STATE OF MINNESOTA

IN SUPREME COURT

A18-1694

Court of Appeals

Gildea, C.J.
Concurring, Lillehaug, J.
Took no part, Thissen, J.

Lyndsey Olson,

Respondent,

vs.

Filed: May 27, 2020
Office of Appellate Courts

John Lesch,

Appellant.

Lisa M. Lamm Bachman, Tessa Mansfield Hirte, Foley & Mansfield, PLLP, Minneapolis, Minnesota, for respondent.

Marshall H. Tanick, Teresa J. Ayling, Meyer Njus Tanick, PA, Minneapolis, Minnesota, for appellant.

S Y L L A B U S

1. Because a state legislator's letter to a city mayor was not related to any business pending before the Minnesota Legislature, the Speech or Debate Clause of the Minnesota Constitution, Minn. Const. art. IV, § 10, does not provide immunity for the state legislator.

2. Because a state legislator's letter was not sent pursuant to the legislator's duties, legislative immunity under Minn. Stat. § 540.13 (2018), does not apply.

Affirmed.

O P I N I O N

GILDEA, Chief Justice.

The question presented in this case is whether legislative immunity protects the statements made in a letter State Representative John Lesch sent to the mayor of Saint Paul. Respondent Lyndsey Olson, Saint Paul City Attorney, sued Lesch for defamation per se based on statements in the letter. Lesch moved to dismiss the complaint, asserting legislative immunity under the Speech or Debate Clause of the Minnesota Constitution, Minn. Const. art. IV, § 10, and under the legislative immunity provision in Minn. Stat. § 540.13 (2018). The district court denied Lesch's motion to dismiss based on legislative immunity, and the court of appeals affirmed. Because neither Article IV, Section 10 of the Minnesota Constitution nor Minn. Stat. § 540.13 extends legislative immunity to Lesch's letter, we affirm.

FACTS

On January 3, 2018, appellant John Lesch sent a letter to the new mayor of Saint Paul, Mayor Melvin Carter. Lesch serves as the state representative for Minnesota District 66B, which includes part of the City of Saint Paul. The letter is written on Lesch's official letterhead from the Minnesota House of Representatives, but the letter is marked "**PERSONAL AND CONFIDENTIAL**."

In the letter, Lesch writes about a variety of topics. He begins by congratulating Mayor Carter "on a very well-organized inaugural ceremony," and then generally references "the upcoming legislative session" and "lobbying" issues. The letter does not discuss these issues with any specificity.

Lesch then "express[es] reservations about two primary issues." The first issue concerns "the hiring process of [Mayor Carter's] department heads." Regarding that topic, Lesch writes that, "[a]s a de facto lead on data practices in the legislature," he is "often asked if government practices conform with the spirit and the letter of our sunshine laws." He recounts that the former mayor had asked him "to deal with certain legislative data practices issues" in the past, and he "offer[s] the same counsel" to Mayor Carter. While the letter generally references "sunshine laws" and "data practices," the letter makes no specific reference to actual, pending, or anticipated legislation.

The second issue discussed in the letter concerns the Saint Paul City Attorney's Office. This issue takes up the bulk of the text in the three-page letter. Lesch begins his discussion of this issue by noting that he served in the office for almost 15 years and explaining that he has "a great love for the office." He comments that the office's decisions are often subject to great public scrutiny and then he says that he was "surprised" by the Mayor's "choice for City Attorney." Lesch contends that Olson has a "track record of integrity questions and management problems" and suggests that Olson is not the right person for such an important position. He then recounts his personal experience acting as defense counsel for individuals charged with crimes for participating in demonstrations on Interstate Highway 94. And Lesch then requests four types of information specifically about Olson.

Finally, Lesch closes the letter writing, "Mayor Carter, this is a personal letter from me to you. I have not copied it to any member of the press or even to the Saint Paul Delegation, as I am hoping we can resolve it internally."

Based on statements Lesch made in his letter about her, Olson brought a defamation suit against Lesch. The complaint alleges that Lesch "knowingly, intentionally and maliciously made false and defamatory" statements about Olson in the letter.[1]

The complaint contends that the allegations made in the letter against Olson were investigated and "determined to be unsubstantiated," and that she "has no record of misconduct or any adverse personnel action in the Minnesota National Guard." Instead, the complaint alleges that Olson has "received many notable recognitions and awards, including a Bronze Star Medal[.]"

Lesch moved to dismiss the complaint under Rule 12.02(a) and (e) of the Minnesota Rules of Civil Procedure. He asserted, among other arguments, that his statements in the letter are communications that are protected by legislative immunity under the Speech or Debate Clause of the Minnesota Constitution and under Minn. Stat. § 540.13. Lesch stressed that his letter was written on official letterhead, he addressed lobbying efforts in the first portion of the letter, and he sought certain disclosures from Mayor Carter.

The district court denied Lesch's motion to dismiss. The district court concluded that the allegedly defamatory statements in the letter are not protected by legislative immunity. The district court noted that Lesch was not claiming that "there was business

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[1] Olson relies on Lesch's statements that: she has a "preexisting track record of integrity questions and management problems"; he has "grave concerns over her fit for the office"; his own experience with Olson "revealed her to be a prosecutor who would sacrifice justice in pursuit of a political win – even going so far as to commit misconduct to do so"; the National Guard conducted an "investigation of her for operating a 'toxic working environment' " and multiple National Guard officers raised "this issue" with him; she used her office "to wage a political fight"; and his experience with Olson suggests that she is not "a seasoned manager, with a track record of good judgment."

pending before the House, or one of its committees, relating to Mayor Carter, Saint Paul, or [Olson]." And the district court stated that there was no suggestion that Lesch was inquiring into Olson's "appointment as Saint Paul City Attorney by reason of any pending legislative business[.]"

Lesch appealed the denial of his motion to dismiss based on the denial of legislative immunity.[2] The court of appeals affirmed. *Olson v. Lesch*, 931 N.W.2d 832, 834 (Minn. App. 2019). The court of appeals concluded that "Lesch's letter was not essential to the legislative process." *Id.* at 841. The court viewed Lesch's letter as "analogous to common activities commonly performed by legislators that are *personal or political* in nature rather than *legislative*." *Id.* at 839. The court also concluded that corresponding with members of the executive branch—like the mayor of Saint Paul—"does not fall within the scope of protected legislative activity." *Id.* at 840. For these reasons, the court concluded that Lesch's allegedly defamatory statements are not entitled to legislative immunity under either the Minnesota Constitution or Minn. Stat. § 540.13. *Olson*, 931 N.W.2d at 841.

We granted Lesch's petition for review.

ANALYSIS

We must decide whether the Speech or Debate Clause of the Minnesota Constitution or Minn. Stat. § 540.13 grants legislative immunity to Lesch for the statements made in his letter to Mayor Carter. Whether immunity applies is "a legal question that we review de

[2] When a denial of a motion to dismiss concerns government immunity, immediate appellate review is available. Minn. R. Civ. App. P. 103.03(j); *Cruz-Guzman v. State*, 916 N.W.2d 1, 7 (Minn. 2018).

novo." *Kariniemi v. City of Rockford*, 882 N.W.2d 593, 599 (Minn. 2016). To determine whether immunity applies in this case, we must interpret a constitutional provision and a statutory provision, and these interpretive questions are also subject to review de novo. *Cruz-Guzman v. State*, 916 N.W.2d 1, 7, 13 (Minn. 2018).[3]

I.

We first turn to the Speech or Debate Clause of the Minnesota Constitution, Minn. Const. art. IV, § 10, and examine whether this provision immunizes Lesch's letter.[4] Lesch argues that his letter is a legislative act that the Speech or Debate Clause protects. The Speech or Debate Clause of the Minnesota Constitution provides:

> The members of each house in all cases except treason, felony and breach of the peace, shall be privileged from arrest during the session of their respective houses and in going to or returning from the same. *For any speech or debate in either house they shall not be questioned in any other place*.

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[3] Olson moved to strike portions of Lesch's brief and addendum that contain documents that are outside the pleadings. On a motion to dismiss, the district court can rely only on the pleadings—the complaint and the documents referenced in the complaint. *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 490 (Minn. 2004). And when we review the denial of a motion to dismiss, we are also limited to those pleadings. *See* Minn. R. Civ. App. P. 110.01; *Cruz-Guzman*, 916 N.W.2d at 7. Accordingly, we grant Olson's motion to strike.

[4] When a case raises both a constitutional issue and a statutory issue, our typical practice would be to determine first whether the case can be resolved on the statutory ground, making it unnecessary for us to resolve the constitutional issue. *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."). We vary from that practice in this case because one of the issues presented is whether statutory legislative immunity is broader than constitutional immunity. The court of appeals held that immunity under the statute was the same in scope as immunity under the constitution. *Olson*, 931 N.W.2d at 836. To determine whether the statute extends broader immunity than the constitution, we begin with a discussion of the constitutional provision to determine its scope, and then we turn to the statute.

Minn. Const. art. IV, § 10 (emphasis added).

We have explained that "[t]he Minnesota Constitution grants absolute privilege from defamation liability to members of the State Senate and House of Representatives in the discharge of their official duties." *Zutz v. Nelson*, 788 N.W.2d 58, 62 (Minn. 2010). We have applied the Speech or Debate Clause on relatively few occasions. For example, we held that the Speech or Debate Clause does not "immunize the Legislature" from claims that legislators violated a duty under other clauses of the Minnesota Constitution. *Cruz-Guzman*, 916 N.W.2d at 13. But we have never directly addressed the scope of legislative activities that are protected by the Speech or Debate Clause.

For that reason, we turn to federal case law for guidance. The language of Minnesota's Speech or Debate Clause is almost identical to the language of the Speech or Debate Clause of the U.S. Constitution.[5] The U.S. Constitution provides:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; *and for any Speech or Debate in either House, they shall not be questioned in any other Place.*

[5] Lesch asserts that we have the authority to construe Minnesota's Speech or Debate Clause "to accord greater rights, privileges, and protections" than the U.S. Constitution. But "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." *Kahn v. Griffin*, 701 N.W.2d 815, 824 (Minn. 2005). Here, Lesch does not state, nor can we determine, a principled basis for granting broader protection under the Minnesota Constitution than what is afforded under the Federal Constitution. Accordingly, we decline to interpret the Minnesota Constitution more broadly than the U.S. Constitution.

U.S. Const. art. 1, § 6, cl. 1 (emphasis added). Because this language is nearly identical to the Minnesota provision, as stated above, federal case law interpreting the federal provision is helpful to our interpretation of the Minnesota provision. *See State v. Harris*, 590 N.W.2d 90, 97 (Minn. 1999) ("A decision of the Supreme Court interpreting a provision of the U.S. Constitution that is identical to a provision of the Minnesota Constitution is of persuasive authority to this court.").

The U.S. Supreme Court has directly interpreted the Speech or Debate Clause of the U.S. Constitution several times. *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *United States v. Helstoski*, 442 U.S. 477 (1979); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975); *Doe v. McMillan*, 412 U.S. 306 (1973); *Gravel v. United States*, 408 U.S. 606 (1972); *United States v. Brewster*, 408 U.S. 501 (1972); *Dombrowski v. Eastland*, 387 U.S. 82 (1967); *United States v. Johnson*, 383 U.S. 169 (1966); *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Kilbourn v. Thompson*, 103 U.S. 168 (1880). The Court interprets the Speech or Debate Clause "broadly to effectuate its purposes." *Johnson*, 383 U.S. at 180. The purpose is "to prevent intimidation" by the other branches of government. *Id.* at 181. Put differently, the focus is not "the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." *Brewster*, 408 U.S. at 507.

Instead of limiting the Speech or Debate Clause to, as the language suggests, speech or debate on the floor of the legislature, the Supreme Court has expanded it to include "within its protections anything 'generally done in a session of the House by one of its members in relation to the business before it.' " *Doe*, 412 U.S. at 311 (quoting *Kilbourn*,

103 U.S. at 204). To that end, the Supreme Court "has given the Clause a practical rather than a strictly literal reading," *Hutchinson*, 443 U.S. at 124, meaning that the Court has focused on "whether the actions . . . fall within the 'sphere of legitimate legislative activity,' " *Eastland*, 421 U.S. at 501. Although the Court has expanded the meaning of the Speech or Debate Clause beyond the plain meaning of the text, "the Clause has not been extended beyond the legislative sphere." *Gravel*, 408 U.S. at 624–25. If "it is determined that Members are acting within the 'legitimate legislative sphere[,]' the Speech or Debate Clause is an absolute bar to interference." *Eastland*, 421 U.S. at 503.

In general, legitimate legislative activity includes activities that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625. The Court has concluded that protected activities include subcommittee investigations, *Eastland*, 421 U.S. at 504–05; subcommittee hearings about, and reports on, investigation findings, *Doe*, 412 U.S. at 313; and a member's conduct, including voting, during a full session or committee meeting, *see Gravel*, 408 U.S. at 624.

In defining immunity under the Speech or Debate Clause, the Court has also distinguished between legislative activity and other types of activity. The Court has recognized "that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause." *Brewster*, 408 U.S. at 512. Such activities include " 'errands' performed for constituents, the making of

appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress." *Id.* But those activities are not immune because "they are political in nature rather than legislative . . . [and] it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause." *Id.* Put differently, immunity does not apply to "activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself." *Id.* at 528.

Finally, regarding defamation lawsuits, the Court has recognized "that nothing in history or in the explicit language of the Clause suggests any intention to create an absolute privilege from liability or suit for defamatory statements made outside the Chamber." *Hutchinson*, 443 U.S. at 127 (holding that a senator was not immune for making allegedly defamatory comments in press releases and newsletters).

Drawing on the principles from these federal cases, we hold that Lesch's letter is not protected legislative activity under the Minnesota Constitution's Speech or Debate Clause. We reach this conclusion because the letter Lesch sent does not fall "within the sphere of legitimate legislative activity." *Eastland*, 421 U.S. at 503. Lesch sent the letter on January 3, 2018, at a time when the Legislature was not in session. And nothing in the letter indicates that Lesch was acting pursuant to his duties as a legislator: nothing suggests that he was preparing for a legislative session, fulfilling a legislative duty to the mayor, or acting pursuant to a resolution of the House of Representatives or an active committee

investigation. In fact, Lesch effectively disclaims any connection to legislative activity when he writes that he hopes he and the mayor can resolve the matter "internally."

Rather than "legitimate legislative activity," the thrust of the letter is clearly personal. Lesch uses highly personal language, stating that, "as a veteran" of the Saint Paul City Attorney's Office, he has "a great love for the office" and that he "remain[s] vested in the success" of the office. But the Speech or Debate Clause was not written "for the personal or private benefit of Members of Congress." *Brewster*, 408 U.S. at 507. The letter does not become de facto legislative activity simply because Lesch sent it on his official letterhead. As recognized in *Hutchinson*, *Gravel*, and *Brewster*, it is commonplace for legislators to engage in activity that is non-legislative for purposes of the Speech or Debate Clause and therefore that activity is not immune. *See, e.g.*, *Hutchinson*, 443 U.S. at 127 (holding that newsletters to constituents and press releases to the public are not immune); *Gravel*, 408 U.S. at 625–26 (concluding that the Speech or Debate Clause does not protect a senator's arrangement to publicly disseminate legislative materials); *Brewster*, 408 U.S. at 512 (explaining that immunity does not protect "speeches delivered outside the Congress"). Accordingly, the Speech or Debate Clause does not immunize Lesch from claims based on the letter.

In urging us to reach a different outcome, Lesch asserts that, by not immunizing the letter, we undermine the purpose of the Speech or Debate Clause. He contends that the fundamental purpose of the Speech or Debate Clause is to defend legislators " 'not only from the consequences of litigation's results but also from the burden of defending themselves,.' " quoting *Hutchinson*, 443 U.S. at 123. But that is not the primary purpose.

Johnson, 383 U.S. at 181 (explaining that the purpose is "to prevent intimidation by the executive and accountability before a possibly hostile judiciary"). Rather, the primary purpose is to make sure legislators can legislate independent of intimidation from the other branches. *Id.* Here, Lesch has not established that, if he is not immune, state representatives would consequently be intimidated by the executive branch or be unable to independently engage in lawmaking.

Alternatively, Lesch argues that he is the "*de facto* lead on data practices" and was engaged in "the role of oversight" when he wrote his letter. We disagree.

Eastland helps to clarify when immunity attaches to committee oversight, or more simply, to committee investigations. In *Eastland*, the Court considered whether actions taken by a Senate subcommittee and its members were protected by the Speech or Debate Clause. 421 U.S. at 501. The Senate passed a resolution authorizing the subcommittee to study the Internal Security Act of 1950. *Id.* at 506. To carry out this study, the subcommittee issued subpoenas for bank records. *Id.* at 494. The Court explained that "the power to investigate is inherent in the power to make laws." *Id.* at 504. But the Court clarified that the investigatory power is "not unlimited" and "that Congress is not invested with a general power to inquire into private affairs." *Id.* at 504 n.15 (citation omitted) (internal quotation marks omitted). The Court also highlighted that the investigation was a "task assigned to [the subcommittee] by Congress[,]" *id.* at 505, which confirmed that it was "a subject on which 'legislation could be had,' " *id.* at 506 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927)). The Court therefore concluded that the subcommittee members were immune under the Speech or Debate Clause. *Id.* at 507.

Here, Lesch does not claim that his writing of the letter was assigned to him by the Legislature, nor that his request for information was sanctioned by a subpoena. Similar to the committee members in *Eastland*, Lesch claims that he has immunity for investigating Mayor Carter's compliance with Minnesota's sunshine laws. But unlike the committee's investigation in *Eastland*, Lesch's letter does not establish that this inquiry is "a subject on which 'legislation could be had.' " *Id.* at 506 (quoting *McGrain*, 273 U.S. at 177). Instead, the letter specifically says that Lesch is raising his concerns "privately in the interest of generating understanding" and he is seeking to resolve the issue "internally."

Based on our analysis, we hold that Lesch is not entitled to immunity under the Speech or Debate Clause of the Minnesota Constitution.

II.

We turn next to the question of whether legislative immunity under Minn. Stat. § 540.13 protects Lesch for his letter. Minnesota Statutes § 540.13 provides:

> No member, officer, or employee of either branch of the legislature shall be liable in a civil action on account of any act done in pursuance of legislative duties.

Lesch argues that the plain language of Minn. Stat. § 540.13 grants legislators broader immunity than the legislative immunity under the Minnesota Constitution. In particular, he points to the phrase, "any act done in pursuance of legislative duties." Minn. Stat. § 540.13. He asserts that this language is different from, and more expansive than, the language of the Speech or Debate Clause of the Minnesota Constitution, which applies to "speech or debate in either house," Minn. Const. art. IV, § 10, and thus the phrase must necessarily expand legislative immunity beyond the limits of the Speech or Debate Clause.

This case presents our first opportunity to interpret Minn. Stat. § 540.13. When interpreting statutes, our object "is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2018). To do so, we first determine whether the statute's language is ambiguous by "constru[ing] the statute's words and phrases according to their plain and ordinary meaning." *In re the Fin. Responsibility for the Out-of-Home Placement Costs for S.M.*, 812 N.W.2d 826, 829 (Minn. 2012). Here, neither party argues that Minn. Stat. § 540.13 is ambiguous, and we discern no ambiguity in application.

The parties' disagreement centers on whether Lesch's letter to the mayor of Saint Paul is an "act done in pursuance of legislative duties." Minn. Stat. § 540.13. Lesch asserts that state legislators "have broad, unlimited, and unspecified 'duties' that extend well beyond merely making speeches and engaging in debate within the 'four walls' of the Capitol[.]" He alleges that he was carrying out his role as a state representative and, thus, "he cannot be sued for it." Olson argues that if we adopt Lesch's interpretation, we would give legislators " 'super-citizen' status and a blank slate to defame private citizens[.]" She asserts that a letter written in a legislator's personal capacity is not protected by the statute.

We agree with Lesch that the statute extends broader immunity than the Speech or Debate Clause. The statute immunizes any act done by a legislator that helps that legislator perform her legislative function. *See* Minn. Stat. § 540.13. But there still must be a legislative function, and there is no such function here. *Cf. Carradine v. State*, 511 N.W.2d 733, 737 (Minn. 1994) (concluding that a police officer was not necessarily entitled to immunity from a defamation claim based on statements the officer made to the press because the officer's duties did not include responding to press inquiries).

As we discussed above, the letter is not tied to any pending or even anticipated legislative activity or committee work. It is true, as Lesch points out, that he begins the letter discussing "lobbying," "the upcoming legislative session," and "sunshine laws." But those general references, without an identification or explanation of legislation requiring action, do not establish that he was performing, or acting in pursuance of, a legislative duty.[6]

But, Lesch argues, the letter requests certain information about the mayor's hiring process. To be sure, fact-finding and information gathering are necessary prerequisites to "enlightened debate" within committees and on the floor of the House of Representatives, and thus such activity could be protected legislative activity. *See Gov't of V.I. v. Lee*, 775 F.2d 514, 521 (3d Cir. 1985). But here the letter claims no such legislatively-motivated

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[6] These general references likewise do not support the concurrence's view that further litigation is required before the court can resolve the immunity question. We could conceive of a situation requiring additional fact-finding by the district court. *See Gov't of V.I. v. Lee*, 775 F.2d 514, 522, 524 (3d Cir. 1985) (remanding for further fact-finding to determine whether the "content" of a legislator's private conversations was protected legislative fact-finding). But that is not the case here. We have the content of Lesch's letter and even construing the content and inferences to be drawn from that content in Lesch's favor, legislative immunity does not attach to the letter because it was a personal letter, not one written in furtherance of an identifiable legislative duty. The concurrence's view that further litigation of the immunity question is necessary in this case is also inconsistent with one of the purposes of immunity, which is to avoid subjecting legislators to examination as to their motives in carrying out their legislative functions. *See, e.g.*, *Tenney*, 341 U.S. at 377 (explaining that "it [i]s not consonant with our scheme of government for a court to inquire into the motives of legislators"). Finally, we disagree with the concurrence's assertion that our decision that immunity does not apply here is dictum. Whether immunity applies is a question of law. *See Kariniemi*, 882 N.W.2d at 599. That legal question is squarely presented in this case. Our decision on that legal question is not dictum. *See State ex rel. Foster v. Naftalin*, 74 N.W.2d 249, 266 (Minn. 1956) (defining dicta).

fact-gathering. The letter contains no statutory citation, and it mentions no ongoing or even anticipated committee work that could be informed by, or relevant to, the requested information. Fact-gathering in a constituent service role might also be a legislative duty. We need not resolve that issue in this case because nothing in the letter supports an inference that Lesch's information-gathering is connected to constituent service. Without a connection to legislative duties, we cannot conclude that the information the letter seeks was requested to assist Lesch in carrying out his legislative duties.

Rather than a letter written to assist Lesch in performing his responsibilities as a legislator, the letter reads as though it was written in a personal capacity. It is marked, "**PERSONAL AND CONFIDENTIAL**." Lesch confirms that it is personal when he explains that he has "great love" for, and "remain[s] vested in," the Saint Paul City Attorney's Office and that, "as a veteran" of the office, he is "compelled to inquire" about the mayor's "choice for City Attorney – Lyndsey Olson." Lesch discusses his personal involvement as an *attorney* for eight defendants in litigation. And he concludes by stating, "Mayor Carter, this is a personal letter from me to you" and "I am hoping we can resolve this internally." These statements make clear that Lesch does not intend to use the information for any legislative duty.

We need not fully define "legislative duties" to decide this case. Whatever the scope of immunity under Minn. Stat. § 540.13, it does not protect letters written in a personal capacity, even when those letters are written on legislative letterhead. Accordingly, we hold that legislative immunity in section 540.13 does not protect Lesch for statements in his letter to Mayor Carter.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.

THISSEN, J., took no part in the consideration or decision of this case.

C O N C U R R E N C E

LILLEHAUG, Justice (concurring).

I agree with the court's reasoning and holding that, as a matter of law, Representative John Lesch's letter to Mayor Melvin Carter—primarily on the subject of City Attorney Lyndsey Olson—is not protected legislative activity under the Minnesota Constitution's Speech or Debate Clause. I concur in the result, but write separately on the issue of Minnesota Statutes § 540.13 (2018), which gives broader immunity than the Speech or Debate Clause. Section 540.13 precludes civil liability "on account of any act done in pursuance of legislative duties."

The court is correct to uphold the court of appeals' affirmance of the district court's decision not to dismiss Olson's complaint based on the statute. But, to the extent that the court's opinion may be read to conclude as a matter of law that Lesch's letter was not written in pursuance of Lesch's legislative duties, but was written solely in a personal capacity, that conclusion is unnecessary to the decision, and thus is dictum.

Importantly, this case is before us at a very early stage: a motion to dismiss. The issue on appeal is whether the district court erred in denying Lesch's motion to dismiss under Minn. R. Civ. P. 12.02(a) (subject matter jurisdiction) and 12.02(e) (failure to state a claim). A claim survives a motion to dismiss "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 603 (Minn. 2014). On a motion to dismiss, we "consider only the facts alleged in the complaint, accepting those facts as true[,] and must

construe all reasonable inferences in favor of the nonmoving party." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003).

To prevail on his motion to dismiss, then, Lesch has the burden to show that Olson's claim cannot, as a matter of law, meet the test we explained in *Walsh*. Lesch contends that he has met his burden because the complaint, which incorporates the text of the letter, shows that he is immune to Olson's defamation claims under both the Minnesota Constitution's Speech or Debate Clause and Minnesota Statutes § 540.13.

I agree with the majority that Lesch's assertion of immunity under the Speech or Debate Clause fails because, as a matter of law, Lesch's letter is not "legislative activity." But that does not dispose of the statutory issue. As the court acknowledges, the statute provides broader immunity than the constitution.

Whether the letter was "an[] act done in pursuance of legislative duties," Minn. Stat. § 540.13, depends on the facts. The statute has two factual components: "legislative duties" and "in pursuance of." *Id.*

On the first factual component, the complaint does not describe the parameters of a Minnesota state representative's "legislative duties." Perhaps recognizing this, Lesch attempted to supplement the record by putting in his addendum extrinsic material about his House duties. I join in the decision of the court to grant Olson's motion to strike this material. As a result, all we can say at this point is that Lesch has not carried his burden on a motion to dismiss to show that, by sending the letter, he was performing a legislative duty.

On the second factual component, both parties point to facts and inferences in the complaint about what Lesch was "in pursuance of." On Olson's side, the letter is labeled "PERSONAL AND CONFIDENTIAL." In it, Lesch tells the Mayor that it is "a personal letter from me to you." Lesch describes his personal interest in the Saint Paul City Attorney's Office. And there is a personal tone as he writes about Olson.

But the complaint contains facts and inferences that cut the other way. The letter is on House letterhead. It touches on the lobbying relationship between the City and the House. Lesch asserts that he is the "de facto lead on data practices" at the Legislature. The letter references "data practices issues" and "sunshine laws," and, by inference, Lesch ties both subjects to the City Attorney hiring process. And he makes document requests, which could be legislative fact-finding.

Applying *Walsh*, 851 N.W.2d at 603, there is no question that Olson's complaint states a claim that the letter was not "in pursuance of" Lesch's "legislative duties"—allegations sufficient to survive a motion to dismiss under Minn. Stat. § 540.13. The district court correctly denied Lesch's motion invoking the statute. Our own analysis should end there.

Any further conclusion that Lesch's letter was not "in pursuance of legislative duties," *id.*, would require the weighing of facts and inferences. But on a motion to dismiss facts must not be weighed. *See Walsh*, 851 N.W.2d at 606–07.[1] To the extent that the

[1] The same is true on a motion for summary judgment. *See Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017) (citing *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 754 (Minn. 2005)). Neither Minn. R. Civ. P. 12 nor 56 contains an exception for cases involving a claim or defense of immunity.

court does more than affirm the district court's denial of the motion to dismiss, its statements are dictum. *Haskin v. County of Hennepin*, 127 N.W.2d 522, 527 (Minn. 1964) ("The scope of any opinion by this court is limited to the facts and issues involved in the decision, and anything said in excess of deciding these issues is pure dictum.").

At oral argument, Olson's counsel acknowledged that she was not seeking a "broad dictate" from the court on immunity, but was merely requesting that the case go forward. She is correct. The case should go forward, and discovery (including from Lesch) will flesh out the issues of his duties and what he was pursuing.

For these reasons, I agree with the court's disposition of the Speech or Debate Clause issue, and respectfully concur in the result—but not all of the reasoning—on the statutory issue.