

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0945**

Minnesota Break the Bonds Campaign, et al.,
Appellants,

vs.

Minnesota State Board of Investment,
Respondent.

**Filed November 13, 2012
Affirmed
Crippen, Judge***

Ramsey County District Court
File No. 62-CV-11-10079

Jordan S. Kushner, Law Office of Jordan S. Kushner, Minneapolis, Minnesota; Peter J. Nickitas, Peter J. Nickitas Law Office, LLC, Minneapolis, Minnesota; and Bruce D. Nestor, De Leon & Nestor, Minneapolis, Minnesota (for appellants)

Lori Swanson, Attorney General, Kristyn Anderson, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Johnson, Chief Judge; Peterson, Judge; and Crippen, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

CRIPPEN, Judge

Appellants challenge the district court's dismissal of their declaratory judgment claims that protest investments of respondent Minnesota State Board of Investment (SBI). Because appellants failed to state a claim upon which relief can be granted as to Count I and do not have standing as to Counts II and III, we affirm.

FACTS

Appellants include four organizations and 23 individuals. Five of the appellants are Minnesota citizens who are beneficiaries of financial plans that have funds invested by respondent SBI. Nine of the remaining appellants are Minnesota citizens or residents. The remaining nine individual appellants have no identified ties to the state. Two of the four appellant-organizations are located in Minnesota.

SBI is a state agency established by Minn. Const. art. XI, § 8, charged with administering and directing the investment of all state funds. SBI is governed by Minn. Stat. §§ 356A.01-.13 (2010), which set forth public pension fiduciary responsibilities, and Minn. Stat. §§ 11A.01-.27 (2010), which establish criteria for investment of state and pension assets.¹

SBI has invested approximately \$10-20 million dollars in general obligation bonds of the state of Israel. Appellants assert that Israel uses some money from its general fund to finance settlement activities in occupied Palestinian territories, conduct that appellants view

¹ Chapters 11A and 356A were amended by 2012 Minn. Laws ch. 286, effective May 1, 2012, and to some extent were renumbered. The district court's order was issued before this amendment became effective and reflects the former numbering.

as illegal or imprudent. In January 2011, appellants demanded that SBI divest its holdings in bonds of Israel. Appellants met with the Minnesota Attorney General's Office in March 2011 to discuss their demand. After a series of meetings, appellants and the attorney general's representative were unable to agree about whether SBI was authorized to purchase Israel's bonds. On June 1, 2011, Howard Bicker, who is the executive director of SBI, informed appellants that the attorney general's office had determined that SBI's investments in bonds of Israel were lawful.

Thereafter, appellants served a complaint, requesting a declaratory judgment that (I) SBI exceeded its investment authority under the investment categories stated in Minn. Stat. § 11A.24, subd. 6(a)(5)²; (II) SBI violated its duty to invest plan assets lawfully because Israel violates international law in its use of funds; and (III) SBI violated its fiduciary duties under chapter 356A by exposing itself to possible liability claims because of Israel's illegal actions.

SBI moved to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. Minn. R. Civ. P. 12.02(a), (e). Appellants moved for summary judgment on Count I of the complaint (exceeding investment authority). Concluding that appellants lacked standing, the district court dismissed the complaint and denied appellants' motion for summary judgment.

² Under the 2012 amendments, this section is now subdivision 6(a)(4). 2012 Minn. Laws, ch. 286, art. 10, § 3.

DECISION

If the facts are undisputed, we review the issue of whether a party has standing to initiate judicial action as a question of law. *Olson v. State*, 742 N.W.2d 681, 684 (Minn. App. 2007). To have standing to sue, a plaintiff must either have suffered an injury in fact or the legislature must confer standing on a plaintiff by statute. *Id.* Appellants do not assert statutorily conferred standing.

Generally, a person suffers an injury in fact when the individual can show he has suffered some detriment that is different from damage or injury sustained by the general public. *Id.* An injury in fact involves harm that is “concrete and actual or imminent, not conjectural or hypothetical.” *Hanson v. Woolston*, 701 N.W.2d 257, 262 (Minn. App. 2005) (quotation omitted), *review denied* (Minn. Oct. 18, 2005). “Prudential limitations on standing additionally require courts to refrain from adjudicating abstract questions of wide public significance that amount to generalized grievances and are most appropriately addressed by the representative branches.” *Id.* (quotation omitted).

Judged solely by the injury-in-fact standard, appellants have not demonstrated standing: they do not allege that they suffered an injury different from any damage or injury sustained by the general public. In Counts II and III of their complaint, appellants assert that they asked SBI to stop investing in Israel’s bonds on moral or legal grounds or because the investment is offensive to plan beneficiaries or their family members who have suffered due to Israeli actions. These claims, as well as those of group members more directly affected by settlements of Israel in occupied territories, are based on actions taken by the Israeli government, not SBI.

If there is no injury in fact, a litigant may nevertheless assert standing as a taxpayer to “maintain an action that restrains the unlawful disbursements of public money or illegal action on the part of public officials.” *Olson*, 742 N.W.2d at 684 (quotation omitted). Taxpayer standing is not limitless. Among other standards, taxpayers may not maintain an action “based primarily on [their] disagreement with policy or the exercise of discretion by those responsible for executing the law.” *Id.* at 685; *see also McKee v. Likins*, 261 N.W.2d 566, 571 (Minn. 1977) (commenting that 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”). A taxpayer does have standing to restrain unlawful expenditures or illegal acts by public officials. *Olson*, 742 N.W.2d at 684.

Count I of the complaint asserts that SBI is acting in excess of its statutory investment authority. Because this is an appeal from a dismissal of a complaint for failure to state a claim upon which relief can be granted, all of the facts alleged by appellants must be accepted as true. *In re Individual 35W Bridge Litig.*, 806 N.W.2d 820, 826 (Minn. 2011). Thus, appellants have pleaded an adequate basis for taxpayer standing as to Count I. Despite this standing, the district court properly dismissed Count I, which is premised on an interpretation of statutes. This court interprets the statutes underlying appellants’ allegations de novo, as a question of law. *Id.*

Minn. Stat. § 11A.24 (2010) sets forth the various investments that SBI is authorized to purchase, sell, lend, or exchange. Subdivisions 1 to 5 of this section set forth in detail the United States and Canadian securities in which SBI is authorized to invest. But subdivision

6, entitled “Other investments,” authorizes SBI to invest in venture capital businesses, real estate interests, business organizations other than corporations, including partnerships or limited partnerships, and “international securities.” Subdivision 6 states that the investments authorized are “[i]n addition to the investments authorized in subdivisions 1 to 5.” There is no ambiguity in this language.

Appellants urge us to consider section 11A.24 as a whole. See *KSTP-TV v. Ramsey County*, 806 N.W.2d 785, 788 (Minn. 2011) (stating that a court must “read and construe a statute as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations”). Considered as a whole, appellants argue, the broad authorization of subdivision 6 conflicts with the narrow limitations set forth in subdivisions 1 to 5. This argument has no merit.

Subdivision 6 is a definite expansion of SBI-authorized investments; section 11A.24, subdivisions 2 to 5, impose much more detailed limitations on the types of securities that SBI is authorized to purchase. But we cannot ignore the language of subdivision 6, which states that the investments set forth in that subdivision are authorized “[i]n addition to the investments authorized in subdivisions 1 to 5” and that subdivision 6(a)(5), international securities, is listed as an investment option separate from those listed in subdivision 6(a)(1-4), not as a modification of those types of investments. Although a reviewing court may question the wisdom of a legislative enactment, it may not substitute its judgment by disregarding the plain meaning of a statute, unless it “utterly confounds a clear legislative

purpose.”³ *Hyatt v. Anoka Police Dep’t*, 691 N.W.2d 824, 827 (Minn. 2005) (quotation omitted).

Because SBI is authorized by the statute to invest in international securities, including the bonds of foreign states, the district court did not err in dismissing appellants’ claim that SBI exceeded its authority by investing in Israel bonds.

Counts II and III of the complaint do not similarly assert taxpayer standing because of illegal acts by SBI. Count II alleges SBI violated its duty to lawfully invest plan assets based on allegedly illegal acts of Israel. Count III claims SBI violated its duty to prudently invest its assets, again alleging illegal conduct by Israel. These claims rest on disagreements with “policy or discretion” of SBI officials; as observed earlier, the supreme court has determined that individuals have no standing to assert disagreements of this kind. *McKee*, 261 N.W.2d at 571; *see Rukavina v. Pawlenty*, 684 N.W.2d 525, 531 (Minn. App. 2004) (contrasting disagreements on policy or the exercise of discretion with claims of unlawful disbursement of public funds), *review denied* (Minn. Oct. 19, 2004). SBI is authorized to use discretion in its choice of investments; appellants’ disagreement with the exercise of that discretion does not establish taxpayer standing.

³ Absent some ambiguity, we will not employ the canons of construction appellants have asked us to consider. *See N. Pac. Ry. Co. v. City of Duluth*, 243 Minn. 84, 89, 67 N.W.2d 635, 638 (1955) (stating that rule of “expressio unius est exclusion alterius” is used as “an aid in discovering legislative intent when not otherwise manifest”); *Lefto v. Hoggsbreath Enters., Inc.*, 567 N.W.2d 746, 749 (Minn. App. 1997) (stating the rule of construction “ejusdem generis” is used only when a statute is ambiguous), *aff’d*, 581 N.W.2d 855, 856 (Minn. 1998).

Finally, the district court concluded that Counts II and III presented non-justiciable issues because the allegations raise political questions or challenge acts of state. *See Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710 (1962). Because we conclude that appellants lack standing to pursue the claims set forth in Counts II and III, we refrain from further review of the district court's justiciability determination.

We affirm the district court's judgment of dismissal.

Affirmed.