

No. A06-840

STATE OF MINNESOTA

IN COURT OF APPEALS

State of Minnesota ex rel. Speaker of House of Representatives
Hon. Steve Sviggum, et al.,

Appellants,

vs.

Peggy Ingison, in her official capacity as Commissioner of Finance,
or her successor, et al.,

Respondents.

RESPONDENTS' BRIEF AND APPENDIX

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LEGAL ISSUES

1. Is Appellants' Petition for a writ of *quo warranto* a proper procedure by which to challenge the purely past conduct of a State public official that is not continuing?

The district court held in the negative.

Most apposite authorities:

Rice v. Connolly, 488 N.W.2d 241 (Minn. 1992)

State ex rel. Mattson v. Kiedrowski, 391 N.W.2d 777 (Minn. 1986)

State ex rel. Grozbach v. Common Sch. Dist. 65, 54 N.W.2d 130 (Minn. 1952)

Lommen v. Gravlin, 295 N.W. 654 (Minn. 1941)

2. Does Appellant's Petition requesting an advisory legal opinion regarding a purely hypothetical future set of facts present a ripe case or controversy?

The district court held in the negative.

Most apposite authorities:

Kennedy v. Carlson, 544 N.W.2d 1 (Minn. 1996)

St. Paul Area Chamber of Commerce v. Marzitelli, 258 N.W.2d 585 (Minn. 1977)

Izaak Walton League of America Endorsement, Inc. v. State Dept. of Nat. Res., 252 N.W.2d 852 (Minn. 1977)

3. Do conclusion of proceedings in the district court temporary shutdown proceeding and legislative ratification of actions taken thereunder render Appellant's Petition moot?

The district court held in the affirmative.

Most apposite authorities:

Kahn v. Griffin, 701 N.W.2d 815 (Minn. 2005)

In re Schmidt, 443 N.W.2d 824 (Minn. 1989)

Chaney v. Minneapolis Cmty. Dev. Agency, 641 N.W.2d 328 (Minn. Ct. App. 2002), *rev. denied* (Minn. May 28, 2002)

4. Does the doctrine of laches preclude Appellants from challenging the district court's approval of the expenditures at issue when Appellants refused to

participate in, or object to, the district court's proceeding and then subsequently ratified the very expenditures they now challenge?

The district court held in the affirmative.

Most apposite authorities:

Apple Valley Square v. City of Apple Valley, 472 N.W.2d 681 (Minn. Ct. App. 1981)

Fetch v. Holm, 52 N.W.2d 113 (Minn. 1952)

Aronovich v. Levy, 56 N.W.2d 570 (Minn. 1953)

5. Do Appellants have standing to as individual members of the Legislature, or as taxpayers, to challenge the expenditures which they expressly ratified.

The district court held that Appellants had standing in their capacity as taxpayers and did not decide whether Appellants had standing as legislators.

Most apposite authorities:

McKee v. Likins, 261 N.W.2d 566 (Minn. 1977)

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

Conant v. Robins, Kaplan, Miller & Ciresi, LLP, 603 N.W.2d 143 (Minn. Ct. App. 1999).

6. Does Minn. Const. art. XI, § 1 override judicial authority and responsibility to order State spending where such expenditures are required to maintain critical government functions?

The district court held in the negative.

Most apposite authorities:

Coalition for Basic Human Needs v. King, 654 F.2d 838 (1st Cir. 1981)

Mattson v. Kiedroenski, 391 N.W.2d 777 (Minn. 1986)

Sharood v. Hatfield, 210 N.W.2d 275 (Minn. 1973)

Fletcher v. Commonwealth of Ky., 163 S.W.3d 852 (Ky. 2005)

7. Did the district court abuse its discretion in denying Appellants' sanctions motion based on Respondents' premature filing of their own sanctions motion?

The district court by definition held in the negative.

Most apposite authorities:

Olson v. Babler, No. A05:, 395, 2006 WL 851798 (Minn. Ct. App. 2006)

Gibson v. Coldwell Banker Burnett, 659 N.W.2d 782 (Minn. Ct. App. 2003)

Burnett, 659 N.W.2d 782 (Minn. Ct. App. 2003)

Muhammad v. State, Nos. Civ. A-99-3742/99-2694, 2000 WL 1876 (E.D. La. 2000)

STATEMENT OF THE CASE

On June 23, 2005, the Ramsey County District Court, in response to a petition filed by Attorney General Mike Hatch, acted to assure short-term continuation of essential government functions in the event that the Legislature failed to approve necessary appropriations before the end of the fiscal state's biennium on June 30, 2005.¹ Notice of those proceedings was served upon the legislative leadership.² However, neither house of the Legislature, which was then in special session, nor any of the individual Appellants, appeared or took part in those proceedings in any way.

As of July 1, 2005, the Legislature had failed to appropriate funds needed to continue numerous essential legally mandated governmental functions, thereby bringing the *Temporary Funding* order into play. Eight days later, on July 9, 2005, the Legislature appropriated funds, retroactively to July 1, 2005, for expenditures that were necessary, in the opinion of the Respondents Commissioner of Finance Peggy Ingison, to

¹ *In re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota*, No. C0-05-5928 (2d Jud. Dist. Ct.) ("*Temporary Funding*"). *Findings of Fact, Conclusions of Law and Order Granting Motion for Temporary Funding*, June 23, 2005, Appellants' Appendix (App.) 154-63.

² App. 164.

continue base-level operations of all agencies whose complete biennial appropriations had not been approved. Act of July 9, 2005, ch. 2, 2005 Minn. Laws 1st Spec. Sess., 2273. On July 13, 2005, the Legislature completed action on the remaining biennial appropriation bills which were signed by the Governor on July 14, 2005. Acts of July 14, 2005, ch. 3-6, 2005 Minn. Laws 1st Spec. Sess. 2454, *et seq.*

On August 31, 2005, some seven weeks later, Appellants commenced a *quo warranto* action in the Minnesota Supreme Court seeking a declaration that Respondent Ingison's expenditures pursuant to the Ramsey County District Court order were unauthorized and unconstitutional. On September 9, 2005, the Supreme Court summarily dismissed the petition because it lacked the exigency necessary to invoke original Supreme Court jurisdiction. *State ex rel. Sviggum v. Ingison*, Minn. S. Ct. No. A05-1742, Order (Minn. Sept. 9, 2005). App. 271, 274. The Court indicated that, absent such exigency, any information in the nature of *quo warranto* should be filed in district court, but also expressly noted the availability of other possible alternatives, specifically noting the possibility of intervention in the *Temporary Funding* action in Ramsey County District Court. *Id.* at 274.

On August 31, 2005, Appellants filed the instant *quo warranto* action in Ramsey County District Court. On cross motions for summary judgment, the district court, the Honorable Chief Judge Greg Johnson presiding, denied the Petition in its entirety in an Order and Memorandum, dated March 3, 2006. App. 311-18. The court held that *quo warranto* is not an appropriate form of action to address Appellants' allegations; that Appellants' Petition is moot; that the Petition is also not ripe; that the Petition is barred

by the doctrine of laches; and that the Minnesota Constitution does not prohibit judicial action, in extraordinary circumstances, to preserve essential government functions pending expected actions by the Legislature. *Id.* The district court also denied Respondents' and Appellants' respective motions for an award of attorney fees. *Id.* at 312.

Appellants subsequently brought this appeal from the judgment of the district court denying their Petition in its entirety and denying their motion for an award of attorney fees. On June 13, 2006, the Court granted the Minnesota Senate permission to file a brief as amicus curiae. *See* Order dated June 13, 2006. Respondents' Appendix (R. App.) at 25-26.

STATEMENT OF FACTS

I. THREATENED STATE GOVERNMENT SHUTDOWN.

The Minnesota Legislature ended the odd-year portion of the last regular session on May 23, 2005 without approving necessary appropriations for many of the executive branch officers and agencies for the fiscal year beginning on July 1, 2005. When Governor Tim Pawlenty convened the Legislature in special session on May 24, 2005, appropriations for many executive branch officers and agencies had not yet been approved as the end of June neared.³

II. COURT TEMPORARY FUNDING PROCEEDINGS.

³ Appellants cynically refer to this sad state of affairs as part of the Legislature's "rich history" of budgetary failures. Appellants' Brief ("App. Br.") at 4.

On June 15, 2005, Attorney General Mike Hatch filed a Petition in Ramsey County District Court seeking a judicial determination that, in the event of a partial government shutdown on July 1, 2005, the executive branch of State government must continue to undertake certain essential or "core" functions of government as required by the Minnesota State and United States Constitutions and that the State must pay for those services. App. 36-43. The services required to be provided, according to the Attorney General, included those relating to the preservation of life, health and safety of Minnesotans and the maintenance and preservation of public property. The Attorney General requested that affected government agencies be directed to determine what core functions were essential and requested those that Respondents Finance Commissioner Ingison be directed to pay for core services, and that a Special Master be appointed by the court to resolve any issues arising as to the definition and payment for core functions. *Id.*

On the same day, the district court issued an Order to Show Cause why the court should not grant the Attorney General's Petition. *Temporary Funding*, Order to Show Cause, June 15, 2005. R. App. 1, 2. The Order scheduled a hearing on the Petition to be held June 29, 2005. *Id.* The court required the Attorney General to serve a copy of the Order on various parties, including Petitioner Steve Sviggum, in his capacity as Speaker of the House of Representatives and James Metzen, in his capacity as President of the Senate. *Id.* On June 15, 2005, copies of the Order to Show Cause were served upon Petitioner Sviggum and Senator Metzen accompanied by personal letters from Attorney General Mike Hatch. R. App. 3-6. On June 16, 2005, they were notified by letter of the change in date of the hearing from June 29, 2005 to June 23, 2005. R. App. 7-10.

On June 23, 2005, the court held a hearing with respect to the Petition. Attorney General Hatch appeared on behalf of the State of Minnesota, and attorney Eric Lipman appeared on behalf of the Governor.⁴ Neither Petitioner Sviggum, nor any of the other Petitioners, nor anyone on their behalf appeared at this hearing. Likewise, no one appeared representing the Senate.

Following this hearing, the court issued Findings of Fact, Conclusions of Law and Order Granting Motion for Temporary Funding (“Order for Temporary Funding”). App. 154-63. Among other things, the Order for Temporary Funding stated that the Minnesota Constitution entrusts certain core functions to the executive branch of government and that those core functions include ensuring compliance with state and federal constitutional rights of citizens and federal mandates. *Id.* at 155, 160. The Order also noted that the State has entered into numerous agreements with the United States government which require the State to make payments to individuals or local government units or to undertake certain duties on behalf of the federal government. *Id.* at 157. Without funding after June 30, 2005, the court found that the State would be unable to carry out those functions and other core functions of the executive branch of government and, therefore, ordered that core functions of State government must continue to be provided and paid for in the event of a government shutdown. *Id.* at 158, 161-62.⁵ The

⁴ On June 15, 2005, Governor Pawlenty filed a Motion for Intervention and Leave to File a Petition for Relief. The Governor’s motion was heard and granted at the June 23, 2005 hearing.

⁵ Attached to the Court’s Order was a list of critical and core operations the Court indicated must be provided during any period of a government shutdown. Exhibit B to (Footnote Continued on Next Page)

court appointed the Honorable Edward Stringer as Special Master to mediate and, if necessary, hear and make recommendations to the court with respect to any issues which may arise regarding compliance with the terms of the Order. *Id.* at 162.

By its terms, the Order for Temporary Funding was to remain in effect only until the earliest of the following: (1) July 23, 2005; (2) The enactment of a budget by the State of Minnesota to fund all core functions of government after June 30, 2005; or (3) Further order of the Court. *Id.* A copy of the Order for Temporary Funding was served on hundreds of individuals, including Petitioner Sviggum and Senator Metzen. App. 164-65.

On June 29 and 30, 2005, the court held a hearing upon the request of the Attorney General with respect to enforcement of the Order for Temporary Funding. The Attorney General sought to ensure that the Order was enforced to continue payments to recipients of Medical Assistance, General Assistance Medical Care, and MinnesotaCare during any government shutdown. The Governor argued that such payments were not core functions of government. On June 30, 2005, the court issued Findings of Fact, Conclusions of Law and Order for Clarification of the June 23, 2005 Order, which stated that "the provision of health care for the state of Minnesota's most vulnerable citizens is a core function of government and must be funded." App. 196-97. The Court further ordered that the Commissioner of the Minnesota Department of Human Services notify all recipients of

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Order for Temporary Funding. R. App. 11-24. In the Order, the Court also indicated that the services set forth in this attachment were not necessarily an exclusive list of core functions.

Medical Assistance, General Assistance Medical Care, and MinnesotaCare that, in the event of a government shutdown, payments to recipients would continue as a core function of government. *Id.*

As of July 1, 2005, the Legislature and Governor had not yet approved appropriations for the executive officers and agencies identified in the Petition. As a result, the provisions of the Order for Temporary Funding were triggered, and the identified core functions of government were required to be provided and paid for by the State in accordance with the terms of the Order. Affidavit of Commissioner of Finance Peggy S. Ingison (“Ingison Aff.”), App. 339.

Following the issuance of the Order for Temporary Funding, over 50 petitions were filed by persons and groups seeking a determination whether a particular service or payment was a core function of government. Justice Stringer held hearings on each petition and made recommendations to the Court with respect to whether the requested service or payment constituted a core service of government. Justice Stringer conducted hearings regarding the petitions on June 27; June 28; July 5; July 6; and July 7, 2005. Following the hearings, Justice Stringer made recommendations to the Court as to whether each petition should be granted or denied. In an Order dated June 30, 2005 (App. 193) and two orders dated July 7, 2005 (App. 215, 217) the district court granted or denied each of the petitions.⁶

⁶ Examples of petitions that were filed include those received from: Pediatric Home Services (requesting funding of ventilators for ventilator-dependent children); Minnesota Trucking Association and Minnesota Manufactured Homes Association (for permitting of (Footnote Continued on Next Page)

On July 9, 2005, the Legislature passed a bill which the Governor signed appropriating money for unfunded agencies necessary in the opinion of the Commissioner of Finance to maintain base-level operations during the period July 1, 2005 through July 14, 2005. 2005 Minn. Laws 1st Spec. Sess. ch. 2. On July 13, 2005, various bills appropriating monies for agencies that were unfunded on June 30, 2005 were passed by the Legislature, and the bills were signed into law by the Governor on July 14, 2005. *Id.* ch. 4-6. These bills funded the agencies for the entire biennium. Finally, on July 26, 2005, the court issued an Order stating, among other things, that the Order for Temporary Funding was no longer in effect as of July 14, 2005. App. 243-44.

Even though both houses of the Legislature were served with notices of the district court's proceedings, and despite the subsequent suggestion of the Supreme Court, not one of the Appellants here or either house of the legislature sought to intervene or even appeared in the *Temporary Funding* case or sought to challenge the orders of the court through timely action in this appellate Court.⁷

(Footnote Continued From Previous Page)

oversized vehicles); Minnesota Indian Women's Resource Center (to ensure funding of the Sexual Assault Advocacy Program and the Indian Child Welfare Program); Metropolitan Transit Commission (to continue bus service in the State's metropolitan areas); and various organizations administering programs through the Department of Public Safety's Office of Justice Programs (including those designed to prevent domestic violence and child abuse and to provide services to battered women).

⁷ As noted above, Petitioner Sviggum and the President of the Senate Metzen were also personally served with an "order to show cause" instructing him to appear before the Court if he had any objections to the Court's process. They would not even have had to formally intervene to present their objections to the Court. Instead, they simply did (Footnote Continued on Next Page)

III. RESPONDENTS' EXPENDITURES PURSUANT TO COURT'S ORDERS.

Appellants grossly misstate the amount of the expenditures Respondent Ingison made without a prior legislative appropriation. They claim this amount exceeded a half billion dollars. Appellants' Brief at 7. In fact, from July 1 through 8, 2005, the only actual payments⁸ made by the Department of Finance under authority of the district court's four Orders for Temporary Funding⁹ were for Greater Minnesota Transit Assistance grants made by the Department of Transportation. Ingison Aff., App. 340, 346-49. The total of all transit assistance grants paid out between July 1 and 8 was \$996,247. *Id.* Inasmuch as state payments (including payrolls) are not made until some time after goods or services have been provided,¹⁰ the vast majority of payments actually made from the Treasury between July 1 and July 14 were for obligations incurred against previously-existing Fiscal Year 2005 appropriations.

Based upon the Court's Order for Temporary Funding of June 23, 2003, the Respondents established \$569,623,962 of interim court-ordered spending authority for essential services for July 1 through 23, 2005. *Id.* Of that amount, \$300,000,000 was

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nothing. A similar process occurred when the Legislature adjourned without enacting a budget in 2001. Appellants here and the Senate never objected to, participated or intervened in, or appealed that temporary funding process either.

⁸ While the Commissioner of Finance is authorized pursuant to Minn. Stat. § 16A.40 (2004) to issue "warrants" in payment of state obligations, the vast majority of state payments are made by electronic fund transfers which are also authorized by that section.

⁹ Order for Temporary Funding on June 23, 2003 (App. 154); Findings of Fact, Conclusions of Law and Order for Clarification of the June 23, 2005 Order (App. 196); Order of June 30, 2005 (App. 193); Orders of July 7, 2005. App. 215, 217.

¹⁰ See, e.g., Minn. Stat. § 16A.17, subd. 8 and § 16A.41, subd. 1.

budgeted for the July 15 general education aid payment to school districts which is authorized pursuant to an open appropriation in Minn. Stat. § 126C.20 (2004). *Id.* The actual obligations incurred by state agencies were far less than that amount for which interim court-ordered spending budgets were established. State agencies incurred obligations for goods or services for which encumbrances of \$29,984,706 were created. Estimated compensation for state workers deemed essential under the court orders totaled \$4,834,090 for actual hours worked during July 1 through July 8.

IV. LEGISLATIVE RATIFICATION OF COURT-ORDERED EXPENDITURES.

The *Temporary Funding* case was effectively concluded after the Legislature enacted the above-referenced appropriation bills in July of 2005. That is, the Legislature, including Amicus Minnesota Senate, retroactively ratified every one of the expenditures the Appellants belatedly challenged in this case. Each of those bills contains the following language or its equivalent:

Appropriations in this act are effective retroactively from July 1, 2005, and supersede and replace funding authorized by order of the Ramsey County District Court in Case No. C9-05-5928, as well as by Laws 2005 1st Special Session chapter 2, which provided temporary funding through July 14, 2005.

Act of July 13, 2005, ch. 3, art. 11, § 14, 2005 Minn. Laws 1st Spec. Sess. 2273, 2454; *see also* Act of July 14, 2005, ch. 4, art. 9, § 16, 2005 Minn. Laws 1st Spec. Sess. 2454, 2790 and Act of July 14, 2005, ch. 6, art. 4, § 1, 2005 Minn. Laws 1st Spec. Sess. 2941, 3058. The Act of July 9, 2005, ch. 2, 2005 Minn. Laws 1st Spec. Sess. 2273, which was approved by the Governor on July 9, 2005, provided:

Section 1. [Continuing Appropriations.]

(a) Retroactively from July 1, 2005, amounts sufficient to continue the operation of state government through July 14, 2005, as determined by the commissioner of finance, are appropriated from the appropriate fund or account in the state treasury to each unit of state government or other entity that received appropriations from the state for June 2005, as a result of money appropriated in Laws 2003 1st Special Session chapters 9, 14, 19, and 21.

(b) The amounts appropriated must be sufficient, but not exceed the amounts needed, to continue the operation of government at base level as it existed in June 2005. Determination of amounts may be made on a proration of annual appropriations or another reasonable basis. The appropriations must not include appropriations in the acts specified in paragraph (a) that are designated as one time appropriations or are one time in nature. This requirement does not affect standing appropriations that are annually appropriated by statute.

Moreover, a majority of Appellants here voted in favor of these bills. As a result, any previous lack of express appropriations for expenditures necessary to maintain core functions was cured as of July 9, 2005.

SCOPE OF REVIEW

As a general matter, on review of disposition of summary judgment motions and constitutional questions, this Court determines *de novo* whether there are any genuine issues of material fact, and whether the district court erred in its legal determinations. *See, e.g., Star Tribune Co. v. University of Minn. Bd. of Regents*, 683 N.W.2d 274, 279 (Minn. 2004); *Noske v. Friedberg*, 713 N.W.2d 866, 872 (Minn. Ct. App. 2006). In addition to statutory and constitutional interpretation, questions concerning standing and mootness are generally considered legal questions subject to *de novo* review. *See, e.g., Druham v. Roer*, 708 N.W.2d 552, 563 (Minn. Ct. App. 2006).

Application of equitable principles such as laches, however, are generally reviewed on an abuse of discretion standard, *see, e.g., Jackel Brower*, 668 N.W.2d 685 (Minn. Ct. App. 2003), *rev. denied* (Minn. Nov. 25, 2003) as are rulings relating to sanctions under Minn. Stat. § 549.211. *See, e.g., Gibson v. Coldwell Banker Bennett*, 659 N.W.2d 782, 787 (Minn. Ct. App. 2003).

SUMMARY OF ARGUMENT

As a threshold matter, the district court correctly recognized the many fatal procedural flaws in the instant Petition for writ of quo warranto. Any one of these procedural infirmities is enough for this Court to affirm the district Court's decision. Collectively, they demonstrate the utter futility of the Petition at issue here.

First, the Petition is a procedurally improper means by which to challenge past conduct of a state official. Minnesota law is absolutely clear that a petition for writ of quo warranto is only available to challenge the "continuous unauthorized usurpation of authority." The district court correctly concluded that the Petition in this case is improper because Appellants did not challenge any on-going conduct. Appellants cite no authority and make no arguments in opposition to this sound and well-established rule of law.

Second, the district court also correctly concluded that the Petition is moot. The Petition did not challenge any on-going conduct. Rather, it focused solely on certain district court actions that were concluded by late July 2005. Appellants seek an impermissible ruling on a hypothetical question for the sole purpose of setting precedent they desire. The district court also properly rejected an exception to the mootness doctrine relied upon by Appellants reasoning that Appellants declined to timely

participate in the district court Temporary Funding proceedings necessitated by the threatened government shutdown.

Third, the Petition also fails to present a ripe controversy as the district court correctly observed. Appellants' Petition requests an impermissible advisory judicial opinion regarding a completely hypothetical and speculative set of future facts. Not surprisingly, Appellants do not even address this fatal procedural flaw in their brief.

Fourth, The Petition here is also barred by the doctrine of laches. This is, in fact, the poster-child of laches cases. Appellants created the budget stalemate. They then completely ignored the district court's Temporary Funding proceedings. Then, after those proceedings concluded, they affirmatively ratified every single expenditure they now contest in their belated Petition. The district court did not abuse its discretion in refusing to exercise its equitable authority to reward such inexcusably dilatory behavior.

Finally, Appellants also lack standing as taxpayers or legislators to bring this action. The district court misapplied Minnesota law in deciding that Appellants have standing as taxpayers. Appellants lack such standing because they do not seek to prevent any specific illegal expenditures from being made. Appellants' legislator standing claim is equally flawed. They have not alleged any interest in this matter that is different from that of the general citizenry. They also mistakenly rely on a voter nullification theory which Minnesota's courts have expressly rejected.

In addition to suffering from these many procedural defects, the Petition here is also fundamentally defective on the merits as the district court correctly concluded. While Petitioners desire to be able to shut down the State government in order to enhance

their political leverage with the Executive Branch, the district court correctly authorized the continued funding of certain core functions required by state and federal constitutional and statutory provisions. As the district court aptly observed, the Minnesota Constitution is not a “suicide pact.” When, as in this case, the Legislature fails to do its job in establishing a budget, it is incumbent on the courts to protect Minnesota citizens adversely affected by the threatened discontinuance of vital State programs.

Finally, the district court did not abuse its discretion in denying Appellants’ motion for sanctions based on Respondents’ premature filing of its sanctions motion. Moreover, Appellants’ belief that their Petition is meritorious, which the district court soundly rejected, does not entitle Appellants to a sanctions award.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DECIDED THAT A WRIT OF QUO WARRANTO IS NOT AVAILABLE TO CHALLENGE PAST CONDUCT THAT IS NOT CONTINUING IN NATURE.

The district court correctly decided that Appellants’ Petition for a writ of *quo warranto* was a procedurally improper means of challenging past conduct of a public official. Order and Memorandum, March 3, 2006 (“District Court Order”) p.5. App. 311, 315. As the court observed, such a writ is only intended to apply to situations involving a “continuous unauthorized usurpation of authority.” *Id.* Because the district court accurately cited and applied Minnesota law applicable to such writs, this Court should affirm the court’s decision.

The jurisdiction of district courts to issue writs of *quo warranto*, which had been abolished with adoption of the Rules of Civil Procedure in 1959, was reinstated by the Minnesota Supreme Court in *Rice v. Connolly*, 488 N.W.2d 241, 244 (Minn. 1992).¹¹ The modern action in the nature of *quo warranto* derives from an ancient common-law writ employed to prevent usurpation of the powers of the monarchy by lesser individuals or entities who lacked proper authority from the sovereign. See, e.g., *State ex rel. Danielson v. Village of Mound*, 48 N.W.2d 855, 860 (Minn. 1951). The title of the writ means literally by “what warrant” and required the persons or groups subjected to the writ to demonstrate by what authority they purported to exercise certain powers properly

¹¹ In that case, the Supreme Court declared:

Accordingly, we have determined that *quo warranto* jurisdiction as it once existed in the district court must be reinstated and that petitions for the writ of *quo warranto* and information in the nature of *quo warranto* shall be filed in the first instance in the district court. While this court retains its original jurisdiction pursuant to Minn. Stat. § 480.04 (1990), we today signal our future intention to exercise that discretion in only the most exigent of circumstances. We comment further that the reinstatement of *quo warranto* jurisdiction in the district court is intended to exist side by side with the appropriate alternative forms of remedy heretofore available.

488 N.W.2d at 244.

the prerogative of the Crown.¹² The writ, as incorporated into Minnesota law, is generally governed by these principles of the common law.¹³

The writ, by its very nature, is an equitable remedy that is only applicable to situations involving a continuing course of unauthorized usurpation of authority. See, e.g., *State ex rel. La Jesse v. Meisinger*, 300, 103 N.W.2d 864, 867 (Minn. 1960) (challenge to the right to hold office); *State ex rel. Harrier v. Village of Spring Lake Park*, 71 N.W.2d 812, 817 (Minn. 1959) (challenge to corporate existence). It is generally not available to contest particular past acts of alleged misconduct. See, e.g., *State ex rel. Grozbach v. Common School Dist. No. 65*, 54 N.W.2d 130, 136 (Minn. 1952) (not appropriate to challenge school debt); *State ex rel. Lommen v. Gravlin*, 209 Minn. 136, 137, 295 N.W. 654, 655 (Minn. 1941) (not available to test official action of public officials).

Appellants assert that these long-established principles have been somehow rendered inoperative in light of the supreme court's decision in *State, ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777 (Minn. 1986). App. Brief at 17. However the *Mattson* case

¹² Originally, the writ could only be issued upon the relation of the Attorney General *ex officio*. See, e.g., *Danielson*, 234 Minn. 536, 48 N.W.2d at 860; *State ex rel. Young v. Village of Kent*, 96 Minn. 255, 259-60, 104 N.W. 948, 949-50 (1905). The ancient writ was modified over time to an information in the nature of *quo warranto* which could be filed either by the Attorney General on behalf of the Crown or by the master of the Crown Office at the instance of private persons. *Young* at 260, 104 N.W. at 950.

¹³ In those cases, instituted by the Attorney General *ex officio*, the writ was held to issue as a matter of course, whereas matters commenced by, or with the consent of, the attorney general upon the relation of private persons, were subject to the discretion of the court to grant leave to file an information "that leave ought not be granted where the law furnishes another remedy." *State ex rel. Simpson v. Dowlan*, 24 N.W. 188, 189 (Minn. 1885).

is entirely consistent with the traditional usage of the writ. The case involved a claim that, under color of authority of particular legislation, the Commissioner of Finance had usurped, and was continuing to usurp, powers and resources rightfully belonging to the constitutional office of State Treasurer. *Id.* at 778. Appellants fail to cite *any case* in which *quo warranto* was employed to address past conduct that had ceased before the action was brought, and have not alleged any on-going, unauthorized usurpation of authority by Respondents Ingison.

Appellants never even address the fact that their Petition only challenges past conduct of Respondents which is clearly not appropriate for *quo warranto* review under Minnesota law. They merely allege that the issues they raised are suitable for *quo warranto* review because they are constitutional and legal questions. App. 17. While the Petition may, in fact, have raised constitutional and legal questions, the allegations indisputably concerned only past conduct of the Respondents, and of the district court itself, which are legally inappropriate for *quo warranto* review.

Finally, Appellants argue that the conduct at issue here may recur in the future. As the district court correctly reasoned in response to this argument, Appellants will have the opportunity to seek judicial review at the time of any future alleged usurpation of legislative prerogative should that ever occur. District Court Order at 6, App. 316. For

all these reasons, the district court properly dismissed the Petition as an improper procedure by which to contest the past conduct of which Appellants complain.¹⁴

II. THE DISTRICT COURT PROPERLY DENIED THE PETITION BECAUSE THE CONTROVERSY AT ISSUE WAS MOOT.

The district court also correctly recognized that the controversy at issue was entirely moot and, accordingly, denied the Petition on this ground as well. Courts only hear “live controversies,” and do not pass on the merits of a particular question merely for the purpose of setting precedent. *Chaney v. Minneapolis Cmty. Dev. Agency*, 641 N.W.2d 328, 331-32 (Minn. Ct. App. 2002), *rev. denied* (Minn. May 28, 2002). *See also In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989) (if a court is unable to grant effectual relief, the issue raised is deemed moot). For the reasons discussed above, this matter was from the start unquestionably moot in the context of a *quo warranto* proceeding. The Petition presented no challenge whatever to Respondents’ ongoing or reasonably foreseeable conduct. Rather, it focused solely on certain actions alleged to have occurred between July 1, 2005 and, at the latest, July 14, 2005 and sought an impermissible ruling on a broadly hypothetical question for the sole purpose of setting precedent.

This matter was also moot in the broadest possible sense since any deficiency in formal authority for the challenged court-ordered spending that might conceivably have

¹⁴ Even Amicus Minnesota Senate recognizes the procedural flaw with Appellants’ Petition in the Senate’s unprecedented request that this Court issue a declaratory judgment in Appellants’ favor if it refuses to issue the requested writ. Brief of Amicus Curiae at 20. Needless to say, the Court is not empowered to change the nature of the case Appellants commenced.

existed between July 1 and July 14, 2005 was retroactively cured when the Legislature effectively ratified such expenditures, first by enacting, 2005 Minn. Laws 1st Spec. Sess. ch. 2., and subsequently, by enacting ch. 3, 4 and 6. Consequently, there was no form of relief the district court could possibly have granted under *any* form of action.¹⁵

The district court also correctly rejected Appellants' argument based on the exception to the mootness doctrine applicable to cases involving issues that are "capable of repetition, yet likely to evade judicial review." *Elzie v. Comm'r of Public Safety*, 298 N.W.2d 29, 32 (Minn. 1980). This exception is available only if two elements are satisfied:

(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.

Kahn v. Griffin, 701 N.W.2d 815, 821 (Minn. 2005) (citations omitted).

Unlike previous cases in which the "repetition" exception to the mootness doctrine has been applied, this is not the continuation of a case that was commenced when a live

¹⁵ If the Legislature, including Amicus Minnesota Senate, had desired to preserve for further judicial consideration the issue of the legality of court-ordered emergency spending, it could easily have withheld the retroactive application of the belated appropriation bills. The same option would be available in any future scenario involving legislative failure to appropriate necessary funds. Given that all three branches of State government have now concurred in the actions taken during the funding impasse, there can be no justification for pursuing a "separation of powers" case at the behest of these Appellants who speak for none of the three branches.

controversy still existed.¹⁶ There had been such a case -- namely, the *Temporary Funding* proceeding. As the district court accurately observed, these Appellants, however, declined to participate in that case, when their involvement might have been actually useful. Instead they waited until the real work was done, and then filed their *quo warranto* case which was moot before it even began. There was, therefore, no previously existing jurisdiction for the district court or this Court to retain.

In addition, the issue raised by Appellants did not evade judicial review, and will not necessarily evade such review in the future. Indeed, the actions of Respondents of which Appellants complained were taken only after, and pursuant to, judicial determinations that were fully subject to further judicial review in this Court. Appellants simply chose not to seek such review and cannot now be heard to complain that no such review was available.¹⁷

Furthermore, it is not necessarily the case, as Appellants allege, that any similar circumstances in the future will entail a time period too short for court review. To the contrary, the courts, including the Minnesota Supreme Court, have repeatedly demonstrated the capacity to address and decide critical public issues in timeframes shorter than the 30 days during which the *Temporary Funding* case was pending. In the past, Minnesota courts have repeatedly demonstrated the capacity to address and decide

¹⁶ Cf. *State v. Brooks*, 604 N.W.2d 345 (Minn. 2000) (appeal from bail order); *Elzie v. Comm'r of Pub. Safety*, 298 N.W.2d 29 (Minn. 1980) (challenge to process whereby plaintiff's driver's license was revoked).

¹⁷ The district court correctly noted that the Legislature could have withheld ratification of the court's order and requested judicial review of its constitutionality. District Court Order at 6, App. 316.

critical issues in much abbreviated timeframes. See, e.g., *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 726 (Minn. 2003); *Clark v. Growe*, 461 N.W.2d 385 (Minn. 1990); *Sharood v. Hatfield*, 296 Minn. 416, 417, 210 N.W.2d 275, 276 (Minn. 1973); *State ex rel. Palmer v. Perpich*, 182 N.W.2d 182, (Minn. 1971).¹⁸

Moreover, even if it might be predicted that a partial failure of legislative funding for one or more critical government functions could occur at some unknown point in the future, that occasion would almost certainly not present the same facts and legal issues as those presented in the *Temporary Funding* case. As discussed below, constitutional appropriation requirements must be read in the context of all then-existing state and federal constitutional and statutory mandates, and each proposed expenditure will need to be evaluated on its own merits in that context in light of the contemporaneous factual setting. See, e.g., *White v. Davis*, 68 P.3d 74 (Cal. 2003). There is no reason to suppose that the essential government functions that could require emergency funding in the future will necessarily be the same as those reviewed in the *Temporary Funding* case. Therefore, the same legal issues will most assuredly not recur, *even if* there were to be a future funding emergency situation.

In a very analogous situation involving the shutdown of the federal government, a federal court dismissed the action on mootness grounds rejecting the exact exception

¹⁸ The Minnesota Supreme Court, in rejecting the same argument Appellants made in support of their request for the court to take original jurisdiction, noted that resolution of the issues raised should not be particularly time-consuming and that if time becomes a problem, procedural mechanisms are readily available to expedite proceedings and obtain accelerated review. App. at 273. This same reasoning demonstrates why this is not a matter that will evade review in the future.

Appellants assert here. In *American Federation of Government Employees v. Rivlin*, 995 F. Supp. 165 (D.D.C. 1998), the precise issue of payment owing to federal employees during a budgetary impasse became moot when Congress passed a budget. The court concluded that the plaintiffs had not shown that their action was too short in its duration to receive judicial review noting that the parties did, in fact, have such an opportunity to be heard. *Id.* at 166. The court also concluded that the plaintiffs had not demonstrated an expectation that they would be subjected to the same action again finding it entirely too speculative for the court to attempt to predict if and when another impasse would occur, how long it would last, what agencies might be affected, and whether employees would be required to work without pay. *Id.* The court's conclusions in that case apply with equal force in this case.

Appellants' reliance on the majority's treatment of the mootness issue in *Fletcher v. Commonwealth*, 163 S.W.3d 852 (Ky. 2005) is misplaced. The majority in that case analyzed whether a challenge to the governor's budget plan, issued after the legislature adjourned without passing a budget, fit the same basic exception to the mootness doctrine for issues capable of repetition that evade review that the Appellants rely on here. *Id.* at 859. The majority concluded that the matter satisfied the exception, noting that on each prior occasion involving similar facts, lawsuits were filed to test the constitutionality of the Governors' actions and that these suits were not resolved by the courts before the legislature ratified the Governors' budgets. *Id.* Here, on the other hand, the executive branch undertook no expenditures independently that evaded judicial review either this year or in 2001. Instead, the courts were involved in the process from the beginning and

each proposed expenditure was scrutinized, approved or disapproved by the district court and subject to appellate review, if requested. Therefore, unlike in *Fletcher*, there is no comparable experience here from which it can reasonably be inferred that adequate judicial review will be unavailable to address future recurrence of issues similar to those raised in this case.

Finally, this matter is also not “functionally justiciable” with respect to future cases within the meaning of *State v. Brooks*, 604 N.W.2d 345 (Minn. 2000), because it cannot be predicted what factual circumstances may arise in which courts may be called upon to balance the general constitutional authority of the legislature to control the State’s purse strings against other constitutional imperatives of arguably equal or greater force.¹⁹ Unless the court is prepared to unconditionally foreclose future recourse to the judiciary in budget crisis situations, the most relief this court could offer Appellants would be to declare that, absent an express legislative appropriation, no expenditures of state funds may be made without a further court order addressing the expenditure proposed. That, however, was exactly the procedure that was followed in the *Temporary Funding* case. Hence, the record does not contain the “raw material traditionally

¹⁹ Functional justiciability is also not, as Appellants suggest, an additional exception to the mootness doctrine. In essence, it is merely a requirement in those cases that fit the exception to the mootness doctrine for issues capable of repetition that evade judicial review. *Id.*

associated with effective judicial decision-making” required under *Brooks*. *Id.* at 348; *see also State v. Rud*, 359 N.W.2d 573, 576 (Minn. 1984).²⁰

III. THE DISTRICT COURT PROPERLY DISMISSED THE PETITION BECAUSE THERE EXISTED NO RIPE CASE OR CONTROVERSY OVER WHICH THE COURT COULD EXERCISE JURISDICTION.

The district court also agreed with Respondents that Appellants’ Petition does not present a justiciable case or controversy over which the court could exercise jurisdiction. District Court Order at 6. App. 316. The district court correctly concluded that Appellants are requesting an “advisory judicial opinion regarding a potentially unknown set of facts.” *Id.* Appellants do not even discuss this fatal procedural flaw in their brief. As discussed below, a request for such a ruling on a “hypothetical question” does not present a ripe controversy.

It is axiomatic that courts do not have jurisdiction to issue advisory opinions. *See Izaak Walton League of America Endowment, Inc. v. State Dep’t of Natural Res.*, 252 N.W.2d 852, 854 (Minn. 1977). Courts only have jurisdiction over justiciable controversies involving definite and concrete assertions of rights on established facts, *see St. Paul Area Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585, 587-88 (Minn. 1977), where there is a “direct and imminent injury” resulting from the alleged unconstitutional provision or conduct, *see Kennedy v. Carlson*, 544 N.W.2d 1, 6 (Minn.

²⁰ Furthermore, unlike *Brooks* this is not a case in which a failure to immediately address the issue could deprive any class of persons of their constitutional rights. The dismissal of the Petition here affected no one’s legal rights in any way.

1996). “[M]erely possible or hypothetical injury is not enough to satisfy this standard.”

Id.

Appellants requested that the district court order declaratory and injunctive relief as to merely possible or hypothetical future circumstances, the nature of which cannot be known at the present time and which cannot possibly occur for at least another two years. As the district court concluded, there is no relief the court could grant at this time since Appellants are not challenging ongoing or even reasonably foreseeable conduct. District Court Order, p. 6. App. 316. Rather, the district court correctly decided that the Petition was a quintessential impermissible request for an advisory judicial opinion regarding a hypothetical future set of unknown facts which may never even materialize.

IV. APPELLANTS ARE ALSO BARRED FROM OBTAINING EQUITABLE RELIEF UNDER THE DOCTRINE OF LACHES.

The district court also correctly exercised its discretion in ruling that Appellants’ claims are barred by the doctrine of laches. *Id.* The equitable doctrine of laches is available in appropriate circumstances to prevent the granting of relief to one who has unreasonably delayed in asserting a known legal right, resulting in prejudice to others such that it would be inequitable to grant the relief prayed for. *See, e.g., Aronovitch v. Levy*, 56 N.W.2d 570, 574 (Minn. 1953); *Fetch v. Holm*, 52 N.W.2d 113, 115 (Minn. 1952). The doctrine has been applied in circumstances where a party delayed in challenging a government action until it was too late for any effective relief to be granted. *See Apple Valley Square v. City of Apple Valley*, 472 N.W.2d 681 (Minn. Ct. App. 1991).

This is a textbook case for the application of the laches doctrine. Appellants, and Amicus Minnesota Senate, were clearly among those responsible in the first instance for the stalemate that gave rise to the need for judicial intervention to preserve the State's essential government functions. As the district court observed, they were also fully informed of both the fact of, and the rulings in, the *Temporary Funding* proceedings and yet they did not assert any objections whatsoever to those proceedings, in general, or to any of the particular proposed expenditures they belatedly attacked in this action. Nor did they seek appellate review from this Court of any of the district court's actions in that case. Instead, as the district court noted, they remained silent until after the district court completed its work in the *Temporary Funding* case, and after they themselves participated in legislative ratification of all of the court-ordered expenditures. Only then did they come forward, when it was too late for their professed objections to have any effect. Suffice it to say, Minnesota courts should not invoke their equitable powers to reward such a cynical belated action, plainly prejudicial to all who participated in good faith in the proceedings to keep the government alive as Appellants watched from the sidelines.

Appellants' claims that they must be excused for not having participated in the *Temporary Funding* case under the principle embodied in Minn. Stat. § 3.16²¹ is entirely

²¹ That section provides in part:

No cause or proceeding, civil or criminal, in court or before a commission or an officer or cause or proceeding, in which a member or officer of, or an attorney employed by, the legislature is a party, attorney, or witness shall be tried or heard during a session of the legislature or while the member, officer, (Footnote Continued on Next Page)

lacking in substance. That section only applies, by its terms, to cases in which a member or officer of the legislature "is a party attorney or witness." Given its potential impact upon judicial proceedings, it should be narrowly applied. *See, e.g., State v. Moeller*, 234 N.W.2d 12 (1931) (cannot be used to delay extradition proceedings). If the Section 3.16 prohibitions were extended to apply, as Appellants contend, retroactively to all cases in which a legislator *could have been* a party, attorney or witness, virtually no judicial business could ever be conducted while the Legislature was in session.

Appellants were not compelled to become parties or witnesses in the *Temporary Funding* case. They, or others on their behalf, could have simply attended the hearing to voice their objections, or submitted written materials expressing their views. If, however, they wanted to be heard on the issues they inappropriately seek to raise in this case, that was the time and place to do so.

V. APPELLANTS LACK STANDING TO SEEK ANY RELIEF IN THIS CONTEXT.

It is clear that a private party does not ordinarily have standing to institute *quo warranto* proceedings without a special interest in the matter apart from that of the general public. *See, e.g., State ex rel. Danielson*, 48 N.W.2d at 861; *State ex rel. Burk v.*

(Footnote Continued From Previous Page)

or attorney is attending a meeting of a legislative committee or commission when the legislature is not in session. The matter shall be continued until the legislature or the committee or commission meeting has adjourned.

The member, officer or attorney may, with the consent of the body of the legislature of which the person is a member, officer, or employee, waive this privilege. The cause or proceeding, motion, or hearing may then be tried or heard at a time that will not conflict with legislative duties.

Thuet, 41 N.W.2d 585, 586 (Minn. 1950). Appellants here assert that they have standing to bring this action in their “*ex officio*” capacity as legislators and as taxpayers. Citing *McKee v. Likings*, 261 N.W.2d 566 (Minn. 1977), the district court concluded that Appellants have standing as taxpayers to argue that the expenditures at issue were made without a lawful appropriation. District Court Order at 5, App. 315. Having made this determination, the district court did not then decide whether Appellants have standing in their capacity as legislators. As discussed below, Appellants do not have standing as legislators to bring the claims in their Petition. Furthermore, the district court misconstrued and misapplied Minnesota law regarding taxpayer standing. Appellants also lack standing as taxpayers because they do not seek to prevent any specific illegal expenditures from being made.²²

A. Appellants Have No Standing As Legislators.

First, individual legislators acting independently - even those in positions of leadership -- for the most part have no *ex officio* powers under the Constitution to challenge or affect the actions of other public officials. Appellants have cited no source of official authority for them to act independently by virtue of their status as members of the legislature to commence litigation challenging actions of executive or judicial officers. Thus, any assertion that they have any *ex officio* authority, comparable to that of

²² Although Respondent did not file a notice of review in connection with the issue of taxpayer standing, it is, like the questions of mootness and ripeness discussed above, a jurisdictional issue that may be raised at any time. See *Annandale Advocate v. City of Annandale*, 590 N.W.2d 24, 27 (Minn. 1989).

the Attorney General, to institute *quo warranto* proceedings in any context is plainly without merit.

Second, legislators, like private citizens, have standing to sue, as such, only to the extent that they can demonstrate injury to themselves apart from the general public, and apart from the institutional interests of the Legislature or of its respective houses. *See, e.g., Rukavina v. Pawlenty*, 684 N.W.2d 525, 532 (Minn. Ct. App. 2004); *Conant v. Robins, Kaplan, Miller & Ciresi, LLP*, 603 N.W.2d 143, 149-50 (Minn. Ct. App. 1999). This claimed injury must be “personal, particularized, concrete and otherwise judicially cognizable.” *Id.* (citation omitted). Here, the injuries Appellants allege are entirely institutional, rather than personal, just like the alleged legislator injuries at issue in *Conant* and *Rukavina*.²³ That is, their primary complaint is that the district court’s orders in the *Temporary Funding* case created a conflict “between the branches of government,” Petition at ¶ 36, App. 291, and “usurped state legislative prerogative,” Petition at ¶¶ 42, 48, App. 292,. App. Br. 13. The prerogatives at issue belong to the Legislature as an institution -- not to the Appellants as individual members. They have not alleged any interest in this matter that is different from that of the general citizenry. Indeed, Appellants specifically asserted in their Petition, that their actions were to “promote the

²³ The Legislature as an institution has standing to sue in certain circumstances. *See, e.g., Seventy-Seventh Minnesota State Senate v. Carlson*, 472 N.W.2d 99 (Minn. 1991) (challenging improper vetoes). However, neither the Legislature, nor either of its houses, including Amicus Minnesota Senate, brought such an action or intervened as a party in the *Temporary Funding* case or in this case. The only official legislative involvement in this matter consisted of formal ratification of the spending directed by the district court and now under attack in this case.

public welfare,” (Pet. at ¶ 34, App. 291) on behalf of themselves and the citizens of the State of Minnesota,” Pet. at ¶ 38, App. 291.

Third, Appellants’ assertion that they have suffered “vote nullification” or “usurpation of legislative power” is without merit. The latter claim raises only an institutional interest which cannot confer standing on individual legislators. *Rukavina*, 684 N.W.2d at 532. Furthermore:

[V]ote nullification has been construed to stand “at most, for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect) on the ground that their votes have been completely nullified.”

Id. (quoting *Conant*, 603 N.W.2d at 150). Here, the Petition did not specify any particular “no” votes by any of the Appellants that were allegedly nullified by actions of the Respondents and the district court.²⁴ Certainly, there is no suggestion that the Appellants expressly voted to deny all funding for the essential government functions addressed by the district court’s orders. To the contrary, on Page 14 of their brief, they state that none of those items were brought to a legislative vote. In actuality, most of them ultimately voted in favor of the very funding they now claim to have opposed. See Journal of the Senate, 2005 1st Spec. Sess. 599, July 8, 2005; Journal of the House, 2005 1st Spec. Sess. 129, July 8, 2005.

²⁴ In fact, numerous of the Appellants voted in favor of a “lights on” amendment to the Environment, Natural Resources, Agriculture and Economic Development Bill, Special Session Senate File 69 which would have continued funding for essential State services just as occurred through the district court’s *Temporary Funding*. See Journal of the Senate, 2005 1st Spec. Sess. 304-05, June 30, 2005. Those Appellants could never be heard to argue that the district court’s proceeding nullified their voting desires.

Moreover, even if Appellants had alleged any such nullified votes, they cannot credibly maintain this action because their votes would clearly not have been sufficient to compel any different result.²⁵ All of the expenditures authorized by the district court in the *Temporary Funding* case were included within appropriation bills voted on and approved by both houses of the Legislature, including, of course, Amicus Minnesota Senate, and by the Governor in the 2005 special session, long before this action was ever commenced. Consequently, no vote, or failure to vote by any of the Appellants, has been “nullified” in any conceivable sense of the term.

B. Appellants Have No Standing As Taxpayers.

Notwithstanding the district court’s ruling to the contrary, Appellants fare no better in their capacity as taxpayers in regard to any standing claim. Minnesota courts have generally recognized standing on the part of ordinary taxpayers to prevent what they believe to be unlawful expenditures of public funds. *See, e.g., McKee*, 261 N.W.2d at 571. The cases cited by Appellants in support of their alleged taxpayer standing were apparently traditional declaratory judgment actions brought in district court. *See, e.g., Arens v. Village of Rogers*, 61 N.W.2d 508, 511 (Minn. 1953); *Conant*, 603 N.W.2d at 145. As discussed above, given the history and limited availability of *quo warranto* relief, the Supreme Court has made it clear that, absent approval of the Attorney General,

²⁵ Relying on other states’ cases, Appellants argue that a single legislator should have standing to make a vote nullification claim. This is, however, clearly not the law in Minnesota. Minnesota law is consistent with the U.S. Supreme Court’s pronouncement that legislators whose votes would have been sufficient to defeat or enact a specific legislative act have standing to claim voter nullification if that action goes into effect or does not go into effect.

private citizens will be granted judicial permission to proceed only in cases where they can demonstrate a special personal interest in the outcome. Therefore, the taxpayer standing that may be available in other forms of action ought not to be recognized in seeking *quo warranto* relief.

Even if broad taxpayer standing were to be recognized in *quo warranto* proceedings, however, it would not apply in this case. Appellants did not seek to prevent any specific illegal expenditures from being made, and the Legislature, in retroactively appropriating funds for expenditures made after June 30, 2005, prevented any possible claim that even past expenditures may presently be considered unauthorized or subject to recovery. This is, like *Rukavina*, a case based not on a desire to prevent or recoup “illegal” expenditures, but on Appellants’ disagreement with public policy as expressed by action of the Legislature and the exercise of discretion by those responsible for executing the law which does not give Appellants standing to sue as taxpayers.

In alluding vaguely to hypothetical future cases in which lack of essential funding might prompt court action, Appellants assert no present-day controversy over any particular expenditures. Consequently, their Petition should also have been denied due to their clear lack of standing.

VI. THE DISTRICT COURT PROPERLY DETERMINED THAT THERE WAS NO MERIT TO APPELLANTS’ CONSTITUTIONAL CLAIMS THAT RESPONDENTS ACTED IN CONTRAVENTION OF HER LEGAL AUTHORITY.

While the district court did not need to reach the merits of the Petition in light of the myriad fatal procedural defects discussed above, the court correctly determined that the Petition was equally defective on the merits. As noted above, a writ of *quo warranto*

asks, literally, "by what authority did the Respondents act?" The response to that question by Respondents was, and remains, direct and uncontrovertible -- she acted upon the express orders of the district court. She had no discretion, or reason, to disobey explicit orders of the court.²⁶

In actuality, Appellants' quarrel has never really been with the absence of legal authorization for Respondents' actions. Rather, their quarrel has been with the rulings of the district court itself. The appropriate way to challenge a judicial decision, however, is to seek appellate review in accordance with the rules of civil appellate procedure, not to start a separate action against the person who acted in compliance with that decision.²⁷

Appellants are also altogether mistaken in their contention that the district court's *Temporary Funding* proceeding and related orders were categorically unconstitutional. They correctly assert that Minn. Const. art. XI, § 1 provides that "[n]o money shall be paid out of the state treasury except in pursuance of an appropriation by law." In addition, Amicus Minnesota Senate has submitted a scholarly, in-depth discussion

²⁶ Appellants make the remarkable suggestion that Respondent should not have followed the district court's orders and should have intervened in the proceedings and raised the constitutional attacks that Appellants are now making. This is ridiculous. Essentially, Appellants argue that Respondent should have flouted the court's orders on their behalf because they did not have the political courage to take action themselves.

²⁷ The doctrine of res judicata also bars Appellants' claim because all of the issues they raised either were determined, or could have been determined, in the district court's temporary funding proceeding. When a governmental unit brings an action, and a determination is made as to the unit's rights and authority, that action "is res judicata on all the residents and taxpayers of the governmental units involved." See *Town of Burnsville v. City of Bloomington*, 145, 117 N.W.2d 746, 754 (Minn. 1962). This prevents the governmental unit from being subjected to "a multiplicity of vexatious suits by every individual who wishes to bring one" sometimes long after the initial proceedings have concluded. *Id.*

ranging back to *Magna Carta*, in support of the proposition that, as a general matter, legislative control of the governmental purse strings has a long and wide-spread history in Anglo-American legal tradition in general, and in Minnesota, in particular. However, neither Respondents nor the district court has ever disputed that, under the Minnesota Constitution, the responsibility for appropriation of funds to support government activities lies with the legislature.²⁸ Notwithstanding this general proposition, courts in Minnesota and other states have long recognized that, as with all constitutional provisions, legislative power to control expenditures is not exclusive or absolute. Rather, it must be balanced against other important constitutional imperatives.

As the Minnesota Supreme Court observed in *Wulff v. Tax Court of Appeals*, 288 N.W.2d 221 (Minn. 1979):

Notwithstanding the separation of powers doctrine, there has never been an absolute division of governmental functions in this country, nor was such even intended. As important a figure in the drafting of the Constitution as James Madison stated with regard to the meaning of separation of powers:

“(I)t can amount to no more that this, that where the Whole power of one department of the government is exercised by the same hands which possess the Whole power of another department, the fundamental principles of a free constitution are subverted.”

[Quoting from: *The Federalist*, edited by Cooke (Meridian Edition 1961), pp. 325, 326.]

²⁸ As the district court acknowledged in its memorandum in this case:

The legislature remains the branch of government with the expertise necessary to fulfill the appropriations role. The court's reluctant intervention on a temporary basis was done with caution in order to ensure funding for core services of government related to life, health and safety. District Court Order at 8, App. 318.

Such a statement presupposes that some functions of one branch may be performed by another branch without subverting the Constitution. That there is some interference between the branches does not undermine the separation of powers; rather, it gives vitality to the concept of checks and balances critical to our notion of democracy.

Id. at 223 (footnotes omitted). Consistent with these principles, the courts, on extraordinary occasions, will and must take necessary action to ameliorate the effects of legislative overreaching or failure to perform its duties. *See, e.g., LaComb v. Growe*, 541 F. Supp. 160, 161 (D. Minn. 1982) (because Minnesota Legislature failed to fulfill constitutional obligation to reapportion, court must do so).

With specific reference to legislative funding control, the Minnesota Supreme Court held in *State ex rel. Mattson v. Keidrowski*, that the Legislature could not “gut” a constitutional executive office by removing “core functions” of that office and necessary funding. The Court, therefore, ordered functions and funds returned to the State Treasurer’s Office notwithstanding contrary legislative action assigning those duties and appropriating the funds to the Department of Finance. 391 N.W.2d at 783. Amicus Minnesota Senate dismisses the *Mattson* case as inapplicable on the narrow ground that all the legislature, judiciary and all the constitutional officers own office budgets which had been funded. Amicus Brief at 11-12. In so doing, the Senate does not address the general principle for which the case was cited in extraordinary cases, the courts have authority to direct state spending in a manner not specifically authorized by the Legislature.

Similarly, in *Sharood v. Hatfield*, 210 N.W.2d 275 (1973), the court, citing interference with its inherent authority to regulate the practice of law, enjoined the state

treasurer from transferring lawyers' registration fees to the general fund subject to legislative appropriation, and ordered that those funds remain in a special fund in the state treasury to be expended pursuant to orders of the court. Likewise, in *Clerk of Court's Compensation for Lyon County v. Lyon County Commissioners*, 241 N.W.2d 781 (Minn. 1976), the Supreme Court stated:

At bottom, inherent judicial power is grounded in judicial self-preservation. Obviously, the legislature could seriously hamper the court's power to hear and decide cases or even effectively abolish the court itself through its exercise of financial and regulatory authority. If the court has no means of protecting itself from unreasonable and intrusive assertions of such authority, the separation of powers becomes a myth. *Commonwealth ex rel. Carroll v. Tate*, 442 Pa. 45, 55, 274 A.2d 193, 199, *cert. denied*, 402 U.S. 974, 91 S. Ct. 1665, 29 L. Ed.2d 138 (1971). The recognition of these truisms has made the doctrine of inherent judicial power established law in virtually every American jurisdiction. However, as with many legal doctrines, to uphold the existence of inherent judicial power in the extreme case does little to guide us in applying it to the numerous and varied financial and regulatory pressures imposed upon the courts.

Id. at 177 at 241 N.W.2d at 784.²⁹ A similar analysis must certainly apply to the preservation of other "essential" governmental functions outside the judiciary.

Furthermore, as the district court correctly recognized in the *Temporary Funding* case, the State has on-going obligations under federal law and state agreements to continue to provide certain critical benefit to individuals legally entitled thereto. App. 160-61. See, e.g., *Coalition for Basic Human Needs v. King*, 654 F.2d 838, 841(1st Cir.

²⁹ The Senate also distinguishes these cases on the narrowest possible ground, stating that court budgets were not directly affected by the 2005 budget impasse. Amicus Brief at 13. Once again, the Senate has not addressed the proposition that such cases refute the claim that the legislature alone passes absolute power to grant or withhold resources for State functions, regardless of consequences.

1981); *Pratt v. Wilson*, 770 F. Supp. 539, 543-44 (E.D. Cal. 1991); *Coalition for Economic Survival v. Deukmejian*, 171 Cal. App. 3d 954, 957 (Cal. App. 2d 1985). Neither Amicus Minnesota Senate's skepticism concerning the ability of those courts to discern the true intent of Congress, nor the fact that a similar analysis may not reach the same result as to all federal programs³⁰ alters the unassailable proposition supported by those cases that, under the Supremacy Clause of the U. S. Constitution, federal law can require states to meet certain financial obligations, notwithstanding countervailing state law claims. Even Appellants, unlike Amicus Minnesota Senate, appear grudgingly to concede this general principle. See App. Br. at 31, 33.

It is important to keep in mind that the district court's orders in the *Temporary Funding* case merely preserved, on an emergency basis, essential government functions that were required under the Constitution and existing state and federal laws pending action by the Legislature and Governor to fulfill their constitutional responsibility to release needed resources for those functions. There was and still has been, no suggestion of any legislative intent to eliminate or withhold funding from those programs. In fact, the Legislature ultimately retroactively appropriated funds for those programs equal to or greater than those authorized by the district court's temporary order.

Appellants and Amicus Minnesota Senate do not argue that the district court acted contrary to the actual expressed or implied will of the Legislature. Indeed the Senate candidly admits that the "political process was poised to enact" necessary to support the

³⁰ Cf. *Dowling v. Davis*, 19 F.3d 445, 448 (9th Cir. 1994). Medicaid law did not impose time constraints on state payments.

same core functions had the court not acted. Amicus Brief at 15. Unfortunately, being “poised” does not supply any ventilator treatment to a needy child. In essence, the Appellants’ and Senate’s arguments relate solely to their admitted desire to maintain individual and collective political leverage, regardless of its effect in practical terms upon the rights and well-being of those Minnesotans who are dependent upon the programs the Legislature as a body has itself put in place. In other words, they would elevate their formalistic “political duel” above the real world affects of that exercise. Thus, while broad questions about creating and funding government programs may indeed encompass general “political” questions best resolved in the legislative forum as Amicus Minnesota Senate argues, the questions addressed, by default, by the district court in the *Temporary Funding* case dealt with the specific, concrete needs of real people whose lives and livelihoods were dependent upon the resources that were withheld solely due to *partisan* political maneuvering.³¹

The Kentucky Supreme Court decision last year in *Fletcher v. Commonwealth*, 163 S.W.3d 852 (Ky. 2005), which Appellants cite in support of their mootness argument and mention only in passing in their general argument, further supports Respondents’ position on the merits. In that case, a majority of the court decided that the Kentucky Governor’s spending plan imposed after a legislative deadlock violated the prohibition against unappropriated expenditures in the Kentucky Constitution. After analyzing a

³¹ See, e.g., fn 7, *supra* - such real people include ventilator-dependent children, victims of domestic and sexual assaults and indian children.

provision in the Kentucky Constitution that mirrors Article XI, Sec. 1 of the Minnesota Constitution, the majority stated that:

Accordingly, we affirm that portion of the Franklin Circuit Court's judgment that declares the Public Services Continuation Plan unconstitutional insofar as it requires expenditure from the treasury of unappropriated funds other than pursuant to statutory, constitutional, and federal mandates; and reverse that portion of the Franklin Circuit Court's judgment that authorizes unappropriated expenditures for other "limited and specific services previously approved in Quertermous."

163 S.W.3d at 873 (emphasis added). This is precisely what happened in this Court's *Temporary Funding* case. In light of the budget impasse, the Court authorized funds necessary to fulfill statutory, constitutional and federal mandates. App. 154, 193, 196, 212 and 215.

To the extent *Fletcher* can be read in any way as supporting Appellants' argument on the merits, it is fundamentally distinguishable. In that case, after the Kentucky Legislature adjourned without passing a budget, the Governor simply issued an executive order adopting an executive branch budget. 163 S.W.3d at 858. In this case, on the other hand, the proposals of the Governor and the Attorney General to fund certain core government functions were considered and expressly approved by a court. Accordingly, here, unlike in *Fletcher*, there was contemporaneous judicial review and approval of the expenditures Appellants now challenge.

Chief Justice Lambert of the Kentucky Supreme Court provides the most logical analysis of the merits of this funding issue in his separate opinion in *Fletcher*, concurring in part and dissenting in part. He makes numerous points, including the following:

- Section 230 [Kentucky's constitutional appropriations clause] is not the only constitutional section implicated or necessary for proper resolution of the case. Section 230 is not to read in an "absolute trump-all-other-sections-of-the-Constitution fashion." 163 S.W.3d at 873-75.
- The constitutional separation of powers provisions are implicated by the potential of the legislature to use the appropriations clause to control the executive and judicial branches. The constitution is not a "suicide pact." It must be interpreted to further its purpose of supporting an enduring republic. The logical extension of allowing the legislature to control the executive by way of the appropriations clause strikes at the heart of the purpose of separation of powers and the logical extension of this idea would be the destruction of government. *Id.* 873-77.
- Analogous situations in history and other jurisdictions provide ample authority for unappropriated executive spending. *Id.* 876-78.
- The majority would give the legislature the power to prevent elections by refusing to pay the cost. *Id.* 879.
- The governor always retains the right to meet genuine emergencies that threaten the welfare of the state's citizens regardless of whether the legislature appropriates money for that purpose. Any contrary view that would leave the governor impotent has the real potential for a "cataclysmic result." *Id.*
- If the legislature does not fulfill its constitutional duty to appropriate money, others must. *Id.* 880.

This analysis is directly applicable here. Article XI, Sec. 1 is not the only constitutional provision implicated by this case and it should not, as Appellants and Amicus advocate, be read in an "absolute trump-all-other-sections-of-the-Constitution fashion." The Minnesota Constitution is also not a suicide pact. It must ultimately be interpreted to further its principal purpose of preserving the State.

Appellants and Amicus contend that funds for most critical state functions, including, not surprisingly the Legislature itself, had been appropriated before the start of the new biennium, and the State was not about to commit suicide. They also question

whether certain of the expenditures that were approved in the *Temporary Funding* case really represent essential or core government functions. Those arguments, however, were ripe for consideration in the *Temporary Funding* case, not here.

Appellants and Amicus mistakenly argue that courts can never act to maintain funding when the Legislature fails or refuses to do its job. The executive and judicial branches must always retain the general right, and the duty, to respond to emergencies that may be occasioned by a Legislature that does not fulfill its constitutional duties. Were it otherwise, the Legislature could bring the other branches and the State itself to their knees by simply denying necessary funding to any or all governmental functions save their own.

Appellants have not cited, and cannot cite, a single case from another state in which a court has adopted Appellants' absolutist argument, supported in even more extreme terms by the Amicus,³² that the Legislature has exclusive control over the State's purse strings even in the event of a threatened shutdown of the State.³³ This Court should reject such an unprecedented, radical, and utterly illogical position.

³² In its initial pleadings, Appellants asserted that no court-ordered expenditures were ever permissible in the absence of an express legislative appropriation. Memorandum in Support of Amended Petition at 25-27, App. 307-09. Subsequently, however, they conceded that spending without an express appropriation may be permissible when necessary to fulfill certain constitutional and statutory responsibilities. App. Br. at 24-25, 33-35. The Senate, on the other hand, would concede no exceptions, save those relating to debt service on State bonds. Amicus Brief at 8, fn 9.

³³ Such cases as there are addressing this general issue recognize that the other branches can act, in admittedly limited fashion, to preserve funding for essential state government services. See, e.g., *Fletcher*; *supra*; *White v. Davis*, *supra*. See also Paul E. Salomanea, (Footnote Continued on Next Page)

Appellants' references to the statutory provisions controlling the allotment and encumbrance systems³⁴ add nothing to the discussion. The only alleged deviation from those statutory requirements is that, for a brief period, relevant allotments and encumbrances were based upon amounts specified in the district court's *Temporary Funding* order rather than legislative appropriation bills.

VII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANTS' MOTION FOR ATTORNEY FEES BASED ON THE PREMATURE FILING OF RESPONDENTS' MOTION FOR SANCTIONS.

Respondents brought a motion under Minn. Stat. § 549.211 and Minn. R. Civ. P. 11 for an award of its attorneys fees on the grounds that the numerous fatal procedural defects in Appellants' Petition and the lack of any case law in Minnesota or elsewhere supporting the merits of the Petition, which the district court, in fact, subsequently recognized, established that Appellants' Petition was not warranted by existing law or a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law. Appellants filed a counter-motion for an award of its fees because of the premature filing of Respondents' motion. The district court considered and denied both motions. District Court Order at 2, App. 312. While Respondents did not cross-appeal the denial of their sanctions motion, Appellants have appealed the denial

(Footnote Continued From Previous Page)

THE CONSTITUTIONALITY OF AN EXECUTIVE SPENDING PLAN, 92 Ky. L. J. 149 (2003-04).

³⁴ See Minn. Stat. §§ 16A.011, 16A.138, 16A.14 and 16A.15.

of their motion. Because the district court did not abuse its discretion in denying Appellants' motion, this Court should affirm that decision.

None of Appellants' arguments as to this issue have any merit. As to Appellants' procedural argument, the district court did not abuse its discretion in denying Appellants' motion for several reasons. First, Appellants cannot claim any prejudice from the premature filing of Respondents' motion when they were provided the full 21-day safe harbor period in Section 549.211 and Rule 11 prior to the motion hearing. Appellants mistakenly argue that *Gibson v. Coldwell Banker Burnett*, 659 N.W.2d 782 (Minn. Ct. App. 2003) precludes an award of sanctions because of the premature filing of the Respondents' motion for sanctions. The mere filing of the Respondents' motion caused no prejudice to Appellants. Appellants were given more than the requisite 21-day safe harbor period to consider whether to dismiss their Petition and declined to do so.³⁵ This is simply not a situation like *Gibson* in which the motion for sanctions was not even brought until after trial and the opportunity to take advantage of any safe harbor period had already long expired. *Gibson* is simply inapplicable here.

Conversely, the court in *Muhammad v. State*, Nos. Civ. A.99-3742/99-2694, 2000 WL 18763350 (E.D. La. 2000) R. App. 36 applied the identical provisions of federal Rule 11 to the precise factual situation here. In that case, the court concluded that the defendants substantially complied with Rule 11 even though their motion for sanctions

³⁵ In fact, Appellants actually received almost a three-month safe harbor period given that they were advised even before they filed their original Petition, in a letter from the AGO dated August 24, 2005, that the filing of their contemplated Petition would prompt a request for sanctions.

was filed prematurely under the Rule because the plaintiff ultimately received more than 21 days to consider withdrawing the complaint and did not do so. *Id.* at 2. *See also Cardillo v. Cardillo*, 360 F. Supp. 2d 402, 419 (D.R.I. 2005) (technical noncompliance with safe-harbor provision when party had ample time to cure alleged violation is not a bar to Rule 11 sanctions).

Because Appellants had actual notice of Respondents' views as to the many fatal flaws in their Petition and Respondents' intention to seek sanctions three months before Respondents ever served and filed their actual sanctions motion, they cannot credibly claim that they had insufficient notice of Respondents' intention to seek sanctions and insufficient time to consider whether to withdraw their Petition.³⁶ This Court considered this very scenario in *Olson v. Babler*, No. A05-395, 2006 WL 851798 (Minn. Ct. App. Apr. 4, 2006), R. App. 27, in which it upheld an award of sanctions reasoning that the respondent had received sufficient advance oral notice that the appellant would be seeking sanctions 23 days before the sanctions motion hearing, notwithstanding the appellant's failure to provide the requisite 21-day safe harbor before the filing of its section 549.211 motion.³⁷ *Id.* at 6. In this case, Appellants received 28 days prior notice

³⁶ Appellants also cannot claim that the premature filing of Respondent's motion gave them insufficient time to withdraw their Petition since they have never once argued, or even suggested, that they would have withdrawn their Petition had Respondent not filed their sanctions motion on November 15.

³⁷ This decision is even stronger support for Respondent's position in this case in that this Court in *Olson* actually affirmed a sanctions award despite noncompliance with the 21-day safe harbor requirement. Here, the Court is merely being asked to affirm the denial of a counter-motion for sanctions after the district court denied Respondent's motion.

of Respondents' intention to seek sanctions when it was served with Respondents' motion. Moreover, as noted above, it actually received three months advance notice of Respondents' intentions.³⁸

Appellants also have no valid argument that Respondents should be sanctioned because Appellants believe their Petition was not frivolous. In fact, Appellants' arguments as to this issue are silly. Appellants basically argue that their Petition cannot be frivolous because they modeled it after another petition for quo warranto they copied from another case. The fact that they copied the form of a pleading from another case scarcely means that Appellants have a good faith basis in law and fact to bring their Petition in this case.

Appellants also inappropriately suggest that the Minnesota Supreme Court's September 9, 2005 Order precludes any argument that their Petition is frivolous. It is completely disingenuous for Appellants to argue that that Order, which did not in any respect decide or even consider the procedural flaws with, or the merits of, Appellants' Petition somehow precluded Respondents and the district court from determining that their Petition is frivolous. As Appellants well know, the only issue the Supreme Court considered and decided was the issue of whether the Petition was filed in the appropriate forum. The Supreme Court simply decided that the Petition should be filed in district court and that there existed no exigency which should cause the Court to assume original jurisdiction over the Petition. In fact, the Supreme Court never even requested that

38 Notably, Appellants have not cited a single case from Minnesota or elsewhere in which a court sanctioned a party for simply prematurely filing a motion for sanctions.

Respondents reply to the Petition before dismissing it. As such, the Court was never even informed of the bases for Respondents' opposition to the Petition.

Appellants also erroneously argue that the present controversy "required" a petition for quo warranto. Appellants' decision to simply "copy" the form of a petition from another different lawsuit, however, does not make their chosen form of action in this case procedurally proper. In fact, as discussed above, and as the district court correctly agreed, such a petition is improper in a case like this which only challenges past conduct of a state official. Appellants could have brought their claims in a procedurally proper proceeding which they elected not to pursue. The means by which Appellants could have properly and timely pursued their claims was by intervening or otherwise participating in the district court's Temporary Funding case. Instead, they deliberately avoided this litigation and elected to bring the instant impermissible belated and collateral attack on the district court's rulings in that case.

Finally, Appellants mistakenly argue that the procedural "issues" of ripeness, mootness, laches, etc. are not frivolous. The question here, however, is not whether these issues are frivolous. Rather, the relevant question is whether Appellants' positions and arguments as to these issues are frivolous. While the district court ultimately appears to have concluded that Appellants' Petition was not frivolous, and Respondents is not appealing this determination, the district court nevertheless ruled in Respondents' favor as to almost every single argument it advanced in this case. The district court's mere denial of Respondents' sanctions motion does not mean that Respondents did not have reasonable grounds to bring its motion. Suffice it to say, the district court did not abuse

its discretion in denying Appellants' motion for sanctions especially after it already denied Respondents' motion.

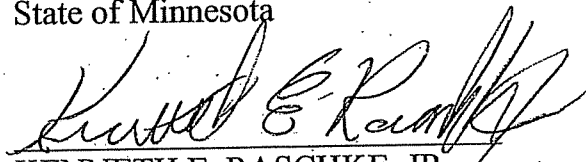
CONCLUSION

For the above-stated reasons, Respondents respectfully request that this Court affirm the March 3, 2006 decision of the district court in its entirety.

Dated: August 28, 2006

Respectfully submitted,

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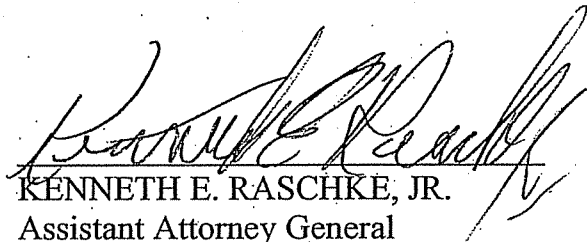
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CERTIFICATE OF COMPLIANCE

WITH MINN. R. APP. P 132.01, Subd. 3

The undersigned certifies that the Brief submitted herein contains 13,675 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2003, the word processing system used to prepare this Brief.



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