



STATE OF MINNESOTA

COURT OF APPEALS

Appellate Case No. A08-1343

Citizens for Rule of Law, State Representative Mark Buesgens, State Representative Tom Emmer, Robert J. Hantan, Victor Niska, Ronald Johnson,

Appellants,

vs.

Senate Committee on Rules and Administration, House Committee on Rules and Legislative Administration, Senate Fiscal Services, House Budgeting and Accounting, Compensation Council and State of Minnesota,

Respondents.

APPELLANTS' BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
ISSUES PRESENTED	vi
STATEMENT OF THE FACTS	1
I. Legislators voted to increase living expenses effective immediately during the 2007 legislative session without an appropriation by law.....	1
II. Public reports show accumulated disbursements of some identified expenses but vast amounts are possible non-reimbursed amounts reflecting emoluments of elected office.....	3
A. The Senate records of reimbursed expenses versus emoluments are incomplete without discovery.....	3
B. Confirming House Expense Report governing reimbursed expenses to determine emoluments is incomplete without discovery.....	5
III. The lower court ruling prematurely leaves the procedural posture incomplete, significant when the facts relied on by the lower court of a 1977 unpublished case are superimposed on the instant case but are inconsistent with the legal theory of the Citizens for Rule of Law's Complaint.....	7
LEGAL ARGUMENTS AND AUTHORITIES	9
Introduction.....	9
I. Despite presumptions of constitutionality of legislative actions, de novo review requires examining constitutional conflicts that arise between actions taken and unambiguous constitutional prohibitions of those actions.....	11

II.	Since Statehood, Minnesota has prohibited the legislature from increasing its compensation and having it take effect within the same session the increase is passed.....	12
III.	Amendments to Minnesota’s Constitution in 1974 did not change prohibitions of legislators increasing compensation and barring a compensation increase from going into effect during the same legislative session voted upon.	13
IV.	The standard of review requires reversal of a dismissal under Rule 12 if evidence might produce support for pleaders’ theory for relief.	17
	A. The instant case is factually and legally distinguishable from the 1977 <i>McDonald</i> case in several important aspects.	18
	1. Taking the facts of the complaint as true, the Senate and House Expense Reports reflect anomalies of per diem payments that on their face raise questions of “living expenses” as compensation.	20
	B. IRS Rulings reveal that when an amount received exceeds accountable expenses or is wholly unaccountable the balance must be declared as gross income.	24
V.	The court has subject-matter jurisdiction to adjudicate illegalities that violate the Minnesota Constitution.....	26
	Conclusion and Requested Relief.....	30

TABLE OF AUTHORITIES

Cases

<i>Baker v. Carr</i> , 369 U.S. 186 (1962)	27, 28
<i>Bodah v. Lakeville Motor Express, Inc.</i> , 663 N.W.2d 550 (Minn. 2003).....	17
<i>Citizens for the Rule of Law v. State Committee</i> , Or. Granting Defs.’ Mot. Dismiss (Gearin, May 30, 2008)	8
<i>Clayton v. Kiffmeyer</i> , 688 N.W.2d 117 (Minn. 2004).....	26, 27
<i>Clerk of Courts’s Compensation for Lyon County v. Lyon County Commissioners</i> , 241 N.W.2d 781 (Minn. 1976).....	28,29
<i>Estate of Karger v. Karger</i> , 253 Minn. 542, 93 N.W.2d 137 (1958)	9
<i>Irwin v. Surdyks Liquor</i> , 599 N.W.2d 132 (Minn. 1999)	28
<i>Martens v. Minnesota Min. & Mfg. Co.</i> , 616 N.W.2d 732 (Minn. 2000).....	19
<i>McDonald v. Minnesota State House of Representatives</i> , Or. Affirming Distr. Ct. (Nov. 22, 1977)	passim
<i>McDonald v. Minnesota State House of Representatives</i> , Slip Op. No. 419863 (Minn. 2d Dist., June 30, 1977).....	passim
<i>McLean v. United States</i> , 266 U.S. 374	15
<i>Newman v. Brendel & Zinn, Ltd.</i> , 691 N.W.2d 480 (Minn. App. 2005).....	17
<i>Radke v. County of Freeborn</i> , 694 N.W.2d 788 (Minn. 2005)	17
<i>State Farm Mut. Auto Ins. Co. v. Ahmed</i> , 689 N.W.2d 306 (Minn. App. 2004).....	26
<i>State v. C.A.</i> , 304 N.W.2d 353 (Minn.1981).....	28
<i>State v. Chauvin</i> , 723 N.W.2d 20 (Minn. 2006).....	29

<i>State v. Rodriguez</i> , 739 N.W.2d 422 (Minn. App. 2007)	11
<i>State v. Scott</i> , 105 Minn. 513, 117 N.W. 1044 (1908).....	13
<i>United States v. Ballin</i> , 144 U.S. 1 (1892).....	27
<i>Wulff v. Tax Court of Appeals</i> , 288 N.W.2d 221 (Minn. 1979).....	28

Statutes

Minn. Stat. §§16.57 and 16A.138.....	21
Minn. Stat. §15A.082.....	22
Minn. Stat. §3.101.....	16
Minn. Stat. §541.0 7(5)	25
Minn. Stat. §645.08(1)	25
Minn. Stat. § 647.17.....	11

Other Authorities

Dictionary of the English Language,” University rev. ed., Noah Webster, L.L.D., New York: (F.J. Huntington, and Mason Brothers, 1856)	13, 15
Black’s Law Dictionary, 470, 5 th ed. Joseph R. Nelson, (West Publishing Co. 1979).....	14
Minn. R. Civ. P. 12.....	1, 7
Minn. R. Civ. P. 67.01.....	7
Minn. R. Civ. P. Rule 12.02	20
Rev. Ru. 74-433 (1974).....	24
<i>The American Heritage Dictionary</i> (Houghton Mifflin Co. 4 th ed. 2000).....	28

Webster's New Collegiate Dictionary, Henry Bosley
Woolf, (G. & C. Merriam Co. 1981) 16

Constitutional Provisions

United States Constitution

Art. I § 8 15

Minnesota Constitution

Article IV, § 9 passim

Article IV, § 9 iv

Art. XI, §1 21

Article IV, § 7 (1857) 13, 14

ISSUES PRESENTED

- I. The Minnesota Constitution under Article IV, Section 9 prohibits legislators from increasing their compensation immediately effective during the legislative session. During the 2007 session, legislators authorized increased per diem payments. If not reimbursable expenses, per diem payments are emoluments. Did the immediate per diem increase in payments – resulting in the supplementation of and thus increase of legislators’ compensation for services as elected officials – violate specific constitutional prohibitions governing legislator compensation?

The lower court found per diem payments were not compensation.

Apposite Constitutional Provisions and Statutes:
Article IV, § 9 Minn. Stat. § 33101.

Apposite Cases:
McLean v. United States, 266 U.S. 374 (1912).

- II. The Minnesota legislature passed a measure increasing their individual compensation immediately effective through emoluments beyond actual living expenses during the legislative session voted upon. Minnesota statutes, such as Minn. Stat. §§ 480.02, 484.03 and 555.01 provide courts procedures to issue relief when citizens seek to challenge the constitutionality of the action. Should Minnesota courts abrogate their jurisdiction over constitutional claims when legislative proceedings ignore constitutional constraints, existing statutory laws, or violate fundamental rights?

The lower court asserted it lacked jurisdiction.

Apposite Cases:
State v. Chauvin, 723 N.W.2d 20 (Minn. 2006);

*In Re Clerk of Lyon County Courts’
Compensation*, 308 Minn. 172, 241 N.W.2d 781
(1976).

STATEMENT OF THE FACTS

Trial Court Disposition

Citizens for the Rule of Law sued the Senate Committee on Rules & Administration and others in Ramsey County District Court because legislators increased per diem payments that effectively increased their compensation. They received income over the amount of reimbursable expenses. Since legislators voted for the increase to take immediate effect during the same legislative session as the increase voted upon, Citizens for the Rule of Law contended, among other claims, that the actions violated Article IV, § 9 of the Minnesota Constitution.

The Senate Committee on Rules & Administration moved under Minn. R. Civ. P. 12 to dismiss. The Honorable Kathleen R. Gearin dismissed the litigation for lack of jurisdiction, namely asserting an absence of circumstances compelling judicial review.

- I. Legislators voted to increase living expenses effective immediately during the 2007 legislative session without an appropriation by law.**

Citizens for the Rule of Law assert that during the 2007 legislative session, the Minnesota Senate and House of Representatives, increased their respective compensation for services as elected officials through emoluments identified as “living expenses.” For instance, the House of Representatives —

without the passage of an appropriations act — increased legislators’ emoluments with an immediate increase of “living expense” compensation:

On January 10, 2007, on a 22-4 vote, the House Rules and Legislative Administration Committee approved an immediate increase for “living expense” compensation from \$66 to \$77 per day. Members were at \$56 per day before an increase in 2005.¹

Likewise, the Senate voted — effective immediately — to an increase of “living expenses:”

On February 21, 2007, on a 59-7 vote, the Senate approved an immediate increase for “living expense” compensation from \$66 to \$96 per day. The Senate was ratifying an earlier decision by the Senate Rules and Administration Committee to increase the rate to \$96 per day. Members were at \$56 per day before an increase in 2005.²

The Senate, like the House, did not pass an appropriation act to disburse state funds governing the increase of expenses other than reimbursed expenses, for services as a public official.³ As Citizens for the

¹ First-Amended Complaint at ¶ 20; App. p. 19. Plaintiffs also sought to amend their First-Amended Complaint to include Minnesota’s Secretary of State as defendant but the lower court did not rule on the motion because of its’ Rule 12 decision.

² First-Amended Complaint at ¶ 19; App. p. 19.

³ First-Amended Complaint, ¶¶ 19, 20, 26, 27, 36, 37-41; App. pp. 19, 20, 21-22.

Rule of Law alleged, the non-reimbursed moneys received are emoluments that increased the compensation of legislators.⁴

II. Public reports show accumulated disbursements of some identified expenses but vast amounts are possible non-reimbursed amounts reflecting emoluments of elected office.

A. The Senate records of reimbursed expenses versus emoluments are incomplete without discovery.

The Citizens for the Rule of Law's First-Amended Complaint included Exhibits A and B, reflecting reimbursement expenses under the headings "Mileage" and "Other" for the Senate and "Dist. Travel," "Lodging," "Mileage," "Other Travel," and "Other Exp." for the House.⁵ Without the opportunity of discovery, Citizens for the Rule of Law could not ascertain what payment of moneys to each Senator or Representative represented non-reimbursed expenses — emoluments.

To illustrate this point of possible non-reimbursed expenses — as emoluments — a review of Minnesota State Senate Expense Report is revealing. State Senator Mee Moua represents Saint Paul. Her mileage expense for calendar year 2007 is "0"⁶ likely because of the proximity between

⁴ First-Amended Complaint ¶¶ 46-53; App. Pp. 22-23.

⁵ First-Amended Complaint, *see e.g.*, Exhibit A at App. pp. 32-35 and Exhibit B at App. pp. 36-49.

⁶ First-Amended Complaint, Exhibit A, App. p. 32.

her Saint Paul residence and the State Capitol building. Senator Moua declared “other” accountable expenses of \$4,480.24.⁷ Yet, in addition to her base salary of \$31,140⁸ as a legislator, Senator Moua received an additional \$21,954 in per diem payments.⁹ The payments made for this amount are alleged as unaccountable and thus supplemental income increasing her compensation by \$21,954 as a result, at least in part, of the immediate effective per diem increase during the 2007 legislative session.

Senator Sharon Ropes is another example. According to 2007 general records, she received per diem payments of \$12,864.00 over her \$31,140 base salary; an additional \$2,877.03 for mileage; and \$14,811.16 for “other” expenses.¹⁰ The total amount given to Senator Ropes in 2007 for expenses

⁷ *Id.* Apparently, before a legislator can receive reimbursement of mileage and “other” expenses, a voucher must be presented. Here, Citizens for the Rule of Law contend that if no vouchers are necessary for “per diem” amounts and paid upon request with no other accompanying documentation to reflect actual expenses they are emoluments effectively increasing compensation. *See e.g.*, First-Amended Complaint ¶¶25-27; 33-36; 46-52; and 62-66; App. pp. 20, 21, 22-24, 25.

⁸ Senators and Representatives receive a salary of \$31,140 as established in 1999. Subcommittee on Employee Relations, Salaries of Minnesota Officials, dated June 12, 2007. App. p. 88. As a public record, Appellants request this Court to take judicial notice of this document.

⁹ First-Amended Complaint, Exhibit A, App. p. 32.

¹⁰ First-Amended Complaint, Exhibit A at App. p. 32.

was \$30,552.19. Since there has been no discovery, it is not known whether any amount of the “per diem” payment of \$12,864.00 were reimbursements for actual expenses.

Nevertheless, the examples of Senator Moua and Senator Ropes are illustrated only as two representations of the 74 Minnesota Senators who received per diem payments in 2007 totaling \$987,382.50 disbursed from the defendant Senate Fiscal Services.¹¹

B. Confirming House Expense Report governing reimbursed expenses to determine emoluments is incomplete without discovery.

The House expense report, also attached to the First-Amended Complaint, further demonstrates amounts members received beyond identified expenses. For instance, Representative Thomas Hackbarth, from District 48A, Anoka County, in addition to his salary of \$31,140¹² received \$11,869.00 in 2007 for per diem payments, including an additional \$649.19 for travel, and no other moneys for lodging, mileage, other travel, or other expenses. His total received in 2007 — \$12,518.19.¹³ Without discovery, it is

¹¹ *Id.*

¹² *See, infra*, n. 8.

¹³ First Amended Complaint, Exhibit B at App. p. 40.

not known what portion of that amount, if any, reflects actual reimbursements for expenses or emoluments.

Similarly, House of Representative Frank Hornstein received \$7,827 in per diem payments over his \$31,140 base salary and received no moneys under the listed categories of distance travel, lodging, mileage, other travel, or other expenses.¹⁴ Without discovery it is unknown what amount of the \$7,827 is reimbursed expenses or emoluments.

Finally, a review of available records reveals that Representative Alan Juhnke, from District 13B, Kandiyohi County (Willmar, Minnesota area), received moneys totaling \$41,516.36. Of that total, \$18,234.35 is identified as a per diem over his \$31,140 base salary; \$1,962.84 for distance travel; \$10,791.17 for lodging; \$7,533.84 for mileage; \$1,738.34 for other travel; and \$1,255.82 for other expenses.¹⁵ Without discovery, it is not known what amount of the \$18,234.35 is reimbursed expenses or what amount represents emoluments.

¹⁴ First-Amended Complaint, Exhibit B at App. p. 40.

¹⁵ First-Amended Complaint, Exhibit B at App. p 41.

III. The lower court ruling prematurely leaves the procedural posture incomplete, significant when the facts relied on by the lower court of a 1977 unpublished case are superimposed on the instant case but are inconsistent with the legal theory of the Citizens for Rule of Law's Complaint.

When Citizens for the Rule of Law served and filed its complaint, the defendants moved for dismissal under Minn. R. Civ. P. 12 (a), (b), and (e). The lower court subsequently granted the motion only as to the lack of jurisdiction relying upon a State Supreme Court order that did not opine on per diem as compensation.¹⁶ Nevertheless, the lower court's decision foreclosed Citizens for the Rule of Law's discovery process.

In addition, at the time of the lower court hearing on the dismissal motion, Citizens for the Rule of Law moved to amend its First-Amended Complaint to include, among other things, Minnesota's Secretary of State as a defendant.¹⁷ Appellants State Representatives Mark Buesgens and Tom Emmer also moved requesting the court leave to deposit funds under Minn. R. Civ. P. 67.01 to avoid issues of illegality and allow for their respective attempts for re-election in 2008.¹⁸

¹⁶ Or. Affirming Distr. Ct. (Nov. 22, 1977) App. pp. 12-13.

¹⁷ App. pp. 52-84.

¹⁸ App. pp. 52-66.

The lower court did not address either of the motions.¹⁹

The lower court adopted the rationale of a 1977 dispute, while similar, it is fundamentally different than the instant case on appeal. Characterizing the present case as outside the jurisdiction of the court, it quoted a previous unpublished 1977 decision in part:

“[T]hat ‘ it is clear that resolutions of the Senate and the House fixing the amount of daily living expense money for its members is a classic example of internal judgment of the Legislature, which is not amenable to judicial review.’”²⁰

And furthering a characterization *not applicable* in the instant case because of the Citizens for the Rule of Law’s legal theory supporting its relief, the lower court nevertheless found:

“In [the 1977] case, as in this one, the plaintiffs did not dispute the power of the Legislature to set a per diem for expenses. The plaintiffs were challenging the amount rather than the fact of the increase over previous sessions. The plaintiffs in the present case are *challenging the amount of the increase in per diem payments* made to members of the Senate and the House....”²¹

Yet, Citizens for the Rule of Law complaint reflects not a challenge to the amount of the increase, but that (1) the increase embodies emoluments of financial gain over actual expenses and thus must be declared as income compensation; and (2) the financial gain realized over actual expenses is an

¹⁹ Or. Granting Defs.’ Mot. Dismiss (Gearin, May 30, 2008), App. pp. 1-4.

²⁰ Or. Granting Defs.’ Mot. Dismiss (Gearin, May 30, 2008), App. p. 2.

²¹ *Id.* (emphasis added).

increase of legislator compensation that took effect in the same session the legislature voted for the increase violating constitutional and statutory law.

Discovery— prevented by the grant of the Rule 12 motion — would resolve the dispute as to what amount legislators benefited monetarily from office when the legislature granted itself an increase, labeled as per diem payments for expenses, that is actually income supplementing a stagnant base compensation salary since 1999 of \$31,140.

LEGAL ARGUMENTS AND AUTHORITIES

“As long as we adhere to the concept that justice is to be administered under a rule of law ... What the law ought to be is for the legislature; what the law is rests with the courts.”²²

Introduction

The Minnesota Supreme Court has never opined that money paid in excess of reimbursed payments of actual per diem living expenses is compensation. This would require an opinion regarding the meaning and application of Article IV, § 9 of the Minnesota Constitution. The Supreme Court has opined however, that it would respect the division of powers of the

²² *Estate of Karger v. Karger*, 253 Minn. 542, 546-47, 93 N.W.2d 137, 142 (1958).

three branches of government, *absent a showing off circumstances compelling its review of discretionary actions taken.*²³

Citizens for the Rule of Law contend that it is for the courts to determine what Minnesota's Constitution means and thus what the law is. If the legislature circumvents the Constitution through means that allow it to define constitutional provisions when disputes arise, then there is no role for the court and there is no rule of law. Despite kernels of facts reflected in State senate and house reports of per diem payments beyond additional money disbursed for actual expenses, there lies an avenue for truth through discovery – now short-circuited through the lower court's Rule 12 decision. The truth can be found through discovery as to what is income over reimbursed expenses, what is unauthorized supplemental income to stagnant salaries, what is considered income for income tax purposes and finally what is to be considered "compensation" under the constitution.

The increased per diem of 2007 during the same legislative session it took effect, resulted in increased legislator compensation violative of Article IV, § 9 of the Minnesota Constitution. There are sufficient compelling circumstances for this Court to reverse the lower court's abrogation of jurisdiction – and allow discovery and a final determination of what is

²³ Or. Affirming Dist. Ct. (Nov. 22, 1977); App. P. 13 (emphasis added).

“income” and what is an “expense” to resolve the underlying constitutional claims.

I. Despite presumptions of constitutionality of legislative actions, de novo review requires examining constitutional conflicts that arise between actions taken and unambiguous constitutional prohibitions of those actions.

Issues of constitutional interpretation are issues of law that this Court will review de novo.²⁴ And although the court will use statutory guidelines in the interpretation of legislative actions and accompanying assertions that its intent do not violate Minnesota’s Constitution,²⁵ it is the court that sits as the final arbiter of what the law means.²⁶

One of the legal issues this Court on review involves the increase of compensation the legislature provided itself that took effect immediately during the session voted upon. Minnesota’s Constitution, Article IV, section 9 prohibits immediate compensation increases to legislators.

²⁴ *State v. Rodriguez*, 739 N.W.2d 422, 428 (Minn. App. 2007).

²⁵ Minn. Stat. § 647.17 governs presumptions in ascertaining legislative intent: “In asserting the intention of the legislature the courts may be guided by the following presumptions: ... (3) the legislature does not intend to violate the Constitution of the United States or this state. ...”

²⁶ *Estate of Karger*, 253 Minn. at 546-47; 93 N.W.2d at 142.

II. Since Statehood, Minnesota has prohibited the legislature from increasing its compensation and having it take effect within the same session the increase is passed.

Legislative members are constitutionally prohibited from voting to increase their compensation and having the increase effective during the same session as the vote. This has not changed historically since 1857.

Under Article IV, § 7 of the 1857 Minnesota Constitution:

The compensation of Senators and Representatives shall be three dollars per diem during the first session, but may afterwards be prescribed by law. But no increase of compensation shall be prescribed which shall take effect during the period for which the members of the existing House of Representatives may have been elected.

The Legislature could at any session increase the compensation of its members but it could not take effect until the next ensuing term.²⁷

The definitions of the language used in 1857 reflect the unambiguous meaning and intent of this constitutional provision. For instance, “per diem” is Latin for “for each day.” “Compensation” meant recompense,²⁸ “recompense” compensation²⁹ or to repay, to make an equivalent return in

²⁷ *State v. Scott*, 105 Minn. 513, 514, 117 N.W. 1044 (1908).

²⁸ “A Dictionary of the English Language,” 81, University rev. ed., Noah Webster, L.L.D., New York: (F.J. Huntington, and Mason Brothers, 1856). “Compensation” as a noun also was defined as “amends.”

²⁹ *Id.* 326 (as a noun).

profit.³⁰ Thus, for providing services as elected officials, legislators received benefits — identified in the constitutional provision as daily pay of \$3.00 each day. The provision further describes that compensation may afterwards “be prescribed by law” allowing for adjustments of per diem pay as the legislators found necessary with one restriction. A legislative vote to increase benefits was not effective during the same session voted upon and would only take effect during the next ensuing session. Compensation was, therefore, linked to money paid for legislative services for each day — per diem — of service.

III. Amendments to Minnesota’s Constitution in 1974 did not change prohibitions of legislators increasing compensation and barring a compensation increase from going into effect during the same legislative session voted upon.

Consistent with the 1857 constitutional prohibitions on legislators’ compensation, 1974 amendments to Minnesota’s Constitution included embracing the original concepts of Article IV, § 7, blended into a redrafted Article IV, § 9 governing compensation. The original 1857 Article IV, § 9 dealt with prohibitions on legislators relinquishing their elected seats and taking advantage of another office where they voted for an increase of emoluments:

No Senator or Representative shall, during the time for which he is elected, hold any office under the authority of the United States or the state of Minnesota, except that of postmaster, and no Senator or Representative shall hold an office under the state

³⁰ *Id.* (as a verb transitive).

which has been created or the emoluments of which have been increased during the session of the Legislature of which he was a member, until one year after the expiration of his term of office in the Legislature.³¹

Emoluments were then defined as “profit or gains in general.”³² And similar to emoluments understood today — as they were in 1974 — compensation includes that which is received arising from holding office, whether appointed or elected:

[T]hat which is received as a compensation for services, or which is annexed to the possession of office as salary, fee, and perquisites.³³ Any perquisite, advantage, profit, or gain arising from the possession of an office.³⁴

And as compared to the payment for services — that is, compensation:

Payment³⁵ (to engage for money or give in return for services)³⁶; remuneration³⁷ (to pay an equivalent for a service).³⁸

³² “A Dictionary of the English Language,” 132, University rev. ed., Noah Webster, L.L.D., New York: (F.J. Huntington, and Mason Brothers, 1856).

³³ “Perquisite” means “a privilege, gain, or profit incidental to regular salary or wages.” Webster’s New Collegiate Dictionary, 848 Henry Bosley Woolf, G. & C. Merriam Co. 1981.

³⁴ Black’s Law Dictionary, 470, 5th ed. Joseph R. Nelson, (West Publishing Co. 1979).

³⁵ Webster’s New Collegiate Dictionary, 835 Henry Bosley Woolf, (G. & C. Merriam Co. 1981).

³⁶ *Id.*

³⁷ *Id.* at 971.

In other words, moneys received for services, whether defined as an emolument or compensation, is payment for the service rendered:

It is difficult to deal with a distinction between pay and emoluments. Both are rewards or compensation... and to distinguish between them notwithstanding is to enter a maze of irrelevant considerations... Pay and emoluments are but expressions of value used to give complete recompense to a deserving officer.³⁹

The intent between the Constitutions of 1857 and 1974 under Article IV, § 9, remains the same — compensation for services rendered as a legislator as prescribed by law — if increased shall not take effect during the term of the house of representatives then in office:

The compensation of senators and representatives shall be prescribed by law. No increase of compensation shall take effect during the period for which the members of the existing house of representatives may have been elected.⁴⁰

Per diem payment to legislators in 1857 prescribed the method or how their compensation for services rendered totaled — if one works two days, compensation is \$6. Today, legislators are paid a flat salary rate of \$31,140 per annum established in 1999 and remains unchanged. But with the

³⁸ *Id.*

³⁹ *McLean v. United States*, 226 U.S. 374, 382 (1912).

⁴⁰ Minn. Const. Art. IV, § 9. The original 1857 version of Art. IV, § 9, that reflected Art. I § 8 of the United States Constitution.

entitlement of elected office, legislators have also given themselves emoluments of per diem expenses. But by statute, for example, such expenses are renumerated through reimbursements of identified and accountable proof of the expenses:

A member of the legislature in addition to the compensation and mileage otherwise provided by law shall be reimbursed for living and other expenses incurred in the performance of duties or engaging in official business during a regular or special session and when the legislature is not in session in the manner and amount prescribed by the senate Committee on Rules and Administration for senators and by the house Committee on Rules and Legislative Administration for house members.⁴¹

By the legislature's own definition, failing to indentify actual expenses incurred for reimbursement is an emolument resulting in a benefit, profit, gain, and a perquisite, and therefore an increase in compensation for holding that office. Thus, whether one dollar or thousands of dollars, any legislator gaining even an incidental increase beyond his or her base salary is gaining an increase in compensation. Having voted on *an increase of that benefit to take immediate effect* is prohibited under Article IV, § 9.

⁴¹ Minn. Stat. § 3.101.

IV. The standard of review requires reversal of a dismissal under Rule 12 if evidence might produce support for pleaders' theory for relief.

This Court will determine de novo whether a complaint adequately establishes a legally sufficient claim for relief.⁴² If evidence might be produced that is consistent with the pleader's theory to grant the relief requested, a dismissal under Rule 12.02(e) will not be upheld:

"This [C]ourt will not uphold a Rule 12.02(e) dismissal 'if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded.'"⁴³

Furthermore, the facts of the complaint are accepted as true and all reasonable inferences are construed in favor of the nonmoving party.⁴⁴

Citizens for the Rule of Law and its co-appellants argue that there are compelling reasons to reverse the lower court and allow the court to reinstate jurisdiction. But, before a jurisdictional argument is made, it is necessary to discuss the underlying rationale for the constitutional challenge to the legislature's actions of 2007.

⁴² *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003) (Appellate court will determine de novo "whether the complaint sets forth a legally sufficient claim for relief").

⁴³ *Newman v. Brendel & Zinn, Ltd.*, 691 N.W.2d 480, 482 (Minn. App. 2005) quoting *Martens v. Minnesota Min. & Mfg. Co.*, 616 N.W.2d 732, 739-40 (Minn. 2000) (citations omitted).

⁴⁴ *Radke v. County of Freeborn*, 694 N.W.2d 788, 793 (Minn. 2005).

A. The instant case is factually and legally distinguishable from the 1977 *McDonald* case in several important aspects.

The lower court relied extensively on two unpublished decisions — the 1977 district court case *McDonald v. Minnesota State House of Representatives*⁴⁵ and the subsequent State Supreme Court order in that same case,⁴⁶ to support the decision to dismiss under Rule 12, both factually and legally. Proceedings under Minn. R. Civ. P. Rule 12.02 require the “factual allegations in the complaint ... are taken as true.” Although the district court decision characterized Citizens for the Rule of Law and the 1977 as the same, the facts and legal allegations distinguish the instant case from 1977 in at least seven important ways.

First, the *McDonald* plaintiffs sought a determination that the entire amount of per diem payments constituted an increase in compensation. Citizens for the Rule of Law and its co-plaintiffs do not. The per diem compensation appears to include both an “expense” and “income” compensation component.

Second, the *McDonald* case reflects per diem payments for specific identified expenses for lodging – an accountable expense permitted under the

⁴⁵ Slip Op. No. 419863 (Minn. 2d Dist., June 30, 1977); App. pp. 5-11.

⁴⁶ Or. Affirming Distr. Ct. Or. of June 30, 1977 (Nov. 22, 1977), App. pp. 12-13.

IRS code. Citizens for the Rule of Law and its co-plaintiffs assert the per diem “living expenses” to the extent they are unaccountable must be declared as “income” under the IRS Code — as compensation — for services rendered. As such, it is also “compensation” for the purposes of the Minnesota Constitution’s Article IV, § 9 restriction on compensation increases.

Third, the *McDonald* case did not assert a statutory violation of Minn. Stat. §3.101 such as the instant case.

Fourth, the *McDonald* case did not assert a statutory violation of Minn. Stat. §§16.57 and 16A.138 such as the instant case.

Fifth, the *McDonald* case did not assert a violation of the Minnesota Constitution under Article XI, § 1 as does the instant case.

Sixth, the *McDonald* case did not implicate wrongful acts of the Compensation Council and Minn. Stat. §15A.082 as does the instant case.

Finally, the *McDonald* case did seek injunctive relief for the return of all per diem amounts. In the instant case, Citizens for the Rule of Law seek to enjoin, among other things, the Senate Fiscal Services and House Budgeting and Accounting Offices responsible for distributing the payments from making future disbursements and to enjoin the Secretary of State from placing certain present elected officials on the ballot for the next election

cycle.⁴⁷ If there is any restitution to the state treasury, it would involve only the return of amounts unsupported by actual expenses that must be considered as supplemental income and thus an improper increase of compensation received during the session of the enacted per diem increase.

- 1. Taking the facts of the complaint as true, the Senate and House Expense Reports reflect anomalies of per diem payments that on their face raise questions of “living expenses” as compensation.**

The *McDonald* court specifically dealt with “lump sum expense payment[s]” identified as “per diem living expenses payments”⁴⁸ to conclude expenses as “not compensation.”⁴⁹ Its ruling suggests a reasonable relationship between the expense at issue in 1977 — lodging— and the increased payment. In the instant case, Citizens for the Rule of Law argue that there is no reasonable relationship between the immediately effective “living expense” per diem increases paid in 2007 and existing accountable expenses, such as travel, lodging, and other expenses for which legislators are already separately reimbursed.

⁴⁷ See Proposed Amended Complaint. Although the recent election cycle appears to moot this point, it does not. Should the legislature act in a similar manner during subsequent sessions, the court’s decision will provide the Secretary of State with the legal framework to prevent the placing of officials on ballots for violating constitutional prohibitions under Article IV, § 9.

⁴⁸ Slip Op. No. 419863 at 6-7(Minn. 2d Dist., June 30, 1977); App. pp. 10-11.

⁴⁹ *Id.* at 7; App. p. 11..

Since the factual allegations of the complaint are taken as true, the Senate and House expense reports show anomalies of purported expenses of public funds entrusted to the legislature on behalf of the people. If the per diem amounts are unaccounted for by receipts, they must be assumed as income derived as emoluments or benefits from holding office — that is, increased compensation.

The legislature plays the role of a trustee in the handling the public funds of the people. Thus, no money may be disbursed from the State Treasury without legislative approval:

“Money paid from the state treasury. No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law.”⁵⁰

It is well settled in fiduciary law that the trustee must not be allowed to advantage himself in dealing with trust funds. Of course, there is no legal trust involved here, but the principle of trusteeship authorizing disbursements to its own members during their legislative term of office is apposite:

[The Legislature] is an instrumentality appointed by the state to exercise a part of its sovereign powers. In that capacity, it holds the public funds in trust for the people.⁵¹

⁵⁰ Minn. Const. Art. XI, §1.

⁵¹ 49 American Jurisprudence 248.

The trust is abridged if actions have the effect of circumventing the constitutional provisions that seek to protect the peoples' monies. For instance, the meaning of Article IV, § 9 of the Minnesota Constitution prohibiting the increase of compensation during the term of office is self-evident. The provision's purpose is to prevent legislators from fixing compensation for themselves different than that provided by law when they offered themselves to the general public as candidates for elected office. There is nothing to prevent legislators from increasing compensation for an incoming House or Senate, but they cannot vote themselves additional compensation during the term each legislator sits as members of their respective house.

But for the Rule 12 ruling, discovery would confirm the Citizens for the Rule of Law allegations of compensation increases granted and received during the same legislative session of enactment violated the prohibitions of the Constitution. The *McDonald* case with its stipulation of facts rightfully assumed "per diem expenses," meant to cover lodging, as allowed deductible expenses under the IRS code. The court specifically identified the expenses as "lodging." But there is no stipulation of facts in this case, and the fundamental challenge is that the additional per diem "living expenses" are not what they are purported to be — expenses — but emoluments as an oblique way of allowing legislators to *supplement their income* for services as

a legislator during and after a legislative session. Because it is an allowance to supplement their income, an effective increase during a legislative session is violative of the Constitution.

To illustrate this point, a review of Minnesota State Senate Expense Report is revealing. State Senator Mee Moua represents Saint Paul. Her mileage expense for calendar year 2007 is reflected as “0.”⁵² “Other” declared accountable expenses amounted to \$4,480.24. Yet, in addition to her base salary of \$31,140 as a legislator, Senator Moua received an additional \$21,954 in per diem payments.⁵³ Unless shown otherwise — through discovery, for instance — the \$21,954 is unaccountable and thus an emolument of holding office increasing her compensation through this additional income. This is a direct result of the legislature’s immediate per diem increase during the 2007 legislative session.⁵⁴

Thus, the question is not whether the legislature can increase reimbursement of expenses as the *McDonald* court holding declares. Rather, it is the consequence of the resolutions passed to supplement legislator

⁵² Plaintiffs Complaint; Exhibit A; App. p. 32.

⁵³ Plaintiffs Complaint, Exhibit A; App. p. 32.

⁵⁴ Senator Moua is illustrated only as a representation of the 74 Minnesota Senators who received per diem payments in 2007 totaling \$987,382.50, disbursed through the Senate Fiscal Services and House Budgeting and Accounting Offices from the State Treasury.

stagnant salaries since 1999 through other revenue streams of income, not reimbursed expenses. The factual allegations and submissions of the Citizens for the Rule of Law taken as true for Rule 12 motion purposes reflect that something other than “expenses” are being paid or made available to each legislator through “per diem” payments.

B. IRS Rulings reveal that when an amount received exceeds accountable expenses or is wholly unaccountable the balance must be declared as gross income.

The 1977 *McDonald* court referenced an IRS Ruling 74-433 regarding per diem allowances. Then, per diem allowances allowed up to \$44 per day if actual expense reimbursement arrangements were not otherwise available.⁵⁵ If however, an amount is received beyond the \$44 per diem allowance, the excess must be reported in gross income.⁵⁶ That ruling has since been modified but the ultimate reporting requirements remain. Any amount in excess of accountable expenses must be reported as gross income for tax purposes.

The Senate and House expense reports reflect reimbursement expenses under the headings “Mileage” and “Other” for the Senate and “Dist. Travel,” “Lodging,” “Mileage,” “Other Travel,” and “Other Exp” for the House. The

⁵⁵ Rev. Ru. 74-433 (1974); App. pp. 89-91.

⁵⁶ *Id.*

“Per Diem” expense lines are not expense reimbursements. If the per diem payment is not a reimbursement then it is for something else — compensation.

Reimbursement is provided to replace money spent or losses incurred. Compensation on the other hand is the receipt of wages for services rendered. “Wages” is defined as “all remuneration for services or employment, including commissions and bonuses and the cash value of all remuneration in any medium other than cash where the relationship of master and servant exists.”⁵⁷ Words and phrases should be construed according to their common and approved usage.⁵⁸ The common and approved usage of “to reimburse” reflects the distinction between “reimbursement” and “wages.”⁵⁹ Therefore, if payments are made for reimbursement, it is not compensation for services and not included as gross income. If the per diem payments are made without remuneration, beyond any IRS ruling or code provision allowing specific amounts for deductions, the excess are wages for services rendered.

⁵⁷ See Minn. Stat. §541.0 7(5).

⁵⁸ Minn. Stat. §645.08(1).

⁵⁹ See, e.g., *The American Heritage Dictionary* 1471 (Houghton Mifflin Co. 4th ed. 2000) (“To repay (money spent); refund ... To pay back or compensate (another party) for money spent or losses incurred.”).

Thus, unless proven otherwise, Senator Moua's per diem amount of \$21,954 for instance, is compensation supplementing her base salary.

Because the facts show a pattern of unconstitutional behavior, within the authority of subject matter jurisdiction for judicial review, the motion to dismiss should be reversed.

V. The court has subject-matter jurisdiction to adjudicate illegalities that violate the Minnesota Constitution.

“That which is dominate does not
make it a political question, more than
just a political case.”⁶⁰

This Court reviews de novo the existence of subject matter jurisdiction.⁶¹ The lower court dismissed Citizens for the Rule of Law for lack of subject matter jurisdiction. Relying on the previous unpublished district court order of 1977, the lower court adopted that rationale to the instant case — mistakenly. Meanwhile, the later 1977 Minnesota Supreme Court order established the threshold for judicial review of legislative discretionary actions — the need for a showing of circumstances compelling review.⁶²

⁶⁰ *Clayton v. Kiffmeyer*, 688 N.W.2d 117, 133 citing *Baker v. Carr*, 369 U.S. 186, 210 (1962).

⁶¹ *State Farm Mut. Auto Ins. Co. v. Ahmed*, 689 N.W.2d 306, 308 (Minn. App. 2004).

⁶² Or. Affirming Distr. Ct. 2 (Nov. 22, 1977); App. p. 13.

The logic follows long-standing doctrine regarding the empowerment of the legislature to make its own rules — but with limitations:

The constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be some reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained.⁶³

In other words, “the legislature’s authority is not boundless.”⁶⁴

Likewise as with political questions, “[t]he courts cannot reject as ‘no law suit’ a bona fide controversy as to whether some action denominated ‘political’ exceeds constitutional authority.”⁶⁵ Although the political question doctrine is a tool for the maintenance of governmental order, it should not be applied to promote only disorder.⁶⁶ Therefore, to suggest the lack of subject matter jurisdiction is to erroneously believe the nonjusticiability of this political question is a function of the separation of powers.

Yet, the court has a compelling interest to assert jurisdiction because of the constitutional questions raised regarding the conduct of the legislature. Although the separation-of-powers doctrine, for instance, is premised on the

⁶³ *United States v. Ballin*, 144 U.S. 1, 4 (1892).

⁶⁴ *Clayton v. Kiffmeyer*, 688 N.W.2d 117, 132 (Minn. 2004).

⁶⁵ *Baker v. Carr*, 369 U.S. 186, 216 (1962).

⁶⁶ *Id.* at 215.

belief that “too much power in the hands of one government branch invites corruption and tyranny,⁶⁷ the doctrine was never intended as being an absolute division of governmental functions.⁶⁸

A court's inherent judicial authority “grows out of express and implied constitutional provisions mandating a separation of powers and a viable judicial branch of government”⁶⁹ extending to the court’s unique judicial functions.⁷⁰ This authority only extends to a court's “unique judicial functions.” A court has inherent judicial authority to engage in activities that are (1) necessary (2) to achieve a unique judicial function (3) without infringing on equally important legislative or executive functions.⁷¹ Applying this test to the facts of this case should lead this Court to conclude that the district court had the inherent jurisdiction to decide the underlying issues brought before it by Citizens for the Rule of Law.

In short, the legislature action is not immune from judicial review.

⁶⁷ *Wulff v. Tax Court of Appeals*, 288 N.W.2d 221, 223 (Minn. 1979).

⁶⁸ *Irwin v. Surdyks Liquor*, 599 N.W.2d 132, 137 (Minn. 1999).

⁶⁹ *In re Clerk of Lyon County Courts' Compensation*, 308 Minn. 172, 180, 241 N.W.2d 781, 786 (1976).

⁷⁰ *State v. C.A.*, 304 N.W.2d 353, 358-59 (Minn.1981).

⁷¹ *Lyon County*, 308 Minn. at 181-82, 241 N.W.2d at 786.

But any confusion of labeling the underlying instant action as interfering with the “internal, discretionary decisions of the Legislative branch” is to obscure the need for the court to analyze the facts as pled against the ultimate interpreter of the Constitution — the court. A court’s “inherent judicial authority ‘grows out of express and implied constitutional provisions mandating a separation of powers and a viable judicial branch of government.’”⁷² That judicial power is essential to the “existence, dignity, and function of a court because it is a court.”⁷³

The dispute of the Citizens for the Rule of Law is not with legislative procedure, but with the consequences of the Minnesota legislature’s decisions to spend state funds in a manner that ignores state constitutional restraints. The initial complaint with the attached accompanying exhibits, reveal and support the Citizens for the Rule of Law legal theory that legislators are receiving something greater than living expenses — emoluments and benefits as income. And, because the increase became immediately effective during a legislative session, the legislature itself created the constitutional issue under Article IV, § 9. But, if the court abrogates its jurisdiction over the

⁷² *State v. Chauvin*, 723 N.W.2d 20, 24 (Minn. 2006), quoting *In re Clerk of Lyon County Courts’ Compensation*, 241 N.W.2d 781, 786 (Minn. 1976).

⁷³ *Clerk of Courts’ Compensation for Lyon County v. Lyon County Commissioners*, 241 N.W.2d 781, 783 (Minn. 1976).

constitutional issue, then who is the final arbiter of the Minnesota Constitution? The legislature?

If the court fails to assert jurisdiction over the constitutional issue raised, then the legislature has successfully found a method to side-step the Constitution. The Citizens for the Rule of Law, however, has provided the court with the requisite showing that judicial review of the legislative action is justified.

While it is understood that the lower court is bound to follow State Supreme Court precedent — including unpublished orders — the lower court never determined that per diem payments were compensation. For that proposition, the lower court relied on the unpublished 1977 district court decision. But the facts of the instant case do not fit *McDonald's* Supreme Court order denying jurisdiction. Unlike *McDonald*, Citizens for the Rule of Law have met the compelling interest standard for judicial review of the constitutional and statutory issues presented.

Conclusion and Requested Relief

The lower court mistakenly abrogated its jurisdiction to decide constitutional irregularities created by the legislature during the 2007 legislative session. When the legislature takes an action creating a issue of constitutional proportions, the court should not avoid the issue on

jurisdictional grounds. The district court case of *McDonald v. Minnesota State House of Representatives* does not apply here. Here, the Citizens for the Rule of Law complaint has sufficiently met the burden of the State Supreme Court to assert jurisdiction because circumstances do compel review of the discretionary actions taken by the legislature.

Therefore, this Court should reverse the decision of the lower court and remand the action accordingly.

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Dated: November 19, 2008



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STATE OF MINNESOTA

COURT OF APPEALS

Appellate Case No. A08-1343

Citizens for Rule of Law, State Representative Mark Buesgens, State Representative Tom Emmer, Robert J. Hantan, Victor Niska, Ronald Johnson,

Appellants,

vs.

Senate Committee on Rules and Administration, House Committee on Rules and Legislative Administration, Senate Fiscal Services, House Budgeting and Accounting, Compensation Council and State of Minnesota,

Respondents.

LR 7.1(c) WORD COUNT COMPLIANCE CERTIFICATE

I, Erick G. Kaardal, certify that the Appellant's Brief complies with Local Rule 7.1(c).

I further certify that, in preparation of this motion/memorandum, I used Microsoft Word 2003, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above referenced memorandum contains 5415 words.

MOHRMAN & KAARDAL, P.A.

Dated: November 19, 2008

By  _____

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