

No. A08-1343

STATE OF MINNESOTA

IN COURT OF APPEALS

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

RESPONDENTS' 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).

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LEGAL ISSUES

I. Whether, under the Minnesota Supreme Court's *McDonald* decision, this case warrants dismissal.

The district court dismissed the case pursuant to the McDonald decision.

Apposite authority:

Minn. Const. art. IV, § 9

McDonald v. Minnesota State House of Representatives, No. 48005 (Minn., Nov. 22, 1977)

McDonald v. Minnesota State House of Representatives, No. 419863 (Minn. 2d Dist., June 30, 1977)

II. Whether Appellants have standing to bring this action.

The district court did not reach this question.

Apposite authority:

Rukavina v. Pawlenty, 684 N.W.2d 525 (Minn. App. 2004)

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

III. Whether Appellants have stated a justiciable claim against a party subject to suit.

The district court did not reach this question.

Apposite authority:

ROM State ex rel. Ryan v. Civil Service Comm'n of Minneapolis, 154 N.W.2d 192 (Minn. 1967)

De Joie v. Medley, 945 So.2d 968 (La. 2006)

IV. Whether the additional counts in Appellants' Complaint are valid as a matter of law.

The district court did not reach this question.

Apposite authority:

Minn. Const. art. IV, § 9 and art XI, § 1

Minn. Stat. §§ 3.099, 3.101, 15A.082, 16A.57, and 16A.138

2005 Minn. Laws ch. 156, art. 1, § 2

2007 Minn. Laws ch. 148, art. 1, § 3

INTRODUCTION

Appellants have filed a lawsuit that was decided more than thirty-one years ago. Minnesota case law that has remained unchanged since 1977 establishes two points that are dispositive in the instant case:

- First, court challenges to the Minnesota Legislature's management of per diem payments constitute judicial "intrusion[s] into the internal management of the legislative" branch that Minnesota courts will not engage in. *See McDonald v. Minnesota State House of Representatives*, No. 48005 (Minn., Nov. 22, 1977) (hereinafter "*McDonald* (Minn.)") (Appellant's Appendix (hereinafter "A.A.") 12-13).
- Second, the Minnesota Legislature may by resolution fix the amount of per diem living expense payments to its members without regard to actual expenses incurred by these members, and increases in those amounts may take effect before the next legislative election--because per diem living expenses payments to legislators are not "compensation" within the meaning of Article IV, § 9, of the Minnesota Constitution. *See id.* at A.A. 12 (affirming "in all respects" *McDonald v. Minnesota State House of Representatives*, No. 419863 (Minn. 2d Dist., June 30, 1977) (A.A. 5-11)).

Recognizing that these holdings eviscerated Appellants' case, the district court below dismissed the instant action. The district court's ruling is supported by established case law, and as such it should be affirmed.

FACTS

A. The Per Diem Resolutions.

In 2007, both houses of the Minnesota Legislature established, by resolution, a maximum per diem allowance for members' living expenses payments that was greater than those established by the previous legislature. (*See* First Amended Complaint

(A.A. 14-31) (hereinafter “Compl.”) ¶¶ 19-20).¹ In so doing, the Legislature was carrying out the responsibilities assigned to it by Minnesota statute, to wit:

Pay days; mileage; *per diem*.

[...]

Each member shall receive mileage for necessary travel to the place of meeting and returning to the member’s residence in the amount and for trips as authorized by the senate for senate members and by the house of representatives for house members.

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.

Minn. Stat. § 3.099, subd. 1 (2006) (boldface in original) (italics added).²

LIVING 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 of

¹ Respondents do not here concede the accuracy of any statement in Appellants’ Complaint. However, in proceedings stemming from a Rule 12.02 motion, “the factual allegations in the complaint and [any] supporting affidavits are to be taken as true.” *Marquette Nat’l Bank of Minneapolis v. Norris*, 270 N.W.2d 290, 292 (Minn. 1978). As such, for the purposes of this appeal, Respondents treat all purely factual allegations in the Complaint as true. Importantly, however, the same deference does not extend to statements in the Complaint that are conclusions of law or mixed assertions of law and fact. *See id.* (“factual allegations”).

² Neither the Complaint nor Appellants’ Brief takes any notice of § 3.099, the central statute granting the Legislature the power to do precisely what it has done in the instant matter.

representatives Committee on Rules and Legislative Administration for house of representatives members.

Minn. Stat. § 3.101, subd. 1 (2006) (boldface in original) (italics added).

Pursuant to the 2007 resolutions,

- the maximum amount of per diem living expenses for senators rose from \$66 to \$96 per day, or 45.45% (*see* Compl. ¶ 19); and
- the maximum amount of per diem living expenses for representatives rose from \$66 to \$77 per day, or 16.67% (*see id.* ¶ 20).

Appellants subsequently filed suit, contending that “the members of the Minnesota Senate and House [have] violat[ed] provisions of the Minnesota Constitution and State Statutes to unlawfully compensate themselves through per diem payments and increases and unlawfully making those increases immediately effective.” (*Id.*, “Introduction” ¶ 1.)

B. The District Court’s Decision.

In March of 2008, Respondents filed a motion to dismiss Appellants’ Complaint pursuant to Minnesota Rules of Civil Procedure 12.02(a), (b), and (e). Respondents argued, among other things, that Minnesota Supreme Court precedent demonstrates that (1) Minnesota courts, under separation of powers principles, do not exercise jurisdiction over cases such as this one and (2) the causes of action asserted in Appellants’ Complaint were legally meritless. (*See* Defendants’ Memorandum in Support of their Motion to Dismiss and Defendants’ Reply Memorandum in Support of their Motion to Dismiss.)

The district court agreed. *See Citizens for Rule of Law v. Senate Committee on Rules and Administration*, No. 62-CV-1286 (Minn. 2d Dist., May 30, 2008) (A.A. 1-4). In its memorandum, the court noted that “[t]he ruling that per diem payments, even when increased significantly, are not increased compensation remains the law in the State of

Minnesota.” *Id.* at A.A. 4. And as a result, the court held, Appellants “have not made the requisite showing that trial court intrusion into the internal, discretionary decisions of the Legislative branch regarding the amount of per diem payments is justified.” *Id.* This appeal followed.

STANDARD OF REVIEW

As the Minnesota Supreme Court has held, “[i]ssues of constitutional interpretation are issues of law that [Minnesota courts] review de novo.” *State v. Shattuck*, 704 N.W.2d 131, 135 (Minn. 2005). Questions regarding the jurisdiction of the Minnesota courts are likewise subject to de novo review. *Handicraft Block Ltd. Partnership v. City of Minneapolis*, 611 N.W.2d 16, 19 (Minn. 2000).

ARGUMENT

The district court’s decision was correct and should be upheld for four reasons, two of which the court below reached. First, as the state supreme court has ruled, Minnesota courts will not exercise jurisdiction over cases such as this one. Second, under the same state supreme court precedent, the legal theory at the center of Appellants’ suit--their notion that legislative per diems, in whole or in part, constitute “compensation” as that term is used in Article IV, § 9, of the Minnesota Constitution--is incorrect. Because of this and a number of additional mistakes in legal interpretation, all of Appellants’ claims fail as a matter of law.

Moreover, even if these had been insufficient grounds for dismissal, Appellants’ action suffers from additional fatal defects, issues that the district court found unnecessary to reach. Appellants lack standing to bring the instant suit, because they

have no interest in per diem living expenses payments that differs from the interests of Minnesota residents generally. Finally, Minnesota courts lack personal jurisdiction over the named Respondents, because none of the entities against whom Appellants have actually stated causes of action are parties subject to suit; four of the named Respondents are not even legally cognizable entities.

For all of these reasons, the district court's decision should be affirmed.

I. UNDER THE MINNESOTA SUPREME COURT'S *McDONALD* DECISION, THIS CASE WARRANTS DISMISSAL.

As the district court recognized, this case turns on questions of jurisdiction, separation of powers, and constitutional interpretation that have been definitively and correctly answered in Minnesota case law for more than three decades. Despite Appellants' attempts to obscure the fact with lengthy discussions of irrelevancies, the 1977 case of *McDonald v. Minnesota State House of Representatives* involved a set of facts and legal principles that could hardly have been more similar to the case at bar. Appellants' entire case rests on an attempt to convince this Court that there are dispositive differences between *McDonald* and the instant litigation. Their attempt is unavailing.

A. The *McDonald* Case.

Because of Appellants' efforts to distinguish the instant case from *McDonald* on grounds that are at best dubious, a detailed discussion of the factual posture and legal reasoning of the *McDonald* decisions is necessary at this point.

1. The facts.

In 1977, individual plaintiffs Tom McDonald and Marvin Eakman filed suit in Ramsey County District Court against the Minnesota House of Representatives, the Minnesota Senate, the Speaker of the House, and the President of the Senate on the basis of resolutions that each house of the legislature had passed increasing the per diem amounts paid to legislators. *McDonald v. Minnesota State House of Representatives*, No. 419863, A.A. 5-7 (Minn. 2d Dist., June 30, 1977) (hereinafter "*McDonald* (2d Dist.)"). McDonald and Eakman contended that increases in per diem amounts previously enacted by the legislature violated Article IV, Section 9, of the Minnesota Constitution, because they constituted "increase[s] in compensation [that took] effect during the period for which the members of the existing house of representatives may have been elected." *See id.* at A.A. 9-10 (quoting Minn. Const. art. IV § 9).

The parties entered into a lengthy stipulation of facts that the district court later adopted, without comment, as its Findings of Fact. *McDonald* (2d Dist.) at A.A. 5-8.

Among the stipulated facts were the following:

- (a) Pursuant to twin resolutions adopted by the houses of the legislature in January 1977, the maximum amount of per diem living expenses provided to legislators who "move[d] from their usual place of lodging" in order to serve in the legislature rose from \$33 to \$48, or 45.45%. (Findings of Fact (hereinafter "F.") ¶¶ 4-6 at A.A. 6.)
- (b) Under the same resolutions, legislators who did *not* "move from their usual place of lodging" saw their maximum per diem living expenses payments rise from \$25 to \$40, or 60%. (*Id.*)
- (c) "[R]egulations of the United States Internal Revenue Service [IRS] in effect since 1974 . . . permit[ted] deductibility of per diem expense payments without itemization in an amount up to \$44 per day if the expenses were incurred away

from home"--\$4 per day less than the corresponding amount (\$48) approved by the 1977 resolutions. (F. ¶ 13 at A.A. 7-8.)

- (d) A May 1977 federal law "permit[ted] a state legislator, who would not otherwise qualify for the \$44 deduction [e.g., because (s)he did not need to travel "away from home" to serve in the legislature] to deduct up to \$35 per diem for expenses"--\$5 per day less than the corresponding amount (\$40) approved by the Minnesota Legislature's 1977 resolutions. (F. ¶ 14 at A.A. 8.)

These factual points are direct analogs to the facts of the instant litigation.

2. The district court decision.

After taking into consideration the factual points that the parties had stipulated, the *McDonald* district court held that the per diem living expenses payments at issue "were not compensation within the meaning of Article IV, § 9, of the Minnesota Constitution." *McDonald* (2d Dist.), Conclusions of Law ¶ 1 at A.A. 8. The court explained this conclusion in the Memorandum of Law it incorporated into its Order. *Id.*, Conclusions of Law ¶ 2; *see also McDonald* (2d Dist.) at A.A. 9-11 (the Memorandum of Law).

In the Memorandum, the *McDonald* court explained that the lawsuit "presents one single issue: May the Legislature by resolution provide lump sum payments to its members in 1977 in excess of actual expenses incurred by its members?" *McDonald* (2d Dist.) at A.A. 9. As the court recognized, "[t]he critical provision" of law at issue in the case was Minn. Const. art. IV, § 9, "which reads as follows:"

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.

Minn. Const. art. IV, § 9, *quoted in McDonald* (2d Dist.) at A.A. 10.

The court noted that plaintiffs McDonald and Eakman did not “dispute the power of the Legislature to set a per diem rate for expenses, but rather the plaintiffs contest[ed] the amount rather than the fact of the increase over previous sessions.” *McDonald* (2d Dist.) at A.A. 10.

The *McDonald* district court then examined decisions from seventeen other states’ courts interpreting constitutional provisions that were similar to Minnesota’s. *Id.* at A.A. 10-11 and cases cited. The courts in all seventeen states concluded that term “compensation,” as it is used in their state constitutions, did not include per diem expense payments to legislators. *Id.*³

The *McDonald* district court’s analysis of the longstanding nationwide consensus in case law is confirmed by an American Law Reports (ALR) annotation that has collected decisions from as long ago as 1880 on this topic:

[I]t is well established upon reason and authority that the expenses of public officers incurred in the performance of their official duties are distinct from and not included in the compensation allowed them, unless authoritatively so declared, and the apparently uniform consensus of opinion in those cases wherein the question has been considered is to the effect that constitutional prohibitions against change in the compensation fixed for public officers are not intended to be construed as limitations upon legislative authority to provide for the expenses of such officials.

³ As the *McDonald* district court subsequently noted, the Colorado Supreme Court had reached a different outcome--but the *McDonald* district court held that that decision “most likely” stemmed from a constitutional text that differed significantly from Minnesota’s. *McDonald* (2d Dist.) at A.A. 11 (citing *Interrogatories by the Governor*, 429 P.2d 304 (Colo. 1967), and quoting Colo. Const. art. V § 6 (1967)).

See Annotation, *Constitutional Inhibition of Change of Officer's Compensation as Applicable to Allowance for Expenses or Disbursements*, 106 A.L.R. 779 (1936) (quoting *State ex rel. Weldon v. Thomason*, 221 S.W. 491, 493 (Tenn. 1919)).

Having examined the precedents from other states, the *McDonald* district court concluded its opinion as follows:

After consideration of the many cases this Court determines that the per diem living expenses payments to members of the Senate and the House of Representatives in 1977 were not "compensation" within the meaning of Article IV, § 9, of the Minnesota Constitution. Therefore, the plaintiffs' demand that the members of the Legislature return all moneys collected for per diem expenses in 1977 be denied.

McDonald (2d Dist.) at 7.⁴

3. The Minnesota Supreme Court decision.

After losing at the district court level, plaintiffs McDonald and Eakman appealed to the Minnesota Supreme Court. In November 1977, the Supreme Court issued its ruling, declaring that the Ramsey County District Court's "order is affirmed in all respects." See *McDonald v. Minnesota State House of Representatives*, No. 48005 (Minn., Nov. 22, 1977) (hereinafter "*McDonald* (Minn.)") at A.A. 12. The supreme court thus affirmed the district court's interpretation of the constitutional text and its consequent ruling that legislative per diem living-expense payments are "not

⁴ The Second District Court reached a similar result eight years before *McDonald* in *McCarty v. Bjornson*, No. 363562, slip op. at 7 (Minn. 2d Dist., May 21, 1969) (dismissing taxpayer challenge under Minn. Const. art. IV § 9 to raise in legislative per diem living expense payments). Defendants are unaware of any case in which a Minnesota court has held, contrary to *McDonald*, that a raise in legislative per diems has ever violated art. IV § 9.

compensation within the meaning of Article IV, § 9, of the Minnesota Constitution.”

McDonald (2d Dist.) at A.A. 8, *aff'd McDonald* (Minn.) at A.A. 12.

In addition to upholding the Second District’s constitutional interpretation, the *McDonald* supreme court issued a memorandum opinion regarding the jurisdictional problems inherent in any challenge to the legislature’s management of per diem living expenses payments:

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.

McDonald (Minn.) at A.A. 12-13.

B. Under *McDonald*, the District Court Below Properly Dismissed This Case for Lack of Jurisdiction.

The above recounting of the facts and court rulings in the *McDonald* litigation are centrally relevant to the case at bar, because there are no distinctions of any significance separating that suit from this one. As a result, the district court’s decision below to dismiss Appellants’ action was proper and should be affirmed.

1. The facts of *McDonald* are indistinguishable from those of the instant case.

A comparison of Appellants’ Complaint and the *McDonald* opinions reveals that the two cases involve functionally identical facts. For example:

- Both cases are fundamentally based on the plaintiff-appellants’ contention that an increase in legislative per diem living expenses payments, if it takes effect before the next legislative election, automatically violates Article IV, § 9, of the

Minnesota Constitution. *Compare McDonald* (2d Dist.) at A.A. 10 (“The critical provision of the Minnesota Constitution in question is Article IV, § 9”) with Compl. ¶¶ 17-23.⁵

- Both sets of plaintiff-appellants object to per diem payments that they allege, and the presiding courts presume *arguendo*, are “in excess of actual expenses incurred” by legislators. *McDonald* (2d Dist.) at A.A. 9; *compare id.* with Compl. ¶¶ 26-27 (complaining that per diems amount to “compensation beyond reimbursement of actual living expenses . . .”).
- Both cases involve challenges to per diem increases that apply to (a) legislators who live far enough away that they require “lodging” while they are serving in St. Paul *as well as* (b) legislators who do not. *Compare McDonald* (2d Dist.) F. ¶¶ 4-6 at A.A. 6 (challenged per diem raises are applicable to “lodging” and non-”lodging” legislators) with Compl. ¶¶ 19-20 (challenged per diem raises are applicable to all legislators, wherever they reside).
- Both cases involve challenges to per diem increases that are high enough that they potentially force legislators to declare their per diem payments as income under IRS and other federal and state regulations. *Compare McDonald* (2d Dist.) F. ¶¶ 4-5, 13-14 at A.A. 6-8 (per diem rate for “lodging” legislators raised to \$48, IRS “income” threshold at \$44; per diem rate for non-”lodging” legislators raised to \$40, federal threshold at \$35) with Compl. ¶¶ 37, 53 (alleging, “[u]pon information and belief,” that per diems are high enough to force legislators receiving them to “declare to federal and state revenue authorities that the per diem payment is ‘income’ for federal and state income tax purposes”).
- The largest per diem amount involved in each case was raised by exactly the same proportion: 45.45%. *Compare McDonald* (2d Dist.) F. ¶¶ 4-6 at A.A. 6 (top per

⁵ In light of Appellants’ subsequent attempts to reformulate their legal theories, Respondents note that Count I (¶¶ 17-23) of the Complaint never alleges that the increased per diem payments exceeded legislators’ actual expenses. According to paragraphs 19 and 20 of the Complaint, the mere fact that the legislature “ma[de] immediately effective an increase in miscellaneous ‘living expense’ compensation” proved that it violated the Minnesota Constitution. (*See* Compl. ¶¶ 19-20.)

diem amount raised from \$33 to \$48 = 45.45% increase) with Compl. ¶¶ 19-20 (top per diem amount raised from \$66 to \$96 = 45.45% increase).⁶

Thus, both the operative facts and the relevant law that applied to the *McDonald* litigation are present, in effectively identical form, in the instant action.

2. As the *McDonald* supreme court held, Minnesota courts do not exercise jurisdiction over cases like this one.

Applying the relevant law to the fact situation set forth above, the Minnesota Supreme Court held that the *McDonald* litigation constituted an attempt to intrude into the internal management of the legislature--an attempt that lies outside of the appropriate jurisdiction of the Minnesota courts. *McDonald* (Minn.) at A.A. 12-13. The *McDonald* supreme court held that appellants Tom McDonald and Marvin Eakman had failed to “ma[k]e the requisite showing that such an intrusion is justified.” *Id.*

In the instant case, Appellants have offered factual allegations that are no more extensive than--indeed, they are not even appreciably *different from*--the ones McDonald and Eakman made. As noted above, the allegations that the *McDonald* appellants adduced to support their causes of action (e.g., per diem amounts allegedly greater than actual expenses, greater than IRS threshold for “income,” etc.) are indistinguishable from the ones Appellants offer here.

⁶ One difference, though it does not cut in Appellants’ favor, is the size of the *other* per diem increases in the respective cases. The *McDonald* supreme court found no fault with a per diem rate (the non-“lodging” rate, which rose from \$25 to \$40, *see McDonald* (2d Dist.) F. ¶¶ 4-6 at A.A. 6) that rose by a full 60%; in contrast, in the instant case one per diem rate (the Senate’s) rose by 45.45%, while the other (the House’s) rose only 16.67%. *See Compl. ¶¶ 19-20.* The raises in the instant case, therefore, are on average more modest than the ones upheld by the state supreme court in *McDonald*.

The supreme court held that McDonald and Eakman's factual allegations were insufficient to demonstrate "circumstances compelling review of discretionary actions taken" by the legislature. As demonstrated above, Appellants are simply making McDonald and Eakman's allegations all over again. What was insufficient in 1977 remains insufficient in 2008 and 2009, and as a result "Appellants have not made the requisite showing that such an intrusion is justified." *See McDonald* (Minn.) at A.A. 13.

Furthermore, as the district court below noted, Appellants have provided additional cause for concern that the judicial process they seek is specifically designed to intrude into legislative affairs in particularly troubling ways. *See Citizens for Rule of Law* at A.A. 4 ("[T]he broad, over-reaching, intrusive remedies sought by the [Appellants] in the present case further support[]" the court's conclusion that this litigation is beyond the proper ambit of the Minnesota court system). Appellants' Brief repeatedly returns to the extensive discovery that Appellants forthrightly admit they seek to conduct into the everyday workings of the legislature, and indeed into the personal finances of nearly every Minnesota legislator. (*See Appellants' Brief* (hereinafter "A.B.") 9, 10, 22, 23 & n.54, 26.) Moreover, the unheard-of injunctive relief Appellants request (*see Part IV.E, infra*)--including a judicial order preventing all legislators who do not comply with Appellants' demands from running for re-election--is further evidence that Appellants expect Minnesota courts to mount an unprecedented intrusion into the internal operations of the legislature. The state supreme court held the *McDonald* complaint to be outside of the Minnesota courts' appropriate jurisdiction in order to avoid precisely the kind of judicial overreach that Appellants openly seek.

Therefore, the district court's decision to dismiss Appellants' Complaint as an improper exercise of Minnesota courts' jurisdiction was proper, and that decision below should be affirmed.

3. Under *McDonald*, Appellants' central legal theory regarding Article IV, Section 9, is invalid as a matter of law.

As the *McDonald* courts and the district court below have all held, the legal principle that "per diem payments, even when increased significantly, are not increased compensation remains the law in the State of Minnesota." *Citizens for Rule of Law* at A.A. 4 (citing *McDonald* (2d Dist.) at A.A. 11); *see also McDonald* (Minn.) at A.A. 12 (affirming *McDonald* (2d Dist.) "in all respects").⁷ As noted above, the facts of the instant case--including issues regarding lodging costs, IRS rulings, per diem payments that potentially exceed "actual expenses," and so on--are indistinguishable from the facts of *McDonald*.

Therefore, the holdings of the *McDonald* supreme court and of the district court decision it upheld apply with equal force here. As the supreme court has affirmed, the Minnesota Legislature may by resolution (1) increase per diem living expenses payments without waiting for an election to intervene and (2) provide such payments to its members in excess of actual expenses incurred by these members--because per diem living expenses payments to legislators are not "compensation" within the meaning of

⁷ Appellants oddly assert that the district court below "never determined that per diem payments were compensation." (A.B. 30.) Indeed not: the court specifically determined that, under controlling case law, per diem payments are *not* compensation. *See Citizens for Rule of Law* at A.A. 4, quoted in text above.

Article IV, § 9, of the Minnesota Constitution. *See McDonald* (Minn.) at A.A. 12 (affirming *McDonald* (2d Dist.) “in all respects”). And as a result, the district court below properly dismissed this action on the grounds that Appellants’ central legal theory is baseless.

4. Appellants’ attempts to distinguish *McDonald* are unavailing.

Because the *McDonald* decisions so comprehensively refute Appellants’ central legal theories, Appellants struggle mightily to suggest factors that could distinguish that litigation from this one. Their efforts are in vain. In most cases, the distinctions Appellants attempt to draw are not even valid distinctions: Appellants simply ignore that their descriptions of their own suit apply, in nearly every instance, to the *McDonald* suit as well.

As noted above, the factual similarities between *McDonald* and the instant case are extensive: for example, both cases involve (a) per diem allowances that, courts have presumed *arguendo*, exceed legislators’ “actual expenses”; (b) per diem payments directed both at legislators who require “lodging” to serve in the legislature *and* legislators who do not; and (c) per diem payments that are large enough to constitute “income” under IRS and other federal standards. (*See* Part I.B.1, *supra*, citing list of factual similarities.)

Significantly, though all of these facts were explicitly set out in the Findings of Fact and/or Memoranda of Law, the *McDonald* courts found *none* of them persuasive in the plaintiff-appellants’ favor. As a result, all attempts to argue that these same factors somehow cut in the Plaintiff-Appellants’ favor in the instant case are without merit.

a. "Expense" vs. "income."

Appellants first attempt to distinguish their suit from McDonald and Eakman's by claiming that their legal theory is fundamentally different:

Citizens for the Rule of Law[']s] complaint represents not a challenge to the amount of the [per diem] 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 increase of legislator compensation

(A.B. 8-9.)⁸ But the first sentence of the *McDonald* district court's Memorandum of Law indicates that the plaintiffs in that action were making precisely the same argument:

This lawsuit presents one single issue: May the Legislature by resolution provide lump sum payments to its members in 1977 *in excess of actual expenses incurred by its members?*

McDonald (2d Dist.) at A.A. 9 (emphasis added). And one page later, the court makes it clear what the plaintiffs claimed that "excess" constituted:

The critical provision of the Minnesota Constitution in question is Article IV, § 9, which reads as follows:

"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."

Id. at A.A. 10 (emphasis added) (quoting Minn. Const. art. IV, § 9). In other words, the *McDonald* courts recognized that that case centrally involved (1) per diem payments that

⁸ As pointed out above, this synopsis misrepresents Count I of Appellants' own Complaint, which alleges a constitutional violation without any reference to legislators' "actual expenses." (See Compl. ¶¶ 17-23.)

(per McDonald and Eakman's allegations) exceeded legislators' actual expenses, and (2) the question whether those payments--including the excess--constituted "compensation" as that term is used in the state constitution. Both courts held that they did not. *See McDonald* (2d Dist.) at A.A. 11 (holding per diem living expenses payments not "compensation"); *McDonald* (Minn.) at A.A. 12 (affirming *id.* "in all respects").

Appellants now attempt to put this old wine into a new bottle labeled "[t]he per diem compensation appears to include both an 'expense' and [an] 'income' compensation component." (A.B. 18.) But this is simply the same argument that McDonald and Eakman tried, and lost, before the Minnesota Supreme Court in 1977. The new label therefore offers no help to Appellants' claim here.

b. "Lodging."

Appellants next claim that "the *McDonald* case reflects per diem payments for specific identified expenses for lodging" (A.B. 18; *see also id.* at 20 ("[T]he expense at issue in 1977 [was] lodging"), 22 ("[T]he court specifically identified the expenses as 'lodging.'").) These are bald misrepresentations of the facts of that case.

As noted above (*see* Part I.B.1, *supra*), *McDonald* Findings of Fact 4-6 make it clear that plaintiffs McDonald and Eakman were challenging *both* (a) increased per diem payments that went to legislators who lived far enough away that they required "lodging" while they were serving in St. Paul *and* (b) increased per diem payments that went to legislators who did not. *McDonald* (2d Dist.) F. ¶¶ 4-6 at A.A. 6. Appellants' claim that *McDonald* is all about "lodging" is bedeviled by the fact that a significant proportion of the per diem payments the *McDonald* plaintiffs challenged went to legislators who did

not need to pay for separate lodging. *See id.* Moreover, Appellants' references to "lodging" as a fundamental basis for the *McDonald* courts' rulings are difficult to square with the fact that neither the word "lodging" nor any synonym appears anywhere in either court's Memorandum explaining its decision. *See id.* at A.A. 9-11; *McDonald* (Minn.) at A.A. 12-13. How could the *McDonald* courts have "specifically identified the expenses as 'lodging,'" as Appellants claim, when neither court ever used the word "lodging" in its Memorandum?

To the contrary, every single use of "lodging" in either *McDonald* decision is contained within Findings of Fact 4-6 and 10. *See McDonald* (2d Dist.) at A.A. 6-7. And notably, the Findings of Fact in *McDonald* were neither selected nor composed by the district court; they were merely a verbatim record of a stipulation that the *parties* had created before the case was argued. *See id.* at A.A. 5 ("The parties hereby enter into the following stipulation of facts for the purposes of this litigation only.") As a result, the presence of any concept in the *McDonald* district court's Findings of Fact carries no implication that a *court* found that concept relevant to its holding. Indeed, there is no indication whatsoever that either *McDonald* court considered lodging a relevant factor to the constitutional question.

Therefore, contrary to Appellants' representations, the *McDonald* case does *not* "reflect[] per diem payments for specific identified expenses for lodging," (*see* A.B. 18), and this irrelevant issue does nothing to distinguish the instant case from its 1977 predecessor.

c. IRS rulings.

Next, Appellants claim that the instant matter is distinguishable from *McDonald* because this case involves per diem living expenses that “must be declared as ‘income’ under the IRS Code--as compensation--for services rendered.” (A.B. 19.) Consequently, they argue, those payments are “also ‘compensation’ for the purposes of the Minnesota Constitution’s Article IV, § 9 restriction on compensation increases.” (*Id.*; *see also id.* at 22, 24-26 (examining IRS policies).)

Appellants supply no precedent for the startling notion that the federal government’s tax treatment of various kinds of payments controls the Minnesota courts’ interpretation of the Minnesota Constitution. But there is no need to look far for relevant legal authority: as even Appellants realize, the *McDonald* courts themselves were aware of the IRS (and other federal) treatment of the per diem payments at issue, even as they were ruling that none of the payments constituted “compensation” for state constitutional purposes.

As Appellants note, the *McDonald* courts were well aware that a then-current IRS rule provided that all per diem payments over \$44 per day were required to be reported as “income.” (*See* A.B. 24 (referencing *McDonald* (2d Dist.) F. ¶ 13 at A.A. 7-8).) Appellants, however, appear to have missed the fact that this provided both *McDonald*

courts with the opportunity to affirm Appellants' legal theory more than thirty years before Appellants came up with it.⁹

As the Findings of Fact make clear, the largest per diem payments authorized by the resolutions at issue in *McDonald* were \$48 per day. *McDonald* (2d Dist.) F. ¶¶ 4-6 at A.A. 6. As a result, any legislator accepting a \$48 per diem payment in 1977 was forced, by IRS Ruling 74-433, to report \$4 of the per diem payment (i.e., \$48 minus the \$44 IRS limit) as income. Moreover, all of this is clear on the face of the *McDonald* district court's Findings of Fact.

By Appellants' logic, both the *McDonald* district court and the state supreme court on appeal were forced to rule that this \$4 per day constituted "income" under the IRS rule and therefore "compensation" for purposes of the Minnesota Constitution. And yet neither court made any such ruling. To the contrary, both courts entirely ignored the IRS's and other federal entities' policies when interpreting the terms of the state constitution, even though these policies had been placed on the record.

Far from demonstrating a distinction between the instant case and the *McDonald* litigation, therefore, the IRS issue Appellants press in fact represents a legal argument that Minnesota courts have rejected. It offers no help to Appellants here.

⁹ Indeed, the citation to the IRS ruling in the *McDonald* Findings of Fact--which were originally the parties' stipulations--indicates that the resort to IRS rules was likely Tom McDonald and Marvin Eakman's legal theory long before it was Appellants'. Regardless, the *McDonald* courts rejected it.

d. Additional counts in Appellants' Complaint.

Finally, Appellants attempt to distinguish the instant matter from *McDonald* by pointing out that Appellants' Complaint stated several more causes of action than Tom McDonald and Marvin Eakman's pleading did. (*See* A.B. 19 (referencing Counts II-VI, Compl. ¶¶ 24-83).)

But first, as the district court below recognized, Appellants' main legal theories-- e.g., that their interpretation of Article IV, § 9, is superior to the one upheld by the Minnesota Supreme Court, and that lower courts have the jurisdiction to so rule--are central to the entire Complaint. *Citizens for Rule of Law* at A.A. 3 ("None of the counts in [Appellants'] complaint can proceed unless this District Court has the authority to decide whether the payments approved by the State's Legislative bodies as 'per diem payments' are, in fact, increases in Legislative compensation.") Appellants cannot rescue their dubious arguments regarding jurisdiction and constitutional interpretation by adding on additional causes of action that rest on the same foundations.

Second, Respondents note that none of the legal provisions cited in Counts II-VI of the Complaint provides any basis for a conclusion that it, unlike Article IV, Section 9 of the state constitution, justifies the "intrusion into the internal management of the legislative" branch that the supreme court held it could not legally conduct in *McDonald*. *See McDonald* (Minn.) at A.A. 12-13. If the *McDonald* plaintiffs were not allowed to mount an attack on internal legislative operations based on an alleged violation of a constitutional provision, Appellants cannot be allowed to cause the same intrusion based on their reading of, for example, Minn. Stat. § 3.101.

Third, as demonstrated in Part IV below, all of the additional Counts of Appellants' Complaint fail as a matter of law. The inclusion of a handful of additional legally baseless claims does nothing to distinguish this matter from the *McDonald* litigation.

C. Appellants Provide No Reason for This Court to Depart from *McDonald*.

For the above reasons, Appellants have neither demonstrated any change in the governing law nor offered any factual showing that would justify reaching a result different from the one reached in *McDonald*.

If anything, Appellants' allegations and prayers for relief here bring into sharper focus the correctness of the *McDonald* courts' disposition of the issues at the center of both cases. First, there has been no Minnesota decision since *McDonald* that has called its holdings into question. Nor are Respondents aware of any change in the broad national consensus identified by the *McDonald* district court that living expense payments to legislators are not subject to constitutional limitations on legislator "compensation." See *McDonald* (2d Dist.) at A.A. 10-11 (citing seventeen cases from other states concurring with the court's conclusion); see also 106 A.L.R. 779 (collecting cases holding, for example, "that the expenses of public officers incurred in the performance of their official duties are distinct from and not included in the compensation allowed them, unless authoritatively so declared . . ."). This treatment of legislator living expenses appears to have been a matter of settled (and indeed unchallenged) law, effectively nationwide, for many years.

Second, Appellants appear to have retreated from their original untenable assertion that per diem allowance payments are *per se* compensation and not expense reimbursement (Compl. ¶¶ 19-20, 50-51) to an acknowledgement that those payments do have an “expense component” (A.B. 8-9, 18). Nevertheless, Appellants’ current theory still includes the assertion that there is an “income compensation component” consisting of the difference between (a) the stated maximum per diem allowance and (b) some undetermined dollar amount that Appellants apparently consider to be a legislator’s legitimate living expenses. (*See id.*)

Third, given that, in contrast to their established uniform compensation, legislators’ individual per diem claims have varied widely (*see* A.A. 32-49), Appellants’ claims have led them to seek what the district court below properly characterized as “broad, over-reaching, intrusive remedies.” *Citizens for Rule of Law* at A.A. 4. Indeed, courts cannot possibly conduct inquiries into such subjective matters--what are legitimate living expenses for legislators? How big can such payments be before they become “compensation”?--without intruding severely on the internal management of the legislature. This is exactly the reason that the *McDonald* court, following the decisions of courts in numerous other states, held that cases like this one are outside of the proper jurisdiction of the Minnesota courts.

For all of these reasons, the district court’s decision to grant Respondents’ motion to dismiss was a proper application of the governing law. As such, it should be affirmed.

II. APPELLANTS LACK STANDING TO BRING THIS ACTION.

Appellants' Complaint suffers from an additional jurisdictional defect that is equally fatal to the problems identified by the *McDonald* court: Appellants' status as taxpayers (and an association of taxpayers) is insufficient to provide them standing to bring this suit.

Appellants brought this action pursuant to the Declaratory Judgment Act ("the Act"), Minn. Stat. § 555.01, *et seq.* (See Compl. ¶¶ 10, 12-16.) The purpose of the Act is to empower courts to adjudicate disputed legal rights, whether or not further relief could be claimed. *Montgomery v. Minneapolis Fire Dept. Relief Ass'n*, 218 Minn. 27, 30, 15 N.W.2d 122, 124 (1944) (citing 18 Minn. L. Rev. 239, 240). For such an action to go forward, however, there must be a justiciable controversy. See *Rukavina v. Pawlenty*, 684 N.W.2d 525, 531 (Minn. App. 2004), *rev. denied* (Minn. Oct. 19, 2004) (discussing the justiciable controversy requirement of standing to seek a declaratory judgment). When all plaintiffs lack standing, the court must dismiss the action. *Id.* (dismissing action as to individual taxpayers for lack of standing).

Standing requires "that a party have a sufficient stake in a justiciable controversy to seek relief from a court." *State v. Philip Morris, Inc.*, 551 N.W.2d 490, 493 (Minn. 1996) (citing *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972)). A sufficient stake exists if (1) the party has suffered an "injury-in-fact" or (2) the legislature has conferred standing by statute. *Id.*

Minnesota case law consistently holds that citizens do not generally have standing to bring actions to enforce rights of a public nature, absent explicit statutory authority or

an injury different from that sustained by the general public. *See, e.g., Channel 10, Inc. v. Independent Sch. Dist. No. 709*, 298 Minn. 306, 312, 215 N.W.2d 814, 820 (1974) (“Without statutory authority to maintain a suit, the individual must show injury to some interest, economic or otherwise, which differs from injury to the interests of other citizens generally.”); *Arens v. Village of Rogers*, 240 Minn. 386, 390, 61 N.W.2d 508, 512 (1953) (“[O]ne seeking a declaratory judgment regarding the constitutionality of a state statute must have a direct interest in the validity of that statute which is different in character from the interest of the citizenry in general.”); *Rukavina*, 684 N.W.2d at 531 (same).¹⁰

Minnesota courts have found the requisite injury in cases challenging the constitutionality or validity of laws that will have a direct prospective effect on the taxpayer. *See, e.g., Leighton v. City of Minneapolis*, 222 Minn. 516, 518, 25 N.W.2d 263, 264 (1946) (finding taxpayer had standing under Act when the constitutionality of a statute that permitted cities to levy taxes that would be imposed on the taxpayer was challenged).

¹⁰ Appellants cite *McKee v. Likins*, 261 N.W.2d 566, 571 (Minn. 1977), in the Complaint to support their claim of standing. (Compl. ¶ 11.) However, the *McKee* case dealt exclusively with a statutory grant of standing under the Administrative Procedure Act (“APA”). *See McKee*, 261 N.W.2d at 570. Indeed, the *McKee* court stated that its holding was limited to the proposition “that a taxpayer suing as a taxpayer has standing to challenge *administrative action which allegedly is rulemaking* adopted without compliance with the statutory notice requirements.” *Id.* at 571 (emphasis added). The instant case in no way involves administrative action, rulemaking, the APA, or statutory notice requirements--and as a result *McKee*'s holding regarding standing has no relevance to this case.

A. Appellants' Claim of "Taxpayer Standing" Is Unavailing.

In the instant case, Appellants' central factual assertion regarding standing is that they (including the individual members of Appellant Citizens for Rule of Law) are "taxpaying citizens." (Compl. ¶ 11.) But under the relevant case law, this is insufficient. Appellants have not shown, and cannot show, that any injury they have suffered or will suffer as the result of Respondents' actions was an "injury to some interest, economic or otherwise, *which differs from injury to the interests of other citizens generally.*" See *Channel 10, Inc.*, 298 Minn. at 312, 215 N.W.2d at 820 (emphasis added). To the contrary, Appellants' factual assertion demonstrates that they are attempting to claim standing precisely because they *are* members of the class "citizens generally." (See Compl. ¶ 11.)¹¹

B. Appellants' Claim of "Voter Standing" Is Unavailing.

During proceedings below on Respondents' Motion to Dismiss, Appellants buttressed their standing argument by contending that Respondents' alleged illegal acts have impaired the individual appellants' "elective franchise": Appellants believe they have "the right to vote on members of the House prior to any increase of compensation

¹¹ In Appellants' responsive memorandum on the Motion to Dismiss below, Appellant Citizens for the Rule of Law attempted to shoehorn itself into "standing as an association" by alleging that its "mission is to protect citizens from the illegalities of state law-makers, among others." (Pls' Mem. at 12.) But this is insufficient. Presumably *all* Minnesotans would prefer that our state officials, "among others," did not break the law--but that hardly grants us (or an association of us) standing to sue absolutely anyone for absolutely any legal transgression we can imagine that they may have committed. Appellants' attempt to read the injury-in-fact requirement out of Minnesota law is unavailing.

taking effect.” (See Plaintiffs’ Memorandum of Law in Opposition to Motion to Dismiss (hereinafter “Pls’ Mem.”) at 14-15.)

This contention is legally baseless. Neither the state constitution nor any other law states that it has created a private cause of action for violations of Article IV, Section 9. Moreover, the individual plaintiffs have lost no elective franchise at all: they were, in November 2008, and are still entirely capable of voting against any and all representatives who have supported an increase in legislative per diems.

The lone case Appellants have cited to support their “voter standing” argument is *Baker v. Carr*, 369 U.S. 186 (1962). That case granted standing to citizens to challenge a Tennessee redistricting plan that directly diluted their ability to elect the candidate of their choice. Appellants have alleged (and can allege) no such direct attack on their elective franchise, and they have no constitutional right to prevent legislative actions on the mere basis that Plaintiffs do not like those actions.

Indeed, once again, Appellants’ status as voters does nothing to distinguish them from their fellow Minnesota residents: the fact that the individual appellants possess voting rights does nothing to demonstrate an “interest, economic or otherwise, which differs from injury to the interests of other citizens generally.” See *Channel 10, Inc.*, 298 Minn. at 312, 215 N.W.2d at 820.

Plaintiffs’ status as taxpayers, voters, and an association of same is insufficient to grant them standing to bring this action. As a result, the action was properly dismissed below.

III. PLAINTIFFS HAVE STATED NO JUSTICIABLE CLAIMS AGAINST ANY PARTY SUBJECT TO SUIT.

The defendants named in the Appellants' Amended Complaint (A.A. 14-31) and proposed Second Amended Complaint (A.A. 67-84) consist of:

1. The State of Minnesota, against which no allegations are made and which Appellants apparently consider a beneficiary rather than a target of their efforts (*see* Plaintiffs' Memorandum of Law in Support of Motions to Deposit Funds and to Amend the Complaint (hereinafter "Pls' Apr. 14 Mem.") at 4-5);
2. The 2006-2007 Compensation Council, which no longer exists, having expired as a matter of law after submitting its 2007 report, *see* Minn. Stat. § 15A.082, subd. 6 (2006);
3. The Secretary of State, who is not alleged to have any connection to the determination or payment of legislative compensation or expenses, but whom Appellants sought to join as a nominal defendant in the misapprehension that he exercises some authority over determining who may seek and hold legislative office (*see* Pls' Apr. 14 Mem. at 4-6);
4. Two legislative committees (the Senate Committee on Rules and Administration and House Committee on Rules and Legislative Administration); and
5. Two administrative functions within the legislature (Senate Fiscal Services and House Budgeting and Accounting).

Appellants asserted below that the named defendants listed in items 4 and 5 above are identified groups established by the legislature that either (a) enact resolutions or (b) act as "agent[s] . . . responsible for disbursement of money from the state treasury." (Pls' Mem. at 11.) Appellants contend that these legislative committees and functions are therefore subject to suit. (*Id.*) Appellants have cited no authority for this assertion; in fact, all relevant case law holds to the contrary.

A defined group of people acting in concert, even a group established by a unit of government, is not a proper party defendant unless it constitutes an actual legal entity with the capacity to be sued. For example, in *ROM State ex rel. Ryan v. Civil Service Comm'n of Minneapolis*, 278 Minn. 296, 298, 154 N.W.2d 192, 194 (1967), while the Civil Service Commission was unquestionably an identified group established by the City, the Minnesota Supreme Court held that the Commission was not itself a proper party because it was not an “artificial person created by law, and had not been granted the right to sue and be sued” under the Minneapolis City Charter. *See also Lovelace v. Dekalb Cent. Probation*, 144 Fed. Appx. 793, 795, 2005 WL 1813341 (11th Cir. Aug. 3, 2005) (unpublished op.)¹² (police department not usually considered a legal entity subject to suit); *Luysterborghs v. Pension and Retirement Bd. of City of Milford*, 927 A.2d 385, 388 (Conn. Super. 2007) (municipal department not subject to suit absent authorizing statute); *De Joie v. Medley*, 945 So.2d 968, 972 (La. 2006) (judges sitting en banc are not a “judicial person” with capacity to be sued).

Appellants have pointed to no statute, legislative rule, or other authority authorizing either the Senate Committee on Rules and Administration or the House Committee on Rules and Legislative Administration to sue or be sued in its own name. Neither have Appellants cited any authority for the proposition that enactment of

¹² A copy of the *Lovelace* opinion constitutes Respondents’ Appendix (“R.A.”), attached hereto.

resolutions in itself may be seen as actionable conduct. Finally, there is no indication that either "Senate Fiscal Services" or "House Budget and Accounting" is even a defined group of individuals. Rather, both terms appear to define administrative functions--on a par with "Building Maintenance"--that are carried out by unspecified employees of the House and Senate.

For these reasons, neither Appellants' Amended Complaint nor their proposed Second Amended Complaint sets forth a single justiciable claim against any legal entity that may properly serve as a party defendant. As a result, the district court's decision to dismiss the instant action was correct.

IV. THE ADDITIONAL COUNTS IN APPELLANTS' COMPLAINT ARE INVALID AS A MATTER OF LAW.

Even if all of the jurisdictional defects identified above did not apply to the instant case, dismissal would still have been the proper outcome of Respondents' motion below. Each of the causes of action in Appellants' Complaint is unavailing as a matter of law--and as a result, even if Minnesota courts retained jurisdiction to hear the instant case, they would still be forced to dismiss under Minn. R. Civ. P. 12.02(e) for failure to state a claim for which relief can be granted.

A. Minnesota Constitution Article IV, Section 9.

Count I of Appellants' Complaint alleges that Respondents have violated Article IV, Section 9 of the Minnesota Constitution by causing an "immediate[]" increase in "miscellaneous 'living expense'" payments. (Compl. ¶¶ 17-23.)

As noted above, this cause of action fails as a matter of law under the Minnesota Supreme Court's holding in the 1977 *McDonald* case. (See Part I.B.3, *supra*.)

B. Minn. Stat. § 3.101.

Count II of Appellants' Complaint alleges that Respondents have violated Minn. Stat. § 3.101 by "paying daily 'living expense' compensation beyond reimbursement of actual living expenses including housing and mileage"; specifically, each house of the legislature pays "'living expense' compensation without requiring [legislators] to vouch for actual expenses to justify" the funds. (Compl. ¶¶ 24-30.)

Appellants here attempt to create statutory text that does not exist. The cited statute nowhere requires senators, representatives, or the Respondents at bar to document or "vouch for" living expenses. Nor are the reimbursed expenses required to meet Appellants' private standards for "actual expenses."¹³ To the contrary, § 3.101 provides that each legislator, "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 . . ." Minn. Stat. § 3.101 (2006).¹⁴ Moreover, § 3.101 specifically assigns two of the instant Respondents--the Senate Committee on Rules and

¹³ Indeed, the very quality that makes a payment a "per diem" payment is that it is paid out *without* documentation of individual expense items. See Minn. Stat. § 3.099, subd. 1 (2006), *quoted in Facts, supra* (each Minnesota legislator "shall also receive per diem living expenses . . .").

¹⁴ Minn. Stat. § 3.099, which Appellants have never cited, provides additional statutory grounds for the legislature to pay out mileage and per diem living expenses to its members. See Minn. Stat. § 3.099, subd. 1 (2006), *quoted in Facts, supra*.

Administration and the House Committee on Rules and Legislative Administration--to determine “the manner and amount” of the payments set forth in the statute. *Id.*

Appellants’ allegations regarding “vouch[ing]” requirements and their own partisan definition of “actual expenses” are thus legally irrelevant; nothing in the cited statute requires such measures. As a result, Count II of Appellants’ Complaint is without legal merit.

C. Minnesota Constitution Article XI, Section 1.

Count III of Appellants’ Complaint alleges that Respondents have violated Article XI, Section 1 of the Minnesota Constitution by paying out money from the state treasury without a supporting appropriation of law. (Compl. ¶¶ 31-44.)

However, there can be no serious dispute that the legislature has duly enacted appropriations to fund the legislative compensation and per diem payments in question: the most recent such appropriations applicable to the expenditures challenged in this case are recorded at 2005 Minn. Laws ch. 156, art. 1, § 2, and 2007 Minn. Laws ch. 148, art. 1, § 3. The challenged action therefore constitutes “pa[ying] out of the treasury of

this state . . . in pursuance of an appropriation of law.” *See* Minn. Const. art. XI § 1.¹⁵

As a result, Count III of Appellants’ Complaint is without legal merit.

D. Minn. Stat. §§ 16A.57 and .138.

Count IV of Appellants’ Complaint alleges that Respondents have violated Minn. Stat. §§ 16A.57 and .138 by spending state money without, or in excess of, a legal appropriation. (Compl. ¶¶ 45-60.) This count merely restates the constitutional argument addressed in Part IV.C, *supra*.

As demonstrated above, both the relevant appropriations and the statutory authorizations for the use of the legislature’s funds to pay the instant per diems are matters of public record. *See, e.g.*, 2005 Minn. Laws ch. 156, art. 1, § 2; 2007 Minn. Laws ch. 148, art. 1, § 3; Minn. Stat. §§ 3.099 and 3.101 (2006). As a result, Count IV of Appellants’ Complaint is without legal merit and should be dismissed.

E. Minn. Stat. § 15A.082.

Count V of Appellants’ Complaint alleges that the Respondent Compensation Council has violated Minn. Stat. § 15A.082 by submitting salary recommendations to the

¹⁵ Count III of the Complaint also contains an allegation--echoing the contentions in Count I--that the per diem payments at issue violate Article IV, Section 9 of the state constitution. (Compl. ¶ 40.) As a result, it is not clear that Count III is actually an independent cause of action from Count I at all. Count IV appears to be of the same “piggybacking” variety. (See Compl. ¶¶ 56-58 (re-alleging violations of Minn. Const. art. IV § 9 and art. XI § 1).) Regardless, Respondents’ actions have not violated Article IV, Section 9 of the state constitution (*see* Part I.B.3, *supra*), and as such any cause of action based on such an alleged violation is without merit.

legislature “without reference to the per-day salary supplement provided by the Senate and House.” (Compl. ¶¶ 61-68.)

To the contrary, the actions of the Council in this regard are consistent with both (a) the statutory language and (b) the long-established principle that payment of living expenses is not part of “compensation” or “salary.” *See, e.g.*, Minn. Stat. § 3.099, subd. 1 (2006) (listing “compensation,” “mileage,” and “per diem living expenses” separately); Minn. Stat. § 3.101 (2006), *quoted in* Complaint ¶ 25 (categorizing the payments in question as “reimburse[ments] for living and other expenses,” not salary); 106 A.L.R. 779 (collecting cases holding, for example, “that the expenses of public officers incurred in the performance of their official duties are distinct from and not included in the compensation allowed them, unless authoritatively so declared . . .”). The state supreme court, following the same principle, has agreed that the payments are not “compensation” for the purposes of the relevant constitutional provisions. (*See* Part I, *supra* (examining *McDonald*)). Appellants have no basis for declaring, contrary to the very statutes they have cited, that per diem living and other expenses are “salary.”

Moreover, even if they were correct that the Compensation Council has miscategorized the per diem payments in question, Appellants cannot hope to demonstrate that they have suffered an injury in fact as the result of this action. The Compensation Council’s governing statutes expressly make the Council’s recommendations “subject to additional terms that may be adopted according to section 3.099” and to further modification or outright rejection by the legislature. Minn. Stat.

§ 15A.082, subd. 3 (2006). Thus, it is the full legislature, and not the Council, that makes the actual decisions that are relevant to the instant litigation.

As noted above, Appellants' assertions that they are taxpayers and voters fail to provide them with standing to bring this lawsuit. *See* Part II, *supra* (citing, *inter alia*, *Channel 10, Inc*, 298 Minn. at 312, 215 N.W.2d at 820 (“Without statutory authority to maintain a suit, the individual must show injury to some interest, economic or otherwise, which differs from injury to the interests of other citizens generally.”)). But even if taxpayer and voter standing were entirely uncontroversial in Minnesota law, Count V of the Complaint alleges nothing more than a technical violation that has no direct effect on Minnesota taxpayers or voters. As such, Appellants' standing argument is even more dubious for this Court than it is for the remainder of their Complaint.

For these reasons, Count V of Appellants' Complaint is without legal merit.

F. Injunctive Relief.

Count VI of Appellants' Complaint claims that Appellants are entitled to injunctive relief based on the allegedly illegal acts by Respondents that were cited in the previous sections of the Complaint. (Compl. ¶¶ 69-83.)

But, for all of the reasons detailed in subparts A-E above, Appellants' assertions that Respondents have violated statutory and constitutional provisions are, as a matter of law, entirely without merit. Because Respondents have not violated the law, Appellants are not entitled to injunctive relief--and therefore Count VI of the Complaint should be dismissed.

Moreover, the specific injunctive remedies demanded by Appellants admit of no legal support. First, Appellants here are asking a court to take the unprecedented course of rendering judgment against individuals--legislators--who are not parties to the instant action. Second, Respondents are aware of no law empowering a Minnesota court to (a) require legislators to return per diem amounts that were paid and received in good faith and under color of state law, including a decision of the Minnesota Supreme Court; (b) mandate Senate Fiscal Services and House Budgeting and Accounting to make "proper accounting" of this "restitution"; or, most bizarre of all, (c) enjoin non-complying legislators from running for re-election.¹⁶ Appellants' implicit belief on this point--their belief that the judicial branch can properly intrude so severely into the legislative and electoral process--is directly contrary to the principles behind longstanding case law such as *McDonald* (Minn.).

Consequently, Appellants' requests for injunctive relief are legally baseless. Indeed, as the district court below recognized, "the broad, over-reaching, intrusive remedies sought by the [Appellants] in the present case further support[]" the court's conclusion that this litigation is beyond the proper ambit of the Minnesota judicial system. *See Citizens for Rule of Law* at A.A. 4.

¹⁶ Indeed, Minnesota courts have no authority to bar anyone who satisfies the requirements provided by the Minnesota Constitution from running for a seat in the legislature. *See Pavlak v. Growe*, 284 N.W.2d 174 (Minn. 1979); *Scheibel v. Pavlak*, 282 N.W.2d 843 (Minn. 1979).

Because all of the causes of action in Appellants' Complaint fail as a matter of law, this case would have properly been dismissed under Minn. R. Civ. P. 12.02(e) even if Minnesota courts did, contrary to all precedent, retain jurisdiction over it.

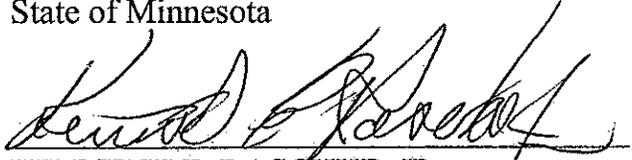
CONCLUSION

For the above reasons, Respondents respectfully request that the Court affirm the decision below dismissing Appellants' Complaint.

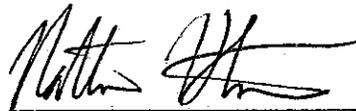
Dated: December 22, 2008

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