

STATE OF MINNESOTA  
COUNTY OF HENNEPIN

DISTRICT COURT  
FOURTH JUDICIAL DISTRICT

Case Type: Other Civil

Douglas Benson, Duane Gajewski,  
Jessica Dykhuis, Lindzi Campbell,  
Sean Campbell, Thomas Triska and  
John Rittman,

Court File No. 27-CV-10-11697  
Judge Mary S. DuFresne

Plaintiffs,

vs.

**DEFENDANT STATE OF MINNESOTA'S  
MEMORANDUM OF LAW IN SUPPORT  
OF ITS MOTION TO DISMISS**

Jill Alverson, in her official capacity as  
The Hennepin County Local Registrar,

And

State of Minnesota,

Defendants.

**INTRODUCTION**

The State of Minnesota should be dismissed because the State is not a proper party. Plaintiffs' claims should also be dismissed based on existing legal precedent of the Minnesota Supreme Court.

**PROCEDURAL BACKGROUND**

On May 11, 2010, Plaintiffs initiated this case naming Defendant Alverson, the Hennepin County Local Registrar, as the sole Defendant. *See* Compl. p. 1. On June 15, 2010, Defendant Alverson filed a motion to dismiss. She asserted that dismissal was appropriate because Plaintiffs failed to include the State, allegedly an indispensable party, as a defendant to this case. *See* Defendant Alverson's Motion to Dismiss at 2. Plaintiffs then served on that same day an Amended Complaint identical in all respects to the original Complaint, except naming the State

as an additional Defendant. *See* Am. Compl. Only one paragraph of Plaintiffs' Amended Complaint mentions the State, and it merely alleges that the State is a "state within the United State of America" and is governed by the Minnesota Constitution. *Id.* ¶ 5.1. Plaintiffs' Amended Complaint seeks no relief from the State. Rather, Plaintiffs seek a judgment "[e]njoining the Registrar [Defendant Alverson] to stop refusing to accept applications for marriage from same sex couples and to grant marriage licenses to otherwise qualified same sex couples." *Id.* ¶ 6 of the Wherefore clause.

### STATUTORY BACKGROUND

Minnesota Statutes section 517.01 provides that "Marriage . . . is a civil contract *between a man and a woman . . . .* Lawful marriage may be contracted *only between persons of the opposite sex . . . .*" (Emphasis added). The first italicized language was enacted in 1977; while the second italicized language was enacted in 1997. *See* 1977 Minn. Laws, ch. 441, § 1, at 1207; 1997 Minn. Laws, ch. 203, art. 10, § 1, at 1857, a part of the commonly referred to Defense of Marriage Act. Minnesota Statutes section 517.03, subdivision 1(a)(4) also prohibits "*a marriage between persons of the same sex.*" (Emphasis added.) This language was enacted in 1997 as another part of the Defense of Marriage Act. *See* 1997 Minn. Laws, ch. 203, art. 10, § 2, at 1858. Am. Compl. ¶ 25.

Minnesota law provides that each county designate an individual called the "local registrar" to issue marriage licenses. *See* Minn. Stat. § 517.001 (citing Minn. Stat. § 144.212, subd. 10); *id.* § 141.214, subd. 1. Local registrars have various statutory responsibilities related to the issuance of marriage licenses. *See, e.g.,* §§ 517.07, 517.08, 517.101. In contrast, the State has no authority to issue marriage licenses or to carry out any of the functions described in Chapter 517.

## ARGUMENT

### I. THE STATE IS NOT A PROPER PARTY TO PLAINTIFFS' ACTION.

Plaintiffs have improperly joined the State as a party to this case. A “proper party” defendant is a party against whom a plaintiff seeks relief and who has actual authority to redress the plaintiff’s alleged injury. *See* Minn. R. Civ. P. 20.01 (allowing joinder of defendant if plaintiff seeks relief against the defendant and other criteria are met); *see also e.g., Benson v. RMJ Sec. Corp.*, 683 F. Supp 359, 378 (S.D.N.Y. 1988) (stating that misjoinder of parties occurs “where a particular defendant lacks authority to provide the requested relief”). A misjoined party is subject to dismissal under Rule 21 of the Minnesota Rules of Civil Procedure (providing that misjoined party be “dropped” by the court). *See also* David F. Herr and Roger S. Haydock, *Minnesota Practice Series, Civil Rules Annotated (“Minnesota Practice”)*, § 21:3 at 589 (5th ed. 2009) (stating Rule 21 “dictates . . . that misjoined party be dropped.”).

The State does not issue marriage licenses or otherwise administer the marriage laws. The State therefore cannot redress Plaintiffs’ alleged injury and Plaintiffs do not seek such a remedy from the State.<sup>1</sup> Accordingly, the State is not a proper party<sup>2</sup> to this case, and it should

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<sup>1</sup> Even if the State had such authority, the proper party defendant would be the individual responsible for the function on behalf of the State. *See Ex parte Young*, 209 U.S. 123, 155-59, 28 S. Ct. 441, 452-54 (1908) (requiring that responsible state official be named as defendant ensures that injunction will be effective without unnecessarily constraining discretion of other state officials). The person would be named in his or her official capacity, as was Defendant Alverson.

<sup>2</sup> Since the State is not a proper party, it cannot be an indispensable party to this action. *See, e.g., 4 Moore’s Federal Practice*, § 20.02[6][b] (Matthew Bender 3d ed.) (“[T]he[] three types of parties-proper, necessary, and indispensable-may be seen as increasingly narrow concentric circles.”).

therefore be dismissed. *See* Minn. R. Civ. P. 20, 21; *see also e.g., Benson*, 683 F. Supp. at 378.<sup>3</sup>

Moreover, “[w]hen the constitutionality of a statute is challenged, the litigant bringing the challenge must, in order to invoke the jurisdiction of the court, be able to show that the statute is, or is about to be, applied to his disadvantage.” *St. Paul Area Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585, 588 (Minn. 1977); *see also Rupp v. Mayasich*, 561 N.W.2d 555, 557 (Minn. Ct. App. 1997) (stating justiciable controversy requires capability to provide “specific rather than advisory relief by decree or judgment” and finding no justiciable controversy because no specific relief requested). There is no justiciable controversy as to the State because, as indicated above, the State does not issue marriage licenses or administer the marriage laws, and accordingly, Plaintiffs do not request relief from the State.

Plaintiffs apparently assert that the State must be included as a defendant in this case pursuant to Minn. Stat. § 555.11. This provision is part of the Minnesota Uniform Declaratory Judgments Act (“Act”) and states that when declaratory relief is sought,

all *persons* shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard.

Minn. Stat. § 555.11 (emphasis added). Plaintiffs’ reliance on this provision is misplaced for several reasons in addition to the fact that, as discussed above, their claim against the State is not justiciable. *See, e.g., Marzitelli*, 258 N.W.2d at 587 (stating justiciability requirement also applies to declaratory relief); *Rupp*, 561 N.W.2d at 557 (same).

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<sup>3</sup> Rules 20 and 21 are identical in relevant part to Rules 20 and 21 of the Federal Rules of Civil Procedure.

First, the State is “not bound by the passage of a law unless named therein, or unless the words of the act are so plain, clear, and unmistakable as to leave no doubt as to the intention of the legislature.” Minn. Stat. § 645.27; *see also Lund v. Comm’r of Public Safety*, 783 N.W.2d 142, 143 (Minn. 2010) (stating that section 645.27 is based on the concept of sovereign immunity). Under the Act, “person” is defined as “any person, partnership, joint stock company, unincorporated association, or society, or municipal or other corporation of any character.” Minn. Stat. § 555.13. Absent from this definition is the State and therefore, in accordance with section 645.27, the State is not subject to section 555.11.

Second, other jurisdictions considering the issue have likewise held that a state is not a person within the meaning of the Uniform Declaratory Judgments Act. *See Capital Properties, Inc. v. State*, 749 A.2d 1069, 1080-81 (R.I. 1999); *Empire Trust Co. v. Bd. of Commerce and Navigation*, 11 A.2d 752, 754 (N.J. 1940); *see also Indiana Fireworks Distrib. Ass’n v. Boatwright*, 764 N.E.2d 208, 210 (Ind. 2002) (state fire marshal acting in his official capacity on behalf of state is not a person); *McGraw v. Caperton*, 446 S.E.2d 921, 925 (W.Va. 1994) (attorney general acting in his official capacity on behalf of state is not a person); *JHK, Inc. v. Nebraska Dep’t of Banking & Fin.*, 757 N.W.2d 515, 522 (Neb. Ct. App. 2008) (stating that “Nebraska’s Uniform Declaratory Judgments Act does not waive the state’s sovereign immunity”). For instance, the New Jersey Supreme Court observed that the declaratory judgments act “may not be invoked for relief against the State” and its provisions “make clear a purpose not to subject the State to its terms.” *Empire Trust*, 11 A.2d at 754.

Third, only a municipality—not the State—is required to be made a “party” under section 555.11. In fact, the statute merely requires that a copy of the proceeding be served on the Attorney General when there is a constitutional challenge. *See Town of Walworth v. Village of*

*Fontana-on-Geneva Lake*, 270 N.W.2d 442, 444 (Wis. Ct. App. 1978) (recognizing that the declaratory judgments act only “requires that a municipality be made a party” and “[n]o such requirement is made for the attorney general”); *Empire Trust*, 11 A.2d at 754 (same and stating such language “does not evince an intent to render the State liable to the compulsory provisions of the enactment”).

Fourth, because there is no requirement that the State be made a party under the Act, this Court should not read one in. *See In re Welfare of J.B.*, 782 N.W.2d 535, 543 (Minn. 2010) (applying canon of statutory construction “*expressio unius est exclusio alterius*” meaning “the expression of one thing is the exclusion of another”).

Finally, Plaintiffs’ argument is entirely inconsistent with Rule 5A of the Minnesota Rules of Civil Procedure and its purpose. This rule was adopted to deal with the multitude of state constitutional challenges. Rather than naming the State as a party, Rule 5A merely provides that the State, through the Attorney General, be notified by a party challenging the constitutionality of a Minnesota statute.

“[T]he purpose of the notice is to permit the Attorney General . . . to decide whether to intervene in the action.” Advisory Committee Notes, 2007 Amendment to Rule 5A. “The rule does not require any action by the Attorney General and in many instances intervention will not be sought until the litigation reaches the appellate courts.” *Id.*; *see also* Minn. R. Civ. App. P. 144 (requiring notice to Attorney General when the constitutionality of a Minnesota statute is challenged in any appellate proceeding). Such intervention is typically done as an *amicus curiae* pursuant to Minn. R. Civ. App. P. 129. *See Minnesota Practice*, § 5A:3 at 175-76. (“[R]ule [5A] does not require intervention by the Attorney General, nor does it permit a party to join the Attorney General or the State of Minnesota as a party. In most cases, the Attorney General will

respond to a notice under this rule with a letter advising that intervention will not be sought at the trial level, but reserving the right to intervene on appeal.”).

Plaintiffs’ argument, if accepted, would result in the State becoming a party in all cases in which a constitutional claim is made. Such a result would frustrate the purpose behind Rule 5A, be contrary to longstanding practice, and strain the State’s resources.

**II. PLAINTIFFS’ ACTION MUST BE DISMISSED ON THE MERITS UNDER APPLICABLE LEGAL PRECEDENT.**

**A. Statutes Are Presumed To Be Constitutional.**

Statutes are presumed constitutional and will be declared unconstitutional “with extreme caution and only when absolutely necessary.” *State v. Tennin*, 674 N.W.2d 403, 407 (Minn. 2004). To successfully challenge the constitutionality of a statute, the challenger “must overcome the heavy burden of showing beyond a reasonable doubt that the statute is unconstitutional.” *Id.* In addition, “the task of extending existing law falls to the supreme court or the legislature,” not to the lower courts. *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. Ct. App. 1987).

**B. The Minnesota Supreme Court’s Decision in *Baker v. Nelson* Is Dispositive.**

This case is controlled by the Minnesota Supreme Court’s decision in *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). *Baker* specifically upheld as constitutional Minnesota’s prohibition on same-sex marriage. In so doing, the court rejected challenges under the First, Eighth, Ninth and Fourteenth Amendments to the U.S. Constitution.

The court reasoned that the prohibition did not violate the due process or equal protection clauses of the Fourteenth Amendment or deny Plaintiffs a fundamental right under the Ninth Amendment. *Id.* at 186. The court found the remainder of the constitutional arguments to be so lacking in merit that it summarily dismissed, “without discussion,” the First and Eighth

Amendment claims. *Id.* at 186 & n.2. The United States Supreme Court then dismissed the appeal from the Minnesota Supreme Court’s judgment for want of a substantial federal question.<sup>4</sup> *Baker v. Nelson*, 409 U.S. 810, 93 S. Ct. 37 (1972). The long-standing *Baker* decision also requires dismissal of Plaintiffs’ state constitutional claims in this case.

**1. *Baker* resolves Plaintiffs’ equal protection claim.**

Plaintiffs claim that Minnesota’s prohibition on same-sex marriage violates the equal protection provision of the Minnesota Constitution, Article I, Section 2. *See* Am. Compl. ¶¶ 26-33. This provision of the Minnesota Constitution and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution “have been analyzed under the same principles.” *Greene v. Comm’r of the Minnesota Dep’t of Human Services*, 755 N.W.2d 713, 725 (Minn. 2008) (citation omitted).

Like a federal constitutional claim, a state constitutional challenge that does not involve a fundamental right or a suspect classification is reviewed under a rational basis test. *Id.* at 725. In applying a rational basis standard, the Minnesota Supreme Court in *Baker* necessarily concluded that Minnesota’s prohibition of same-sex marriage did not involve an interest that required anything more than rational basis review. In fact, *Baker* specifically held that the prohibition did not implicate a “fundamental right” or any form of “irrational or invidious discrimination.” *Baker*, 191 N.W.2d at 186, 187 (citing *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817 (1967) and distinguishing suspect class based on race). A rational basis standard therefore applies to Plaintiffs’ state constitutional claims, and *Baker* held that the State law is rationally

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<sup>4</sup> The U.S. Supreme Court’s dismissal of an appeal for want of a federal question is based on the Court’s determination that the appeal does not present a constitutional question that is “substantial in character.” *Zucht v. King*, 260 U.S. 174, 176, 43 S. Ct. 24, 25 (1922).

based.<sup>5</sup> *Id.* at 186-87. The *Baker* holding governs the resolution of Plaintiffs' state equal protection claim.

**2. *Baker* resolves Plaintiffs' due process claim.**

Plaintiffs also assert that Minnesota's prohibition on same-sex marriage violates the due process provision of the Minnesota Constitution, Article I, Section 7. *See* Am. Compl. ¶¶ 17-23. However, "if legislation does not violate equal protection, it does not violate substantive due process." *Everything Etched, Inc. v. Shakopee Towing, Inc.*, 634 N.W.2d 450, 453 (Minn. Ct. App. 2001). Moreover, for the same reasons discussed above, based on *Baker* a state due process challenge is subject to rational basis review because of the nature of the interest involved. *See also State v. Morrow*, 492 N.W.2d 539, 546-47 (Minn. Ct. App. 1992) ("[T]he Minnesota Supreme Court has consistently declared that the due process protection provided under the Minnesota Constitution is identical to the due process guaranteed under the federal constitution.") (citation omitted). *Baker* established that the subject law is rationally based and therefore *Baker* is dispositive of Plaintiffs' state due process claim.

**3. *Baker* resolves Plaintiffs' freedom of conscience claim.**

Plaintiffs further claim that Minnesota's prohibition on same-sex marriage violates the freedom of conscience provision of Article I, Section 16 of the Minnesota Constitution, *see* Am.

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<sup>5</sup> *See, e.g., Baker*, 191 N.W.2d at 186 (referring to "[t]he institution of marriage as a union of man and woman," quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S. Ct. 1110, 1113 (1942)). Numerous other courts have reached similar conclusions. *See, e.g., Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006) (upholding Nebraska's prohibition on same-sex marriage); *Wilson v. Ake*, 354 F. Supp.2d 1298, 1308-09 (M.D. Fla. 2005) (upholding federal Defense of Marriage Act as rationally based); *Andersen v. King County*, 138 P.3d 963, 983 (Wash. 2006) (upholding Washington Defense of Marriage Act as rationally based); *Conaway v. Deane*, 932 A.2d 571, 630-31 (Md. 2007) (upholding Maryland same-sex marriage prohibition as rationally based).

Compl. ¶¶ 34-36, which is the state constitutional counterpart to the freedom of religion provision of the First Amendment. *See Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857, 862-63 (Minn. 1992) (recognizing that the First Amendment contains a free exercise of religion clause). Plaintiffs' reliance on this provision is misplaced.

The *Baker* court summarily rejected a First Amendment challenge to Minnesota's prohibition on same-sex marriage, indicating the court's determination of the complete absence of merit in the claim.<sup>6</sup> *Baker*, 191 N.W.2d at 186 n.2. Indeed, the state and federal religious freedom constitutional provisions have no application to this case.

To prevail under the freedom of conscience provision, it must be shown, among other things, that "the state regulation burdens the exercise of religious beliefs." *Hill-Murray*, 487 N.W.2d at 865. The burden on the exercise of religious beliefs must be "significant" and not "remote." *Shagalow v. State Dep't of Human Servs.*, 725 N.W.2d 380, 391 (Minn. Ct. App. 2006). *See also Hill-Murray*, 487 N.W.2d at 866 (rejecting freedom of conscience claim, in part, because state statute did not "excessively burden[] . . . religious beliefs"). In determining if an impermissible burden exists, the court considers whether compliance with the law requires a change in "religious conduct or philosophy." *Rooney v. Rooney*, 669 N.W.2d 362, 369 (Minn. Ct. App. 2003). In *Shagalow*, for example, the court found no violation of the freedom of conscience provision, stating in part that "[i]n contrast to cases in which we have found a burden on free exercise, [the government's] action here does not force appellant to choose between criminal sanctions and her free exercise of religion." 725 N.W.2d at 391.

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<sup>6</sup> The appellants in *Baker* did not even pursue their First Amendment claim in their appeal to the U.S. Supreme Court. *See In the Matter of the Marriage of J.B. and H.B.*, \_\_\_ S.W.3d \_\_\_, \_\_\_, 2010 WL 3399074 at \*13 (Tex. App. Aug. 31, 2010).

The prohibition on same sex marriage also does not burden the right to the free exercise of religion. The marriage laws, including the same sex-prohibition, apply generally without regard to religious beliefs of the people seeking a license to marry. In addition, the legislation does not require a change in religious conduct or philosophy or a choice between criminal penalties and the exercise of religion. Plaintiffs' freedom of conscience claim should be dismissed.

**4. *Baker* resolves Plaintiffs' freedom of association claim.**

Plaintiffs claim that Minnesota's prohibition of same-sex marriage violates their freedom of association rights under the Minnesota Constitution, Article I, Sections 1, 2, and 16. *See* Am. Compl. ¶¶ 37-40. "Constitutional freedom of association protects the right of an individual to associate with others for the purpose of expressing and advancing ideas and beliefs." *Metro. Rehab. Servs., Inc. v. Westberg*, 386 N.W.2d 698, 700 (Minn. 1986) (rejecting freedom of association claim under both the First Amendment and Minnesota constitution and applying same analysis to both claims).

In this case, Plaintiffs' claim fails because *Baker* summarily dismissed a First Amendment challenge to Minnesota's prohibition on same-sex marriage, *Baker*, 191 N.W.2d at 186 n.2, again reflecting the court's conclusion that the claim is wholly lacking in merit. *See also supra* note 6. In addition, the prohibition on same-sex marriage does not prevent Plaintiff from associating with others to advocate their ideas and beliefs. Plaintiffs' freedom of association claim should also be dismissed.

Plaintiffs apparently contend that the Court should disregard *Baker* because the Court can reach a conflicting decision under the state constitution. *See Kahn v. Griffin*, 701 N.W.2d 815, 824 (Minn. 2005) ("We have indicated that we will not construe our state constitution as

providing more protection for individual rights than does the federal constitution unless there is a principled basis to do so. We adhere to the general principle of favoring uniformity with the federal constitution.”) (citation omitted). However, *Baker* is binding precedent, and as discussed above, each of the state constitutional claims is without merit based on *Baker*. In fact, the state laws challenged by Plaintiffs were simply enacted in accordance with *Baker*, reiterating the interpretation of state law set forth in the *Baker* decision that same-sex marriage is prohibited. *See* 191 N.W.2d at 186.

**C. Plaintiffs’ Single-Subject Claim Is Without Merit.**

Finally, Plaintiffs claim that the Defense of Marriage Act, 1997 Minn. Laws ch. 203, art. 10, violates the single-subject provision of the Minnesota Constitution. *See* Am. Compl. ¶¶ 24-25. Article IV, section 17 of the Minnesota Constitution requires that “[n]o law shall embrace more than one subject, which shall be expressed in its title.” “[T]he single subject provision should be interpreted liberally and the restriction would be met if the bill were germane to one general subject.” *Associated Builders & Contractors v. Ventura*, 610 N.W.2d 293, 299 (Minn. 2000). To be germane to a single subject, the various sections of the bill need only be connected by a “mere filament” to one another and to the general subject. *Id.* at 302.

The Court need not reach the issue raised by Plaintiffs. *See In re Senty-Haugen*, 583 N.W.2d 266, 269 n.3 (Minn. 1998) (“It is well-settled law that courts should not reach constitutional issues if matters can be resolved otherwise.”). Even if the challenged 1997 legislation violates the single-subject provision, other Minnesota law still prohibits marriage between persons of the same sex.

As noted above, long before the challenged language was enacted, the Minnesota Supreme Court held in *Baker* that Minnesota Statutes Chapter 517 “does not authorize marriage

between persons of the same sex and that such marriages are accordingly prohibited.” 191 N.W.2d at 186. In 1977, the Minnesota Legislature amended section 571.01 to provide explicitly that “Marriage . . . is a civil contract *between a man and a woman . . .*.” See 1977 Minn. Laws, ch. 441, § 1, at 1207. Thus, even assuming *arguendo* that the language added in 1997 is unconstitutional under the single-subject provision, other Minnesota law prohibits same-sex marriage.<sup>7</sup> Therefore, Plaintiffs’ single-subject argument is not properly considered by the Court.

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<sup>7</sup> In any event, the marriage provisions found in Article 10 of 1997 Minnesota Laws chapter 203 are germane to the “one general subject” of the bill—children and families—which is the “common thread which runs through the various sections of chapter [203].” See *Associated Builders*, 610 N.W.2d at 299, 302 (stating that various sections of a bill need only be connected by a “mere filament” to one another and to the general subject) (citation omitted). In addition, the challenged legislation was enacted more than 13 years ago. Plaintiffs’ delay in asserting this “single-subject” claim raises a significant laches issue. See *Clark v. Pawlenty*, 755 N.W.2d 293, 299 (Minn. 2008) (“Laches is an equitable doctrine applied to prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay.”) (citation and quotation omitted).

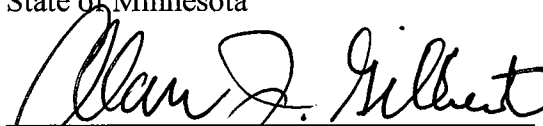
## CONCLUSION

Based on the foregoing, Defendant State of Minnesota respectfully requests that it be dismissed and that Plaintiffs' Complaint be dismissed under the applicable legal precedent.

Dated: November 8, 2010

Respectfully submitted,

LORI SWANSON  
Attorney General  
State of Minnesota

A handwritten signature in black ink, appearing to read "Alan I. Gilbert", written over a horizontal line.

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**MINN. STAT. § 549.211 ACKNOWLEDGMENT**

The party on whose behalf the attached document is served acknowledge through their undersigned counsel that sanctions may be imposed pursuant to Minn. Stat. § 549.211 (2008).

Dated: November 8, 2010.



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