because the "constitution textually obligates the Governor and the Legislature to set the budget for our state. *Id.* at 624. Here, the text of the Constitution provides the means by which the eligibility of defendant to serve as a state senator must be determined. Yielding to the process set forth in the Constitution by no means requires the judicial branch to sit on its hands should the issue present itself in a manner in which there exists both subject matter jurisdiction and justiciability, as in *Stearns*. Nor is the court concerned that, if the appropriate case presents itself, the legislative and judicial branches might reach opposite conclusions. As the court stated in *Powell*, "[o]ur system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." 395 U.S. at 549. Should a *Stearns* scenario present itself and should legislation be invalidated after a finding that defendant cast an illegal vote, the ultimate determination of defendant's eligibility to retain her seat will remain in the hands of the state senate. In the meantime, the case must be dismissed for lack of jurisdiction.

II. PLAINTIFF IS NOT ENTITLED TO INJUNCTIVE RELIEF

A. Legal Standard Applicable to Motions for Injunctive Relief.

The actual motion before the court is a motion for a temporary restraining order. Plaintiff asks the court to enjoin defendant from taking her seat as a senator when the legislature convenes on February 20, 2018. It is therefore appropriate to place the court's jurisdiction and justiciability holdings in the context of a traditional TRO analysis.

The procedure for obtaining a TRO is set forth in Rule 65 of the Minnesota Rules of Civil Procedure. The purpose of an injunction is to preserve the rights of the parties pending determination of the litigation. *Metro. Sports Facilities Comm. v. Minnesota Twins P'ship*, 638 N.W.2d 214, 220 (Minn. Ct. App.), *rev. denied* (Minn. Feb. 4, 2002). Because an injunction is an equitable remedy, the party seeking an injunction must demonstrate that there is no adequate legal remedy and that the injunction is necessary to prevent irreparable harm. *Cherne Industrial, Inc., v. Grounds & Associates, Inc.*, 278 N.W.2d 81, 92 (Minn. 1979).

Once there is a finding of irreparable harm, the court must weigh five factors to determine the propriety of granting a motion for injunctive relief. *E.g., Dahlberg Brothers, Inc. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965). These factors are known as the "Dahlberg Factors." *State by Ulland v. Int'l Ass'n. of Entrepreneurs of Am.*, 527 N.W.2d 133, 136 (Minn. Ct. App.), *rev. denied* (Minn. Apr. 18, 1995). The applicant for injunctive relief has the burden of proving all five *Dahlberg* factors. *N. Cent. Pub. Serv. Co. v. Vill. of Circle Pines*, 302 Minn. 53, 60, 224 N.W.2d 741, 746 (1974). "Injunctive relief should be awarded only in clear cases, reasonably free from doubt." *Sunny Fresh Foods Inc. v. MicroFresh Foods Corp.*, 424 N.W.2d 309, 310 (Minn. Ct. App. 1988) (quoting *AMF Pinspotters, Inc. v. Harkins Bowling, Inc.*, 260 Minn. 499, 110 N.W.2d 348, 351 (Minn. 1961)).

B. Plaintiff Does Not Demonstrate Irreparable Harm.

An applicant's failure to demonstrate irreparable harm is a sufficient basis to deny a temporary injunction. As the court stated in *Miller v. Foley*:

> The key word in this consideration is *irreparable.* Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

317 N.W.2d 710, 713 (Minn. 1982) (emphasis in original) (quoting *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)); s*ee Thompson v. Barnes*, 294 Minn. 528, 532, 200 N.W.2d 921, 925 (1972). Here, plaintiff's claim of irreparable harm is unknown and speculative. It is not yet known whether defendant will be permitted to take her seat in the legislature and the state senate has not yet acted in accordance with its exclusive constitutional prerogative to determine the eligibility of its members. There is no imminent harm because the senate cannot exercise its authority to determine defendant's current eligibility to serve as a state senator until it is in session. Therefore, the potential for harm is entirely speculative. Plaintiff certainly has a right to make her case before the state senate like any other citizen.

A temporary injunction cannot be issued if there is an adequate legal remedy. *Pac. Equip. & Irrigation, Inc. v. Toro Co.*, 519 N.W.2d 911, 914 (Minn. Ct. App.), *rev. denied* (Minn. Sep. 16, 1994). If defendant chooses not to resign her senate seat, plaintiff and the other the voters of defendant's district have several adequate remedies that are found in the Minnesota Constitution: the exclusive ability of the Minnesota Senate to determine the eligibility of its members; recall; and, expulsion. At most, plaintiff might sustain harm in the future depending upon the unpredictable outcome of future events. As such, plaintiff cannot demonstrate irreparable harm so she is not entitled to injunctive relief.

C. Analysis of the *Dahlberg* Factors.

Even with proof of irreparable harm, plaintiff must still demonstrate entitlement to injunctive relief. However, the balancing of the *Dahlberg* factors does not entitle plaintiff to injunctive relief.

1. The Relationship Between the Parties.

If the relationship between the parties has no bearing on the determination of whether to grant an injunction, the factor is neutral to the court's overall analysis. Here, the court concludes that the relationship between the parties is neutral. Plaintiff argues that she is disenfranchised if defendant remains in office. However, other constituents in the district may feel disenfranchised if she is removed. Plaintiff's entitlement to injunctive relief depends upon analysis of the other factors.

2. The Public Interest and Consideration of Public Policy.

The next *Dahlberg* factor examines the public policy implications if injunctive relief is granted. There is certainly a public policy interest in making sure that public officials are eligible to serve before they are permitted to serve. However, resolving disagreements in accordance with the laws and procedures developed to decide the dispute is paramount. Here, the Minnesota Constitution expressly sets forth the ways this dispute must first be addressed. On multiple occasions, the Minnesota Supreme Court has made clear that only the state senate may determine if defendant is eligible to represent Senate District 13. The public interest and public policy favors resolving the instant dispute in accordance with the Minnesota Constitution. Should a case come to the courts in a different context, as it did in *Stearns*, there will be an ample opportunity to consider the constitutional question raised by Article III, Section 1 and Article IV, Section 5.

3. Administrative Burden of Supervising and Enforcing the Injunction.

In this case, there is no administrative burden associated with overseeing an injunction. If defendant does not comply, plaintiff may commence contempt proceedings. Enforcing an injunction interposes no greater burden on the court than the enforcement of any other court order. Since the administrative burden of overseeing an injunction is negligible, the administrative burden factor is neutral in determining whether to grant the requested injunctive relief.

4. The Likelihood of Success on the Merits.

If plaintiff shows no likelihood of prevailing on the merits, the court cannot grant injunctive relief. *Metro. Sports Facilities Comm'n*, 638 N.W.2d at 226. However, "if a plaintiff makes even a doubtful showing as to the likelihood of prevailing on the merits, a district court may consider issuing a temporary injunction to preserve the status quo until trial on the merits." *Id.* (citation omitted).

Based on the procedural posture of this litigation, plaintiff cannot make "even a doubtful" showing that she will succeed on the merits. As already discussed, this case must be dismissed for lack of jurisdiction and because plaintiff fails to present a justiciable issue. The Minnesota Constitution provides the sole means by which legislators may be removed from office. The text of the Minnesota Constitution does not authorize constituent lawsuits to remove a duly elected member of the legislature. Since the court has no jurisdiction over a constituent lawsuit to remove a sitting member of the legislature, the court cannot reach the merits of plaintiff's constitutional position.

5. The Comparative Harm to the Parties.

The last step of the *Dahlberg* analysis is a weighing of the relative hardship to the parties if injunctive relief is or is not granted. *Cramond v. AFL-CIO*, 267 Minn. 229, 234, 126 N.W.2d

252, 256 (Minn. 1964). The court balances plaintiff's irreparable harm against any harm to defendant. Plaintiff must demonstrate irreparable harm to secure her requested relief and defendant need only show substantial harm to prevent an injunction. *See Yager v. Thompson*, 352 N.W.2d 71, 75 (Minn. Ct. App. 1984).

Having already found that there is not irreparable harm to plaintiff, the inquiry is ordinarily over. Nevertheless, the court will weigh the relative harms. Disenfranchisement is the harm alleged by plaintiff. However, if this court creates a new and heretofore unknown and extra-constitutional remedy to remove a sitting legislator through a constituent lawsuit, thereby usurping the various constitutional means by which a legislator may be removed from office, the residents of Senate District 13 are also disenfranchised. Moreover, defendant would be deprived of her seat with nearly three years remaining in the term. Plaintiff asks this court to fashion an extra-constitutional injunctive remedy to preclude a validly elected official from serving her constituents without giving the existing constitutional remedies a chance to operate. Under the present circumstances, the balance of harms favors defendant.

III. CONCLUSION

The court must dismiss the Complaint for lack of jurisdiction and because plaintiff fails to present a justiciable issue. In addition, the *Dahlberg* analysis warrants denial of a temporary restraining order. Despite its holding, the court has grave concern over the applicability of *Stearns* to the Minnesota Constitution in its present form. However, this is not the right case, the right plaintiff, the right time, or the right legal context to consider defendant's eligibility to serve in the Minnesota Senate. The Complaint is dismissed without prejudice.

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