No. A06-2324

STATE OF MINNESOTA
IN COURT OF APPEALS

ALEC G. OLSON AND BUTTERWORTH LIMITED PARTNERSHIP,

Appellants,

vs.

THE STATE OF MINNESOTA, DANIEL A. SALOMONE, THE COMMISSIONER OF THE MINNESOTA DEPARTMENT OF REVENUE, MATTHEW KRAMER, COMMISSIONER OF THE MINNESOTA DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT

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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STATEMENT OF ISSUE

I. Minnesota recognizes taxpayer standing for citizens who allege procedural violations or improper local expenditures. Appellants, who challenged the constitutionality of the 2003 Legislature's economic development programs, did not allege any procedural violations, identified no improper local expenditures, and admitted a policy animus toward the programs that cannot confer standing. Do Appellants have taxpayer standing to challenge the presumptively constitutional legislation creating the programs?

The district court ruled that Appellants lack taxpayer standing and dismissed their Complaint for lack of subject matter jurisdiction.

In Re Pappas, 488 N.W.2d 795 (Minn. 1992).
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Arens v. Village of Rogers, 61 N.W.2d 508 (Minn. 1953), *appeal dism'd* 347 U.S. 949 (1954).
Rukavina v. Pawlenty, 684 N.W.2d 525 (Minn. Ct. App.), *rev. denied* (Minn. Oct. 19, 2004).

STATEMENT OF THE CASE

The 2003 Minnesota Legislature enacted a series of economic development programs to stimulate economic growth and job development in certain targeted areas of the state. In 2005, Appellants brought constitutional challenges to those programs. The parties entered into a Stipulation of Undisputed Facts and then cross-moved for summary judgment. Appellants subsequently abandoned one of their claims, brought under the Commerce Clause of the United States Constitution.

As to the remaining claims, the State first argued that Appellants' lacked standing, which they asserted based solely on their status as taxpayers. Alternatively, the State demonstrated that Appellants' remaining constitutional challenges failed as a matter of law. The Ramsey County District Court, the Honorable Marybeth Dorn, heard the parties' cross-motions on August 7, 2006. In an Order dated October 9, 2006, the District Court granted the State's Motion, concluding that Appellants had not shown the requisite injury to establish taxpayer standing. Final judgment was entered on October 17, 2006, and this appeal followed.

STATEMENT OF FACTS

The record for the parties' cross-motions for summary judgment included the Complaint, the State's Answer, the Joint Stipulation of Undisputed Facts with exhibits, and additional exhibits submitted with those motions.

A. Introduction to the Challenged Programs.

The 2003 Minnesota Legislature passed legislation creating the Job Opportunity Building Zones Program ("JOBZ") and the Biotechnology and Health Sciences Industry

Zone Program ("Bioscience") to stimulate economic development in targeted areas of Minnesota. *See* Minn. Stat. § 469.314, subd. 1(a) (2006); Act of June 8, 2003, ch. 21, art. 2, § 1, 2003 Minn. Laws (1st Sp. Sess.) 2447. Through various income, sales, and property tax benefits and job credits ("the tax benefits"), the JOBZ Program is intended to increase economic development and revitalization of economically distressed rural areas of Minnesota by encouraging businesses to expand or locate in those areas. (Stip. ¶ 14; A.14).[1] The Bioscience Zone Program is intended to foster high-paying job growth in areas "in proximity to the research institutions where [biotechnology] discoveries occur." (Stip. ¶ 5; A.14).

The Department of Employment & Economic Development ("DEED") through its Commissioner is the principal administrator of the JOBZ and Bioscience Zone Programs ("the Programs") (Stip. ¶¶ 15-16; A.17). DEED, the state agency charged with facilitating "an economic environment that produces new net job growth in excess of the national average while improving the quality of the state workforce," *see* Minn. Stat. § 116J.011 (2006), administers the Programs within the framework of statutory need and success criteria. (Stip. ¶¶ 34-35, 92-93; A.24-25, 43-45). The Department of Revenue ("DOR"), the state agency charged with using innovative fiscal practices to manage the State's resources, administers the Programs' tax benefits. (Stip. ¶¶ 17-19; A.17-18).

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[1] A Job Zone could include an "agricultural processing facility" ("APF") Zone, a business with certain defined operations. *See* Minn. Stat. § 469.310, subd. 2 (2006). Since the Program operates in a largely identical fashion for an APF Zone, references to a Job Zone will include an APF Zone.

B. Undisputed Facts Regarding Zone Designations, Qualified Businesses, and Available Tax Benefits.

The Programs operate through a sequence of legislatively-mandated steps of application, designation, and administration. In general, regional authorities apply for Zone designation, DEED designates Zones,[2] and local officials in designated Zones thereafter administer the Programs by entering into agreements with qualified businesses willing to operate in Zones and monitoring the performance of those businesses.

1. Zone Designations.

Pursuant to the 2003 legislation, DEED published forms and instructions for proposed Zone designation applications by August 1, 2003. (Stip. ¶¶ 43, 100; A.28, 47). Local government units interested in proposing certain areas as Zones then compiled the necessary supporting materials, including:

(a) a development plan for the proposed Zone, indicating proposed geographic boundaries, present condition and use, social, economic, and demographic characteristics of the proposed Zone, anticipated improvements and use, and methods to increase economic opportunity and expansion in that Zone;

(b) evidence of community support for and commitment to the Zone designation and the benefits to be provided in the Zone;

(c) the applicant's agreement to comply with the requirements of Minnesota's business subsidy law, Minn. Stat. § 116J.993-.995 (2006); and

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[2] The Legislature authorized the designation of "one or more noncontiguous areas or subZones" within a designated Zone. (Stip. ¶¶ 32, 91; A.23, 43).

(d) evidence of adopted resolutions or ordinances by which localities provided local tax exemptions in a Zone. (Stip. ¶¶ 45-47, 101-103; A.29-30, 47-48). The state demographer also provided DEED with demographic information relevant to the statutory need criteria for Job Zones. (Stip. ¶ 55; A.32).

Once applications were received, DEED, along with DOR and as necessary the Commissioner of Agriculture or the Office of Strategic and Long-Range Planning, reviewed each Zone application for compliance with the Legislature's statutory designation criteria. (Stip. ¶¶ 28, 34-35, 51, 52, 56, 88, 92-93, 107; A.22, 24-25, 31-32, 42-44, 49). Contrary to Appellants' suggestion that Zones are designated with unfettered discretion, App. Br. at 3, DEED's designation authority was constrained by legislatively imposed limits on the size, location, and duration of Zones, and guided by the goal of achieving a geographic distribution of Zones around the state. (Stip. ¶¶ 32, 52, 91; A.23, 31, 43).

The review proceeded on a parcel-by-parcel basis. (Stip. ¶¶ 56-57, 59-61, 107-08, 110-11; A.32-34, 49-50). For Job Zone applications, DEED first evaluated whether the magnitude of each locality's request was reasonable, or instead sought the designation of too many acres (either more acres than could successfully be developed or more acres than were needed for development purposes). (Stip. ¶ 59; A.34). DEED then considered, among other things: (a) the relation of each parcel to other relevant features of the locality; (b) whether each parcel was supported by sufficient infrastructure; (c) whether the each parcel was properly Zoned; and (d) whether each parcel was on a floodplain.

(Stip. ¶ 59; A.34). A similarly fact-intensive review was undertaken with respect to Bioscience Zone applications. (Stip. ¶ 110; A.50).

Ultimately, DEED designated ten Job Zones, one APF Zone, and one Bioscience Zone. (Stip. ¶¶ 51, 62-63, 112; A.31, 34, 50). In doing so, DEED narrowed the total acreage of proposed Zones, excluded existing businesses from Job Zone designations, excluded proposed sub-Zones if the proposed business activity was incompatible with legislative goals, and granted and denied parts of other proposed Zone and sub-Zone applications. (Stip. ¶¶ 60-62, 112; A.33-34, 50).

2. Zone Administration & Qualified Businesses.

Once Zone designations were complete, local officials were responsible for administering the Zones under Minnesota's business subsidy law, *see* Minn. Stat. § 116J.993-.995, which ensures transparency and political accountability by requiring criteria for awarding business subsidies and obtaining local approval for such subsidies through a public hearing process. (Stip. ¶¶ 47, 72-74, 77, 80, 82, 115, 117, 119-20; A.30, 36-40, 51-54). Local officials were thus required—*before* entering into a business subsidy agreement with any business—to hold a public hearing and to adopt a business subsidy policy specifying grant criteria. (Stip. ¶¶ 74, 77-78, 115, 117; A.37-39, 51-52). The Business Subsidy Law allows a locality to deviate from its grant criteria only by documenting in writing the reason for the deviation and reporting it to DEED. (Stip. ¶ 74; A.37).

Second, with a policy in place, local officials marketed the Programs and evaluated potential businesses to determine whether they could be a qualified business.

(Stip. ¶¶ 77, 83, 117, 130; A.38, 41, 51,-52, 56-57). Local officials could enter into business subsidy agreements only with businesses willing to operate in designated Zones. (Stip. ¶¶ 36, 39, 94; A.25-27, 45).[3]

Third, each proposed business subsidy agreement had to be approved by a local, politically accountable development authority. (Stip. ¶¶ 80, 120; A.39-40, 53-54). Each agreement also had to contain "measurable, specific, and tangible goals for the subsidy" including: "(1) goals for the number of jobs created . . . ; (2) wage goals for any jobs created or retained; and (3) wage goals for any jobs to be enhanced through increased wages." (Stip. ¶ 126; A.55). And, if a participating business either ceased to be a "qualified business" or failed to meet the goals specified in that agreement, it had to "repay the amount of the total tax reduction . . . and any refund . . . in excess of tax liability, received during the two years immediately before it ceased to operate in the Zone." (Stip. ¶ 128; A.56).

3. Available Tax Benefits.

The Programs' tax benefits are available to qualified businesses operating in a designated Zone, to individuals investing in qualified businesses, and to property in a Zone occupied by a qualified business. (Stip. ¶ 20; A.18). The tax benefits include statutory exemptions from corporate franchise taxes, individual income tax, state and

[3] Appellants incorrectly claim that "local officials decide who will enjoy the tax benefits" and the businesses "are nowhere defined in the legislation." App. Br. at 3. The undisputed facts confirm that local officials had to adopt, after a public hearing, specific criteria for awarding subsidies to qualified businesses and then could enter into agreements only with businesses willing to operate in Zones. (Stip. ¶¶ 39, 74, 94, 115; A.27, 31, 45, 51.).

local sales tax, and property tax. (Stip. ¶ 21, 23; A.18-20). A refundable jobs credit is also available. (*Id.*). In the JOBZ Program, no existing businesses were included within designated Zones. (Stip. ¶ 60; A.33-34).

For the Bioscience Zone Program, the credits and exemptions for state taxes other than property (i.e., other than local) were limited to a total of $1 million statewide, for all qualifying businesses. (Stip. ¶ 25; A.21). "No property actually benefited from a property tax exemption under the Bioscience Zone Program." (Stip. ¶ 24; A.20). No such exemptions will ever be available because the Bioscience Zone property tax exemption was repealed. *See* Act of July 13, 2005, ch. 3, art. 7, § 20, 2005 Minn. Laws (1st Sp. Sess.) 2413.

C. Appellants Challenge the Constitutionality of the Programs.

Appellant Alec Olson lives in Spicer, Minnesota; he pays local property taxes and state sales and individual income taxes. (Stip. ¶ 9; A.16). Appellant Butterworth Limited Partnership ("Butterworth"), a Minnesota limited partnership, owns and operates a mobile home park in Bloomington, Minnesota. (Stip. ¶ 10; A.16). Butterworth pays local property tax and Minnesota sales tax, while Butterworth's partners, a Minnesota S corporation and an individual, pay sales tax and individual income tax, respectively. (Stip. ¶¶ 10-11; A.16).

Appellants filed suit in Ramsey County District Court on March 18, 2005, asserting six separate constitutional challenges to the Programs. (Stip. ¶ 12; A.16). Appellants' claims included two challenges under Article X, Section 1 of the Minnesota Constitution, alleging an improper delegation and a contracting away of the taxing

power; violation of federal and state constitutional due process rights; a violation of the prohibition against special laws in Article XII, Section 1 of the Minnesota Constitution; violations of the Uniformity Clause of Minnesota's Constitution and the Equal Protection Clause of the United States Constitution; and, a violation of the Commerce Clause of the United States Constitution.[4] (Compl. ¶¶ 60-104; A.88-98).

Appellants alleged that they each had "an interest in the structure and operation of Minnesota's tax system being in accordance with constitutional requirements." (Compl., ¶ 44; A.82). They also alleged that the exemptions extended by the Programs "diminish the funds available" for state and local government needs. (Compl. ¶ 37; A.80). Appellants conceded, however, that "the mere fact that some taxpayers are exempt [from individual income tax, corporate franchise tax, and state and local sales taxes] does not automatically cause any taxpayer's taxes of these types to increase." (Stip. ¶ 138; A.59). In addition, Appellants acknowledged that no "property actually benefited from a property tax exemption under the Bioscience Zone Program," (Stip., p. 24; A.20). Finally, Appellants disclaimed any argument "that they pay too much." (Plaintiffs' Mem. in Opp'n to Defs.' Mo. for Summ. J., at 6 (Jul. 25, 2006)).

Appellants neither sought to nor intended to seek participation in either Program. Appellants simply believe the Programs "are bad public policy." (Plaintiffs' Rep. Mem. in Support of Mo. for Summ. J., at 1 (Aug. 1, 2006)). Indeed, Appellants accused the Legislature of "depart[ing] from the rule of law;" of abdicating its power of taxation; and

[4] Appellants abandoned this claim during the summary judgment process. (Defs. Rep. Mem. in Support of Mo. for Summ. J. at 1 (Aug. 1, 2006)).

of enacting profoundly irrational programs. (Plaintiffs' Mem. in Support of Mo. for Summ. J. at 1, 14 (Jul. 11, 2006)).[5]

D. Proceedings in the District Court.

The parties submitted a Joint Stipulation of Undisputed Facts, and then cross-moved for summary judgment. Appellants sought summary judgment on all of their claims, as well as an award of attorneys fees. (*Id.* at 2, 27). The State sought summary judgment on two separate grounds. First, the court lacked subject matter jurisdiction over all the claims because Appellants did not have taxpayer standing; and, the court's subject matter jurisdiction over the contracting away claim was not ripe.[6] (Mem. in Support of Defs.' Mo. for Summ. J. at 5, 22 (Jul. 11, 2006)). Second, the State sought summary judgment on the merits of all Appellants' constitutional claims because Appellants could not demonstrate beyond a reasonable doubt that the legislation was unconstitutional. (*Id.* at 9-35).

The District Court, the Honorable Marybeth Dorn, heard the parties' motions on August 7, 2006. In an Order dated October 9, 2006, Judge Dorn dismissed Appellants' remaining five constitutional challenges with prejudice, finding that Appellants did not

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[5] As the State noted before the district court, Appellants' policy disagreements with the Legislature's Programs thoroughly permeated their summary judgment submissions. The excerpts above convey only a small slice of those disagreements. The full depth and breadth of their disagreement was captured in the Appendix to the State's Memorandum In Opposition To Plaintiffs' Motion for Summary Judgment, *see* Respondents' Appendix at RA 1-4.

[6] *See, e.g., State v. Murphy*, 545 N.W.2d 909, 917 (Minn. 1996) (noting that purely hypothetical future issues are not ripe and therefore not justiciable).

have standing as taxpayers to pursue those challenges. (Order at 8; A.10). The district court noted that the taxpayer standing doctrine does "not open wide the door to taxpayer constitutional challenges to state laws." (*Id.* at 5; A.7). The district court found that Plaintiffs "do not claim, nor have they shown, that they have paid a tax as a result of this legislation. They do not claim and do not allege that they have individually or collectively been denied anything as a result of this legislation. They claim constitutional violations with no evidence of injury." (*Id.* at 8; A.10). Final judgment was entered on October 17, 2006, and this timely appeal followed.

SUMMARY OF ARGUMENT

It is axiomatic that, absent some concrete injury, citizens do not have standing to challenge the constitutionality of legislation based on ideological disagreement. Although Appellants' challenge to the Programs is avowedly ideological, they attempt to avoid this rule by alleging that they have *taxpayer standing*. Taxpayer standing, however, does not allow citizen-taxpayers to mount ideological challenges where they otherwise cannot. Instead, it is a judicial doctrine which recognizes that a citizen *in his capacity as taxpayer* can, in some circumstances, sustain a concrete injury based on improper government spending. Even where a citizen-taxpayer alleges improper spending, however, the doctrine is narrow. Appellants lack taxpayer standing because, as taxpayers, they have sustained no injury whatsoever from any unlawful expenditure.

First, Appellants do not have taxpayer standing based on their payment of local property taxes. Although Appellants pay property taxes, they cannot show that the Programs involve any expenditure of local funds. At the local level, both Programs are based exclusively on property tax *exemptions*, and do not involve *expenditures*. Moreover, since no existing businesses received property tax exemptions in the JOBZ Program, and since no Bioscience Zone property received any property tax exemption, there was no diminution in any local property tax base.

Second, Appellants do not have taxpayer standing based on their payment of statewide taxes. It is at the statewide level that Minnesota courts have circumscribed the doctrine of taxpayer standing. Accordingly, courts decline to find standing even when a taxpayer can point to an expenditure of statewide tax revenue, reasoning that the injury to

any given taxpayer from such an expenditure -- shared as it is with every other taxpayer-- is too diffuse to be cognizable as an injury-in-fact capable of supporting standing.

For these reasons, Appellants cannot show that they, as taxpayers, have been injured in any way by the Programs. Accordingly, they lack taxpayer standing to challenge the Programs. In the end, Appellants are simply citizens who wish to challenge the Programs based on ideological disagreement. Because Appellants lack standing, this Court should affirm the district court's dismissal.

STANDARD OF REVIEW

This case was submitted to the district court on cross-motions for summary judgment supported by a Joint Stipulation of Undisputed Facts. The district court granted the State's Motion for Summary Judgment and dismissed Appellants' Complaint for lack of taxpayer standing. Standing is a legal question that is reviewed on appeal *de novo*. *Rukavina v. Pawlenty*, 684 N.W.2d 525, 531 (Minn. Ct. App. 2004), *rev. denied* (Minn., Oct. 19, 2004).

ARGUMENT

"Standing is the requirement that a party has a sufficient stake in a justiciable controversy to seek relief from a court." *State ex rel. Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996). Standing is an essential element of a court's subject matter jurisdiction. *See Annandale Advocate v. City of Annandale*, 435 N.W.2d 24, 27 (Minn. 1989). To establish standing, the party attacking the constitutionality of legislation must demonstrate an injury beyond "mere differences of opinion." *County*

Board of Education v. Borgen, 257 N.W. 92, 95 (Minn. 1934) (noting that such differences do not present a justiciable controversy). It is "an elementary doctrine of constitutional law that one who invokes the power of the court to declare a statute unconstitutional must be able to show not only that the statute is invalid but that he has sustained or is in immediate danger of sustaining some direct injury resulting from its enforcement and not merely that he suffers in some indefinite way in common with people generally." *Lott v. Davidson*, 109 N.W.2d 336, 345 (Minn. 1961).[7] For this reason, standing "focuses on the party seeking to get his complaint before a court and not on the issues he wishes to have adjudicated." *Sundberg v. Abbott*, 423 N.W.2d 686, 688 (Minn. Ct. App.), *rev. denied* (Minn. June 29, 1988).[8]

I. CITIZENS DO NOT HAVE TAXPAYER STANDING TO ASSERT POLICY CHALLENGES TO LEGISLATION. TAXPAYERS WHO DEMONSTRATE THE NECESSARY NEXUS BETWEEN THEIR TAX PAYMENTS AND GOVERNMENT EXPENDITURES MAY HAVE STANDING.

Minnesota courts recognize that citizens may not use their status as taxpayers to assert policy challenges to presumptively constitutional legislation. *See, e.g., In Re*

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[7] This requirement is important in attacks on presumptively constitutional legislation, *see Walker v. Zuehlke*, 642 N.W.2d 745, 750 (Minn. 2002), and especially tax legislation, which is reviewed deferentially because of the "political give-and-take and an awareness of local conditions" that underlies this peculiarly legislative function. *Id.* at 751; *cf. Kaljuste v. Hennepin County Sanatorium Comm'n*, 61 N.W.2d 757, 766 (Minn. 1953) ("Courts should accept an act of the legislature as final and discourage attacks upon it except where necessary to protect the private interest of the individual asserting invalidity and who is peculiarly and particularly affected by the act.").

[8] Appellants thus pose the wrong question when they ask "who has standing to challenge the constitutionality" of the Programs. App. Br. at 9. This question incorrectly focuses on the *issue* (constitutionality), not Appellants (as taxpayers).

Pappas, 488 N.W.2d 795, 798 (Minn. 1992) (finding that citizen did not have taxpayer standing to pursue disagreement with election board's disposition of campaign violation); *St. Paul Area Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585, 588 (Minn. 1977) (recognizing that citizens challenging highway project must have an identifiable interest distinct from the general public); *State ex rel. Smith v. Haveland*, 25 N.W.2d 474, 478 (Minn. 1946) (noting that citizen does not have standing to assert constitutional challenge of interest to taxpayers generally).

In contrast, citizens may, "when the situation warrants," *Oehler v. City of St. Paul*, 219 N.W. 760, 763 (Minn. 1928), invoke their status as taxpayers to challenge a government expenditure. *See, e.g., McKee v. Likins*, 261 N.W.2d 566 (Minn. 1977) (taxpayer had standing to assert procedural violation in authorizing government expenditure); *Arens v. Village of Rogers*, 61 N.W.2d 508 (Minn. 1953) (municipal taxpayers had standing to challenge municipality's expenditures), *appeal dism'd* 347 U.S. 949 (1954). The taxpayer plaintiffs in such cases may have standing based on the injury-in-fact that stems from the government's expenditure of the taxpayer's taxes. Courts have thus drawn a clear line for purposes of standing between the interests of citizens and those of taxpayers:

> Thus, while the activities of governmental agencies engaged in public service ought not to be hindered *merely because a citizen does not agree* with the policy or discretion of those charged with the responsibility of executing the law, *the right of a taxpayer* to maintain an action in the courts to restrain the unlawful use of public funds cannot be denied. Taxpayers are legitimately concerned with the performance by public officers of their public duties.

McKee, 261 N.W.2d at 571 (emphasis added).

Citizens can acquire taxpayer standing only by alleging a particular injury in fact; namely, that the government has collected taxes from them and has committed tax revenue so collected to an unlawful expenditure. Where a citizen asserting taxpayer standing does not identify such an expenditure, there can be no injury-in-fact sufficient to support standing. In such instances, the citizen is suing only as a citizen and therefore cannot assert taxpayer standing. *See, e.g., In Re Pappas*, 488 N.W.2d at 798; *see also Rukavina*, 684 N.W.2d at 531 (refusing to find taxpayer standing where challenges "are based primarily on appellants' disagreement with policy"); *Conant v. Robins, Kaplan, Miller & Ciresi, LLP*, 603 N.W.2d 143, 147 (Minn. Ct. App. 1999), *rev. denied* (Minn. Mar. 14, 2000) (noting that taxpayer standing will not be found where there is no expenditure of public funds).

This distinction between citizens, who lack standing to pursue policy disputes, and taxpayers, who have standing to challenge unlawful expenditures, is critical. Absent this distinction, every citizen who pays taxes could assert standing to challenge any program or legislation, regardless of whether the citizen was affected by the program. Minnesota courts have prudently rejected this uncontainably broad approach to taxpayer standing. *See Haveland*, 25 N.W.2d at 479; *see also Rukavina*, 684 N.W.2d at 531 (taxpayer standing requires a direct interest different from that of citizens generally). Appellants fail to appreciate or acknowledge this crucial distinction. The district court properly applied the distinction, however, and concluded that Appellants claimed violations "without evidence of injury," and therefore lacked standing. (Order at 8; A.10).

II. TAXPAYERS HAVE STANDING TO CHALLENGE ALLEGED PROCEDURAL VIOLATIONS IN THE EXPENDITURE OF PUBLIC FUNDS. IN ADDITION, MUNICIPAL TAXPAYERS HAVE STANDING TO CHALLENGE IMPROPER LOCAL EXPENDITURES. APPELLANTS, WHO IDENTIFIED NO PROCEDURAL VIOLATIONS OR LOCAL EXPENDITURES, DO NOT HAVE AN INJURY THAT CONFERS TAXPAYER STANDING.

Appellants argue that, if standing was found in *McKee v. Likins* and *Arens v. Village of Rogers,* then standing should be found here. App. Br. at 16-21. Alternatively, Appellants argue that they have standing as taxpayers to pursue their constitutional challenges because they pay local property taxes. App. Br. at 10. Neither argument, however, provides Appellants with the necessary injury-in-fact.

A. *McKee* Reflects Minnesota's Longstanding Rule That Taxpayers Have Standing To Challenge Alleged Procedural Violations In Authorizing Expenditures.

Appellants argue that they have "as much of a personal stake in this dispute" as did the taxpayer plaintiff in *McKee v. Likins*, 261 N.W.2d 566 (Minn. 1977). App. Br. at 16, 19. If there was standing in *McKee*, Appellants conclude, "there must be standing here." *Id.* at 21. Appellants are wrong.

McKee found taxpayer standing to assert a *procedural* challenge to a rule authorizing the spending of county tax dollars to which the plaintiff had contributed through his property tax payments. *See* 261 N.W.2d at 568, 571. The court did not address the second, separate ground the plaintiff asserted for standing, a First Amendment free exercise claim, noting only that it "question[ed] Plaintiff's standing to

sue" on those substantive grounds. *See id.* at 570.[9] Rather, the court looked to the plaintiff's procedural challenge, namely that the policy bulletin authorizing payment for abortion expenses was an unpublished "rule" within the meaning of Minnesota's Administrative Procedure Act. *Id.* at 568. The *McKee* court explained its holding as follows: "a taxpayer suing as a taxpayer has standing to challenge administrative rulemaking which allegedly is rulemaking without compliance with the statutory notice requirements." *Id.* at 571.

McKee did not announce a new rule for taxpayer standing. Minnesota has long recognized that taxpayers have standing to challenge alleged procedural violations that authorize the expenditure of public funds. *See, e.g., Phillips v. Brandt*, 43 N.W.2d 285, 287-88 (Minn. 1950) (municipal taxpayer had standing to seek an injunction restraining payment of assistant city attorney's salary where "proper procedure" required certain steps, and "such proceedings had not been taken"); *Regan v. Babcock*, 247 N.W. 12, 14-16 (Minn. 1933) (taxpayer standing to challenge state road construction contracts awarded in violation of competitive bidding requirements); *Schiffman v. City of St. Paul*, 92 N.W. 503, 504 (Minn. 1902) (city taxpayer had standing to challenge city's process for soliciting bids for street lighting "if any illegal course was followed that deprived an interested contestant for the contract" from participating). Indeed, Minnesota courts have subsequently acknowledged that *McKee's* holding is limited to procedural challenges,

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[9] Thus, while Appellants note that McKee suffered an affront to his religious and moral convictions, App. Br. at 19, this "affront" played no role in the Court's standing analysis.

and they have embraced *McKee's* doubt about taxpayer standing to mount substantive challenges. *See In Re Pappas*, 488 N.W.2d at 798 (acknowledging *McKee* standing as based on taxpayer challenge to "government rulemaking authority" and rejecting taxpayer standing where "source of disagreement does not lie with the promulgation of rules making possible the allocation of tax revenue"); *Hageman v. Stanek*, No. A03-2045, 2004 WL 1563276 (Minn. Ct. App., July 13, 2004) (unpublished) (recognizing that *McKee* "does not offer an open door to taxpayer standing on any issue" and rejecting taxpayer standing for an equal protection challenge to funding for domestic abuse programs), *rev. denied* (Minn., Sept. 21, 2004) (R.A. 5).

Appellants' proposed extension of *McKee*'s narrow procedural holding to encompass their constitutional challenges, *see* App. Br. at 20, is untenable. Appellants cannot benefit from *McKee* by recasting their substantive constitutional claims as the Legislature's "procedural mistakes" that allegedly defy constitutional mandates or as a "violation of the procedural norms for the exercise of the power of taxation." *See* App. Br. at 13, 21. The *McKee* court properly drew a line between a citizen's lack of standing to assert alleged constitutional violations, and taxpayer standing to assert a procedural challenge to spending. *McKee,* 261 N.W.2d at 570. Similarly, this Court has rejected standing for citizens who assert "taxpayer standing" as a means of pursuing political disagreements through alleged constitutional violations. *Rukavina*, 684 N.W.2d at 530-31 (rejecting taxpayer standing to assert alleged violation of Minn. Const., art. III, §1); *Hageman*, A03-2045, 2004 WL 1563276 at *2 (rejecting taxpayer standing to assert alleged equal protection violations); *cf. Conant v. Robins, Kaplan, Miller & Ciresi, LLP*,

603 N.W.2d 143, 147 (Minn. Ct. App. 1999) (rejecting taxpayer standing to challenge fees paid to private attorney retained by state).

As discussed above, only the nexus between a plaintiff's tax payment and a challenged expenditure can establish the injury-in-fact necessary to assert taxpayer standing. Where, in contrast, the plaintiff invokes his status as a taxpayer but asserts an alleged constitutional violation unrelated to spending, that critical link evaporates and the plaintiff must be considered merely a citizen who lacks standing to sue over a policy disagreement. This point is well-illustrated by *Hageman*.

There, the plaintiffs (like Appellants here) asserted standing as taxpayers. The challenged legislation provided "for grants of appropriated funds to local programs that offered services for victims of domestic abuse." 2004 WL 1563276 at *1. Plaintiffs did not challenge the ultimate use of the funds for these purposes. Instead, they asserted equal protection violations alleging that funding had been denied for male abuse victims. *Id.* This court concluded that the plaintiffs did not have taxpayer standing because they did not "allege to have been denied anything by the statute, nor do they allege to know anyone who has." *Id.* All the *Hageman* plaintiffs had was their *incidental status as taxpayers* and their political disagreement -- framed as a constitutional violation -- with the Legislature's funding decision.

The same is true here. Appellants assert taxpayer standing only to pursue constitutional challenges to economic programs that they believe are "bad public policy." Indeed, Appellants disclaim any argument that they "pay too much." Framing their

policy beliefs as alleged constitutional violations does not confer true taxpayer standing. The district court properly recognized this and dismissed Appellants' complaint.

B. *Arens* Reflects Minnesota's Rule That Local Taxpayers Whose Tax Contributions Are Directly Impacted By Local Decisions Can Challenge Local Expenditures.

Appellants also seek taxpayer standing such as that recognized in *Arens v. Village of Rogers*, 61 N.W.2d 508 (Minn. 1953). *See* App. Br. at 17-18. *Arens,* however, recognizes a similarly narrow form of taxpayer standing that does not encompass Appellants' proposed standing.

In *Arens*, the taxpayer-plaintiffs were "citizens, taxpayers, residents, and freeholders of the Village of Rogers[.]" 61 N.W.2d at 511. These plaintiffs, who were also former owners of liquor stores in Rogers, challenged the constitutionality of a statute that authorized municipalities to spend *municipal* funds to operate a municipal liquor store. 61 N.W.2d at 511. The Minnesota Supreme Court found that these taxpayers had standing to challenge "an illegal expenditure of tax money *by a municipality*." *Id.* at 514 (emphasis added). The municipal taxpayers' requisite injury-in-fact was apparent because "the project being financed is a money-losing venture which will likely have the effect of increasing the overall tax burden *of the community*." *Id.* Thus, the taxpayer plaintiffs demonstrated the necessary direct interest that was different from that of citizens generally. *See id.* at 512 (noting that taxpayer asserting challenge to constitutionality of statute requires an interest different from that of citizens generally).

Like *McKee*, the *Arens* decision did not expand taxpayer standing. Rather, it continued a long line of decisions recognizing a *municipal* taxpayer's injury-in-fact from an improper expenditure of the *local* funds to which that taxpayer contributes. *See, e.g.*, *Williams v. Klemmer*, 224 N.W. 261, 262 (Minn. 1929) (noting that taxpayer has standing to challenge municipal officer's unauthorized expenditure of public funds); *Oehler v. City of St. Paul*, 219 N.W. 760, 763 (Minn. 1928) (noting that, "when the situation warrants," city taxpayer has standing to challenge unauthorized use of municipal funds); *Burns v. Essling*, 191 N.W. 899, 900 (Minn. 1923) (city taxpayer has standing to enjoin use of city funds to pay for sports programs). These decisions logically and correctly recognize that because local budgets are funded by a relatively small pool of taxpayers, injury-in-fact can be inferred from an unlawful local expenditure. *Cf. Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 486-87 (1923) (recognizing that taxpayer challenging municipal spending has "direct and immediate" interest in proper expenditure of municipal funds).

Appellants cannot bring themselves within *Arens* because they do not challenge any local spending. They thus do not have an injury-in-fact. Nor can Appellants establish such an injury by hypothesizing about possible future sales, income, or property tax increases. *See* App. Br. at 18. The Supreme Court's reference to the likely tax increase in *Arens* was made in the context of the undisputed fact that the Village's municipal liquor store operation was "a money-losing venture." 61 N.W.2d at 514. Appellants simply cannot convert speculation into injury-in-fact, particularly when they disavow any argument that they pay too much.

Finally, consistent with general standing principles, this small-pond exception correctly limits potential taxpayer plaintiffs to those who have a direct injury distinct from that of citizens generally. It does not apply to those citizens who, although they may pay statewide taxes, can allege only an injury shared in common with the far larger pool of state taxpayers. *Cf. Lott,* 109 N.W.2d at 345 (rejecting standing where alleged injury suffered in common with others); *Arens*, 61 N.W.2d at 512. The Court's limited small-pool exception - which somewhat relaxes the injury-in-fact requirement where local expenditures are concerned - does not apply to statewide taxes. Indeed, Minnesota has rejected broad taxpayer standing where statewide taxes are concerned. *See, e.g., Marzitelli,* 258 N.W.2d at 588 (rejecting taxpayer standing based on payment of gasoline and license taxes); *Haveland*, 25 N.W.2d at 478 (rejecting taxpayer challenge to income exemption).[10]

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[10] It is not surprising that early taxpayer standing decisions do not reflect the distinction underlying more recent cases between taxpayer standing at the local and statewide levels, respectively. This distinction did not acquire significance until the marked expansion of statewide taxes during the mid- to late-Twentieth Century. As recently as the early 1920's, Minnesota's primary means of raising revenue was the general ad valorem property tax. *See* Roy G. Blakey, *Taxation in Minnesota* 4, 576-81 (1932). Indeed, local taxes accounted for approximately 80% of all Minnesota state and local tax revenue in 1921. *See id.* at 3. Minnesota first imposed its broad-based statewide income tax in 1933. *See generally* Act of Apr. 21, 1933, ch. 405, 1933 Minn. Laws 688-727 (first imposing individual income tax and corporate franchise tax); *Reed v. Bjornson*, 253 N.W. 102 (Minn. 1934). It first imposed a statewide sales tax in 1967. *See* Act of June 1, 1967, ch. 32, art. 13, 1967 Minn. Laws (Ex. Sess.) 2177-96; *Hoene v. Jamieson*, 182 N.W.2d 834, 835 (Minn. 1971). These two statewide taxes are now the primary source of state and local tax revenue, and accounted for more than 72% of such revenue in fiscal year 2005. *See* Stip. ¶ 13; A.58; *see also* http://www.house.leg.state.mn.us/hrd/issinfo/sltaxes.htm. Because earlier taxpayer standing cases dealt primarily with *local* taxes, as to which a local taxpayer has a more

(Footnote Continued on Next Page)

Appellants' proposed theory of taxpayer standing would unduly expand the small-pond exception and would thereby strip the direct interest requirement out of taxpayer standing. The district court correctly recognized that this was improper, and dismissed Appellants' Complaint.

C. Appellants' Property Taxpayer Status Does Not Confer The Necessary Direct Interest.

Appellants claim they have standing simply because they pay property tax, relying on the decisions in *Walker v. Zuehlke*, 642 N.W. 2d 745 (Minn. 2002) and *Metropolitan Sports Facilities Comm'n v. County of Hennepin*, 451 N.W.2d 319 (Minn. 1990). App. Br. at 10. Neither decision supports taxpayer standing here.

Walker, which involved a challenge to legislation that imposed "a limited form of commercial-industrial tax base sharing" in certain taconite mining areas of the state, 642 N.W.2d at 749, was preceded by *Village of Burnsville v. Onischuk*, 222 N.W.2d 523 (1974), *appeal dism'd*, 420 U.S. 916 (1975), which upheld the constitutionality of similar tax revenue sharing legislation in the metropolitan area. Together, *Walker* and *Onischuk* represent the proper application of *Arens'* small-pond exception, discussed above. Taxpayer standing existed in these cases not simply because the plaintiffs paid property taxes, but because their local taxes were paid to municipalities that were "net contributors" to the revenue-pools dictated by the challenged legislation. *See Walker*,

(Footnote Continued From Previous Page)
concrete interest, rather than with statewide taxes, as to which a state taxpayer's interest is more diffuse, the broad language about taxpayer standing found in such cases must be understood in the proper historical context.

642 N.W.2d at 747-48; *Onischuk*, 222 N.W.2d at 525-26.[11] Because *Walker* and *Onishuck* were simply small-pond cases, they have no application to Appellants' claim that they have taxpayer standing to challenge statewide tax programs.

Similarly, the decision in *Metropolitan Sports Commission* does not assist Appellants. App. Br. at 11. There, the Court addressed the issue of public official standing, not taxpayer standing. *See* 451 N.W.2d 319, 321 (Minn. 1990). Further, the Court acknowledged that the "statute under scrutiny here can only apply to a very small number of taxpayers, namely the two major sports teams who are the Metrodome lessees." *Id.* at 323. To the extent that any other taxpayer's interest was implicated, it was only because "a substantial piece of property" had been removed from the County's tax rolls, *id.* at 322. *See also Pine County v. Minnesota Dep't of Natural Resources*, No. C2-93-2140, 1994 WL 193732 (Minn. Ct. App. May 17, 1994) (unpublished), *rev. denied* (Minn. July 27, 1994) (distinguishing *Metropolitan Sports* and refusing to recognize public official standing where alleged reductions in payments to county "have not been so great" that any "property tax owner's tax bill [would increase] significantly.") (R.A. 8).

Appellants cannot profit from *Metropolitan Sports Comm'n* for several reasons. First, the rules for public official standing are not applicable to individual taxpayers. Second, standing was granted in *Metropolitan Sports Comm'n* in part because existing property was removed from Hennepin County's tax rolls. But no existing businesses

[11] Even then, the standing of the taxpayer-public official in *Onischuk* presented a "close" "doubtful" and "difficult" question. 222 N.W.2d. at 527.

were removed from tax rolls in the JOBZ Program, and no property in the Bioscience Program received a property tax exemption.[12] Third, Appellants acknowledge that the decision to raise property taxes is constrained in part by "the political process (the reality that local officials must face voters in the next election)." (Compl. ¶ 32; A.79). Thus, it is sheer speculation to assume that any taxpayer's property tax has increased or might increase because of the challenged Programs, particularly where no existing businesses were removed from tax rolls in the JOBZ Program, and no Bioscience Zone property received an exemption.[13]

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[12] Even though Plaintiff Butterworth "cannot definitely be said to be paying more in local property taxes," Appellants suggest Butterworth held a reasonable expectation of that possibility when suit was filed in March, 2005. App. Br. at 15. Appellants stipulated, however, that no Bioscience Zone property was eligible for a property tax exemption by July 2004, *nine months before suit was filed*. (Stip. ¶ 24; A.20-21). Thus, the reasonableness of Butterworth's expectation later, with no exemptions granted and the subsequent legislative repeal of that exemption, is dubious. Further, urging the Court to find taxpayer standing where the Programs admittedly pose no increased property tax burden is an untenable request for an advisory opinion. *See, e.g., State v. Colsch*, 284 N.W.2d 839, 842 (Minn. 1979) (deciding issue that rests on speculative injury requires court to issue an impermissible advisory opinion).

[13] The decisions Appellants cite from other jurisdictions are inapposite because they simply accord with Minnesota's small-pond exception explained above, or the citizen was challenging property actually removed from tax rolls, a critical fact missing here. *See Fetzer v. Town Bd. of Town of Aurora*, 705 N.Y.S.2d 147, 148 (N.Y. App. Div. 2000) (noting that taxpayers "in a community have standing to challenge a determination that property within the community's borders is exempted from the tax rolls"); *Ball v. Village of Streamwood*, 665 N.E.2d 311, 313, 317 (Ill. App. Ct. 1996) (taxpayer citizen was within class expressly excluded from the exemption extended by municipality's challenged ordinance); *Richards v. Iowa Dept. of Revenue & Finance*, 454 N.W.2d 573, 575 (Iowa 1990) (taxpayer standing recognized for municipal taxpayer to challenge removal of property in his taxing district); *Dudley v. Kerwick*, 421 N.E.2d 797, 798 (N.Y. 1981) (noting that challenge was to removal of approximately 88% of municipality's assessed property from tax rolls).

Appellants' status as property taxpayers does not confer taxpayer standing. Appellants' claimed standing still fails because, even as property taxpayers, they do not have the requisite injury-in-fact.

III. APPELLANTS, WHO CHALLENGED ONLY THE TAX POLICY SUPPORTING THE PROGRAMS, DO NOT HAVE STANDING TO ASSERT GENERALIZED GRIEVANCES SHARED IN COMMON WITH ALL TAXPAYERS.

Appellants assert that they have suffered an injury because the "reality is that [their] taxes will, in some measurable amount, ultimately increase." App. Br. at 16. The record does not support this claim; indeed, the undisputed facts contradict it. Appellants' constitutional challenges are driven by their policy disputes and nothing more. Those disputes cannot support taxpayer standing, particularly since any speculative possibility of increased taxes is shared in common with all taxpayers.

A. Alleged Injuries Shared In Common With All Taxpayers Do Not Support Taxpayer Standing.

Appellants' alleged injury -- that their taxes will inevitably rise -- fails to confer standing both because it is speculative and because it is shared in common with all taxpayers. The very purpose of the Programs is to increase state revenues. *See* Minn. Stat. § 469.314, subd. 1(a) (2006); Act of June 8, 2003, ch. 21, art. 2, § 1, 2003 Minn. Laws (1st Sp. Sess.) 2447. Appellants' speculative injury cannot support taxpayer standing. *See Haveland*, 25 N.W.2d at 478; *cf. Pine County v. Minnesota Dep't of Natural Resources*, No. C2-93-2140, 1994 WL 193732 at *5 (Minn. Ct. App., May 17, 1994) (unpublished) (noting, in refusing to find public entity standing, that possibility of future decrease in payments to county was speculative) (R.A. 8).

The United States Supreme Court recently addressed taxpayer standing in the context of constitutional challenges to a state economic development program. *See DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854 (2006). There, state taxpayers asserted that the tax credit feature of Ohio's development program diminished funds in the State's general fund, and imposed disproportionate burdens on taxpayers. *Id.* at 1862. The Court held that these asserted interests were, for three separate reasons, insufficient to confer standing.[14]

First, the Court noted that any purported interest in the "asserted effect of the allegedly illegal activity on public revenues, to which the taxpayer contributes," was an insufficient injury in fact to confer standing. *Id.* at 1862. Such an interest "is not 'concrete and particularized,' but instead a grievance the taxpayer 'suffers in some indefinite way in common with people generally.'" *Id.* (citations omitted).

Second, the Court noted that there was no evidence that a decrease in general revenues occurred as a result of the challenged development program. *Cuno*, 126 S. Ct. at 1862. Thus, "the injury is not 'actual or imminent,' but instead 'conjectural or

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[14] The *Cuno* Court was obviously bound by Article III's "case or controversy" restriction on federal subject matter jurisdiction. *See Cuno*, 126 S. Ct. at 1861 (acknowledging case or controversy requirement in federal jurisdiction); *see also McKee*, 261 N.W.2d at 570, n.4 (noting that Article III requirement supports, in part, a different test for taxpayer standing at federal level). Nevertheless, the *Cuno* Court's analysis of the taxpayer's alleged injuries in a challenge to a similar economic development program, while not binding, is relevant and persuasive, particularly since Minnesota courts have articulated similar concerns to those the *Cuno* Court identified. *See* discussion, *infra* at 29-31; *cf. Williams v. Lara*, 52 S.W.3d 171, 181 (Tex. 2001) (noting that federal jurisprudence on taxpayer standing "mirrors what is necessary to establish taxpayer standing in Texas" and therefore relying on that authority to guide state court).

hypothetical.' As an initial matter, it is unclear that tax breaks of the sort at issue here do, in fact, deplete the treasury: The very point of the tax benefits is to spur economic activity, which in turn increases government revenues." *Id.* (emphasis in the original, citations omitted).

Third, the assumption that taxpayers' tax burden will increase as a result of the economic development program is speculative. That possible injury, the Court noted "depends on how legislators respond to a reduction in revenue, if that is the consequence of the credit." *Id.* at 1862. Even if the taxpayer-plaintiffs prevailed on their constitutional challenges, it would "require speculating that abolishing the challenged credit will redound to the benefit of the taxpayer because legislators will pass along the supposed increased revenue in the form of tax reductions." *Id.* at 1863. Neither form of speculation could support taxpayer standing. *Id.*

Appellants' taxpayer standing claim is based on the analogous speculative assumption that their taxes will inevitably rise, and therefore suffers from the same flaws identified in *Cuno*.[15] First, Appellants have not identified any way that this speculative injury distinguishes them from any other taxpayer. Indeed, in the proceedings below,

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[15] The *Cuno* decision illustrates the United States Supreme Court's view of state taxpayer standing, in federal court, to challenge the constitutionality of state legislation. *See* 126 S. Ct. at 1854. In the current term, the Court returns to taxpayer standing, to address the doctrine in the context of a challenge to the constitutionality of an executive branch program that receives federal congressional appropriations for administrative expenses. *See Freedom From Religion Found'n, Inc. v. Chao*, 433 F.3d 989, 994 (7th Cir.) (noting that expenditures were within Executive Branch appropriations for general administrative expenses), *cert. granted sub nom. Hein v. Freedom From Religion Found'n, Inc.*, 127 S. Ct. 722 (2006).

Appellants repeatedly asserted their typicality as Minnesota taxpayers. *See infra* at 31. If Appellants' speculative claim that a typical taxpayer's payments is sufficient for taxpayer standing, then every taxpayer would have standing to assert the same claims based on the same alleged injury. Injury-in-fact -- the very basis for the court's subject matter jurisdiction over a justiciable controversy -- would be eliminated. *See Lott*, 109 N.W.2d at 345 (refusing to consider constitutional challenge where alleged injury demonstrates only that plaintiff "suffers in some indefinite way in common with people generally").

Second, Appellants' claimed injury ignores the very purpose of the Programs, which is to increase tax revenues. The legislation cannot be viewed in isolation for purposes of determining whether a citizen has the necessary injury-in-fact for taxpayer standing. *See Pine County*, 1994 WL 193732 at *7 (refusing to view challenged statutes in isolation where the "combined effect of these two related sections has been to increase state payments to counties, not reduce them"); *cf. Reed v. Village of Hibbing*, 184 N.W. 842, 847-48 (Minn. 1921) (noting, in upholding denial of injunction to taxpayer plaintiffs, that alleged injury from mining operation was speculative in light of intended "pecuniary advantage" for city and taxpayers from those operations), *cert. denied* 260 U.S. 725 (1922); *see also Seymour v. Region One Bd. of Educ'n*, 874 A.2d 742, 749 (Conn. 2004) (noting that "common sense suggests that a taxpayer who challenges a part of a particular governmental program must demonstrate . . . injury in the entire fiscal context of that program, taking into account both the burdens and benefits of the program"), *cert. denied* 126 S. Ct. 659 (2005).

Third, Appellants' claimed injury is highly speculative in light of the undisputed facts. Appellants acknowledged that the possibility of increased property taxes was constrained by "the political process (the reality that local officials must face voters in the next election)." (Compl., ¶ 31; A.79; Stip. ¶ 136; A.59). Further, Appellants admitted that no existing business was removed from tax rolls in any Job Zones, and no property in Bioscience Zones benefited from a property tax exemption. (A.20, 33-34). Finally, Appellants conceded that the remaining taxes they pay -- sales and income -- do not automatically increase merely because other taxpayers are exempt from those taxes. (A.59). In sum, these stipulated facts confirm that any possibility of an increased tax burden due to the Programs' tax benefits is remote, conjectural, and speculative.

Given that the political atmosphere may preclude a property tax increase; given that there may be no need for such an increase since no existing JOBZ business or Bioscience Zone property was removed from tax rolls; and given that Appellants' sales and income taxes may not have increased simply because qualified businesses were exempt, the injury on which Appellants rest their proposed taxpayer standing is simply inadequate. Standing, particularly for taxpayers who must distinguish their alleged injuries from all other citizens, cannot rest on such speculation. *See, e.g., Hageman*, A03-2045, 2004 WL 1563276 at *2 (rejecting standing where taxpayer could not show challenged legislation applied to his detriment).

B. Appellants' Policy Disputes And Generalized Grievances Cannot Substitute For Proper Standing.

Below, Appellants focused not on Programs' effect on *their taxes*, but on the wisdom of the 2003 Legislature's economic development policies and their supposed impact on *all* taxpayers. For example, Appellants identified their generalized interest in the "structure and operation of Minnesota's tax system." (Compl. ¶ 44; A.82). Appellants also challenged the Legislature's view that the Programs will generate revenue increases by repeatedly invoking harms to Minnesota taxpayers generally. *See* Pls.' Opn'g Mem. at 7 (claiming that the Programs "reduce tax revenues that would otherwise be payable to state and local governments," which increases the burden on "other taxpayers."); *see also id.* at 21 (Programs are "taxation without representation for all Minnesota taxpayers"); *id.* at 4 (Programs discriminate "against every individual taxpayer who must pay more taxes"); *id.* at 33 ("the deals are irrational from the public's perspective"); *id.* at 34 (local officials make judgments "affecting the state taxes paid by taxpayers all over the state"). Finally, Appellants emphasized their belief that the Programs were "bad public policy." (Plaintiffs' Rep. Mem. in Support of Mo. for Summ. J., at 1 (Aug. 1, 2006)).

Policy disagreements, no matter how deeply felt, do not confer standing. *See Marzitelli*, 258 N.W.2d at 589-91 (citizen with policy dispute "must take its case to the legislature"). A justiciable controversy requires more than "mere differences of opinion." *County Board of Educ. v. Borgen*, 257 N.W. 92, 95 (Minn. 1934). "This requirement precludes citizens from bringing lawsuits against governmental agencies based only on

their disagreement with policy or the exercise of discretion by those responsible for executing the law." *Conant*, 603 N.W.2d at 146. *See also Rukavina*, 684 N.W.2d at 531 (no taxpayer standing where challenges based on policy disagreements).

Appellants' policy quarrels with the Legislature's economic development neither distinguished their alleged injuries from other taxpayers, nor presented a justiciable controversy. Ultimately, the authority to make social and economic policy decisions resides in the Legislature, and the Judiciary does not pass upon the factual accuracy or political wisdom of legislative programs. *AFSCME Councils 6, 14, 65 & 96 v. Sundquist*, 338 N.W.2d 560, 570 (Minn. 1983) (noting, in rejecting constitutional challenge to change in pension contributions, that court does not engage in such questions), *appeal dism'd* 466 U.S. 933 (1984); *see also Westling v. County of Mille Lacs*, 581 N.W.2d 815, 822 (Minn. 1998) (noting that "social policy decisions are committed to the legislature"), *cert. denied* 525 U.S. 1105 (1999). Appellants' policy disputes would require courts to wade into the political arena and pass upon the wisdom of choices that were properly made by the Legislature. Even if there was some basis for the court to do so, nothing in these policy disputes distinguishes Appellants from all other taxpayers.

> The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same . . . in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned.

Commonwealth of Massachusetts v. Mellon, 262 U.S. 447, 487 (1923).

Finally, Appellants' suggestion that taxpayer standing is appropriate where "basic concerns of advocacy" are met is misplaced. App. Br. at 22. Neither the fact that the parties are represented by competent counsel nor Appellants' perception that their challenges have "substantial public interest" will substitute for the necessary direct interest for such standing. Even in *Channel 10, Inc. v. Indep. School Dist. No. 709*, which Appellants cite for this proposition, the Minnesota Supreme Court still required evidence of "injury to some interest, economic or otherwise, which differs from injury to the interests of other citizens generally." 215 N.W.2d 814, 820 (Minn. 1974). Further, it was the plaintiffs' "economic interest in the availability of news for discussion at a profit" (not counsel's competency) that assured the court that the issues raised would be vigorously and adequately presented. *Id.* at 821.[16] Regardless of counsels' ability to present the issues vigorously here, the undisputed fact remains that these Appellants have no interest, "economic or otherwise, which differs from injury to the interests of other citizens generally."

Appellants' policy disputes with the Legislature's Programs do not confer taxpayer standing. The district court correctly recognized this rule and dismissed Appellants' Complaint for lack of standing.

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[16] *Paul v. Blake*, 376 So.2d 256 (Fla. Dist. Ct. App. 1979), which Appellants cite in support of their argument that the decision in *Channel 10* supports standing, is distinguishable. Taxpayer standing was granted in that case, in part, because Florida had expressly adopted, "as the law of Florida," the rule announced in *Flast v. Cohen*, 392 U.S. 83 (1968). *See* 376 So.2d at 259-60. The *Flast* decision, however, is currently under consideration in the *Hein* decision currently before the United States Supreme Court.

CONCLUSION

Appellants' taxpayer standing theory eliminates all restrictions on that doctrine, thus allowing any taxpayer to challenge any statute. The Court should conclude, as the district court did, that Appellants' theory falls outside the permissible scope of state taxpayer standing.

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 9,320 words. This brief was prepared using Microsoft Word.

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