STATE OF MINNESOTA
IN SUPREME COURT

CASE NO. _____

State Senator Warren Limmer, et al.,

Petitioners,

vs.

Lori Swanson, et al.,

Respondents.

RESPONDENT ATTORNEY GENERAL'S MEMORANDUM IN SUPPORT OF HER MOTION TO DISMISS PETITION FOR QUO WARRANTO

This matter is not an appropriate *quo warranto* action, and even if it was, the Supreme Court should exercise its discretion to decline original jurisdiction over the case. Accordingly, the Petition for *quo warranto* should be dismissed pursuant to Minn. R. Civ. P. 127.

I. *QUO WARRANTO* IS NOT AN APPROPRIATE REMEDY IN THIS CASE.

Quo warranto is an equitable remedy which is rarely invoked by the courts. *Rice v. Connolly*, 488 N.W.2d 241, 244 (Minn. 1992) (recognizing the Court has exercised its discretion to issue the writ of *quo warranto* "infrequently and with considerable caution"). The remedy does not apply to government conduct that is pending or has been completed. *State ex rel. Danielson v. Village of Mound*, 234 Minn. 531, 544, 48 N.W.2d 855, 864 (1951) ("Until an actual usurpation has occurred, the remedy of quo warranto

has no application"); *State ex rel. Lommen v. Gravlin*, 209 Minn. 136, 137, 295 N.W. 654, 655 (1941).

On June 13, 2011, the Attorney General filed a petition in Ramsey County District Court on behalf of the State of Minnesota in her *parens patriae* capacity, seeking an order that the core functions of the executive branch be performed if the current budget impasse is not resolved by July 1, 2011. The Minnesota Constitution, Minnesota Statutes, and Minnesota common law clearly vest the Attorney General with the plenary authority to initiate such an action on behalf of the State. Minn. Const. art. V § 4; Minn. Stat. § 8.01 (2010); *Slezak v. Ousdigian*, 260 Minn. 303, 308, 110 N.W.2d 1, 5 (1961).[1]

Likewise, the Ramsey County District Court has not ordered the relief Petitioner finds to be objectionable. A hearing on the matter is currently set for Thursday, June 23, at 10 a.m. in the Ramsey County Courthouse. The Ramsey County District Court has not only the authority, but the obligation to preside over this civil action and to adjudicate the respective powers and obligations of the different branches of state government. *See, e.g.*, *State v. Askerooth*, 681 N.W.2d 353, 362 (Minn. 2004) (recognizing the court's responsibility to "independently safeguard for the people of Minnesota the protections embodied in our constitution."); *In re McConaughy*, 106 Minn. 392, 416, 119 N.W. 408, 417 (1909) ("[T]he judiciary is the department which is charged with the special duty of determining the limitations which the law places upon all official action."). In fact,

[1] Nor has the Governor or his Commissioner of the Department of Management and Budget disbursed any public funds in the absence of an appropriation. Rather, the

Petitioners do not even claim that the judiciary has no authority to order the requested disbursement of funds because they admit that State funds may be paid to effectuate the mandates of the Minnesota Constitution and federal law even absent duly enacted appropriations. (Petitioners' Pet. for Writ of Quo Warranto at 49-53)..

Thus, Petitioners do not seek to correct an ongoing usurpation of power by any of the above Respondents, but rather seek a declaration on the merits that the judiciary should not issue some of the requested relief. Under these circumstances, the extraordinary writ of *quo warranto* is simply an inappropriate remedy. *See, e.g.*, *Lommen*, 209 Minn. at 137, 295 N.W. at 655 (1941) ("writ of quo warranto is not allowable as preventative of, or remedy for, official misconduct and can not be employed to test the legality of official action of public . . . officers."); *People ex rel. Town of Richwoods v. City of Peoria*, 225 N.E.2d 48, 51 (Ill. App. Ct. 1967) (proceeding in *quo warranto* is only appropriate to challenge "a total absence of power or jurisdiction.").

In *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312 (Minn. Ct. App. 2007), the Court of Appeals considered a similar issue to the one presented here. During the 2005 budget impasse, the Ramsey County District court issued an Order authorizing the expenditure of State funds for the core functions of the State constitutional officers until the budget impasse was resolved. The Order was directed to the State Finance Commissioner to pay for the performance of those core functions. The Order was

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Governor and Legislature are continuing to negotiate a resolution of the pending budget impasse.

subsequently challenged by some legislators in a *quo warranto* action and the Finance Commissioner was the named respondent.

In denying the petition, the Court of Appeals stated that *quo warranto* does not apply to the "legality of either pending conduct or official conduct that has been completed." *Sviggum*, 732 N.W.2d at 319-20. The court held as follows:

> What the legislators seek, in essence, is not a writ to correct an ongoing usurpation of power but a declaration that the judiciary lacks the power to authorize an executive officer to disburse funds without an appropriation by law. *Quo warranto* is not an appropriate action to attempt to obtain this relief.

Id. at 320.

As discussed above, the same conclusion applies here.

II. IN ANY EVENT, THE COURT SHOULD DECLINE ORIGINAL JURISDICTION OVER THIS MATTER.

In *Rice v. Connolly*, 488 N.W.2d 241, 244 (Minn. 1992), the court stated that the normal procedure is that "petitions for the writ of quo warranto and information in the nature of quo warranto shall be filed in the first instance in the district court." In this case, there is already a proceeding pending in district court which will shortly consider the very issue raised by Petitioners in this matter. As noted above, a hearing is scheduled for June 23, 2011, and Petitioners can fully participate in the proceeding by intervening. *See also State ex rel. Burnquist v. Village of North Pole*, 213 Minn. 297, 302, 6 N.W.2d 458, 460 (1942) ("Since the writ [of *quo warranto*] is an extraordinary legal remedy, it is not granted where another adequate remedy is available."); *Whitcomb v. Lockerby*, 58 Minn. 275, 277, 59 N.W. 1015, 1016 (1894) (recognizing the Supreme Court "will not

grant such an application [in the nature of quo warranto] if there is a remedy in some other court which is at all adequate"); *United States ex rel. Chase v. Burton*, 293 F.2d 156, 156-57 (D.C. Cir. 1961) (refusing to issue writ of *quo warranto* where there was already pending an action in the district court that involved the same issues and in which petitioners' *quo warranto* claims could be determined). In fact, Petitioners moved to intervene in the district court proceeding on June 20, 2011, the same day their Petition was signed. See attached Motion of Intervention. (Attachment 1)

In the *Sviggum* case, the petitioners initially sought original *quo warranto* jurisdiction in the Supreme Court. The Court dismissed the petition without prejudice reasoning in part that the petitioners could intervene in the then-pending Ramsey County proceeding. (See attached Order). (Attachment 2) *See also State ex rel. Mattson v. Kiedrowski,* 391 N.W.2d 777, 781 (Minn. 1986) (stating *quo warranto* petition was initially filed with Supreme Court, which remanded the matter to the Ramsey County District Court). The Court should do the same here.

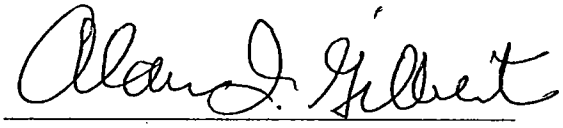
CONCLUSION

Respondent Attorney General Lori Swanson respectfully requests that the Petition be dismissed in its entirety, without prejudice.

Dated: June 20, 2011

Respectfully submitted,

LORI SWANSON
Attorney General
State of Minnesota



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STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT
Case Type: Civil
Case Number:

In Re: Temporary Funding of
Core Functions of the Exccutive
Of the State of Minncsota

NOTICE OF INTERVENTION OF STATE SENATORS WARREN LIMMER, SCOTT NEWMAN, ROGER CHAMBERLAIN AND SEAN NIENOW; NOTICE TO REMOVE PRESIDING JUDGE AND ALTERNATIVE WRIT OF MANDAMUS AND PETITION FOR THE ISSUANCE OF A WRIT OF MANDAMUS COMPELLING THE GOVERNOR TO CALL A SPECIAL SESSION OF THE LEGISLATURE

TO: The Parties of Record of the foregoing action, to-wit, Minnesota Attorney General Lori Swanson, 102 State Capitol, 75 Rev. Dr. Martin Luther King Jr. Blvd., St. Paul, MN 55155-1609 and Governor Mark Dayton, 100 State Capitol, 75 Rev. Martin Luther King, Jr. Blvd., St. Paul, MN 55155-1609.

YOU ARE HEREBY NOTIFIED, that, pursuant to Rule 24.03 of the Minnesota Rules of Civil Procedure; the above-captioned, duly-elected Minnesota State Senators, Warren Limmer, Scott Newman, Roger Chamberlain and Sean Nienow, desire and intend to intervene as a matter of right, as necessary parties or, in the alternative, as permissive parties, as authorized under Rules 24.01 and 24.02 of the Minnesota Rules of Civil Procedure, in the above-captioned matter.

The pleadings in this matter, to date, have failed utterly to include these Interveners, or any other duly elected legislators, as the necessary and essential parties they, in fact, are in any consideration of the underlying Petition in the matter in accordance with the Minnesota

KMA 1/20/11 2:38 pm

ATTACHMENT 1

Constitution. These Interveners have, each and all, voted for the necessary appropriations to fund Minnesota state government that were rejected and vetoed by the above-noticed Governor, Mark Dayton, who now purports to act on behalf of the citizens of the state by circumventing the Constitution of the State of Minnesota on matters of expenditure and appropriation.

More specifically, these Interveners herein state that these proceedings, to the extent they seek the expenditure of funds without appropriation of the legislature as required under the Minnesota Constitution are unconstitutional or, in the alternative, seek a plainly unconstitutional remedy.

An alternative and appropriate constitutional remedy exists in the calling, by the Governor, of a special session of the legislature for the purpose of appropriating the necessary funds and there has not been, nor could there be, any showing that such a remedy has been attempted, much less attempted and failed.

YOU ARE FURTHER NOTIFIED, that these interveners expressly object to designation of the currently designated presiding judge in this matter inasmuch as her previous participation in the earlier unallotment litigation, in addition to her participation in the Senate Recount in which her actions could have, and were, perceived by some citizens to have been partisan or, in some way biased, in her determinations. The critical nature of these proceedings requires the selection of a presiding judge whose partisan background or experience would place him or her above any such recrimination or reproach, whether or not justified in fact. This allegation is intended to serve as

Notice of Removal under Rule 63.03 of the Minnesota Rules of Civil Procedure at such time as these Interveners may be determined to have standing herein.

These same interveners also PETITION, herein, this Court for the Issuance of a Writ of Mandamus, pursuant to Minnesota Statute §586.03, requiring Governor Mark Dayton to call a special session of the Minnesota legislature for the purpose of funding the ongoing functions of State Government.

As PETITIONERS, these same State Senators, Warren Limmer, Scott Newman, Roger Chamberlain and Sean Nienow, state and allege as follows:

1. That they are duly elected Minnesota State Senators and, in that capacity, share the exclusive authority vested in the legislature under the Minnesota Constitution to consider and pass appropriations, and have, therefore, standing to bring this action.
2. That Article XI, Section 1 of the Minnesota Constitution expressly states that ***"No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law."***
3. That these Petitioners, in fact, complied with their duties and voted for an appropriation law to fund the function of the State government.
4. That Governor Mark Dayton vetoed the legislation and has created, as a result, a circumstance in which no funding will exist for the continuance of the functions of State government after June 30, 2011.

5. That the lack of funding that will result from Governor Mark Dayton's veto of appropriation legislation will effectively shut down State Government.

6. That no authority exists in the Minnesota Constitution for the expenditure of funds without the direct authority and participation of the legislature and, in particular, without the passage by the legislature of a law appropriating funds for that purpose.

7. That the legislature cannot, on its own initiative, go into a legislative session for the purpose of authorizing the expenditures necessary to keep the government functions funded.

8. That Article IV, Section 12, of the Minnesota Constitution gives to the Governor, as one of his powers and duties, the duty to call a special session of the Minnesota legislature "on extraordinary occasions".

9. That the prospective shutdown of State government for want of appropriations by law is manifestly an "extraordinary occasion" remediable only by action of the Governor to call the legislature into session to pass the necessary appropriation bill.

10. That Minnesota Statute §586 creates a remedy, the Writ of Mandamus, to require a public official to do a duty he or she is required to do but is, for whatever reason, unwilling to do.

11. That the only way in which the State of Minnesota can legally continue to spend money in order to fund its ongoing operations is by "appropriation by law" which requires the legislature to enact a bill appropriating funds for that purpose.

12. That the only way the legislature can accomplish its constitutional obligation is for the Governor to perform his constitutional duty to call a special session of the legislature.

13. That these allegations and assertions, in addition to those submitted to the Court by Governor and Attorney General of the State of Minnesota, constitute a sufficient factual basis by which the Court can properly issue a Writ compelling the Governor to call a special session of the legislature for the purpose of effecting the ongoing funding of Minnesota State legislative functions.

14. That the Court must necessarily deny the Petition of the Attorney General and the supportive position take by the Governor with respect to the Attorney General's opinion in this matter as, at the very least, premature, and, more accurately, as unconstitutional.

WHEREFORE, in addition to those matters otherwise noticed above, THESE PETITIONERS Pray this Court for the following relief:

1. Issuance of Writ of Mandamus compelling Minnesota Governor Mark Dayton to call, in accordance with his duties under the Minnesota Constitution, a Special Session of the Minnesota legislature for the purpose of permitting the legislature to enact appropriation legislation to fund the ongoing operation of Minnesota Government.
2. An Order Denying the relief sought by the Attorney General and Governor herein.
3. Such further relief as the Court may deem appropriate and just under the circumstance, including the inclusion of Senators Scott Newman, Roger Chamberlain and Sean Nienow as necessary parties to the above-captioned action.

Dated: June 20, 2011

Signed:

Frederic W. Knaak (Mn. Lic. 0056777)
Attorney for Intervener/Petitioners Limmer, Newman, Chamberlain and Nienow
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Acknowledgement: Frederic W. Knaak, as attorney for the aforesaid individuals, Senators Warren Limmer, Scott Newman, Roger Chamberlain and Sean Nienow, states that they acknowledge and are aware that the inappropriate use of legal proceedings, including in this case if so found, could result in sanctions, including attorneys fees, being awarded to an aggrieved party.

Frederic W. Knaak (Mn. Lic. 0056777)

STATE OF MINNESOTA

IN SUPREME COURT

A05-1742

State of Minnesota ex rel. Speaker of the House of Representatives Hon. Steve Sviggum, et al.,

Petitioners,

vs.

Peggy Ingison, in her official capacity as Commissioner of Finance or her successor,

Respondent.

ORDER

On August 31, 2005, 13 state legislators, including the Speaker of the House and the Majority Leader,[1] filed a petition for a writ of quo warranto in this court against respondent Peggy Ingison, in her official capacity as Commissioner of Finance. Petitioners challenge the constitutionality of expenditures from the state treasury made by respondent at the beginning of this fiscal biennium pursuant to court orders issued in *In Re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota*, No. C0-05-5928 (Ramsey County District Court), in the absence of a legislative appropriation. They seek an order requiring respondent and her successors to cease and desist from any further disbursements of state funds at the end of the fiscal biennium without an appropriation by law.

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[1] In addition to Speaker Steve Sviggum and Majority Leader Erik Paulsen, petitioners are State Representatives Paul Kohls, Scott Newman, Mark Buesgens, Tim Wilkin, Chris DeLaForest, Duke Powell, Kurt Zellers, Matt Dean, Jim Knoblach, Jeff Johnson, and Philip Krinkie.

"An action in the nature of *quo warranto* is 'a common law writ designed to test whether a person exercising power is legally entitled to do so. * * * It is intended to prevent exercises of power that are not conferred by law * * *.'" *State ex rel. Graham v. Klumpp*, 536 N.W.2d 613, 614 n.1 (Minn. 1995) (quoting *Black's Law Dictionary* 1256 (6th ed. 1990)). Under Minn. Const. art. VI, § 2 and Minn. Stat. § 480.04 (2004), this court has original jurisdiction to issue any writs and processes, including quo warranto, as "necessary to the execution of the laws and the furtherance of justice" * * *. *Rice v. Connolly*, 488 N.W.2d 241, 244 (Minn. 1992).[2]

In *Rice v. Connolly*, we reinstated quo warranto jurisdiction in the district court that the Rules of Civil Procedure had abolished in 1959. 488 N.W.2d at 245. We explained that in the future:

> petitions for the writ of quo warranto and information in the nature of quo warranto *shall be filed in the first instance in the district court.* While this court retains its original jurisdiction pursuant to Minn. Stat. § 480.04 (1990), we today signal our future intention to exercise that discretion *in only the most exigent of circumstances.*

Rice, 488 N.W.2d at 244 (emphasis added).

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[2] Article VI, section 2 provides that the court "shall have original jurisdiction in such remedial cases as are prescribed by law * * *." The court has construed the word "remedial" to include cases where common law remedies would be summarily afforded through the use of certain extraordinary writs, including quo warranto. *Page v. Carlson*, 488 N.W.2d 274, 277-78 (Minn. 1992) (citing *Lauritsen v. Seward*, 99 Minn. 313, 322, 109 N.W. 404, 408 (1906)). Section 480.04 states that this court "shall have power to issue * * * writs of * * * quo warranto and all other writs and processes, whether especially provided for by statute or not, that are necessary to the execution of the laws and the furtherance of justice."

Although the constitution and statutes make reference to writs of quo warranto, this court has explained several times that the common law writ of quo warranto was long ago replaced by the "information in the nature of quo warranto." *E.g.*, *State ex rel. Danielson v. Village of Mound*, 234 Minn. 531, 537, 48 N.W.2d 855, 860 (1951); *see also Rice*, 488 N.W.2d at 242 n.1 (Minn. 1992).

Petitioners implicitly address the court's directive in *Rice* that future quo warranto actions are to be filed in district court by proffering two reasons why the issues in this case are suitable for determination by this court. First, petitioners argue that the case presents purely legal, constitutional questions, with no known disputed issues of material fact. Second, they contend that time is of the essence because the case must be resolved prior to the end of the next biennium on June 30, 2007, and litigation in the district court followed by the normal appellate process will take too long. For the reasons that follow, we conclude that these reasons are not sufficient to overcome the requirement that quo warranto proceedings be initiated in district court.

In *Rice*, we did not condition our directive that quo warranto proceedings "shall be filed in the first instance in the district court" on the existence of disputed facts. *Rice*, 488 N.W.2d at 244. Rather, we established that filing in the district court would be the norm, with this court exercising original jurisdiction "in only the most exigent of circumstances." *Id.* Accordingly, the absence of disputed facts does exempt this action from the *Rice* directive to proceed in district court first.

Additionally, petitioners' desire for a final decision by June 30, 2007, almost two years from now, does not present "the most exigent of circumstances." Resolution of purely legal issues in the district court should not be a particularly time-consuming process. To the extent that the passage of time becomes a problem either in district court or in the event of an appeal, procedural mechanisms are available to address that issue, such as a motion to expedite proceedings or a petition for accelerated review under Minn. R. Civ. App. P. 118.

Because we conclude that petitioners have not demonstrated that "the most exigent of circumstances" exist to justify exercise of our original jurisdiction, the petition will be dismissed, without prejudice, so that petitioners can proceed in district court. We note that quo warranto is not an exclusive remedy, but "is intended to exist side by side with the appropriate alternative forms of remedy." *Rice*, 488 N.W.2d at 244. Therefore, petitioners have several procedural alternatives to effectively raise their claims in district court. In accordance with *Rice*, they can file an information in the nature of quo warranto raising the issues they raised here. They can file a declaratory judgment action under Minn. Stat. ch. 555 (2004), as the court directed in *Seventy-Seventh Minnesota State Senate v. Carlson*, 472 N.W.2d 99 (Minn. 1991). Finally, petitioners can file a motion to intervene in the pending Ramsey County action, where another litigant apparently has moved to intervene in order to raise similar challenges to the expenditures challenged here.

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition for writ of quo warranto be, and the same is, dismissed without prejudice.

Dated: September 9, 2005

BY THE COURT:

Kathleen A. Blatz
Chief Justice