

OFFICE OF
APPELLATE COURTS

Case No. A11-1222

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**STATE OF MINNESOTA
IN SUPREME COURT****FILED**

State Senator Warren Limmer, State Senator Scott J. Newman, State Senator Sean R. Nienow, State Senator Roger C. Chamberlain, State Representative Glenn H. Gruenhagen, and State Representative Ernest G. Leidiger,

Petitioners,

v.

Lori Swanson in her official capacity as Attorney General, Mark Dayton in his official capacity as Governor, Jim Schowalter in his official capacity as Commissioner of Department of Management and Budget, and Kathleen R. Gearin in her official capacity as Chief Judge of the Ramsey County District Court,

Respondents.

**MOTION TO INTERVENE AND RESPONSE OF PUTATIVE INTERVENORS
LEAGUE OF MINNESOTA CITIES, COALITION OF GREATER MINNESOTA
CITIES, AND ASSOCIATION OF MINNESOTA COUNTIES**

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE ISSUES	1
STATEMENT OF FACTS	2
A. The Putative Intervenors.....	2
B. Standing Appropriations to Minnesota’s Cities and Counties.....	3
C. A “Justiciable Controversy” Regarding City and County Aid “Involving Definite and Concrete Assertions of Rights on Established Facts”	9
SUMMARY OF LEGAL ARGUMENT.....	12
LEGAL ARGUMENT.....	13
I. ASSOCIATIONS OF MINNESOTA’S CITIES AND COUNTIES ARE ENTITLED TO INTERVENE TO DEFEND THE RELIEF THAT A COURT HAS AWARDED IN THEIR MEMBERS’ FAVOR.....	13
II. NO WRIT OR CAUSE OF ACTION – ESPECIALLY QUO WARRANTO – IS AVAILABLE TO ALLOW PETITIONERS TO SUE A JUDGE FOR ISSUING AN ALLEGEDLY “ADVISORY” OPINION.....	15
A. Petitioners Lack Standing to Litigate Whether Chief Judge Gearin’s Orders were Advisory Opinions.	15
B. In the Alternative, the Petition Seeks Relief That Will Be Largely (if Not Entirely) Moot.....	17
C. In Any Event, the Issuance of an Advisory Opinion Does Not Make a Judge or her Decision a Proper Target of a Writ of Quo Warranto.	19
1. Quo warranto has a narrow focus that does not extend to nullifying advisory opinions.	19
2. Suing a judge in quo warranto because of a disagreement with the propriety of her ruling in a pending case is an abuse of the writ.	20

D. Permitting This Petition to Proceed Regarding the Alleged “Advisory Opinion” Would Turn Quo Warranto Into a Device for Impatient Litigants to Leapfrog All But the Highest Level of the Minnesota Judicial System.22

III. IN ANY EVENT, PETITIONERS’ CLAIM THAT JUDGE GEARIN’S ORDERS FOR PAYMENT OF LOCAL GOVERNMENT AID AND COUNTY PROGRAM AID ARE “ADVISORY OPINIONS” IS UNSUPPORTED BY EVIDENCE, AND FALSE.24

CONCLUSION.....25

CERTIFICATE OF COMPLIANCE.....28

TABLE OF AUTHORITIES

	Page(s)
STATE CASES	
<i>AFSCME Council 6 v. Sundquist</i> , 338 N.W.2d 560 (Minn.1983).....	18
<i>Brannan v. Smith</i> , 784 So. 2d 293 (Ala. 2000).....	21, 22
<i>Channel 10, Inc. v. Independent Sch. Dist. No. 709</i> , 298 Minn. 306, 215 N.W.2d 814 (1974).....	1, 17
<i>City of Missouri City v. State ex rel. City of Alvin</i> , 123 S.W.3d 606 (Tex. Ct. App. 2003).....	15
<i>Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.</i> , 603 N.W.2d 143 (Minn. Ct. App. 1999).....	1, 15, 16, 17
<i>Demarest v. Fire Dept. of City of Norwalk</i> , 76 Conn. App. 24, 817 A.2d 1285 (Conn. App. Ct. 2003).....	14
<i>Lee v. Delmont</i> , 228 Minn. 101, 36 N.W.2d 530 (1949).....	2, 24
<i>McKee v. Likins</i> , 261 N.W.2d 566 (Minn. 1977).....	1, 17
<i>People ex rel. Sandberg v. Grabs</i> , 373 Ill. 423, 26 N.E.2d 494 (1940).....	15
<i>Republican Party of Minnesota v. O'Connor</i> , 712 N.W.2d 175 (Minn. 2004).....	22, 23
<i>Rice v. Connolly</i> , 488 N.W.2d 241 (Minn. 1992).....	2, 22, 23
<i>Rukavina v. Pawlenty</i> , 684 N.W.2d 525 (Minn. Ct. App. 2004).....	16
<i>Seventy-Seventh Minn. State Senate v. Carlson</i> , 472 N.W.2d 99 (Minn. 1991).....	23, 24
<i>State ex rel. Christianson v. Johnson</i> , 201 Minn. 219, 275 N.W. 684 (1937).....	2, 21

<i>State ex rel. Danielson v. Village of Mound</i> , 234 Minn. 531, 48 N.W.2d 855 (1951).....	21
<i>State ex rel. Graham v. Klumpp</i> , 536 N.W.2d 613 (Minn. 1995).....	18
<i>State ex rel. Lommen v. Gravlin</i> , 209 Minn. 136, 295 N.W. 654 (1941).....	2, 20
<i>State ex rel. Olsen v. Bd. of Control</i> , 85 Minn. 165, 88 N.W. 533 (1902).....	18
<i>State ex rel. Sviggum v. Hanson</i> , 732 N.W.2d 312 (Minn. Ct. App. 2007)	passim
<i>State ex rel. Town of Stuntz v. City of Chisholm</i> , 196 Minn. 285, 266 N.W. 689 (1936).....	1, 13, 14

FEDERAL CASES

<i>Raines v. Byrd</i> , 521 U.S. 811 (1997).....	16
---	----

STATE STATUTES AND LAWS

2010 Minn. Laws ch. 215, art. 13, § 5	6
2010 Minn. Laws ch. 215, art. 13, § 7	3, 4, 5, 6
2010 Minn. Laws. ch. 389, art. 8, § 16	6
Minn. Stat. § 69.011.....	8
Minn. Stat. § 69.021.....	8
Minn. Stat. § 69.031.....	8
Minn. Stat. § 97A.061.....	8
Minn. Stat. § 204B.19.....	23
Minn. Stat. § 204B.44.....	23
Minn. Stat. § 273.1384.....	8, 9
Minn. Stat. § 273.1385.....	4, 7

Minn. Stat. § 275.065.....	4
Minn. Stat. § 275.07.....	4
Minn. Stat. § 477A.011.....	6
Minn. Stat. § 477A.013.....	5, 6, 8
Minn. Stat. § 477A.015.....	6, 19
Minn. Stat. § 477A.0124.....	5
Minn. Stat. § 423A.02.....	7
Minn. Stat. § 477A.03.....	3, 4, 5, 6
Minn. Stat. § 477A.13.....	8
Minn. Stat. § 477A.16.....	4, 7

CONSTITUTIONAL PROVISIONS

Article VI of the Minnesota Constitution	13
--	----

OTHER AUTHORITIES

Brief of Amicus Curiae Eighty-fourth Minnesota Senate in Support of Appellants, <i>State ex rel. Sviggum, et al. v. Ingison, et al.</i> , No. A06-840, 2006 WL 4589020 (Aug. 1, 2006).....	18, 23
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STATEMENT OF THE ISSUES

1. Where a duly-adopted statute requires an executive-branch department to pay cities and counties over \$300 million in local government aid by a specified date, a district court orders timely payment of those obligations, and six nonparties to that suit then file a "Petition for Quo Warranto" in the Minnesota Supreme Court seeking to nullify that order in its entirety, should associations of cities and counties be permitted to intervene to defend the portion of the challenged order granting relief to their members?

Apposite authority:

State ex rel. Town of Stuntz v. City of Chisholm, 196 Minn. 285, 266 N.W. 689 (1936)

2. Do the Petitioners lack standing to obtain the relief requested, where the alleged legal flaw in the order to pay cities and counties – that is an "advisory opinion" – has not injured any Petitioner in any capacity, and the Petition asks this Court to rule *after* the required date for payment?

Apposite authority:

Channel 10, Inc. v. Independent Sch. Dist. No. 709, 298 Minn. 306, 215 N.W.2d 814 (1974).

McKee v. Likins, 261 N.W.2d 566 (Minn. 1977)

Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P., 603 N.W.2d 143 (Minn. Ct. App. 1999)

State ex rel. Sviggum v. Hanson, 732 N.W.2d 312, 319 (Minn. Ct. App. 2007)

3. In the alternative, can quo warranto be used to sue a judge for issuing an allegedly advisory opinion?

Apposite authority:

State ex rel. Sviggum v. Hanson

State ex rel. Lommen v. Gravlin, 209 Minn. 136, 295 N.W. 654 (1941)

State ex rel. Christianson v. Johnson, 201 Minn. 219, 275 N.W. 684 (1937)

Rice v. Connolly, 488 N.W.2d 241 (Minn. 1992)

4. In the alternative, is Petitioners' characterization of the ruling as an advisory opinion unfounded, and false?

Apposite authority:

Lee v. Delmont, 228 Minn. 101, 36 N.W.2d 530 (1949)

STATEMENT OF FACTS

The League of Minnesota Cities, the Coalition of Greater Minnesota Cities, and the Association of Minnesota Counties seek to intervene in this quo warranto proceeding for the purpose of protecting the portion of Respondent The Honorable Kathleen Gearin's June 29, 2011 Order that required an executive-branch agency to timely "make payments such as LGA [Local Governmental Aid] payments that have already been lawfully appropriated." (Petitioner's App. ("PA") 18; *see also id.* at 14, 17.)

A. The Putative Intervenors

The League of Minnesota Cities ("League") has a voluntary membership of 830 out of 854 Minnesota cities. The League represents the common interests of Minnesota

cities before judicial courts and other governmental bodies. In seeking intervention in this matter, the League represents each of its member cities.

The Coalition of Greater Minnesota Cities (“Coalition”) is a nonprofit, nonpartisan advocacy organization that represents 75 cities outside of the seven-county metropolitan area. In seeking intervention in this matter, the Coalition represents each of its member cities.

The Association of Minnesota Counties (“AMC”) is a voluntary statewide organization that assists the state’s 87 counties in providing effective county governance to the people of Minnesota by working closely with the legislative and administrative branches of government and by providing educational programs, training, research, and communications for county officials and staff.

B. Standing Appropriations to Minnesota’s Cities and Counties

As Chief Judge Gearin correctly recognized, what sets apart the 2011 payments to cities and counties from most of the financial assistance described in the Petition is that the payments to cities and counties were already statutorily appropriated. (PA 14, 17-18.) For example, in 2010, the previous Minnesota Legislature, and the previous Governor of Minnesota, duly amended a statute to spell out how much aid the Department of Revenue must pay cities and counties in 2011 (and when installments of those amounts are due), and also provided money to cover the Department’s cost of complying with those duties. *See* Minn. Stat. §§ 477A.03, subs. 2a (Local Government Aid), 2b (County Program Aid); 477A.2010; Minn. Laws ch. 215, art. 13, § 7 (same). Thus, what Petitioners label as “the fatal flaw in the 2011 Ramsey County District Court proceeding” regarding

payments never appropriated (Pet. 49) has nothing to do with that court's order to "make payments such as LGA that have already been lawfully appropriated." (PA 18.)

1. Local Government Aid and County Program Aid

Well before June 2011, the Minnesota Legislature approved bills, signed into law by the Governor, which authorized the spending of certain money via standing or open appropriations. *See, e.g.*, Minn. Stat. § 477A.03, subd. 2a and 2b; 2010 Minn. Laws ch. 215, art. 13, § 7; Minn. Stat. § 477A.16, subd. 3 (Utility Value Transition Aid); Minn. Stat. § 273.1385 (Public Employees Retirement Association Aid). Those open and standing appropriations are existing law, do not require any additional legislative action, and, thus, were not affected by the 2011 budget impasse.

Local Government Aid ("LGA") and County Program Aid ("CPA") are examples of such appropriations. The legislature determines by statute the amount of LGA and CPA payments over a year before the LGA payments must be made. It does so because of the statutory schedule for determining property tax levies. Minnesota Statutes Section 275.065, subdivision 1, requires that, by September 15, each city and county must establish a proposed budget and set a proposed property tax levy for the following year. This proposed property tax levy is determined in conjunction with the amount of LGA or CPA certified by the state in July, along with other expected revenues, in order to produce sufficient revenues to cover proposed, budgeted expenditures. Under Minnesota Statutes Section 275.065, subdivision 6, the proposed property tax levy, with few defined exceptions, becomes the maximum a city or county can certify when, in late December, it must finalize its property tax levy for the following year as required by Minnesota

Statutes Section 275.07, subdivision 1. This statutory process can only function properly if cities and counties know in advance of the September proposed levy deadline and the December levy certification deadline how much LGA and CPA they will receive in the following year, so that they may set their property tax levy to produce a budget that balances expenditures with sufficient revenues. Accordingly, the Legislature set the 2011 LGA and CPA amounts through statutory amendments that were approved in the 2010 session, and signed into law by then-Governor Pawlenty.

The State's current LGA and CPA obligations are provided under Minnesota Statutes Section 477A.03, which is entitled "APPROPRIATION," and each is known as a "standing appropriation." The law spells out the total amount "for aids payable in 2011 and thereafter," that is to be "paid" to cities and counties. In its current form, Section 477A.03, subdivision 2a, states "**Cities:** For aids *payable in 2011 and thereafter*, the total amount paid under section 477A.013, subdivision 9, is \$527,100,646." Similarly, subdivision 2a, states in relevant part:

Counties: (a) "For aids *payable in 2011 and thereafter*, the total aid payable under section 477A.0124, subdivision 3, is \$96,395,000. . . . (b) For aids *payable in 2011 and thereafter*, the total aid under section 477A.0124, subdivision 4, is \$101,309,575.

Minn. Stat. § 477A.03, subd. 2b (emphasis added). Those provisions were affirmed by the 2010 Minnesota Legislature (with the approval by then-Governor Pawlenty) with the enactment of 2010 Minnesota Laws Chapter 215, article 13, section 7, which amended subdivision 2a and 2b to specifically refer to 2011 and to set forth the specific dollar amounts currently in the statute. That Session law specifically provided that "[t]his

Section is effective for aids payable in 2011 and thereafter.” 2010 Minn. Laws ch. 215, art. 13, § 7.

In addition to the appropriations for LGA and CPA, Section 477A.03 also provides an appropriation of the funding needed to administer the staffing necessary to distribute LGA and CPA. Specifically, Minnesota Statutes Section 477A.03, subdivision 2, specifies that “a sum sufficient to discharge the duties imposed by Minn. Stat. § 477A.011 to 477A.014 is annually appropriated from the general fund to the commissioner of revenue.” Among the “duties imposed by Minn. Stat. § 477A.011 to 477A.014” are the requirements for dividing up the LGA pursuant to formulas set forth in Section 477A.013, as amended most recently in 2010. *See* 2010 Minn. Laws ch. 215, art. 13, § 5; 2010 Minn. Laws. ch. 389, art. 8, § 16.

Finally, Section 477A.015 defines *when* the LGA payments must be made. Specifically, Section 477A.015 states: “The commissioner of revenue shall make the payments of local government aid to affected taxing authorities in two installments on July 20 and December 26 annually.” The amounts scheduled to be paid for LGA on July 20, 2011, and December 26, 2011, were certified to each city in July 2010. In a memorandum to Minnesota cities that accompanied the certification, the Department of Revenue stated, “Your city’s 2011 local government aid will be paid in two equal installments. The first half installment will be paid on or before July 20, 2011, and the second half installment will be paid on or before December 26, 2011.” (See Exhibit A hereto.)

2. Utility Value Transition Aid

In addition to the LGA and CPA, state funding for various other local government programs has been appropriated with similar due dates. For example, Minnesota Statutes Section 477A.16 establishes an open and standing appropriation for Utility Value Transition Aid, stating specifically in subdivision 3: "An amount sufficient to pay transition aid under this section is annually appropriated to the commissioner of revenue from the general fund." The estimated amount of this aid is \$1.51 million and is to be apportioned to qualifying government entities. The first half payment is due on July 20, 2011, and the second half payment is due on December 26, 2011.

3. Public Employee Retirement Association Aid Payments

Minnesota Statutes Section 273.1385 establishes an open and standing appropriation for the Public Employees Retirement Association, stating specifically in subdivision 1: "The amount necessary to make these aid payments is appropriated annually from the general fund to the commissioner of revenue." The estimated amount of this aid is \$14.4 million and is to be allocated to cities, counties, and school districts. The first half payment is due on July 20, 2011 and the second half payment is due on December 26, 2011.

4. Police and Firefighter Relief Association Amortization Aid

Minnesota Statutes Section 423A.02 establishes state aid, and supplementary aid, for local police and firefighters relief association amortization, stating specifically in subdivision 1(f): "The amount required under this section . . . is appropriated annually from the general fund to the commissioner of revenue." The aggregate amount of these

aids payable to cities is approximately \$1.255 million. The first one-third payment is due on July 15, 2011, the second on September 15, 2011, and the final one-third payment on November 15, 2011.

5. Payments in Lieu of Taxes

Minnesota law also provides standing appropriations for the Payment in Lieu of Taxes (or "PILT") to counties. *See* Minn. Stat. §§ 97A.061, 477A.13. Payments for PILT are also due on July 20, 2011, pursuant to Section 477A.13.

6. Other Relevant Aids and Credits

In addition to the various types of aid described above, similar state funding for various other programs has been appropriated, with later due dates for payment. For example, Minnesota Statutes Sections 69.011 to 69.051 addresses police and fire pension aid and provides an appropriation, stating specifically, in Section 69.031, subdivision 3: "There is hereby appropriated annually from the state general fund to the commissioner of revenue an amount sufficient to make the police and fire state aid payments specified in this section and section 69.021." The amount of this aid is estimated to be \$85.1 million to be paid on October 1, 2011, from the State General Fund, representing dedicated proceeds of equivalent to two percent of the insurance premium tax.

Minnesota Statutes Section 273.1384, establishes and open and standing amount to be paid for the Market Value Homestead Credit (described in subdivision 1), stating specifically, in subdivision 5: "An amount sufficient to make the payments required by this section to taxing jurisdictions other than school districts is annually appropriated from the general fund to the commissioner of revenue." Minn. Stat. § 273.1384, subd. 5.

The amount of this aid is estimated to be \$199.1 million, and is to be apportioned to cities, counties, and townships. One-half of the payment is due on October 31, 2011, and the second half is due on December 26, 2011.

Minnesota Statutes Section 273.1384 establishes an open and standing amount to be paid for the Agricultural Market Value Homestead Credit (described in subdivision 2), stating specifically, in subdivision 5: “An amount sufficient to make the payments required by this section to taxing jurisdictions other than school districts is annually appropriated from the general fund to the commissioner of revenue.” Minn. Stat. § 273.1384, subd. 5. The amount of this aid is estimated to be \$18 million, and is to be apportioned to cities, counties, and townships. One-half of the payment is due on October 1, 2011, and the second half is due on December 26, 2011.

C. A “Justiciable Controversy” Regarding City and County Aid “Involving Definite and Concrete Assertions of Rights on Established Facts”

Petitioners concede that “Minnesota statutes can be a basis for continued state funding absent an annual legislative appropriation.” (Pet. 42.) Indeed, without specifically mentioning aid to cities or counties, the examples Petitioners give of such statutory appropriations are indistinguishable from statutory appropriations of aid to cities and counties. (Pet. 42-43.) Despite this concession, Petitioners argue a different reason for asking this Court to nullify the city and county aid portions of Chief Judge Gearin’s ruling: They claim that such an order is an “improper advisory opinion.” (Pet. 44, 48.) However, Petitioners fail to provide any factual basis for that statement – such as evidence establishing that the prospect of nonpayment was purely hypothetical. The

Petition does nothing more than state that “[c]ourts only have jurisdiction over justiciable controversies involving definite and concrete assertions of rights on established facts” (Pet. 44, 48), without citing a single fact suggesting that such a controversy was not present when Chief Judge Gearin ruled.

Because it was Petitioners who commenced this extraordinary proceeding, and who selected as one of its targets Chief Judge Gearin’s allegedly “advisory opinion,” their failure to include a factual basis for that allegation in the Petition (or in the accompanying 637-page Appendix) leaves this Court no choice but to conclude that the accusation is unfounded. But, in any event, there is an ample factual basis to draw the opposite conclusion – that there was a ripe, justiciable controversy regarding payment of statutory appropriations to cities and counties when Chief Judge Gearin issued her July 29, 2011 Order.

For example, notwithstanding the foregoing appropriations mandated by existing law, in June 2011, the Department of Revenue twice expressed a contrary plan in case of a shutdown. First, on June 15, 2011, in response to a question from a representative of the League about LGA, Assistant Commissioner of Revenue Matt Massman advised the League’s Director of Intergovernmental Relations “that the [LGA] payments would not be paid.” A true and correct copy of this email exchange is attached hereto as Exhibit B.

On June 22, 2011, in the proceeding that Petitioner’s attack, the League, the Coalition, and other public entities submitted a “Response of League of Minnesota Cities, Coalition of Greater Minnesota Cities, and the City of St. Paul to, and Comments on, Petition and Governor’s Response.” (PA 416-424.) That document foreshadowed that

“[s]hould the aid go unpaid when scheduled or should responsible officials announce any refusal to make the payments when due, then the League would take such steps as may be necessary to enforce applicable law, including a declaratory judgment action, mandamus, or other suitable procedures.” (PA 421-22.)

The Minnesota Department of Revenue’s last word on this subject before Chief Judge Gearin’s June 29, 2011 order was in a memorandum dated and released on June 24, 2011. That memorandum indicated that “in general” local government aid would not be paid during a shutdown, absent a court order. Specifically, the Department of Revenue’s memorandum stated, in pertinent part:

As you may know, the Minnesota State Legislature adjourned May 23, 2011 without having reached a negotiated, enacted budget for the biennium beginning July 1, 2011. In the absence of an enacted budget, current budget authority for Department of Revenue operations expires June 30, 2011 and all operations of the department, other than those determined by the courts to be critical functions, will cease.

* * *

Aid Payments

In general, local government aid payments will not be made during the time of a state government shutdown unless directed to do so by the courts. The department will notify you of any change in the status of aid payments like County Program Aid and Local Government Aid.

(Emphasis added.) A true and correct copy of this Memorandum is attached hereto as Exhibit C. That was the Department of Revenue’s latest statement on the subject at the time that Chief Judge Gearin issued her June 29, 2011 order.

SUMMARY OF LEGAL ARGUMENT

Petitioners have commenced this original proceeding in Minnesota's highest court, attempting to collaterally attack all aspects of an order issued by the Chief Judge Gearin. They bring this "Petition for Writ of Quo Warranto," in which their principal theme is the protection of the roles of the legislature and governor in the appropriations process. The Petition is so broad, however, that it includes an unwarranted and improper attack on the aspect of Chief Judge Gearin's order directing that responsible administrative officials should pay admittedly lawful standing appropriations to Minnesota's cities and counties. Petitioners' misguided attempt to leave no part of Chief Judge Gearin's order intact has led them to disregard well-established decisions limiting the role of courts in general, and the role of this Court in particular in quo warranto proceedings.

The Petition, if granted, would nullify that portion of Chief Judge Gearin's order in favor of Minnesota's cities and counties, yet Petitioners omitted all such public bodies from the suit. Under these circumstances, associations that represent those public bodies are entitled to intervene in this proceeding to protect rights recognized under those orders.

For numerous reasons, this Court cannot entertain Petitioners' effort to invalidate Chief Judge Gearin's order to pay standing appropriations to Intervenors' members. First, Petitioners lack standing to pursue their attack on the alleged "advisory opinion," because their Petition alleges no special injury that they have suffered or are about to suffer because of the order's supposed advisory nature. Second, Petitioners' challenge will be largely (if not entirely) moot by the time that this Court has its first chance to rule on it.

Finally, even if standing and a justiciable dispute were present, the writ of quo warranto is plainly not available to sue judges who issue advisory opinions. A writ of quo warranto is not available to challenge the *manner* of exercising powers or to test the legality of official actions. Even if Chief Judge Gearin had issued an advisory opinion regarding a duty to pay standing appropriations, she did not thereby usurp franchises or liberties of Petitioners or any other person or official. If this Court allows the extraordinary remedy of a quo warranto proceeding in Minnesota's highest court to become available to sue judges personally for issuing opinions that someone believes to be merely advisory, that avenue will soon become the tool of choice, in a way that will turn upside down the hierarchy of the judiciary set forth in Article VI of the Minnesota Constitution.¹

LEGAL ARGUMENT

I. ASSOCIATIONS OF MINNESOTA'S CITIES AND COUNTIES ARE ENTITLED TO INTERVENE TO DEFEND THE RELIEF THAT A COURT HAS AWARDED IN THEIR MEMBERS' FAVOR.

This Court's ruling in *State ex rel. Town of Stuntz v. City of Chisholm*, 196 Minn. 285, 294, 266 N.W. 689, 689 (1936), resolves any doubt that parties with special rights that may be affected by the outcome of a quo warranto proceeding may intervene in it.

¹ This response narrowly focuses on the defects in Petitioners' use of quo warranto to attack Chief Judge Gearin's order regarding standing appropriations. It assumes that Attorney General Swanson will continue to effectively defend the legality of her petition and the resulting special master process, and that Governor Dayton will continue to effectively defend that Chief Judge Gearin's standard for "core functions," thus making it unnecessary for these Intervenors to do so. Local governance, like so much else in modern Minnesota, requires a certain level of state governance. If the legislative and executive branches once again fail to provide it, the judiciary must have the power to provide a temporary solution to the resulting emergencies.

That case involved the most common use of quo warranto in Minnesota – to challenge an annexation. The town of Stuntz used quo warranto “to test the propriety of including within the boundaries of the respondent city of Chisholm certain portions of territory formerly contained within the limits of” Chisholm, which had just been created through the incorporation of areas previously contained within the boundaries of the town of Balkan. *Id.* Several taxpayers and residents of Balkan and property owners sought to intervene in that proceeding. *Id.* at 295, 266 N.W. at 689-90. For reasons that apply with equal force here, this Court easily allowed the intervention:

It appears that these petitioners may have ‘special rights’ that will be affected by the final determination of the case. We are of opinion that no harm can result by permitting them to intervene, and their petitions to so do are granted.

Id. (emphasis added).

Here, the Associations represent members that have a statutory entitlement to receive defined appropriations on specified dates. The orders challenged in this suit require the state to perform that obligation by timely paying cities and counties. To speak with some understatement, cities and counties have special rights under both the appropriations and the challenged order. Petitioners’ request that this Court nullify that order, if granted, would impair those rights. *See Demarest v. Fire Dept. of City of Norwalk*, 76 Conn. App. 24, 30, 817 A.2d 1285, 1289-90 (Conn. App. Ct. 2003) (“We cannot escape the conclusion that the trial of the action without first requiring joinder of the firefighters resulted in a final disposition that necessarily was inconsistent with equity and good conscience. . . . There simply cannot be any decree or final decision in a quo

warranto action in the absence of the parties whose ouster is sought.); *People ex rel. Sandberg v. Grabs*, 373 Ill. 423, 429, 26 N.E.2d 494, 498 (1940) (holding, in a quo warranto proceeding, that “[t]he court did not abuse its discretion in permitting appellees to intervene so that a complete determination of the issues could be had.”). No party to this proceeding already represents the interests of Minnesota’s cities and counties, as reflected in the fact that no Respondent in this action had specifically requested Chief Judge Gearin to enforce these standing appropriations. (PA 34-44, 122-56.)

Finally, no harm can result by permitting the Associations to intervene; indeed, the exclusion of the Associations from this suit would by contrast create great harm. *See City of Missouri City v. State ex rel. City of Alvin*, 123 S.W.3d 606, 617 (Tex. Ct. App. 2003) (“Because Alvin’s issues were identical to those in the quo warranto action, the intervention did not complicate the case by an excessive multiplication of issues.”). Thus, the Court should permit the Associations to intervene.

II. NO WRIT OR CAUSE OF ACTION – ESPECIALLY QUO WARRANTO – IS AVAILABLE TO ALLOW PETITIONERS TO SUE A JUDGE FOR ISSUING AN ALLEGEDLY “ADVISORY” OPINION.

A. Petitioners Lack Standing to Litigate Whether Chief Judge Gearin’s Orders were Advisory Opinions.

Petitioners concede that they “must show that their claimed injury is ‘personal, particularized, concrete, and otherwise judicially cognizable.’” (Pet. 23 (quoting *Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143, 150 (Minn. Ct. App. 1999))). The only thing that sets Petitioners aside from any other sextet of Minnesota citizens is that each of them has been elected to the Minnesota Legislature. Whatever difference

that may make when attacking a supposed judicial interference in the legislative appropriation process,² it can make no difference when attacking an alleged advisory opinion by a court to an executive-branch agency, requiring it to pay undisputedly lawful appropriations.

In a long section devoted to “standing,” the Petition completely fails to identify how, if at all, any of the Petitioners have suffered an injury, or may suffer an injury, because Chief Judge Gearin allegedly issued an advisory opinion that an executive agency must honor certain statutory appropriations. (See Pet. 23-28.) The Petition claims that legislative standing is derived from “vote nullification” and judicial usurpation of “the exclusive legislative constitutional authority to appropriate state funds.” (Pet. 23, 25-26.) Yet if the statutory appropriations are paid because a judge has so directed the executive branch (instead of at the executive branch’s own initiative), Petitioners are no worse off, whether as legislators, taxpayers or citizens. As Petitioners appear to acknowledge, that part of the order is based on a lawful and binding statutory appropriation (passed by the Legislature and signed by a governor). An order that an executive-branch agency timely pay a standing appropriation cannot conceivably injure

² Intervenors do not concede that Petitioners’ status as legislators give them standing to bring any part of this suit. As the Minnesota Court of Appeals ruled in *Rukavina v. Pawlenty*, 684 N.W.2d 525, 532 (Minn. Ct. App. 2004), when denying standing to two DFL legislators, the injury to legislators must be personal rather than institutional. “[V]ote nullification [as a basis or legislator standing] has been construed to stand ‘at most, for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect) on the ground that their votes have been completely nullified.’” *Id.* (quoting *Conant* 603 N.W.2d at 150 (citing *Raines v. Byrd*, 521 U.S. 811, 823 (1997))).

Petitioners as legislators. To the contrary, for legislators such as Petitioner Limmer, who was a member of the 2010 Legislature when the statutory appropriations for LGA and CPA were signed into law, an order that requires the executive branch to comply with that statute gives effect to the legislative process in which he participated and cannot reasonably be construed as injuring legislative participants. Petitioners do not dispute that the statutory appropriations are lawful, Petitioners lack *taxpayer* standing to bring this challenge, under the very decision that the Petition cites. (Pet. 26-27 (citing *McKee v. Likins*, 261 N.W.2d 566, 571 (Minn. 1977))).

Put another way, Petitioners' "advisory opinion" complaint is a generalized grievance. Absent explicit statutory authority (of the kind not found here), standing must be based on an injury that is distinct from the public's injury. *Channel 10, Inc. v. Independent Sch. Dist. No. 709*, 298 Minn. 306, 312, 215 N.W.2d 814, 820 (1974). That injury must be one that is "special or peculiar and different from damage or injury sustained by the general public." *Id.*; see also *Conant*, 603 N.W.2d at 150. Petitioners' characterization of Chief Judge Gearin's standing appropriations order as an advisory opinion does not affect these Petitioners in any way that is different from the general public. As a result, they have no better right to ask this Court to weigh in on that dispute than would any other person, which means that they have no right at all.

B. In the Alternative, the Petition Seeks Relief That Will Be Largely (if Not Entirely) Moot.

In several respects, this Petition seeks to relitigate battles lost by Petitioners Limmer, Nienow, and their counsel in *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312,

319 (Minn. Ct. App. 2007).³ In that case, the Minnesota Court of Appeals held that, “[b]ecause it is well-established that the quo warranto remedy may be applied only to an ongoing exercise of power, we conclude that **quo warranto cannot be used to challenge the constitutionality of completed disbursements of public funds.**” *Id.* at 320 (emphasis added). In so ruling, the court of appeals did not make new law; instead, it followed this Court’s rulings in *State ex rel. Graham v. Klumpp*, 536 N.W.2d 613, 614 n.1 (Minn. 1995) (involving a challenge to a governor’s request that the attorney general prosecute certain individuals and seeking dismissal of indictments obtained by attorney general); *State ex rel. Olsen v. Bd. of Control*, 85 Minn. 165, 166, 88 N.W. 533, 533-34 (1902) (involving proceedings against the board of control to test the constitutionality of statutory transfer of school management to newly created board of control); and *AFSCME Council 6 v. Sundquist*, 338 N.W.2d 560, 564 (Minn.1983) (stating that a quo warranto petition seeking to prevent enforcement of legislation increasing government employees’ existing contribution to pension funds did not “fit[] within the nature of quo warranto”). *Sviggim*, 732 N.W.2d at 319-20.

The Petition does not ask this Court to hear or decide Petitioners’ challenge until a date *after* a completed disbursement of LGA and CPA is expected to occur. Petitioners sought a July 29 hearing date, and asked the Court to defer any ruling in their favor for seven additional days. (Pet. 56.) However, by statute, many of the appropriations

³ Senators Limmer and Nienow were among fifteen senator-plaintiffs in the *Sviggum* suit, according to the amicus brief filed on behalf of the Minnesota Senate in that matter. See “Brief of Amicus Curiae Eighty-fourth Minnesota Senate in Support of Appellants” in *Sviggum, et al. v. Ingison, et al.*, No. A06-840, 2006 WL 4589020, *1 n.1 (Aug. 1, 2006).

discussed above and that were the subject of the challenged order, including LGA, must be paid before then – by July 20, 2011. *See, e.g.*, Minn. Stat. § 477A.015. This means that Chief Judge Gearin’s order requires the State to make its first installment of those aids no later than that date. Presumably, the “completed disbursement of public funds” identified in *Sviggum* will occur on July 20 – several days before the July 27 hearing set by the Court on the Petition.

Certainly there are future deadlines for payment of future installments of these kinds of statutory appropriations. However, just as the petitioners in *Sviggum* could not litigate the legitimacy of such orders based on the prospect that they would reoccur, 732 N.W.2d at 323, the prospect that a future order might be issued does not entitle these plaintiffs to pretend that the activity they challenge is on-going. Indeed – to use the *Sviggum* court’s phrase – to do so would be to render an “advisory opinion.” *Id.*

In this respect, Petitioner’s challenge to Chief Judge Gearin’s order regarding “payments such as LGA payments” is on a collision course with itself. Crusading against what Petitioners mischaracterize as an advisory opinion by Chief Judge Gearin, they come to this Court seeking what the court of appeals in *Sviggum* correctly characterized as an advisory opinion.

C. In Any Event, the Issuance of an Advisory Opinion Does Not Make a Judge or her Decision a Proper Target of a Writ of Quo Warranto.

1. Quo warranto has a narrow focus that does not extend to nullifying advisory opinions.

Relying once again upon rulings by this Court, the court of appeals held in *Sviggum* that “Quo warranto is not ordinarily available, on the other hand, to challenge

the manner of exercising powers conferred by law or the validity of conduct that would result in liability but would not be grounds for forfeiture of a public office or corporate franchise.” 732 N.W.2d at 319 (emphasis added). In so ruling, the court of appeals quoted with approval from this Court’s statement that “quo warranto is not allowable as preventative of, or remedy for, ‘official misconduct and **cannot be employed to test the legality of the official action of public or corporate officers.**”” *Id.* (quoting *State ex rel. Lommen v. Gravlin*, 209 Minn. 136, 137, 295 N.W. 654, 655 (1941)).

Petitioners improperly seek to use quo warranto to “test the legality of the official action of” Chief Judge Gearin. Even if Chief Judge Gearin had issued an advisory opinion, that would not be “grounds for forfeiture” of her judicial office. While it might be said that the judiciary lacks the jurisdiction to issue advisory opinions, that jurisdictional dimension cannot transform every dispute about whether a district court judge decided a non-justiciable question into an occasion to commence a wholly new dispute in this Court, and to entitle the judge’s sideline critics to the benefit of this Court’s original jurisdiction.

2. Suing a judge in quo warranto because of a disagreement with the propriety of her ruling in a pending case is an abuse of the writ.

While a judge is technically a public officer, that does not begin to make Chief Judge Gearin an appropriate defendant in a quo warranto suit, especially a suit that is about one of her judicial decisions. This suit is an improper collateral attack.

Most, if not all, successful quo warranto proceedings in Minnesota history were directed to non-judicial officers. *See, e.g., Sviggum*, 732 N.W.2d at 318 (“The writ of quo warranto is a special proceeding designed to correct the unauthorized assumption or exercise of power by a public official or corporate officer” (citing *State ex rel. Danielson v. Village of Mound*, 234 Minn. 531, 48 N.W.2d 855, 863 (1951))). Petitioners’ use of that writ to sue a judge in this setting conflicts with this Court’s decision in *State ex rel. Christianson v. Johnson*, 201 Minn. 219, 275 N.W. 684 (1937). In that case, a district court had already ruled, in a separate proceeding, that the office of recorder of the Village of Golden Valley was vacant due to a tie vote in an election that the village council could fill, but one of the candidates then brought a quo warranto action alleging, among other things, that no vacancy existed that the council had authority to fill. In affirming the dismissal of the quo warranto proceeding, this Court stated that “Petitioner will not be permitted in these proceedings to collaterally attack that finding and order, and we will not consider his claim herein, that no vacancy existed which the council had authority to fill by appointment.” 201 Minn. at 222, 275 N.W. at 685.

Similarly, in *Brannan v. Smith*, 784 So. 2d 293, 296 (Ala. 2000), the Alabama Supreme Court held that quo warranto was not a valid procedural device by which to proceed against a judge as a respondent, after that judge had granted a petition to set an election to incorporate a new city. The court explained:

Judge Smith is not a corporation and the residents do not allege that he “unlawfully holds or exercises any ... office.” The residents challenge only certain actions taken by Judge Smith in connection with the petition authorizing the incorporation election of December 7, 1999. Therefore, the residents have not demonstrated that quo warranto is a valid procedural device by which to proceed against Judge Smith.

Id.

D. Permitting This Petition to Proceed Regarding the Alleged “Advisory Opinion” Would Turn Quo Warranto Into a Device for Impatient Litigants to Leapfrog All But the Highest Level of the Minnesota Judicial System.

Petitioners seek to use an extraordinary, ancient tool to force this Court to take up a relatively ordinary kind of legal question, and without the benefit of a factual record built by Petitioners in a lower court. Such an approach shows disrespect for this Court’s increasingly clear statements about where and how to bring a quo warranto suit. It also shows disrespect for the rights of the thousands of other litigants who would not dream of pushing their way to the front of the line in the manner that Petitioners have done.

For the second time in a month, Petitioners have ignored the highlighted directive of this Court in *Rice v. Connolly*, 488 N.W.2d 241, 244 (Minn. 1992):

Accordingly, **we have determined** that quo warranto jurisdiction as it once existed in the district court must be reinstated and 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.** 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. We comment further that the reinstatement of quo warranto jurisdiction in the district court is intended to exist side by side with the appropriate alternative forms of remedy heretofore available.

Id. (emphasis added). This court then reinforced the same principle in 2004 in its ruling in *Republican Party of Minnesota v. O'Connor*:

Any future petitions brought pursuant to Minn. Stat. § 204B.44 that challenge the political party balance of election judges under Minn. Stat. § 204B.19, subd. 5 between the date of this order and the completion of the November 2, 2004, general election **shall be commenced in the district court. See Rice v. Connolly, 488 N.W.2d 241, 244 (Minn.1992) (requiring quo warranto petitions to be commenced in the district court).**

712 N.W.2d 175, 178 (Minn. 2004) (emphasis added). The Court's message ought to be especially familiar to Petitioners Limmer and Nienow, whose attempt in *Sviggum* to proceed in the first instance in this Court, by a petition for quo warranto, was also dismissed by reference to the same language in *Rice*. Sup. Ct. Ord. Denying Pet. Quo Warranto, *State ex rel. Sviggum v. Ingison*, at 3 (Minn. Sept. 9, 2005).

These Petitioners have also disregarded the reason *why* this Court has directed quo warranto petitioners to the district court, even in high-stakes battles between the legislative and executive branches: Because district courts are a superior place to address in the first instance the inevitable fact disputes that arise in litigation. As this Court had demonstrated in 1991 when hearing a quo warranto petition regarding the effectiveness of several attempted vetoes of Governor Carlson, "While the parties have urged this court to exercise its original jurisdiction to decide this controversy, a reading of the petition and its response compels our conclusion that there exists a substantial dispute as to the facts underlying the matter—a dispute which, in accordance with our long-standing practice, must be resolved by traditional means." *Seventy-Seventh Minn. State Senate v. Carlson*, 472 N.W.2d 99, 99-100 (Minn. 1991). "We are certainly aware of the immediacy and significance of the substantive issue presented. However, the procedure which we now designate as appropriate will, in our view, accomplish an expeditious resolution of the

disputed facts and applicable law, thereby developing a complete record for effective appellate review, in the event an appeal is taken.” *Id.* (dismissing the petition to allow the parties to recommence it as a declaratory judgment action in the district court).

Here, for example, Petitioners label this portion of Chief Judge Gearin’s ruling as an advisory opinion. Yet the difference between an improper advisory opinion and a proper ruling depends on questions such as the likelihood of an unlawful action, *see, e.g., Lee v. Delmont*, 228 Minn. 101, 110-11, 36 N.W.2d 530, 537 (1949), which inevitably involves an analysis of certain kinds of facts. Petitioners have decided to proceed in the first instance in the state’s highest court, and have not attempted to develop any facts that would support their “advisory opinion” label. They must lose either because they have filed in a court where records cannot be built, or because they have even attempted to carry their burden of proof on this point.

III. IN ANY EVENT, PETITIONERS’ CLAIM THAT JUDGE GEARIN’S ORDERS FOR PAYMENT OF LOCAL GOVERNMENT AID AND COUNTY PROGRAM AID ARE “ADVISORY OPINIONS” IS UNSUPPORTED BY EVIDENCE, AND FALSE.

As demonstrated above in Section C of the Statement of Facts, two statements by the Department of Revenue in the days leading up to the supposed “advisory opinion” resolved any doubt that, in case of a shutdown, the Department of Revenue would refuse to pay LGA and CPA by the July 20 deadline unless it were ordered to do so by a court. (*See Exs. A & B.*) This evidence stands in stark contrast with Petitioners’ failure to make any attempt to support with evidence their characterization of the decision as an “advisory opinion.” Thus, even if the Court forgives Petitioners’ disregard for principles

of standing, mootness, and the purpose and use of the writ of quo warranto, the Petition must be denied as to Chief Judge Gearin and her order regarding “payments such as LGA payments that have already been lawfully appropriated” (PA 18), because that “advisory opinion” label is unfounded and false.

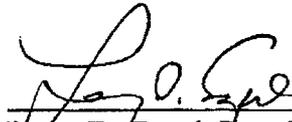
CONCLUSION

For the reasons set forth above, the League of Minnesota Cities, Coalition of Greater Minnesota Cities, and Association of Minnesota Counties respectfully request the court to permit them to intervene, and if permitted, to dismiss the Petition.

Respectfully submitted,

Dated: July 18, 2011

GREENE ESPEL P.L.L.P.

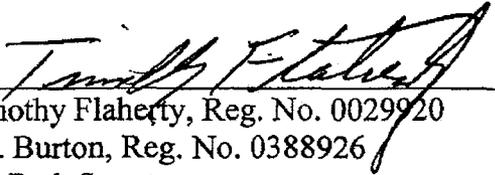


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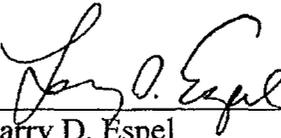
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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). The brief was prepared using Microsoft Word 2003, which reports that the brief contains 6,806 words.


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