

STATE OF MINNESOTA
COURT OF APPEALS
Appellate Case No. A08-1343

Citizens for Rule of Law, et al.,

Appellants,

vs.

Senate Committee on Rules & Administration, et al.,

Respondents.

APPELLANTS' REPLY BRIEF
AND SUPPLEMENTAL APPENDIX

Counsel for Appellants:

Erick G. Kaardal, #229647
Mohrman & Kaardal, P.A.
33 South Sixth Street, Suite 4100
Minneapolis, Minnesota 55402
Telephone: 612-341-1074

Dan Biersdorf, #8187
Biersdorf & Associates
33 South Sixth Street, Suite 4100
Minneapolis, Minnesota 55402
Telephone: 612-339-7242

Counsel for Respondents:

Kenneth E. Raschke, Jr.
Office of the Attorney General
State of Minnesota
445 Minnesota Street, Suite 1800
St. Paul, MN 55101

January 2, 2009

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
Argument and Authorities	1
I. The Respondents have improperly raised issues on appeal not decided by the district court and therefore this Court should strike all arguments regarding those issues.	1
II. The Minnesota Supreme Court, having not opined on per diem excessive payments as compensation, the 1977 published district court decision is not the same issue before the 2008-09 court.....	5
A. The legislature’s self-imposed limitations of reimbursement to incurred expenses is not embodied in the 1977 decision.	5
B. There are no lump sum payments in lieu of incurred expenses as a “manner” for reimbursement.	9
C. The cases the McDonald court relies upon do not support the underlying principle that “per diem” payments are not compensation as clearly or cleanly as the Respondents seek to demonstrate.	13
III. Contrary to the Respondents’ stead-fast reliance of McDonald, its underlying foundation is left in doubt and is not applicable to the present controversy.....	20
IV. All Appellants have standing to bring the underlying action.	21
A. Citizens for the Rule of Law has standing as an association.	22
B. Each individual appellant has standing to bring suit.....	24
C. Additionally, the State Representatives-Plaintiffs-Appellants Have Standing as Legislators and Potential Recipients of Per Diem Compensation.	27
Conclusion	32

Word Count Compliance Certificate

Supplemental Appendix, Complaint dated February 11, 2008

TABLE OF AUTHORITIES

Statutes:

Minn. Constitution, Article I, § 8	26
Minn. Constitution, Article IV, § 9	2, 5, 9, 20, 26, 32
Minn. Constitution, Article VI, § 1	2, 26
Minn. Constitution, Article XI, § 1	2
Minn. Stat. § 3.099.....	6, 7, 11
Minn. Stat. § 3.101.....	7, 9, 10, 11, 21, 22, 32

Cases:

<i>Areans v. Village of Rogers</i> , 240 Minn. 386, 61 N.W.2d 508 (1953).....	25
<i>Alliance for Metro. Stability v. Metro. Council</i> , 671 N.W.2d 905 (Minn. App. 2003)	22, 24
<i>Appeals of Loushay</i> , 169 Pa. Super. 543, 83 A2d. 408 (1951), aff'd 88 A.2d 793 (1952)	18, 19
<i>Baker v. Carr</i> , 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).....	26
<i>Bender v. Williamsport Area School Dist.</i> , 475 U.S. 534 (1986).....	28
<i>Christopherson v. Reeves</i> , 44 S.D. 634, 184 N.W. 1015 (1921)	19, 20
<i>Coleman v. Miller</i> , 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385.....	27, 28, 30
<i>Collins v. Riley</i> , 24 Cal. 2d 912, 152 P.2d 169 (1944)	15
<i>Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.</i> , 603 N.W.2d 143 (Minn. App. 1999)	25, 27
<i>Cummings v. Simth</i> , 368 ILL. 94, 101 N.E.2d 69 (1938).....	16
<i>Dodak v. State Admin. Bd.</i> , 441 Mich. 547, 495 N.W.2d 539.....	27, 29

<i>Eberle v. Nielson</i> , 78 Idaho 572, 306 P.2d 1083 (1957).....	14
<i>Hoppe v. State</i> , 78 Wash. 2d 164, 469 P.2d 909 (1970).....	11, 12
<i>In re Horton</i> , 668 N.W. 2d 208 (Minn. App. 2003)	4
<i>Jones v. Mearas</i> , 256 Ark. 825, 510 S.W.2d 857 (1974).....	14
<i>Kurk v. Brantley</i> , 228 So.2d 278 (Fla. 1969).....	15, 16
<i>Manning v. Sims</i> , 308 Ky. 587, 213 S.W.2d 577 (1948).....	13
<i>McDonald, et al. v. Minn. Stat. House of Representatives, et al.</i> , Dist. Ct. File No. 415863 (June 30, 1977)	passim
<i>McKee v. Likins</i> , 261 N.W.2d 566 (Minn. 1977)	24
<i>Milwaukee County v. Halsey</i> , 149 Wisc. 82, 136 N.W. 139 (1912)	19, 20
<i>Newman v. Brendel & Zinn, Ltd.</i> , 691 N.W.2d 480 (Minn. App. 2005)	12
<i>In re Petition for Improvement of County Ditch No. 86</i> , 625 N.W.2d 813 (Minn. 2001)	1
<i>Raines v. Byrd</i> , 521 U.S. 811 (1997)	27
<i>Rehberger v. Project Plumbing Co.</i> , 295 Minn. 577, 205 N.W.2d 126 (1973)	1, 2
<i>Rukavina v. Pawlenty</i> , 684 N.W.2d 525 (Minn. App. 2004)	23, 24, 25, 27
<i>Scroggie v. Bates</i> , 213 S.C. 141, 48 S.E.2d 634 (S.C. 1948)	19
<i>Silver v. Pataki</i> , 96 N.Y.2d 532, 755 N.E.2d 842, 730 N.Y.S.2d 482, 2001 N.Y. Slip Op. 06138 (N.Y. 2001)	27, 29
<i>Spearman v. Williams</i> , 415 P.2d 597 (1966)	11
<i>State ex rel. v. Aronson</i> , 132 Mont. 120, 314 P2d. 849 (1957)	16

<i>State ex rel. Harbage v. Ferguson</i> , 68 Ohio App. 189, 36 N.W.2d 500, <i>appeal dism'd</i> , 138 Ohio 617, 37 N.E.2d 544 (1941)	17
<i>State ex rel. Overhulse v. Appling</i> , 226 Or. 575, 361 P.2d 86 (1961).....	18
<i>State ex rel. Sviggum v. Hanson</i> , 732 N.W.2d 12 (Minn. App. 2007).....	25
<i>Thiele v. Stich</i> , 425 N.W.2d 580 (Minn. 1988).....	1, 2
<i>Walker v. Omdahl</i> , 242 N.W.2d 649 (N.D. 1976)	16, 17

Other Authorities:

Black's Law Dictionary, 8 th ed. Bryan A. Garner (Thomson/West 2004).	10
Webster's New World College Dictionary, 4 th ed. Michael Agnes (MacMillan 1999)	10

The Appellants submit the following argument and authorities as their reply brief.

ARGUMENT AND AUTHORITIES

I. The Respondents have improperly raised issues on appeal not decided by the district court and therefore this Court should strike all arguments regarding those issues.

Respondents raise several issues on appeal that were not decided by the lower court. The issues include, “[w]hether the additional counts in Appellants’ Complaint are valid as a matter of law;” and “[w]hether Appellants have stated a justiciable claim against a party subject to suit.”¹ Respondents admit on these issues they raise on appeal for the first time that “[t]he district court did not reach this question.”² An appellate court will not consider issues raised but not decided by the district court.³

¹ Response Brief at p. 1.

² *Id.* (Italics in the original).

³ *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (statute-of-limitations issue that had been raised in, but not decided by, the district court would not be addressed on appeal). See *In re Petition for Improvement of County Ditch No. 86*, 625 N.W.2d 813, 816 n.2 (Minn. 2001) (holding when reviewing the grant of a temporary injunction, appellate courts will “not decide” legal issues that have not yet been addressed by the district court); *Rehberger v. Project Plumbing Co.*, 295 Minn. 577, 578, 205 N.W.2d 126, 127 (1973) (stating that even though a

None of the issues were “passed on by the [district court].”⁴ This instant lawsuit is in its earliest stages — in fact, no discovery has started — such that this Court should find it inappropriate to resolve issues not decided by the district court, particularly, constitutional issues. For instance, Respondents seek this Court to hold invalid all other constitutional claims as a matter of law as pled in the Complaint regarding Article IV § 9, and Article XI, §1, Minn. Stat. §§ 3.099, 3.101, 15A.082, 16A.57, and 16A.138.

But equally importantly, the district court assumed jurisdiction for the purposes of dismissing the action on grounds other than the existence of justiciable claims. Unlike standing in which the issue can be raised at any time, this Court should not rule on the justiciability question since the lower court did not rule on the issue of justiciability.⁵

Whether all other claims fail if this Court affirms the lower court’s decision is not on appeal. The instant appeal is based on the lower court’s holding that it lacks jurisdiction to hear the Citizens for

question was raised in the district court, it should not be decided on appeal “if it was not passed on by the [district court].”)

⁴ *Rehberger*, 295 Minn. at 578, 205 N.W. 2d at 127.

⁵ *Thiele*, 425 N.W.2d at 582.

the Rule of Law Complaint having failed, according to the lower court, to meet the Minnesota State Supreme Court standard for review:

In this Court's opinion, the plaintiffs have not made the requisite showing that the trial court intrusion into the internal, discretionary decision of the Legislative branch regarding the amount of per diem payments is justified...⁶

The Honorable Kathleen Gearin granted the defendants motion to dismiss and denied the plaintiffs-appellants' motion to amend their complaint.⁷ Therefore, in light of Supreme Court precedent, the identified issues raised by the Respondents — justiciable claims and the dismissal of counts as a matter of law — should be stricken and such issues not be decided by this Court.⁸

In addition, prior to the perfection of this appeal, this Court questioned whether the lower court's decision was an appealable order. This Court granted the appeal stating “[t]he parties agree that the May 30 order is appealable because the district court dismissed the action

⁶ Distr. Ct. Decision, Aug. 4, 2008, App. p. 4.

⁷ *Id.* at App. p. 2.

⁸ In addition, the record on appeal does not reflect the filing of any cross-appeal, or more appropriately a separate and timely filing of a notice of appeal of the Respondents as is required under Minn. R. App. P. 103.02.

on the ground of lack of jurisdiction.”⁹ To the extent the Respondents raise issues on appeal which were not decided by the lower court and do not respond to the Appellants’ specific questions or arguments on appeal of the underlying order, Respondents’ issues and arguments as such should be disregarded by the Court.

Nevertheless, even though the lower court did not reach the issue of standing, Citizens for the Rule of Law also understands that the question of standing cannot be waived and may be raised at anytime.¹⁰ Therefore, the Respondents’ issue on appeal “[w]hether Appellants have standing to bring this action”¹¹ is appropriate even at the appellate stage of the proceedings, and thus, Citizens for the Rule of Law shall address that issue below.¹²

⁹ Court of Appeals Or. 2 (Sept. 8, 2008).

¹⁰ *In re Horton*, 668 N.W. 2d 208, 212 (Minn. App. 2003).

¹¹ Response Brief at p. 1.

¹² Respondent’s Brief at p. 29 indicate that the 2006-07 Compensation Council no longer exists, having expired as a matter of law after submitting its 2007 report. To the extent the Council no longer exists it could not be a party to the action. But, should it be reconstituted, the allegations of the Complaint remain viable. In short, it is not clear from the Respondents’ Brief the meaning of “no longer exists.”

II. The Minnesota Supreme Court, having not opined on per diem excessive payments as compensation, the 1977 published district court decision is not the same issue before the 2008-09 court.

A. The legislature's self-imposed limitations of reimbursement to incurred expenses is not embodied in the 1977 decision.

The Minnesota Supreme Court has never made a determination that monies in excess of expenses actually incurred for legislative services is not compensation and therefore violative of Minnesota's Constitution, Article IV, § 9. While affirming the district court's decision "in all respects,"¹³ the opinion of the court reflected nothing more than the jurisdictional standard necessary for review of the legislative act — met in all respects — in the instant case:

This court adheres to the broad principles respecting the division of powers among the three branches of government, namely the executive, legislative and judicial. Implementation of this principle is achieved by this court's decision to refrain from an intrusion into the internal management of the legislative or executive branches absent a showing of circumstances compelling our review of discretionary actions taken. Appellants have not made the requisite showing that such an intrusion is justified.¹⁴

The Respondents seek to compare the instant case to the 1977 *McDonald* as a mere reiteration of the question, "[m]ay the Legislature

¹³ Or. Affirming Dist. Ct. 1 (Nov. 22, 1977) App. p. 12.

¹⁴ Or. Affirming Dist Ct. 1-2 (Nov. 22, 1977) App. pp. 12-13.

by resolution provide lump sum payments to its members in 1977 in excess of actual expenses incurred by its members?” While the answer of the unpublished opinion was then “yes,” the answer is now “no.” “No” because the *McDonald* court did not interpret the core statutes as corollary to the constitutional provision prohibiting the grant of increases to compensation within the same term of the elected official.

The interpretation of the legislature’s statutory authority to grant and to account how per diem expenses are accounted for will determine, at least in part, whether or not legislators have violated the rule of law. Respondents cite two statutes, criticizing the Appellants — Citizens for the Rule of Law, State Representative Mark Buresgens, State Representative Tom Emmer, Robert J. Hantan, Victor Niska, and Ronald Johnson — for not taking notice of Minn. Stat. § 3.099 “the central statute granting the Legislature the power to do precisely what it has done in the instant matter.”¹⁵ This statute is not ignored, though not mentioned, because it merely states the obvious regarding legislative authority to allow each legislator to receive “per diem living expenses.”¹⁶ But as Respondents appear to readily admit, this statute

¹⁵ Response Brief at p. 3 n. 2.

¹⁶ Minn. Stat. § 3.099, subd. 1.

cannot be read in isolation.¹⁷ The other is Minn. Stat. § 3.101, which is the core statute of the Citizens for the Rule of Law complaint.

Citizens for the Rule of Law complaint does not challenge the legislature's authority to grant per diem living expenses as found in Minn. Stat. § 3.099, subd. 1:

Each member shall also receive per diem living expenses during a regular or special session of the legislature in the amounts and for the purposes as determined by the senate for senate members and by the house of representatives for house members.

But, central to the Citizens for the Rule of Law complaint and to which Respondents fail to appreciate, is the legislature's self-imposed limitations of Minn. Stat. § 3.099, subd. 1 found in Minn. Stat. § 3.101, subd. 1:

A member of the legislature in addition to the compensation and mileage otherwise provided by law *shall be reimbursed for living expenses 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 of representatives Committee on Rules and Legislative Administration for house of representative members.

(Emphasis added.)

¹⁷ Response Brief at p. 3-4.

Importantly, the *McDonald* court did not reflect on the stipulated facts nor did it opine on the effect of this statute as a self-imposed limitation of legislative powers on reimbursable expenses. For example, the *McDonald* court did not address the reimbursement of living expenses “in the manner ... prescribed by the senate Committee on Rules and Administration ...and by the house of representatives Committee on Rules and Legislative Administration...” Additionally, the *McDonald* court did not address the “manner” in which expenses of legislators are reimbursed -- through submission of invoices or other statements “declaring a need for specific reimbursements of daily expenses relating to those per diem payments.”¹⁸ Lastly, the *McDonald* court did not determine whether an increased per diem payment to a legislator, if not for a declared expense and if declared to federal and state revenue authorities as “income,”¹⁹ was “compensation” under the Minnesota Constitution.

¹⁸ Complaint at ¶ 52 (Expressed in the negative).

¹⁹ Complaint at ¶ 53 (Expressed in the negative and upon information and belief. Citizens for the Rule of Law contends, as presented in its’ principal brief, discovery would likely reveal the truth of the allegations sufficient to grant the relief requested and to defeat a Rule 12(e) dismissal of the underlying Complaint.)

B. There are no lump sum payments in lieu of incurred expenses as a “manner” for reimbursement.

The Citizens for the Rule of Law Complaint seeks a declaratory judgment on factual allegations that monies received in excess of reimbursable incurred expenses under Minn. Stat. § 3.101 as violative of Article IV, § 9, because, as a matter of fact, such money received is an emolument and therefore is compensation:

26. The Senate violates Minn. Stat. Section 3.101 by paying daily “living expense” compensation beyond reimbursement of actual living expenses including housing allowance and mileage. The Senate pays \$96 per day for “living expense” compensation without requiring Senators to vouch for actual expenses to justify the \$96 per day.

27. The House violates Minn. Stat. Section 3.101 by paying daily “living expense” compensation beyond reimbursement of actual living expenses including housing allowance and mileage. The House pays \$77 per day for “living expense” compensation without requiring Senators to vouch for actual expenses to justify the \$77 per day.²⁰

The Respondents provide no evidence that the legislature provides per diem payments in a “lump sum” for living expenses nor challenge the “accuracy of any statement in Appellants’ Complaint.”²¹ Thus, unlike the *McDonald* court, here, Minn. Stat. § 3.101 does *not provide for lump sum payments* but requires reimbursement for “living

²⁰ Citizens for the Rule of Law, et al. Complaint at ¶¶ 26-27.

²¹ Response Brief at p. 3 n.1. In addition, the Respondents “treat all purely factual allegations in the Complaint as true.”

and other expenses incurred in the performance of duties...” in a manner requiring vouchers or statements of expenses for the reimbursement.²²

Black’s Law Dictionary defines “incur” as “to suffer or bring on oneself (a liability or expense).”²³ Likewise, Webster’s New World College Dictionary defines “incur” as “1. to come into or acquire (something undesirable [to incur a debt]; 2. to become subject to through one’s one action, bring upon oneself.”²⁴

“Reimbursement” is defined as “repayment.”²⁵ Similarly “reimburse” is defined as “1. to pay back (money spent); 2. to repay or compensate (a person) for expenses, damages, losses, etc.”²⁶

Using the plain language of the statute, Minn. Stat. § 3.101, subd. 1, when a legislator incurs an expense, he or she may be reimbursed for that expenditure. This is consistent with the Citizens for the Rule of Law complaint. The challenge in the instant case, is

²² Complaint at ¶¶ 52-53.

²³ Black’s Law Dictionary, 782, 8th ed. Bryan A. Garner (Thomson/West 2004).

²⁴ Webster’s New World College Dictionary, 724, 4th ed. Michael Agnes (MacMillan 1999).

²⁵ Black’s Law Dictionary, 1312.

²⁶ Webster’s New World College Dictionary, 1208.

whether the amounts beyond actual incurred expenses are emoluments and thus compensation.

The *McDonald* court determined the constitutionality of Minnesota's legislative actions regarding per diem payments in partial reliance on Oklahoma and Washington Supreme Court decisions. The analysis of these cases fails to appreciate the self-imposed limitations of Minn. Stat. § 3.101 -- since neither of those states reflect a similar statutory provision.

First, in Oklahoma's *Spearman v. Williams*, the challenged statute read "[i]n lieu of all expenses in maintaining said offices the sum of Fifty Dollars (\$50.00) monthly is hereby authorized, and in lieu of said travel expenses throughout a member's district, the sum of Fifty Dollars (\$50.00) monthly is hereby authorized."²⁷ No such language — in lieu of — appears in Minn. Stat. 3.101 or 3.099.

Second, in *Hoppe v. State*, Washington's challenged statute read "Members of the legislature including the president of the senate shall be paid not to exceed Forty dollars per day in lieu of subsistence and lodging during and while attending any legislative session."²⁸ Again,

²⁷*Spearman v. Williams*, 415 P.2d 597, 599 (1966).

²⁸ *Hoppe v. State*, 78 Wash. 2d 164, 166, 469 P.2d 909, 911 (1970).

“in lieu of” language is used. As the Washington Supreme Court explained, “(1) there is no constitutional limitation against reimbursement of the expenses for subsistence and lodging necessarily incurred by legislators compelled to leave their usual place of residence to attend upon a regular or special session of the legislature; (2) the reimbursement of such necessary expenses by way of a flat or lump sum per diem allowance, as opposed to requiring the vouchering, auditing, and approval of only those expenses actually and individually incurred, is not per se unconstitutional; (3) the choice between the two methods of reimbursement is a legislative decision...”²⁹

In the instant case, it is the contention of the Citizens of the Rule of Law, undisputed by the Respondents, that vouchers or other statements for the reimbursement of expenses are required under Minn. Stat. § 3.101. But for the Rule 12.02(e) motion, discovery upon the Respondents would confirm — or deny — the manner in which expenses are reimbursed. 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 by this Court.³⁰

²⁹ *Hoppe*, 78 Wash. 2d at 173, 469 P.2d at 915.

³⁰ *Newman v. Brendel & Zinn, Ltd.*, 691 N.W.2d 480,482 (Minn. App. 2005).

Nevertheless, there is nothing in the statute suggesting per diem payments of incurred expenses are paid in lump sums or in lieu of incurred expenses. This case should be remanded and allowed to move forward.

C. The cases the *McDonald* court relies upon do not support the underlying principle that “per diem” payments are not compensation as clearly or cleanly as the Respondents seek to demonstrate.

Respondents Response brief at page 9-10 opine on the *McDonald*'s court's reliance on a string citation of cases purported to support its position on per diem payments as consistent with its ruling. Yet, upon closer examination of those cases, they are distinguishable and do not wholly support the lower court's ruling.

For instance, in *Manning v. Sims*, the Kentucky court found constitutional the legislature's reimbursement of judges by lump sum appropriations *in lieu of* actual expenses.³¹ But the court also stated that nothing in its opinion “precluded judicial inquiry into expense allowances of public officers and if it appears that allowances exceed official expenses or reasonable estimates thereof, the courts are *free to condemn them.*”³²

³¹ *Manning v. Sims*, 308 Ky. 587, 602, 213 S.W.2d 577, 586 (1948).

³² *Id.*

In *Eberle v. Nielson*, the court found the burden to be upon the defendant, in challenging the constitutionality of the act — an increase of per diem payments — to show that the allowance is in fact an augmentation of either the per diem or mileage allowed.³³ There, no showing was made.³⁴ In the instant case, discovery has not been achieved because of the Rule 12.02(e) motion, but sufficient evidence attached to the Complaint reflects an understanding that further inquiry is necessary. Even under the *Eberle* decision, but for the lack of evidence, if a showing had been made, the plaintiffs' claims would have prevailed.

The Arkansas Supreme Court in *Jones v. Mearas*, did not find an act to reimburse legislators violative of the state's constitution, but did note that "advancements of payment for sums" as violating the Arkansas constitution.³⁵ Furthermore, in that case the court found the evidence of incurred expenses as "borderline" reimbursements, but nevertheless determined the evidence sufficient.³⁶ In the instant case,

³³ *Eberle v. Nielson*, 78 Idaho 572, 580, 306 P.2d 1083, 1087-88 (1957).

³⁴ *Id.*

³⁵ *Jones v. Mearas*, 256 Ark. 825, 829, 510 S.W.2d 857, 860 (1974).

³⁶ *Id.*

the Citizens for the Rule of Law seek to present evidence to substantiate its claims as pled.

The California court in *Collins v. Riley* determined that the challenged statute as constitutional since it intended to provide only for the reimbursement of “a member’s actual living expenses while away from home.”³⁷ Thus, the court found that repayment of expenses is not additional compensation but merely a reimbursement to the legislator for actual cash outlays necessarily incurred for expenses while attending to legislative business.³⁸ Likewise, the Citizens for the Rule of Law do not challenge the reimbursement of actual incurred expenses but only those that are not accounted for by receipts. Those extra payments as a part of “per diem” must be identified as emoluments and therefore are “compensation” under Minnesota’s Constitution and statutes.

Kurk v. Brantley, a cited Florida case does not appear to apply since it determined that no law prevented legislators from increasing

³⁷ *Collins v. Riley*, 24 Cal. 2d 912, 915, 152 P.2d 169, 170 (1944).

³⁸ *Id.*

salaries within the same term they were elected.³⁹ This is prohibited under Minnesota's Constitution.

The Illinois Supreme Court in *Cummings v. Smith* does not advocate any position contrary to those expressed in the Citizens for the Rule of Law Complaint. The Illinois court found that the reimbursement of “only... expenses incurred in conducting the business of the circuit court...” and that “payment of legitimate expenses of travel, upkeep, and maintenance of judges in holding court outside their judicial district...” as constitutional and not compensation.⁴⁰ The same is true for *State ex rel. James v. Aronson* where the Montana court found that travel expenses do not constitute compensation.⁴¹

In *Walker v. Omdahl*, the North Dakota Supreme Court also found, as the Citizens for the Rule of Law Complaint asserts, “[t]o the extent session laws providing for increases in unvouchered expense payments of certain state officials exceeded amounts reasonably necessary to cover increases in cost of living, provisions *were violative of State Constitution as allowance of salary which had been increased*

³⁹ *Kurk v. Brantley*, 228 So.2d 278, 280 (Fla. 1969).

⁴⁰ *Cummings v. Smith*, 368 ILL. 94, 101 N.E.2d 69, 72 (1938).

⁴¹ *State ex rel. v. Aronson*, 132 Mont. 120, 314 P2d. 849 (1957).

during term for which state officials were elected.”⁴² There, the court determined the legislature could increase cost of living increases through unvouchered expenses, but then the issue becomes one of the reasonableness of the increase and requiring an inquiry into the amount of the increase and percentage of the increase.⁴³ Anything beyond reasonable would be considered salary violative of the constitution.⁴⁴

The Ohio Supreme Court in *State ex rel. Harbage v. Ferguson* duly noted that because it could “clearly determine that the reimbursement of a member of the Legislature for his *actual expenses* does not fall within the ordinary definition of the word ‘prequisite’” and therefore is not compensation.⁴⁵ Citizens for the Rule of Law do not challenge “actual expenses” of Minnesota legislators but if not reimbursements of incurred expenses, the monies received must be emoluments and therefore “compensation.” This is also consistent with

⁴² *Walker v. Omdahl*, 242 N.W.2d 649, 659 (N.D. 1976) (emphasis added).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *State ex rel. Harbage v. Ferguson*, 68 Ohio App. 189, 194, 36 N.W.2d 500, 503, *appeal dismissed*, 138 Ohio 617, 37 N.E.2d 544 (1941) (emphasis added).

the holding in *State ex rel. Overhulse v. Appling* where the court found the legislature could reimburse its members “for legitimate legislative expenses incurred by them.”⁴⁶ Citizens for the Rule of Law seek to determine legitimate expenses incurred versus non-reimbursable, non-vouchered expenses that are emoluments and, therefore, “compensation.”

Contrary to the Respondents assertion in their brief at page 14, intrusive and extensive discovery is not necessary. The senators and representatives are reimbursed through their respective entities — the Senate Fiscal Services and House Budgeting and Accounting— for vouchered expenses. Discovery here, should result in adequate evidence reflecting how expenses are paid. Likewise, any department issuing legislators federal and state income tax records reflecting the amount of income will further constitute a complete record to substantiate the underlying claims of the Citizens for the Rule of Law Complaint.

Contrary to the *McDonald* court’s reliance on *Appeals of Loushay* in support of its 1977 decision, the Pennsylvania court found an act increasing the allowance for gross expenses outside of the realm of

⁴⁶ *State ex rel. Overhulse v. Appling*, 226 Or. 575, 590, 361 P.2d 86, 94 (1961) (emphasis added).

reasonableness and declared it unconstitutional because it “plainly violates the Constitution of the Commonwealth.”⁴⁷

Likewise, in *Scroggie v. Bates*, the court found that even though it did not have the aid of extrinsic facts, since the statute at issue allowed for payment of appropriated amounts “without the required itemization ... the real intent and purpose of the appropriation ... was to increase the compensation or per diem of the members of the General Assembly, in violation of the Constitution of this State....”⁴⁸

Both decisions in *Loushay* and *Scroggie* emphasize the need to allow the Citizens for the Rule of Law lawsuit to conduct discovery to provide the extrinsic evidence to substantiate its claims. The dismissal under Rule 12.02(e) of the underlying action was premature at the very least. But even so, there is sufficient evidence for this Court to determine that evidence could be produced to substantiate the Appellants’ claims for relief.

Finally, in both *Christopherson v. Reeves*⁴⁹ and *Milwaukee County v. Halsey*⁵⁰, the courts found the payment of legitimate expenses not

⁴⁷ *Appeals of Loushay*, 169 Pa. Super. 543, 550-51, 83 A2d. 408, 412-13 (1951), *aff’d* 88 A.2d 793 (1952).

⁴⁸ *Scroggie v. Bates*, 213 S.C. 141, 48 S.E.2d 634, 640 (S.C. 1948).

⁴⁹ *Christopherson v. Reeves*, 44 S.D. 634, 184 N.W. 1015 (1921);

violative of their states' respective constitutions. These positions are not in contradiction to the issues of the Citizens for the Rule of Law Complaint since reimbursement of legitimate expenses incurred are not the issue.

III. Contrary to the Respondents' stead-fast reliance of *McDonald*, its underlying foundation is left in doubt and is not applicable to the present controversy.

What remains of the *McDonald* decision, as applied to this case, is in doubt? There is doubt whether it remains on a firm judicial footing. This doubt exists because the evidence thus far produced as attached to the Complaint reflect something other than actual incurred expenses are being paid. Such overpayment, if proven, would be an emolument and therefore "compensation" received by some legislators violative of the constitutional limitations imposed under Article IV, § 9.

The *McDonald* court relied on cases that actually do support the Appellants' claims asserted here. These cases cited by the *McDonald* court, on the whole, do not support the 1977 decision's application to Appellants' claims. What the Citizens for the Rule of Law seek is the opportunity to place the full record and evidence before the lower court to determine whether compensation is being paid through per diem

⁵⁰ *Milwaukee County v. Halsey*, 149 Wisc. 82, 136 N.W. 139 (1912).

payments in a way violative of Minn. Stat. § 3.101 and the Minnesota Constitution – something the *McDonald* court never addressed.

IV. All Appellants have standing to bring the underlying action.

Respondents assert the Appellants have no standing to bring the underlying action. If Respondents seek to rely wholly on the 1977 *McDonald* decision, then it also must accept that court's position on standing. It granted standing to the two plaintiff taxpayers because of their "direct claim of violation of the constitution."⁵¹ Though the court might have been reluctant, it assumed jurisdiction for this narrow purpose and decided the matter accordingly: "It is with great reluctance that this Court denies the defendants' motion to dismiss and elects to determine this case on its merits."⁵² Furthermore, the State Supreme Court did not contradict the lower court.⁵³

If only for that limited purpose, then because the present plaintiffs-appellants are challenging the actions of legislators regarding violation of constitutional prohibitions of increasing compensation

⁵¹ Or. Distr. Ct. 5 (Jun. 30, 1977), App. p. 9.

⁵² *Id.*

⁵³ Or. Sup. Ct. 2 (Nov. 22, 1977), App. p. 12-13.

through per diem payments beyond the scope of Minn. Stat. § 3.101, then Respondents should agree with Appellants' standing. But, they do not.

A. Citizens for the Rule of Law has standing as an association.

Citizens for the Rule of Law is an association of citizens concerned with advancing beliefs, in part, that elected officials are obligated to follow the Minnesota Constitution and statutes and to act where the rule of law is abridged. The instant action is brought to redress injuries on its own behalf and on behalf of its members.⁵⁴

Citizens for the Rule of Law's mission is to protect citizens from the illegalities of state law-makers and to promote accountability of those in power to follow the rule of law. The association acts when the law is disregarded and directly affects the otherwise disenfranchised. Two key questions are answered regarding organizational standing: (1) if the organization is denied standing, would that mean that no potential plaintiff would have standing to challenge the

⁵⁴ *Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 914-15 (Minn. App. 2003).

unconstitutional acts asserted in its' complaint; and (2) for whose benefit was the per diem increase enacted?⁵⁵

If the Citizens for the Rule of Law did not act, it is unlikely anyone would have the resources or the ability to do so. An obvious plaintiff in the underlying action for instance should have been the Minnesota Attorney General's Office representing the State of Minnesota. As a separate entity and within a separate branch of government, it is also responsible to ensure law-makers and other legislative acts are within the restraints of the Minnesota Constitution. Instead, the Attorney General's Office is counsel for the Respondents, challenging the Appellant Citizens for the Rule of Law and other Appellants' allegations, of unconstitutional behavior to disburse monies illegally from the state treasury. If not Citizens for the Rule of Law, then who?

The resulting expenditures of monies given to legislators for expenses, not incurred, through increased per diem payments within the same term as elected -- as challenged in the Citizens for the Rule of Law complaint -- is an increase of compensation violative of Minnesota's constitution and statutes. That action is contrary to the

⁵⁵ *Rukavina v. Pawlenty*, 684 N.W.2d 525, 532-33 (Minn. App. 2004).

rule of law and affects the mission of the association⁵⁶ to encourage compliance of those in positions of power to follow the law.⁵⁷ This Court should find that Citizens for the Rule of Law has standing to pursue the claims asserted in this case.

B. Each individual appellant has standing to bring suit.

Respondents assert State Representative Mark Buesgens, State Representative Tom Emmer, Robert J. Hanten, Tom Janas, Victor Niska, and Ronald R. Johnson lack standing to bring the underlying action because they lack an injury-in-fact. The law finds otherwise.

As previously discussed, the *McDonald* court granted standing — outright — to the taxpayers challenging the constitutionality of the legislators' actions. Nevertheless, when the situation warrants, a taxpayer may maintain an action to restrain unlawful disbursements of public money and to restrain illegal action on the part of public officials.⁵⁸ This is exactly the instant case. The individual appellants

⁵⁶ *Rukavina*, 684 N.W.2d at 533.

⁵⁷ *Rukavina*, 684 N.W.2d at 533, citing *Alliance for Metro. Stability*, 671 N.W.2d at 914 (challenged provisions of regulations affected the mission of the organization).

⁵⁸ *Id.* 684 N.W.2d at 531, citing *McKee v. Likins*, 261 N.W.2d 566, 571 (Minn. 1977).

are taxpayers seeking to enjoin public officials⁵⁹ from continuing to violate the Minnesota Constitution⁶⁰ and specific Minnesota statutes.⁶¹ “It has been generally recognized that a taxpayer has sufficient interest to enjoin illegal expenditures of both municipal and state funds.”⁶²

The underlying complaint makes specific allegations of illegal disbursements of state treasury funds. This action is not a disagreement with policy or the exercise of discretion by legislators in the execution of enacting laws or resolutions. The effect of increased per diem payments within the same term of office, is violative of the Minnesota Constitution, and each disbursement to pay that per diem is an unlawful disbursement of funds.⁶³

⁵⁹ Complaint at Count VI, Supp. App.

⁶⁰ Complaint at Counts I and III, Supp. App.

⁶¹ Complaint at Counts II, IV, and V, Supp. App.

⁶² *Areans v. Village of Rogers*, 240 Minn. 386, 392, 61 N.W.2d 508, 513 (1953); *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 12 (Minn. App. 2007) (state legislators had taxpayer standing); *Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143, 146 (Minn. App. 1999) (“[T]axpayers have the right to ‘maintain an action in the courts to restrain the unlawful use of public funds’”).

⁶³ See *Rukavina*, 684 N.W.2d at 531.

In addition to taxpayer standing, the individual Appellants claim voter standing.⁶⁴ The individual plaintiffs have the elective franchise pursuant to Article VI, Section 1 of the Minnesota Constitution. Part of that elective franchise under Article IV, § 9 of the Minnesota Constitution is the right to vote on members of the House prior to any increase of legislative compensation taking effect. Moreover, Article I, § 8, addressing “Redress of Injuries or Wrongs” appears to confer on voters a cause of action for constitutional violations such as the ones described in the Complaint.

Pursuant to these authorities, the individual Appellants as voters have standing to bring an action against the Respondents enjoining them from further deprivation of their voting rights – including the future right to vote on members of the House or Senate prior to any increase of legislative compensation taking affect. This lawsuit and its remedies are, in part, intended to avoid further deprivation of constitutionally-protected voter rights.

⁶⁴ In the seminal case of *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), the Court accorded voters standing to challenge population variations between electoral districts despite the fact that the legislative reapportionment sought would and eventually did have dramatic “restructuring” effects.

C. Additionally, the State Representatives-Plaintiffs-Appellants Have Standing as Legislators and Potential Recipients of Per Diem Compensation.

State Representative Mark Buesgens and State Representative Tom Emmer claim state legislator standing to challenge the per diem payments in violation of Minnesota's Constitution and statutes.

Minnesota courts have acknowledged that state legislators may bring claims for vote nullification and usurpation of legislative powers.⁶⁵ For legislators to have standing, they must show that their claimed injury is "personal, particularized, concrete, and otherwise judicially cognizable."⁶⁶ "Cases considering legislator standing generally fall into one of three categories: lost political battles, nullification of votes and usurpation of power."⁶⁷ "Only circumstances presented by the latter two categories confer legislator standing."⁶⁸

⁶⁵ See *Rukavina*, 684 N.W.2d 525, 532; *Conant*, 603 N.W.2d 143, 149-150.

⁶⁶ *Conant*, 603 N.W.2d at 150 (citing *Raines v. Byrd*, 521 U.S. 811, 820 (1997)).

⁶⁷ *Silver v. Pataki*, 96 N.Y.2d 532, 539, 755 N.E.2d 842, 730 N.Y.S.2d 482, 2001 N.Y. Slip Op. 06138 (N.Y. Jul 10, 2001) (vote nullification).

⁶⁸ *Id.* at 539, citing *Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (vote nullification); *Dodak v. State Admin. Bd.*, 441 Mich. 547, 495 N.W.2d 539 (usurpation of power belonging to legislative body).

The U.S. Supreme Court in *Coleman* found standing for individual legislators who claimed that their “no” votes were nullified by the legislative act being given effect anyway. There, the Court held that Kansas state legislators who had been locked in a tie vote that would have defeated the State's ratification of a proposed federal constitutional amendment, and who alleged that their votes were nullified when the Lieutenant Governor broke the tie by casting his vote for ratification, had "a plain, direct and adequate interest in maintaining the effectiveness of their votes."⁶⁹ The U.S. Supreme Court in *Raines v. Byrd*, 521 U.S. 811, 822 (1997) restated the *Coleman* holding and further explained that legislative standing existed when legislators' no votes were nullified by the legislative act being given effect anyway.

⁶⁹ *Id.*, at 438 (emphasis added). The U.S. Supreme Court in *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 544-545, n. 7 (1986)(dicta), also recognized legislative standing based on vote nullification. The Court stated, “It might be an entirely different case if, for example, state law authorized School Board action solely by unanimous consent, in which event Mr. Youngman might claim that he was legally entitled to protect “the effectiveness of [his] vot[e].” *Coleman v. Miller*, 307 U.S. 433, 438 (1939). . . But in that event Mr. Youngman would have to allege that his vote was diluted or rendered nugatory under state law and even then he would have a mandamus or like remedy against the Secretary of the School Board . . .” 475 U.S. at 544, 545, n. 7 (citations omitted).

The New York Court of Appeals in *Silver v. Pataki*⁷⁰ held that the Speaker of New York's General Assembly had capacity and standing as a legislator to bring suit seeking to vindicate his rights as a legislator. The Speaker's successful challenge was based on the Governor using the line item veto on non-appropriation bills. The Court stated that a single legislator had standing on a vote nullification claim:

Nor is a controlling bloc of legislators (a number sufficient to enact or defeat legislation) a prerequisite to plaintiff's standing as a Member of the Assembly. The *Coleman* Court did not rely on the fact that all Senators casting votes against the amendment were plaintiffs in the action (*see, Kennedy v. Sampson, supra*, 511 F.2d, at 435 ["In light of the purpose of the standing requirement * * * we think the better reasoned view * * * is that an individual legislator has standing to protect the effectiveness of his vote with or without the concurrence of other members of the majority"]). Moreover, plaintiff's injury in the nullification of his personal vote continues to exist whether or not other legislators who have suffered the same injury decide to join in the suit.

Id. at 848-49.

Similarly, the Michigan Supreme Court in *Dodak v. State Admin. Bd.*⁷¹ held that a single member of the state house appropriations committee had standing to bring an action alleging that the state administrative board's transfer of appropriated funds from one

⁷⁰96 N.Y.2d 532, 755 N.E.2d 842, 730 N.Y.S.2d 482, 2001 N.Y. Slip Op. 06138 (N.Y. Jul 10, 2001).

⁷¹ 441 Mich. 547, 495 N.W.2d 539 (1993).

program to another within a department of state government was unauthorized.

According to these precedents, the State legislators have legislator standing under two categories. First, the State legislators have standing because of vote nullification. Vote nullification exists under *Coleman* and its progeny because the state legislators through their "no" votes and or legislative inaction did not approve the violative per diem payments. Because the proper constitutional or statutory amendments were not enacted to make the violative per diem payments conform to state law -- or, alternatively, to make the state law conform to the violative per diem payments -- the state legislators' exclusive legislative prerogative to appropriate state funds was violated.

Second, the state legislators have standing because the Senate Committee on Rules and Administration and the House Committee on Rules and Legislative Administration usurped the exclusive legislative prerogative to appropriate state funds by enactment. Since the Senate and House Committees' resolutions were violative of constitutional and statutory law, they usurped a power allocated to the state legislature

under Articles III, IV and XI of the Constitution to appropriate funds – subject to the Governor’s veto.

Additionally, the state legislators assert injury because the Senate and House Committee proceedings and orders unconstitutionally tipped the balance of powers in favor of “more compensation” for state legislators. The legislature’s power to appropriate funds for compensating state legislators is balanced with the Governor’s power to veto. When the Senate and House committees usurped the power by making per diem payments in violation of Minnesota’s constitution and statutes, they unconstitutionally deprived the two state legislators of working with the Governor to keep state legislative compensation under control.

Further, Respondents neglect that State Representative Mark Buesgens and State Representative Tom Emmer assert standing as recipients or possible recipients of the 2007 authorized increases in per diem living expenses as compensation and not as legitimate expenses incurred. The issue for them is receiving the money. Should they take the increase? State Representatives Buesgens and Emmer have an obvious interest in a court declaratory judgment determining the legal

issues in the case because they have been or could be recipients of the increase.

Conclusion

The Respondents arguments are unavailing and unpersuasive. The underlying 1977 *Tom McDonald and Marvin Eakman v. The Minnesota State House of Representatives and the Minnesota State Senate (Edward Gearty, President of the Minnesota State Senate, and Martin Sabo, Speaker of the Minnesota State House of Representatives* is left in doubt. Its applicability to the statutory construction of Minn. Stat. § 3.101 and questionable supporting base of cases throughout the opinion are insufficient to declare such an important issue as finally determined — particularly an unpublished district court opinion. The Minnesota Supreme Court, nor any other appellate court, has thoroughly applied the applicable Minnesota constitutional and statutory law to the issue presented here.

The issue is important to the transparency of government. Have the legislators gained increased compensation through per diem payments of non-incurred expenses violative of Article IV, § 9 ? Have they violated their own self-imposed limitations governing reimbursements of actual expenses? If they have, the monies received

are emoluments and compensation. It is income. Thus, there is evidence to show without interfering with or requiring extensive discovery, that the underlying claims of the Appellants' complaint are supportive of the relief demanded.

The Appellants respectfully request that the lower court decision be reversed and this matter remanded in accordance with this Court's decision.

MOHRMAN & KAARDAL, P.A.

Dated: January 2, 2009



Erick G. Kaardal, #229647
33 South Sixth Street, Suite 4100
Minneapolis, Minnesota 55402
Telephone: 612-341-1074

BIERSDORF & ASSOCIATES

A handwritten signature in cursive script, appearing to read "Dan Biersdorf", is written over a horizontal line.

Dan Biersdorf, #8187
33 South Sixth Street, Suite 4100
Minneapolis, Minnesota 55402
Telephone: 612-339-7242

Dated: January 2, 2009

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 Reply 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 5,416 words.

MOHRMAN & KAARDAL, P.A.

Dated: January 2, 2009

By



Erick G. Kaardal (229647)
33 South Sixth Street, Suite 4100
Minneapolis, MN 55402
Telephone: 612-341-1074
Facsimile: 612-341-1076

Attorneys for Appellants