

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT
CASE TYPE: CIVIL

Destiny Dusosky,

Court File No. 62-CV-18-254

Plaintiff,

v.

Michelle Fischbach,

Defendant.

**PLAINTIFF'S REPLY MEMORANDUM
OF LAW IN SUPPORT OF MOTION FOR
INJUNCTION AND RULE 65.02(c)
CONSOLIDATION WITH A HEARING
ON THE MERITS**

I. INTRODUCTION

Lieutenant Governor Fischbach contends that this is a mere political dispute and that the Court should abstain from addressing the question of whether she can hold the office of state senator. The Minnesota Constitution is not a political document and its interpretation and application are not political questions. The Court should act quickly to resolve the constitutional uncertainty created by Lieutenant Governor Fischbach's attempt to serve as both the lieutenant governor and state senator for Senate District 13. Plaintiff Destiny Dusosky requests that the Court grant her motion for a temporary injunction barring Lieutenant Governor Fischbach from continuing to hold, and to exercise the powers of, the office of state senator, consolidate this motion with a hearing on the merits, and enter a final judgment in her favor.

II. ARGUMENT

Lieutenant Governor Fischbach raises several arguments in opposition to Plaintiff's motion for a temporary injunction. None have merit. The alleged political questions and alternative remedies are red herrings with no application to the narrow question of law presented in the Complaint. Moreover, Lieutenant Governor Fischbach ignores the substantive changes to the

powers and duties of the office which have been enacted through constitutional amendments and legislation since the 1898 *Marr* decision. Ultimately, nothing in Lieutenant Governor Fischbach's response brief changes the fact that she can no longer hold the office of state senator as of January 3, 2018.

A. Plaintiff's Claims Do Not Present a "Political Question."

Lieutenant Governor Fischbach asks this court to abstain from hearing this matter because Plaintiff's claims present a nonjusticiable political question. 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.

First, the Minnesota Constitution provides a clear, judicially discoverable, and manageable standard for resolving the dispute. Plaintiff presents a pure question of law: whether the Minnesota Constitution prohibits Lieutenant Governor Fischbach from continuing to hold the office of state senator once she assumed the office of lieutenant governor. The interpretation of the law, including the Minnesota Constitution, 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 is prohibited from holding the office of state senator after she assumed the office of lieutenant governor. Nothing in Article IV, Section 6 or the cases cited by plaintiff support the conclusion that the Senate has any authority, let alone the exclusive authority, to resolve this purely legal question. See *Cruz-Guzman v. State*, 892 N.W.2d 533, 540 (Minn. Ct. App. 2017), review granted (Apr. 26, 2017) (“If respondents’ claims ... required us to determine whether appellants have violated a defined constitutional mandate, we would have no difficulty concluding that this case presents a justiciable controversy.”) (citing *Baker*, 369 U.S. at 217). Indeed, when this question arose in 1898, it was resolved by the courts. See *State ex rel. Marr v. Stearns*, 75 N.W. 210, 211 (Minn. 1898).

B. The Right of Recall Does Not Provide a Remedy

Lieutenant Governor Fischbach next asserts that the court should abstain from hearing this matter and instead allow voters to resolve the dispute through a recall election. The Minnesota Constitution provides that a member of the senate “is subject to recall from office by the voters” on the grounds of “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.” Minn. Cons. art. VIII, § 6. This case does not involve allegations of “serious malfeasance or nonfeasance” or “conviction . . . of a serious crime” during Fischbach’s term as a state senator and, therefore, the power of voters to recall a member of the senate does not apply.

Moreover, a recall election cannot resolve the question of whether Fischbach ceased to hold the office of state senator upon assuming the office of Lieutenant Governor. If Plaintiff’s

interpretation of the Minnesota Constitution is correct, a recall would be both unnecessary and impossible because voters cannot recall Fischbach from an office she no longer holds. If Plaintiff is incorrect, there would no basis for removing Fischbach from the office of state senator. Either way, the possibility of a recall does not provide an adequate remedy for Plaintiff's claims.

C. Plaintiff's Claims Are Ripe for Adjudication.

"[A] declaratory judgment action must present 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.

Plaintiff alleges that Lieutenant Governor Fischbach cannot hold the office of state senator after she assumed the office of lieutenant governor. Lieutenant Governor Fischbach, on the other hand, asserts that she can hold both offices simultaneously and is attempting to do so. The dispute is live and justiciable. Deferring resolution of the dispute until Lieutenant Governor Fischbach exercises the powers of the incompatible offices simply invites chaos and confusion which can be avoided through a prompt resolution.

Moreover, neither the results of the special election in Senate District 54 nor the convening of the legislature on February 20, 2018 will "significantly advance" the court's ability to deal with the narrow, purely legal issue presented in Plaintiff's complaint. The outcome of an unrelated special election has no bearing on the question of whether Fischbach is prohibited from holding her senate seat after assuming the office of lieutenant governor. And, although Lieutenant Governor Fischbach asserts that the Senate could vote to expel her at the start of the legislative

session, the court is not required to defer consideration of the live controversy in anticipation of this speculative possibility.

D. The *Dahlberg* Factors Favor Granting Plaintiff's Motion for a Temporary Injunction.

As set forth in Plaintiff's initial brief, the *Dahlberg* factors favor granting a temporary injunction in this matter. Plaintiff limits her discussion of the *Dahlberg* factors in this reply brief to responding to the arguments made by Lieutenant Governor Fischbach.

1. Plaintiff is Likely to Prevail on the Merits

a) *The 1898 Marr Decision Did Not Address the Question Before this Court.*

Marr addressed the question of whether the text of the 1898 constitution prohibited the lieutenant governor from continuing to perform the duties of state senator. The constitution has changed. Indeed, every constitutional provision discussed in *Marr* has been amended since 1898. The question before the Court now is whether the *current* text of the Constitution prohibits Lieutenant Governor Fischbach from continuing to hold the office of state senator. The Court is not bound by the Supreme Court's decision in *Marr* which did not, and could not, address the Constitution as it exists today.

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). Plaintiff's initial memorandum explains in detail why the rationale of the *Marr* decision no longer applies. Pl. Mem. at 4. "Where the reasons for the rule have ceased to exist or where the rule is no longer adapted to the changed conditions of society, a court ought not to blindly adhere to former decisions even though legally sound when the case was decided." *Johnson v. Chicago, B. & Q. R. Co.*, 66 N.W.2d 763, 771 (Minn. 1954). The court should not "blindly adhere" to the outcome in *Marr* based on the law as it existed in 1898, but

instead should analyze and apply the Constitution as written today. *See Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 406 (Minn. 2000) (“[S]tare decisis does not bind us to unsound principles.”).

b) *The Amendments to the Minnesota Constitution Materially Changed the Nature of the Office of Lieutenant Governor.*

The amendments to the Constitution since *Marr* demand a different result because the duties of the office of lieutenant governor are now solely executive in nature. At the time of the *Marr* decision, the lieutenant governor’s “sole constitutional duties” were to “preside over the senate” and to “authenticate by his signature bills passed by the senate.” Def. Mem. at 15 (quoting *Marr*, 75 N.W. at 213). These duties were legislative in nature and did not “properly belong” to the executive department. *Marr*, 75 N.W. at 213. As explained in Plaintiff’s initial memorandum, constitutional amendments since 1898 removed these legislative duties from the office of lieutenant governor. Pl. Mem. at 5. Today, the primary roles of the lieutenant governor 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.

Fischbach relies primarily on two arguments to support her position that the changes to the duties of the lieutenant governor do not compel a different conclusion today. First, Lieutenant Governor Fischbach argues that there is no express language providing that the last elected presiding officer of the senate ceases to be a senator after succeeding to the office of lieutenant governor. Def. Mem. at 19. The Constitution does not demand this “express language.”¹ Instead, the Constitution states, “No person or persons belonging to or constituting one of those

¹ The similar statement in *Marr*—that “express words of the constitution” are needed to conclude that the president pro tempore ceases to be senator upon a vacancy in the office of lieutenant governor—depended entirely on the fact that the constitution does *not* distinguish between a “temporary” and “permanent” vacancy. *See Marr*, 75 N.W. at 213. The constitution now distinguishes between a temporary and permanent situation. *See Pl. Mem.* at 7.

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 (emphasis added). Accordingly, in order to continue to hold her senate seat, Fischbach must point to language expressly authorizing her to hold offices in both the legislative and executive branch. There is no express language authorizing the lieutenant governor to simultaneously hold the office of state senator.²

Fischbach also relies on the *Marr* court’s analysis of the language prohibiting legislators from holding any other office under the authority of the United States or the state of Minnesota to support her view. The *Marr* court concluded that this provision “had little relevancy” to the question before it 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*. *Marr*, 75 N.W. at 214. This provision has been amended and harmonized with the rest of the Constitution and now provides that “If 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, makes clear that Lieutenant Governor Fischbach is prohibited from holding the office of state senator after she assumed the office of lieutenant governor.

² However, there are at least two instances in the constitution that *expressly* provide that persons belonging to one department shall exercise the powers properly belonging to another department. See Minn. Const. art. V, § 7 (“The governor, the attorney general and the chief justice of the supreme court constitute a board of pardons.”); Minn. Const. art. VI, § 6 (“A judge of the supreme court, the court of appeals or the district court shall not hold any office under the United States except a commission in a reserve component of the military forces of the United States and shall not hold any other office under this state.”).

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

Lieutenant Governor Fischbach notes that the legislature cannot grant the lieutenant governor executive constitutional powers. While this is true, the statutorily assigned duties confirm that the office of lieutenant governor 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 of lieutenant governor.

Similarly, the State Capitol Preservation Commission and the advisory committee on Capitol Area Security were created in 2011 and 2012 respectively. Def. Mem. at 27. The Commission and advisory committee each include members from all branches of government. *Id.* 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.*

Finally, in 1973—again, after the 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. Def. Mem. at 26. This further confirms the executive nature of the office of lieutenant governor. 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.

2. The Parties' Relationship Prior to the Lawsuit Favors Granting a Temporary Injunction.

Lieutenant Governor Fischbach's argument presumes that under the status quo, she has retained her seat as a senator. This is not accurate. Fischbach is the lieutenant governor and, by operation of law, no longer holds her senate seat. Granting Plaintiff's motion for a temporary injunction precluding Lieutenant Governor Fischbach from holding the office of state senator or exercising the powers of such office would preserve, not upset, the "status quo relationship" between the parties.

3. Plaintiff will Suffer Irreparable Harm if the Motion for Temporary Injunction is not Granted.

Lieutenant Governor Fischbach asserts that Plaintiff Destiny Dusosky will only be harmed through the denial of valid representation in the Senate if the motion for temporary injunction is granted. This is not correct. First, the assertion ignores that any actions Lieutenant Governor Fischbach may take as a senator would need to be invalidated if the court concludes that she could not hold the office of state senator after assuming the office of lieutenant governor. Second, it assumes without explanation that the injunction would deny residents of Senate District 13 of representation throughout the legislative session. There is no reason that this matter should not be resolved with sufficient time for a special election to be held to fill the vacancy in the office of state senator for Senate District 13 well before the end of the legislative session. *See* Minn. Stat. § 204D.19, subd. 2 (requiring a special election within 35 days after the writ of election is issued if the vacancy occurs when the legislature will be in session).

Additionally, it would not be as easy as Fischbach suggests to unwind her unauthorized legislative actions. Not only floor votes, but all procedural votes and other actions taken by Fischbach would be invalidated and, if this occurred after the end of the legislative session, re-passing the invalidated legislation would require a special session. The harm resulting from

allowing Lieutenant Governor Fischbach to continue to exercise the powers of a state senator would be irreparable.

Finally, for all the reasons set forth in Plaintiff's initial memorandum, the potential harm to Lieutenant Governor Fischbach would be insignificant in comparison to that suffered by Plaintiff Destiny Dusosky and other Minnesotans. Pl. Mem. at 10.

4. Public Policy Favors Granting the Motion for Temporary Injunction.

Again, Lieutenant Governor Fischbach's argument presumes that she has retained her seat as a senator. As Lieutenant Governor, Fischbach cannot continue to hold her senate seat and granting Plaintiff's motion for a temporary injunction would preserve the "status quo relationship" and prevent Fischbach from taking legislative actions which are prohibited by law. Moreover, as explained in Plaintiff's memorandum, other public policy considerations support granting the Plaintiff's motion. Pl. Mem. at 10-11.

5. No Security is Necessary for the Temporary Injunction.

Lieutenant Governor Fischbach asks the court to require Plaintiff to pay a pro rata share of her senate salary as security for the period the injunction is in effect. This request should be denied. The amount of security required for the entry of a temporary injunction is left to the court's discretion and may be waived entirely if appropriate. *See Howe v. Howe*, 384 N.W.2d 541, 546 (Minn. Ct. App. 1986) (affirming trial court decision not to require a bond in connection with a temporary injunction). No security is necessary or appropriate here.

Lieutenant Governor Fischbach chose not to accept the salary for the office of lieutenant governor; no one forced her to make this decision. If the motion for temporary injunction is granted and Lieutenant Governor Fischbach can no longer accept her senate salary, she is free to change her mind and accept the higher salary for the office of lieutenant governor. It is neither necessary nor appropriate to require security in connection with the entry of temporary injunction

where Lieutenant Governor Fischbach could mitigate any alleged harm by simply accepting the salary for her current office.

E. The Trial on the Merits Should be Consolidated with the Hearing on Plaintiff's Motion for a Temporary Injunction.

The public interest is not served by delaying the adjudication of this matter. A prompt resolution will eliminate the uncertainty regarding whether Lieutenant Governor Fischbach continues to hold the office of state senator before the legislature convenes on February 20, 2018 and, if the court concludes that Lieutenant Governor Fischbach no longer holds the office of state senator, a special election may be called in time to ensure that the residents of Senate District 13 are represented in the senate for at least a portion of the 2018 legislative session. Minn. Stat. § 204D.19, subd. 2. Notwithstanding the clear benefits of a prompt resolution, Lieutenant Governor Fischbach asks the court to slow this matter down and deny Plaintiff's motion for consolidation because: (1) she intends to file a motion to dismiss; and (2) "[f]urther factual development will occur as political events unfold in February." Neither point justifies deferring consideration of the merits.

The only new issue which Lieutenant Governor Fischbach states will be addressed in her forthcoming motion to dismiss is the argument that the Minnesota Senate is an indispensable party to this matter because the Constitution grants the senate the power to judge election returns and the eligibility of its members. According to Fischbach, consolidation "would deny the parties adequate opportunity to brief and argue this important issue." There is no need for extensive briefing and argument. As explained above, the court's resolution of the narrow legal question presented in Plaintiff's complaint—whether Lieutenant Governor Fischbach continued to hold the office of state senator after assuming the office of lieutenant governor—does not interfere with the legislature's power to determine the eligibility of its members.

Fischbach also asserts that the court should allow “political events [to] unfold in February” so that a full record can be presented to the Minnesota Supreme Court in the event of an appeal. Fischbach does not explain how these “political events” would affect the court’s analysis of the legal issues and empty speculation that additional material facts may come to light at some future date is not enough to overcome the strong public interest in a prompt resolution of this dispute.

III. CONCLUSION.

For the foregoing reasons and for the reasons set forth in her initial brief, Plaintiff Destiny Dusosky respectfully requests that the Court: (1) enjoin and restrain Lieutenant Governor Fischbach from continuing to hold her former position as senator; and (2) consolidate this motion for a temporary injunction with a hearing on the merits of Plaintiff’s declaratory judgment claim under Rule 65.02(c) and enter final judgment in favor of Plaintiff.

Dated: February 1, 2018

Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

s/Charles N. Nauen

Charles N. Nauen (#121216)

David J. Zoll (#0330681)

Arielle S. Wagner (#0398332)

100 Washington Avenue South, Suite 2200

Minneapolis, MN 55401

Tel: (612) 339-6900

Fax: (612) 339-0981

cnnauen@locklaw.com

djzoll@locklaw.com

aswagner@locklaw.com

**ATTORNEYS FOR PLAINTIFF
DESTINY DUSOSKY**