No. A21-0626

State of Minnesota in the Court of Appeals

DRAKE SNELL, et al.,

Appellants,

v.

TIM WALZ, Governor of Minnesota, in his official capacity, et al.,

Respondents.

On Appeal from the Ramsey County District Court, Civil Division.
State of Minnesota, Case No.: 62-CV-20-4498.

BRIEF OF APPELLANTS

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STATEMENT OF LEGAL ISSUES

(1) Whether the District Court erred by granting Respondents' motion to dismiss.

a. Respondents raised this issue in their motion to dismiss, Doc. 30. Appellants contested the motion to dismiss and argued that the mask mandate violates state and federal law, Docs. 39, 54, 63. The District Court addressed these issues in its judgment, Doc. 69.
b. The District Court granted Respondents' motion to dismiss.
c. Appellants preserved this issue for appeal by timely filing the Notice of Appeal from the March 16, 2021 Judgment on May 13, 2021.
d. Apposite Cases and Statutes:
    1. Minn. Const. Art. III, Sec. 1;
    2. Minn. Stat. §12.31;
    3. Minn. Stat. §12.21;
    4. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

(2) Whether Minn. Stat. §§12.02, 12.21, and 12.31 are an unconstitutional delegation of power from the Legislature to the Governor.

a. Appellants raised this issue in the District Court throughout their Petition for a Writ of Quo Warranto, Doc. 1, and in their memoranda of law before the District Court, Docs. 39, 54, 63.
b. The District Court held that these statutes are not an unconstitutional delegation of legislative power, Doc. 69 at 11-19.
c. Appellants preserved this issue for appeal by timely filing the Notice of Appeal from the March 16, 2021 Judgment on May 13, 2021.
d. Apposite Cases and Statutes:
    1. Minn. Const. Art. III, Sec. 1;
    2. Minn. Stat. §12.31;
    3. Minn. Stat. §12.21;
    4. *State v. Great N. Ry. Co.*, 111 N.W. 289 (Minn. 1907).

(3) Whether Minn. Stat. §§12.02, 12.21, and 12.31 allows the Governor to declare a peacetime emergency based on a public health matter that does not endanger property.

e. Appellants raised this issue in the District Court throughout their Petition for a Writ of Quo Warranto, Doc. 1, and in their memoranda of law before the District Court, Docs. 39, 54, 63.
a. The District Court held that COVID-19 is an "act of nature" despite the Legislature's removal of "public health emergency" from qualifying events for invocation of Chapter 12's power, Doc. 69 at 19-22.

b. Appellants preserved this issue for appeal when Appellant timely filed the Notice of Appeal from the March 16, 2021 Judgment on May 13, 2021.
c. Apposite Cases and Statutes:
    1. Minn. Stat. §12.31;
    2. H.F. No. 1555 (2005);
    3. Minn. Stat. §12.61;
    4. Minn. Stat. §144.419.

(4) Whether Emergency Executive Order 20-81 exceeds the power granted by Minnesota Statutes, Chapter 12 or MEMA exceeds the power granted by the Minnesota Constitution, Article III, Section 1 because Section 12.32 does not allow a MEMA-based order to set aside contrary statutes, and if it does, MEMA impermissibly allows a line-item veto of contrary statutes.

f. Appellants raised this issue in the District Court throughout their Petition for a Writ of Quo Warranto, Doc. 1, and in their memoranda of law before the District Court, Docs. 39, 54, 63.
a. The District Court held that EO 20-81 did not exceed the Governor's powers under Minnesota Statutes, Chapter 12 because it does not conflict with Minn. Stat. §609.735, Doc. 69 at 22-29.
b. Appellants preserved this issue for appeal by timely filing the Notice of Appeal from the March 16, 2021 Judgment on May 13, 2021.
c. Apposite Cases and Statutes:
    1. Minn. Stat. §12.32;
    2. Minn. Stat. §609.735;
    3. *State v. Fleck*, 810 N.W.2d 303 (Minn. 2012);
    4. *State v. Kjeldahl*, 278 N.W.2d 58 (Minn. 1979).

(5) Whether Emergency Executive Order 20-81 violates the First Amendment to the United States Constitution and Article I, Section 16 of the Minnesota Constitution.

g. Appellants raised this issue in the District Court throughout their Petition for a Writ of Quo Warranto, Doc. 1, and in their memoranda of law before the District Court, Docs. 39, 54, 63.
a. The District Court held that EO 20-81 does not violate the speech and religious free exercise clauses of the federal and state constitutions, Doc. 69 at 29-38.
b. Appellants preserved this issue for appeal by timely filing the Notice of Appeal from the March 16, 2021 Judgment on May 13, 2021.
c. Apposite Cases and Statutes:
    1. U.S. Const. Amend. I;
    2. Minn. Const. art. I, sec. 16;

3. *Northland Baptist Church v. Walz*, 2021 WL 1195821 (D. Minn. Mar. 30, 2021);
4. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

STATEMENT OF THE CASE AND FACTS

Appellants brought this matter in the Second Judicial District of Minnesota, Ramsey County District Court, before Judge John H. Guthmann. Appellants are sixteen Minnesota residents, businesses, and churches who petitioned the Ramsey County District Court for a Writ of Quo Warranto seeking to restrain the implementation and enforcement of Governor Walz' mask mandate, Emergency Executive Order 20-81. Appellants moved for a temporary injunction stopping the enforcement of the mandate, and Respondents Governor Tim Walz and Attorney General Keith Ellison moved to dismiss. The District Court granted Respondents' motion to dismiss and denied Appellants' motion for a temporary injunction.[1] This appeal timely followed.

I. The Mask Mandate's Promulgation and Termination.

With only the claim that "[a]ccording to the Centers for Disease Control and Prevention ("CDC"), face coverings are effective in preventing the transmission of respiratory droplets that may spread COVID-19," on July 22, 2020, Governor Tim Walz issued Emergency Executive Order 20-81, which required all

[1] While Appellants initially noted that they were appealing both the judgment and the order denying the temporary injunction, *see* Statement of the Case, Appellants have decided only to move forward on the appeal of the judgment entered on March 16, which relates to the grant of the motion to dismiss.

"Minnesotans"—unless in an airport or on tribal lands—to wear masks in indoor businesses and public settings. Doc. 21 (Am. Petition ¶38, citing Emergency Executive Order ("EO") 20-81, available at https://mn.gov/governor/assets/EO%2020-81%20Final%20Filed_tcm1055-441323.pdf).[2]

Governor Walz persisted with the mask mandate until ending it, in part, on May 14, 2021. EO 21-23, *available at* https://mn.gov/governor/assets/Signed%20EO%2021-23%20Final_tcm1055-482197.pdf.[3] The mask mandate purportedly continues for Minnesota's K-12 schools. *Id.* In addition, Governor Walz continues to claim emergency authority under Minnesota Statutes, Chapter 12, which he believes would allow him to re-impose the mandate at any time.

II. The District Court Limited Its Inquiry to the Amended Petition and Embraced Documents, and Not the Fact Affidavits Related to the Temporary Injunction Motion.

In its Order, Doc. 69, the District Court noted that, in terms of the facts considered in deciding the motion to dismiss, it was only relying on the Amended Petition (Doc. 21) and the public documents referenced therein. Doc. 69 at 2 n.2.

[2] References to the Governor's executive orders referenced by the Amended Petition and the memoranda of law below (and which are also relevant public records) will refer directly to the EOs and their pages or paragraphs for clarity.

[3] While EO 21-23 post-dates the decision below, this Court may take judicial notice of public records using its "inherent power," where "the orderly administration of justice commends it." *Eagan Econ. Dev. Authority v. U-Haul Co. of Minn.*, 787 N.W.2d 523, 530 (Minn. 2010).

Because Appellants are only appealing the District Court's judgment entered pursuant to its grant of the motion to dismiss, only the facts in the Amended Petition, the public documents embraced by those documents, and other public documents related to which the Court takes judicial notice, are relevant to this Court's review.

III. A Brief Review of COVID-19 and Its Arrival in Minnesota.

The COVID-19 pandemic began in Minnesota on March 15, 2020, when the first known cases caused by community spread were reported. EO 20-81. On March 13, 2020, Governor Walz issued Executive Order 20-01, declaring a peacetime emergency because of COVID-19, and declaring it an act of nature. EO 20-01, available at https://mn.gov/governor/assets/EO%2020-01_tcm1055-422957.pdf. Notably, Governor Walz has repeatedly referred to COVID-19 as a "public health" emergency or crisis, including in EO 20-81. EO 20-81, ¶18.

IV. The Mask Mandate Created a Vague and Difficult-to-Implement Web of Requirements and Exceptions.

Again, on July 22, 2020, Governor Walz issued EO 20-81, which makes it illegal for any Minnesotan over the age of 5 not to wear a mask in "indoor businesses and indoor public settings." https://www.leg.state.mn.us/archive/execorders/20-81.pdf. EO 20-81, ¶2.

But EO 20-81 has exemptions for those who are under 5 years old; those who have a medical condition, mental health condition, or disability that makes it "unreasonable" for the individual to wear a mask; and those individuals for whom mask wearing at their workplace would "create a job hazard for the individual or

others, as determined by local, state, or federal regulators." EO 20-81, ¶8. What is "unreasonable" or poses a "job hazard" is undefined in EO 20-81.

Important as well, tribal members, or those within the federal land held in trust for Minnesota Tribal Nations, or any persons who are not citizens of Minnesota, are not subject to EO 20-81. EO 20-81, ¶¶2 ("Minnesotans"), 7 (tribal members on reservations and federal tribal trust lands). EO 20-81 thus leaves a broad swath of individuals within the territorial jurisdiction of Minnesota untouched, despite no valid distinction between these individuals and Minnesota residents in other locations in terms of their ability to spread COVID-19.

EO 20-81 also allows individuals to "temporarily remove" masks in certain circumstances:

> a. When participating in organized sports in an indoor business or indoor public space while the level of exertion makes it difficult to wear a face covering.
>
> b. When exercising in an indoor business or public indoor space such as a gym or fitness center, while the level of exertion makes it difficult to wear a face covering, provided that social distancing is always maintained.
>
> c. When testifying, speaking, or performing in an indoor business or public indoor space, in situations or settings such as theaters, news conferences, legal proceedings, governmental meetings subject to the Open Meeting Law… presentations, or lectures, provided that social distancing is always maintained….
>
> d. During practices or performances in an indoor business or indoor public space when a face covering cannot be used while playing a musical instrument, provided that social distancing is always maintained.

e. During activities, such as swimming or showering, where the face covering will get wet.

f. When eating or drinking in an indoor business or indoor public space, provided that at least 6 feet of physical distance is maintained between persons who are not members of the same party.

g. When asked to remove a face covering to verify an identity for lawful purposes.

h. While communicating with an individual who is deaf or hard of hearing or has a disability…or…condition that makes communication with that individual while wearing a face covering difficult, provided that social distancing is maintained to the extent possible between persons who are not members of the same household.

i. While receiving a service—including a dental…or…medical… examination or procedure, or personal care service—that cannot be performed or would be difficult to perform when the individual receiving the service is wearing a face covering.

j. When an individual is alone, including when alone in an office, a room, a cubicle with walls that are higher than face level when social distancing is maintained, a vehicle, or the cab of heavy equipment or machinery, or an enclosed work area….

k. When a public safety worker is actively engaged in a public safety role, including but not limited to law enforcement, firefighters, or emergency medical personnel, in situations where wearing a face covering would seriously interfere in the performance of their public safety responsibilities.

EO 20-81, ¶10. EO 20-81 also sets forth a set of requirements and exemptions for schools and childcare services. EO 20-81, ¶12.

EO 20-81 also states that "[b]usinesses must require that all persons, including their workers, customers, and visitors, wear face coverings as required by

this Executive Order." EO 20-81, ¶15a. Although EO 20-81 forces this requirement on businesses, it also says that businesses must:

a. provide accommodations to workers such as "permitting use of an alternate form of face covering . . . or providing service options that do not require a customer to enter the business." EO 20-81, ¶15b. There is no explanation of what can be done if either of these do not apply;

b. follow all requirements related to inquiry into conditions for workers' exemption from the mask mandate, EO 20-81, ¶15d;

c. not inquire about the reasons behind or proof of customers' mask-exemption conditions, EO 20-81, ¶15c; and
d. not restrain customers or remove them from the premises for violation of the mask requirement, EO 20-81, ¶15e.

EO 20-81 declares, without authority, that "[w]earing a face covering in compliance with this Executive Order or local ordinances, rules, or orders is not a violation of Minnesota Statutes 2019, section 609.735." EO 20-81, ¶19.

This patchwork of mask requirements and exemptions is based on authority claimed by the Governor under Minn. Stat. §§12.02, 12.21, 12.31, and 12.32.

V. Minn. Stat. §609.735 Criminalizes the Wearing of a Mask in Public, With Limited Exceptions Related to the Intent of the Wearer.

In 1963, the Minnesota Legislature passed, and the Governor signed into law, Minn. Stat. §609.735, which amended a prior law and made it illegal to conceal one's identity in public "by means of a . . . mask." https://www.revisor.mn.gov/laws/1963/0/Session+Law/Chapter/753/pdf/. Amendments to the statute in the subsequent decades added exceptions to the law, which include, in today's iteration, mask uses based on "religious beliefs, or

incidental to amusement, entertainment, protection from weather, or medical treatment." Minn. Stat. §609.735. The statute says, in full:

> A person whose identity is concealed by the person in a public place by means of a robe, mask, or other disguise, unless based on religious beliefs, or incidental to amusement, entertainment, protection from weather, or medical treatment, is guilty of a misdemeanor.

Wearing a mask to prevent one-self or others from contracting COVID-19 or spreading COVID-19 is not "medical treatment" under any definition of the term.

VI. Governor Walz' Executive Orders Have Regulated Nearly Every Aspect of Minnesotans' Lives Without Legislative Input.

Governor Walz' use of Chapter 12 of the Minnesota Statutes has impacted the State of Minnesota and its residents in breathtaking fashion. His orders are seemingly limitless in their scope; Executive Order 20-99, as just one example, categorizes virtually all industries in Minnesota as critical or non-critical, or public accommodation or not public accommodation, and treats them as Governor Walz deems appropriate. https://www.leg.mn.gov/archive/execorders/20-99.pdf. According to Governor Walz' orders: "'Business' and 'businesses' are broadly defined to include entities that employ or engage workers, including private-sector entities, public-sector entities, non-profit entities, and state, county, and local governments." EO 20-99, ¶5. In addition, Governor Walz regulated church attendance and even gatherings in Minnesotans' homes. He shut down churches and some businesses entirely (but exempted others, like labor union offices and Target). The regulated aspects of Minnesotans' lives include:

- Houses of worship

- Social gatherings in homes
- K-12 schools
- Judicial proceedings
- Sobriety and mental health support groups
- Health care and residential facilities
- Landlords' ability to evict delinquent tenants
- Weddings and funerals
- Outdoor recreation, including hunting, fishing, trapping, boating, hiking, biking, golfing, picnicking, skiing, skating, and snowshoeing
- Outdoor recreation such as soccer and basketball
- Establishments and facilities that offer food and beverage not for on-premises consumption, including grocery stores, markets, convenience stores, pharmacies, drug stores, and food pantries
- Crisis shelters, soup kitchens, or similar institutions
- Restaurants, food courts, cafes, coffeehouses, bars, taverns, breweries, microbreweries, distilleries, brewer taprooms, micro distiller cocktail rooms, tasting rooms, wineries, cideries, clubhouses, dining clubs, tobacco product shops, hookah bars, cigar bars, vaping lounges, and other Places of Public Accommodation offering food, beverages (including alcoholic beverages), or tobacco products for on-premises consumption
- Public pools, gymnasiums, fitness centers, recreation centers, indoor sports facilities, indoor climbing facilities, trampoline parks, indoor and outdoor exercise facilities, martial arts facilities, and dance and exercise studios
- Venues providing indoor events and entertainment such as theaters, cinemas, concert halls, festivals, fairs, vendor fairs, museums, performance venues, stadiums, arcades, and bowling alleys
- Venues providing outdoor events and entertainment such as racetracks, paintball, go-karts, mini-golf, performance venues, festivals, fairs, vendor fairs, and amusement parks
- Minnesota State Parks, Trails, State Forests, State Recreation Areas, Wildlife Management Areas, Scientific and Natural Areas, and other State managed recreational lands
- Outdoor parks, trails, arboretums, and gardens
- Public and private marinas and docks…as well as facilities that provide safety-related services including fueling, emergency dockage, and sanitary pump-out stations
- Public and private golf courses and outdoor driving ranges
- Ski areas, Nordic trails, snow tubing hills, sledding hills, and outdoor skating rinks
- Lake service providers who install, repair, and remove docks, boatlifts

- Outdoor shooting ranges and game farms
- Outdoor recreational equipment rental outlets
- Public and private campgrounds
- Barbershops, salons, and other [personal care businesses]
- Household services businesses
- Licensed childcare providers
- Organized Youth Sports
- Organized Adult Sports
- Professional and intercollegiate athletes and teams
- Higher education institutions

The list goes on. There isn't much about Minnesotans' lives that Governor Walz has *not* regulated by executive order in the past year and a half. And Governor Walz claimed the authority to do all of this pursuant to Chapter 12 of the Minnesota statutes, the Minnesota Emergency Management Act ("MEMA").

In addition, the only practical temporal limitation on Governor Walz' claimed executive power appears to be the end of his term—he has now held onto his emergency powers for more than half of his gubernatorial term.

VII. The Mask Mandate Was Intrusive and Significantly Affected Minnesotans' Daily Lives.

EO 20-81 changed how all Minnesotans interacted with their neighbors daily. The mandate required every business in Minnesota to place a bulletin instructing patrons to wear a mask due to the mandate. EO 20-81, ¶14. Businesses were forced to confront employees, customers, or visitors who refused to wear a mask, with potential abounding for violating the Americans with Disabilities Act and other federal regulations. EO 20-81, ¶15. The specter of fines and closure orders from the state hung over these businesses when any third party turned them in for *apparent*

violations to Attorney General Ellison—without knowing whether those apparent violations were *actual* violations. EO 20-81, ¶20; https://www.ag.state.mn.us/Office/Forms/COVID19Complaint.asp. The mask mandate compelled Minnesotans to express agreement with the State with the symbol of the state over their mouths and noses.

Governor Walz imposed this order on Minnesotans without legislative approval. Governor Walz had four months from the time he initially declared an emergency to discuss the possibility of a mask requirement with the Legislature. Yet instead of negotiating with both houses of the Legislature, Governor Walz issued EO 20-81.

VIII. Appellants Object to the Government Forcing Them to Wear Masks in Public Indoor Spaces Because It Compels Them to Speak Against Their Will.

Appellants believe that wearing a mask makes it appear that they agree with EO 20-81 and the government's position that mask wearing is an effective and appropriate public health measure. Am. Petition ¶¶76-81, 95-97, 98-100, 103, 105-107, 109-110, 122-130. Wearing masks, in Appellants' eyes, is virtue signaling.[4] Am. Petition ¶¶81, 95-96, 99-100, 103, 105-107, 109-110. Appellants fear the potential civil and criminal consequences of not following EO 20-81. Am. Petition ¶¶82, 84-86, 95-110. Some of the Appellants hold bona fide religious beliefs that it

[4] A brief stroll through Twitter provides ample evidence that people on both sides of the political aisle consider mask-wearing or refusal to be political speech. *E.g.*, https://twitter.com/davidhogg111/status/1393191013808754688?lang=en; https://twitter.com/StephenM/status/1387110038779711493.

is sinful for them to wear masks, or that masks interfere with their ability to worship. Am. Petition ¶¶82-83, 134. Some feel so strongly about this issue that they perform civil disobedience and refuse to wear a mask, even though they are afraid of prosecution. Am. Petition ¶¶82, 98. Some appellants have experienced medical problems and employment discrimination because they have a valid medical reason to not wear a mask. Am. Petition ¶¶104, 105. Appellants do not understand the vague categories of exemptions and requirements in EO 20-81. Am. Petition ¶¶39-44, 96, 101, 103, 108, 130, 138.

ARGUMENT AND AUTHORITIES

I. Introduction

Governor Walz and Attorney General Ellison appear to believe that MEMA allows the executive branch of Minnesota's republican form of government to ignore the Legislature entirely and regulate every single aspect of Minnesotans' lives, even setting aside contrary laws passed by the Legislature. Appellants believe that this interpretation violates the Minnesota Constitution's Article III, Section 1, and renders the separation of powers in Minnesota illusory.

Since the Northwest Ordinance of 1789, those in the Northwest Territory, which includes the part of Minnesota east of the Mississippi River, have been guaranteed a republican form of government, with a legislature that makes laws, an executive that enforces them, and a judiciary that interprets them. Minnesota's Constitution enshrined this provision in Article III, Section 1. Governor Walz and

Attorney General Ellison have thrown off these shackles of constitutional restraint, and Executive Order 20-81 is a symptom of that problem.

This Court should restrain Respondents' illegal action, reverse the District Court, and instruct the District Court to issue the Writ of Quo Warranto. Related to the specific issues raised on appeal here, Appellants ask this Court to hold as follows:

(1) Minn. Stat. §§12.02, 12.21, and 12.31, which Governor Walz claims enabled him to issue EO 20-81, are an unconstitutional delegation of power from the Legislature to the Governor in violation of Minnesota Constitution Article III, section 1.

(2) Even if these statutes are not an unconstitutional delegation of power, Governor Walz did not have the legal authority under Minn. Stat. §§12.02, 12.21, and 12.31 to declare a peacetime emergency based on a public health matter that does not endanger property.

(3) Even if Governor Walz did have the authority to declare a peacetime emergency under MEMA, EO 20-81 exceeds the power granted by Section 12.32 because Section 12.32 does not allow a MEMA-based order to set aside contrary statutes. Alternatively, if MEMA is interpreted to allow EO 20-81 to override a contrary statute, then MEMA is unconstitutional because it creates an illegal line-item veto.

(4) EO 20-81, and MEMA in purportedly enabling it, violate the First Amendment to the United States Constitution and Article I, Section 16 of the Minnesota Constitution.

Appellants will address each issue in turn after setting forth basic principles applicable to each issue on appeal.

II. The District Court's Grant of Respondents' Motion to Dismiss and Its Statutory Interpretation Is Subject to *De Novo* Review.

A District Court's decision to grant a motion to dismiss under Rule 12.02(e) of the Minnesota Rules of Civil Procedure is subject to *de novo* review. *Sipe v. STS Mfg., Inc.*, 834 N.W.2d 683, 686 (Minn. 2013). When the Court reviews "questions of law de novo, [it] giv[es] no deference to the district court's conclusions of law. *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 214 (Minn. 2014).

The District Court below was required to "consider only the facts alleged in the complaint, accepting those facts as true and…constru[ing] all reasonable inferences in favor of the nonmoving party." *Finn v. Alliance Bank*, 860 N.W.2d 638, 653 (Minn. 2015) (quotation omitted). The District Court was also authorized to consider documents attached to or referenced in the complaint. *Northern States Power Co. v. Metropolitan Council*, 684 N.W.2d 485, 490 (Minn. 2004).[5] As noted above, this Court may also take judicial notice of public records using its "inherent power," where "the orderly administration of justice commends it." *Eagan Econ. Dev. Authority v. U-Haul Co. of Minn.*, 787 N.W.2d 523, 530 (Minn. 2010). Given the post-argument and post-decision orders issued by Governor Walz which are relevant to this appeal, Appellants believe it is appropriate for the Court to take

[5] Appellants are not challenging "sufficiency of the evidence," as opposed to whether the District Court erred as a matter of law on the Rule 12 motion.

notice of any relevant executive order issued by the Governor related to his use of Chapter 12 powers and the mask mandate.

Further, Appellants agree with the District Court that whether Chapter 12 violates the Minnesota Constitution, whether EO 20-81 exceeds the Governor's statutory authority, or whether Minn. Stat. §609.735 preempts EO 20-81 involve statutory interpretation. Add. 9-10. When deciding what these legal provisions mean, the Court should strive to "ascertain and effectuate the intention of the legislature." Minn. Stat. §645.16. If a provision subject to statutory interpretation is unambiguous, plain meaning controls. *Ninetieth Minnesota State Senate v. Dayton*, 903 N.W.2d 609, 617 (Minn. 2017). The Court cannot add words to a provision that do not exist, or "supply what the legislature either purposely omitted or inadvertently overlooked." *Tracy State Bank v. Tracy-Garvin Coop.*, 573 N.W.2d 393, 395 (Minn. Ct. App. 1998) (citation omitted). A provision is ambiguous if it is subject to more than one reasonable interpretation. *Figgins v. Wilcox*, 879 N.W.2d 653, 656 (Minn. 2016). If there is ambiguity in a provision subject to statutory interpretation, the Court should "may look to other factors, such as the occasion and necessity for the law, to determine legislative intent. Minn. Stat. §645.16." *Lietz v. N. States Power Co.*, 718 N.W.2d 865, 870 (Minn. 2006).

III. The District Court Erred by Relying on a "Nonbinding and Expired" Deferential Standard to a Governor's Executive Orders.

The District Court erred in its analysis from the beginning by affording far too much deference to Governor Walz' executive orders during the COVID-19

pandemic. Add. 10-11. As the District of Minnesota has now recognized, normal canons of scrutiny apply to the Governor's orders. *Northland Baptist Church v. Walz*, 2021 WL 1195821, at *10-11 (D. Minn. Mar. 30, 2021) (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020)). The United States Supreme Court itself abandoned the *Jacobson v. Massachusetts* standard well before the District Court made its decision in this case. *Northland Baptist Church*, 2021 WL 1195821, at *10-11; *Roman Catholic Diocese*, 141 S. Ct. 63 (2020).

Yet the District Court relied on Chief Justice Roberts' concurrence in *South Bay United Pentecostal Church v. Newsom*, which expressly invoked *Jacobson*. Add. 11. As Justice Gorsuch noted in his concurrence in *Roman Catholic Diocese*, Chief Justice Roberts' opinion, on which the District Court relied, is "a nonbinding and expired concurrence." *Roman Catholic Diocese*, 141 S. Ct. at 70 (Gorsuch, J.). Further, the District Court relied heavily on Judge Schiltz' decision in *Minnesota Voters Alliance v. Walz*, 492 F. Supp. 3d 822 (D. Minn. 2020), which also relied heavily on *Jacobson*. Add. 24, 28, 33, 35; *Minnesota Voters Alliance*, 492 F. Supp. 3d at 836-38. Thus, to the extent the District Court relied on a higher than normal level of deference for "judicial review of an executive order designed to limit the spread of COVID-19," Add. 10, it clearly erred. As this Court will see, this extreme deference continued throughout the District Court's opinion below.

IV. Because Governor Walz Continues to Assert Authority to Impose a Mask Mandate, This Case Remains a Live Controversy.

Appellants would dismiss this action if Respondents would agree to settle this action by giving up the authority to re-impose a mask mandate under Governor Walz' claimed COVID-19 powers. The parties could go their separate ways and end the controversy. It would be simple and save the Court time and the parties their resources. However, that hasn't happened. And because Respondents have not taken that action, this case remains a live controversy susceptible to judicial review.

The United States Supreme Court just held that the cessation of a COVID-19 emergency order does not moot applications for injunctive relief against those orders. *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021). The Court so held because of the possibility that a Governor might re-impose the restrictions complained of by a subsequent executive order, so long as he claimed to retain his emergency powers:

> Fourth, even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case. And so long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants "remain under a constant threat" that government officials will use their power to reinstate the challenged restrictions.

Id. at 1297. Consequently, this action remains live and the Court may still rule here.

V. MEMA Violates the Separation of Powers Principle Rooted in the Minnesota Constitution.

The purpose of Article III, Section 1 of the Minnesota Constitution is to prevent situations like this from happening. The Governor of Minnesota simply cannot exercise the entire power of the Legislature for 15 months and counting

because of a declared emergency. This is especially true given that EO 20-81 was issued several *months* after the original emergency declaration, after the Legislature had many opportunities to propose and pass a mask mandate, and after the Governor had months to consider the wisdom of a mask mandate and negotiate a deal with the Legislature to pass such a law. Because, at least in Governor Walz' interpretation and application of it, MEMA allows him to control every aspect of Minnesotans' lives through legislative action, MEMA is unconstitutional, and the orders that flow from it, including EO 20-81, are invalid. This Court should reverse the District Court on this basis.

A. Article III, Section 1 of the Minnesota Constitution Prohibits Delegation of Pure Legislative Power.

Minnesota's courts have interpreted Article III, Section 1 as prohibiting the Legislature from delegating pure legislative power to the Governor. *Lee v. Delmont*, 36 N.W.2d 530, 538 (Minn. 1949). "Pure legislative power, which can never be delegated, is the authority to make a complete law—complete as to the time it shall take effect and as to whom it shall apply—and to determine the expediency of its enactment." *Lee v. Delmont*, 36 N.W.2d 530, 538 (Minn. 1949).

Justice Page, in his concurrence in *Brayton v. Pawlenty*, aptly enunciated the distinction between *administering* a law and *creating* a law under Article III, Section 1 by citing to *State v. Great Northern Railway Co.*, 111 N.W. 289 (Minn. 1907):

> The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and the conferring of authority or discretion to be exercised under and in pursuance of the law. . . . We found the statute at issue constitutionally

> deficient because it committed "the whole subject of the increase of capital stock by railway corporations to the judgment and discretion of the commission."

Brayton v. Pawlenty, 781 N.W.2d 357, 369 (Minn. 2010) (Page, J., concurring) (cleaned up). As Justice Page noted, in *Great Northern Railway*, the Minnesota Supreme Court struck down a law that delegated the "the manner in which and the terms upon which that capital stock of railway corporations may be increased." 111 N.W. at 294. This impermissible delegation gave away the whole *substantive* scope of that authority—regardless of any *procedural* limitations on it. *Id.* It gave the question of whether capital stock could be raised to "the exclusive judgment and discretion of the commission." *Id.* at 293.

Similarly, leaving discretion to the Governor to determine what penalties to impose under a statute violates the nondelegation doctrine. *State v. Oliver Iron Min. Co.*, 292 N.W. 407, 410–11 (Minn. 1939) ("Without defining the conditions which the commission must find before it could impose a penalty the legislature could not, as the state claims, leave the imposition of the penalty to the discretion of the commission. There would be an unconstitutional delegation of legislative powers."). Governor Walz has claimed the power to do just that in each of his orders, including EO 20-81, in excess of the limitation of Minn. Stat. §12.45. *E.g.*, EO 20-81, ¶20.

More recently, the Minnesota Supreme Court held unconstitutional the delegation of judicial authority to handle child support cases to Administrative Law Judges because the "statute explicitly grants ALJs 'all powers, duties, and responsibilities conferred on judges of district court' to handle child support cases."

Holmberg v. Holmberg, 588 N.W.2d 720, 724 (Minn. 1999). The Court expressed "grave separation of powers concerns" with this arrangement—even though appellate review of ALJ decisions would be available under the law. *Id.* at 725. Turning over the *substantive powers* of one branch to another with limited *procedural limitations*, violates the Minnesota Constitution.

These decisions outline some of the contours of Minnesota's nondelegation doctrine. Laws that purport to give power to administer discretionary penalties violate the doctrine. Likewise, laws that allow another constitutional body to regulate what is properly within legislative purview violate the doctrine. And, limiting provisions, like appellate review, do not save laws from impermissible delegation of the powers that give rise to the review.

B. The Michigan Supreme Court's Voiding of Governor Whitmer's COVID-19 Orders Based on Legal Provisions Nearly Identical to Minnesota's Shows the Nondelegation Doctrine Should Apply Here.

In the context of COVID-19 executive orders, the Michigan Supreme Court analyzed Governor Whitmer's use of Michigan's emergency law and properly found that the Michigan emergency management law unconstitutionally delegated legislative power to the Governor. The Michigan court's correct application of nondelegation law should be persuasive to this Court.

Michigan's constitutional nondelegation provision states:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

Mich. Const. art. 3, §2.

Minnesota's Article III, section 1 likewise states:

> The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.

These are virtually identical. So too is the Michigan law struck down and the Minnesota law at issue here. Michigan's law stated, in relevant part:

> "After making the proclamation or declaration, the governor may promulgate *reasonable* orders, rules, and regulations as he or she considers *necessary* to protect life and property or to bring the emergency situation within the affected area under control." *In re Certified Questions From United States Dist. Court, W. Dist. of Michigan, S. Div.*, No. 161492, 2020 WL 5877599, at *16 (Mich. Oct. 2, 2020) (emphasis in original).

Likewise, in Minnesota, Minn. Stat. §12.31, Subd. 3 purports to allow the Governor to "exercise for a period not to exceed the time specified in this section the powers and duties conferred and imposed by this chapter for a peacetime emergency." Those powers and duties, as described by Section 12.32, include the power to "make necessary orders and rules to carry out the provisions of this chapter." Indeed, the Governor claims this sweeping authority in EO 20-81: "Pursuant to subdivision 3 of [Minn. Stat. §12.21], the Governor may 'make, amend, and rescind the necessary orders and rules to carry out the provisions' of Minnesota Statutes 2019, Chapter 12."

In Michigan, the Supreme Court held that this incredibly broad scope of delegated power constitutes "the power to reorder social life and to limit, if not altogether displace, the livelihoods of residents across the state and throughout wide-ranging industries." *In re Certified Questions*, 2020 WL 5877599, at *15 (listing more than 40 different industries affected by Governor Whitmer's orders).

Any observer of Governor Walz' orders can see the parallel between their scope of claimed substantive authority and Governor Whitmer's. Appellants invite the Court to review the above list of regulated businesses and activities pulled from Governor Walz' executive orders to see how broadly Governor Walz has asserted legislative authority. The list of industries which he has categorized as critical or non-critical, or public accommodation or not public accommodation, is seemingly limitless. There is no difference between Governor Whitmer's unconstitutional power grab and Governor Walz' in terms of the scope of claimed authority.

And even if there are "procedural" limitations on a governor's authority, as the Michigan Supreme Court pointed out, unconstitutional delegation of substantive power, "for only two days," is still unconstitutional. *In re Certified Questions*, 2020 WL 5877599, at *14.

The Michigan Supreme Court did, however, address purported procedural limitations on Governor Whitmer's authority under the Michigan emergency management law. *In re Certified Questions*, 2020 WL 5877599, at *16. That court was troubled with the apparent indefinite duration of Governor Whitmer's powers under the Michigan law. *Id.* Minnesota's law, at least under Governor Walz'

interpretation and application of it, has no time limitation other than the end of the Governor's term. If one only looks superficially at Chapter 12, there is an illusion of a 30-day limitation on Governor Walz' authority. Minn. Stat. §12.31, Subd. 2(b). But this 30-day limitation is, in practice, meaningless. Governor Walz has exercised untrammeled control over Minnesota's entire economy and social fabric for fifteen months and counting now. Governor Walz' claim to emergency power remains in effect indefinitely, until he decides the emergency has passed, or if the Legislature, by a vote of *both houses*, removes the Governor's emergency powers. There has only been a Legislative majority of both houses in a party different from the Governor in Minnesota for a total of approximately 29 years (1905-10, 1931-32, 1963-64, 1971-72, 1980, 1985-86, 1991-98, 2007-10, 2017-18) in the last 119. https://www.lrl.mn.gov/history/caucus_table. The purported temporal limitation in Chapter 12 has no practical purpose, so long as the Governor enjoys a slim majority in just one house[6] of Minnesota's Legislature, which has been the case throughout Governor Walz' regime.

Thus, in Michigan, because Governor Whitmer could essentially do anything she considered "reasonable" or "necessary"—and she did that, regulating nearly

[6] A meaningful procedural limitation would, at least, require both houses of the legislature to agree that an emergency should extend beyond the initial time period. *See* Wis. Stat. § 323.10 ("A state of emergency shall not exceed 60 days, unless the state of emergency is extended by joint resolution of the legislature."), as discussed in *Fabick v. Evers*, 956 N.W.2d 856 (Wis. 2021). If a situation is truly an ongoing emergency, it should be apparent to all, not just one political party.

every aspect of Michiganders' lives, much like Governor Walz has done in Minnesota—and because there was no significant restraint on the amount of time such orders could remain in effect (like with Governor Walz' 15-month and counting rule over Minnesota), the Michigan emergency powers law was held to be an unconstitutional delegation of legislative authority. *Id.* at 8-16. Likewise, MEMA is unconstitutional here.

C. The District Court Misapplied the Nondelegation Doctrine to Chapter 12.

First, the District Court only noted that MEMA has "procedural and temporal limitations" on the Governor's authority thereunder. Add. 12-13. This is a tacit admission that the substantive scope of the law's delegation is unlimited. Appellants agree with the Michigan Supreme Court that even two days of substantive delegation of the legislature's entire powers is two days too long.

The District Court then cited *Lee v. Delmont* for the premise that "a delegation of power is proper if it provides a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies." Add. 15 (cleaned up). The District Court also adopted Respondents' view of the delegation question: "whether, in delegating emergency management to the Governor—the actual authority delegated in MEMA—the Legislature gave constitutionally sufficient guidance to the Governor." Add. 16. These formulations do not hamper Appellants' claims here because Chapter 12 is, beyond a reasonable doubt, a delegation of full legislative

power to the Governor, as discussed above. And "when the scope [of claimed power] increases to immense proportions ... the standards must be correspondingly more precise." *Synar v. United States*, 626 F. Supp. 1374, 1386 (D. D.C., 1986)." *In re Certified Questions*, 958 N.W.2d at 18.

Boiled down to the essence, the District Court then held that five things make MEMA a constitutional delegation: (1) there are certain predicate reasons for which a Governor can declare an emergency; (2) an emergency must endanger both life and property; (3) local government resources must be inadequate to handle the situation; (4) both houses of the Legislature can end an emergency; and (5) an emergency cannot extend beyond 30 days. Add. 17-18.

Appellants will address item 1 below, related to whether a public health emergency can ever be a predicate for a peacetime emergency under MEMA. Related to item 2, the District Court erred by not considering whether Governor Walz' *ipse dixit* that "life and property" are endangered by COVID-19. The District Court incorrectly held that Appellants did not challenge whether COVID-19 affects both life *and* property. *Compare* Add. 19 n.10 *with* Doc. 63 at 9 ("But as for true "public health emergencies" in the form of infectious disease (which do not damage "property," further removing them from the scope of Section 12.31), the Legislature put power to address the spread of disease in specific health-related statutes that allow for quarantine and due process."). There is no question that COVID-19, a communicable disease, threatens life. But it does not threaten property, and Governor Walz' emergency orders do not identify any property endangered by

COVID-19. They merely say that property is endangered in a feeble attempt to satisfy the statute.

Item 3 of the District Court's analysis is a non-standard, which the District Court's analysis reveals. The District Court held that the Governor's mere declaration—his *ipse dixit*—that local government resources are inadequate justifies the exercise of emergency powers. Add. 21-22. To arrive at this conclusion, the District Court faulted Appellants' allegations—at the Rule 12 stage—that the Governor had not supported his declaration that local resources were inadequate to deal with COVID-19 with empirical evidence. Add. 22. The District Court flipped the Rule 12 analysis and put upon Appellants the burden of *proving a negative*, a concept totally foreign to a motion to dismiss. *See, e.g., In re UnitedHealth Grp. Inc. S'holder Derivative Litig.*, 754 N.W.2d 544, 561 (Minn. 2008) ("all else being equal, the burden is better placed on the party with easier access to relevant information"). If a litigant pleading a constitutional violation is forced to peer inside the mind of the Governor—with no discovery—and identify what he is thinking, then it is impossible for the Governor to ever fail the District Court's supposed "standard." This Court should reverse on this ground alone, because whether the Governor properly declared a peacetime emergency depends on facts supporting that declaration which are particularly in the Governor's hands. And if the Governor need not prove anything to satisfy this supposed test, then where is the standard?

Further, the District Court is correct that the Amended Petition refers to hospital resources. Add. 22. But what other local government resources are taxed

by a communicable disease that does not endanger property? The District Court does not say. If there are no such local government resources being taxed, then there is no reason for an emergency. And if there are, then the Governor must identify them and support his emergency. Again, if the Governor's say-so is enough, this supposed test is not a test at all.

Finally, as noted above related to items 4 and 5, there is no practical temporal limitation on the Governor's powers written into Chapter 12 because both houses of the Legislature are required to terminate an emergency, and Governor Walz has been using "emergency" powers for 15 months and counting, even now, when life for Minnesotans is entirely back to normal and a substantial majority of adult Minnesotans have been vaccinated against COVID-19. An emergency is not something that should be definable as such by one political party or half of the population—it should be something that everyone agrees is an *ongoing* problem. Thus, unlike Wisconsin's both-houses approach, MEMA provides no actual procedural check on legislative delegation.

For all practical purposes—statutes deal with practical matters, not the hypothetical—none of these supposed limitations actually limit the Governor. The District Court's interpretation of "act of nature" cobbles together Black's Law Dictionary and Merriam-Webster, and appears to be anything "in the process . . . [of] the external world in its entirety." Add. 20. Or it might be, "[a]n overwhelming, unpreventable event caused exclusively by forces of nature." *Id.* Under these definitions, the Governor could call a peacetime emergency for virtually anything.

For example, there is no reason that the Governor cannot issue a similar declaration based on "climate change," which he identified as an "existential threat" in Executive Order 19-37 in 2019. https://mn.gov/governor/assets/2019_12_2_EO_19-37_Climate_tcm1055-412094.pdf. And given the "climate change" is defined by many influential people as an ongoing problem that will require decades of work to address, Governor Walz could simply declare a climate emergency, ban all gas vehicles, and wait for the courts to sort it out until the end of his term.

* * * *

MEMA therefore creates the exact scenario that *Great Northern Railway* prohibited: it commits the entirety of the laws of the state of Minnesota to the "exclusive judgment and discretion" of the Governor, rather than the discretion to execute laws related to the specific subjects of those laws. Appellants listed above some of the businesses and activities controlled by Governor Walz pursuant to his claimed authority under Chapter 12. The breadth of his claimed authority is case in point: what is it that Governor Walz believes he *cannot do* under Chapter 12?

As to EO 20-81, it commits the whole subject of wearing a mask to the Governor. Nowhere is there any enabling provision or limitation in Chapter 12 on the Governor's supposed authority to force people to wear masks. But under the Governor's legal position, for example, the Governor could force people to wear masks while taking showers or sleeping. Just because Governor Walz drew lines at certain absurdities does not mean the statute, interpreted in the manner the

Respondents pressed below and which the District Court adopted, would not extend to absurdities. EO 20-81 provides the time the mask mandate will take effect, creates punishments for violations, and tells the Attorney General and others to enforce it. It is a "law" made out of whole cloth based on Chapter 12's limitless enabling. This Court should reverse the District Court and hold that Minn. Stat. §§12.02, 12.21, and 12.31, which Governor Walz claims enabled him to issue EO 20-81, are an unconstitutional delegation of power from the Legislature to the Governor in violation of Minnesota Constitution Article III, section 1.

VI. The COVID-19 Pandemic Is Not an Event that Could Trigger a Peacetime Emergency Under MEMA.

COVID-19 is a dangerous infectious disease for many people, and still of unknown origin. There is no question that, regardless of government action, many people would have changed their lives and daily routines because of it. And the Legislature has given the Executive a number of tools to deal specifically with public health issues, such as quarantine for specific persons infected with a communicable disease while following due process protocols. *See* Minn. Stat. §§144.419 through 144.4199. However, in 2005, the Legislature removed the Governor's power to declare a peacetime emergency because of a public health crisis. Recognizing this limitation on the Governor's power, some in the Legislature attempted to give the Governor that power back in 2020. That measure failed. Therefore, because the COVID-19 relates to "public health," and the Legislature removed the Governor's former power to declare a public health emergency under

MEMA, the Governor's COVID-19 Executive Orders exceed his legal authority and should be struck down.

A. COVID-19 Is Not Within the Plain Meaning of "Act of Nature" Under Chapter 12.

The District Court held that the plain meaning of "act of nature" includes COVID-19, and therefore the Governor had authority to declare an emergency on its basis. Add. 19-22. As noted above, however, there is no limit to what could constitute an "act of nature" based on the District Court's incredibly broad definition. The District Court faulted Appellants for not specifically stating what an "act of nature" is, which seems contradictory given the District Court's inability to limit it beyond anything "in the process . . . [and of] the external world in its entirety." Add. (20). As Appellants pointed out before, whether a pandemic is an "act of nature" is not a settled matter at all.

For example, competing expert witnesses' exhaustive reviews of hundreds of contracts that either used or did not use the phrases "calamity," "natural disaster," "Act of God," or "*force majeure*" related to pandemic risk did not create a rule for defining what those terms mean as a matter of uniform usage. *AB Stable VIII LLC v. Maps Hotels And Resorts One LLC*, No. CV 2020-0310-JTL, 2020 WL 7024929, at *64 (Del. Ch. Nov. 30, 2020). There, the Delaware Chancery Court noted that

> It is difficult to reach strong conclusions based on these data, but it is possible to reject the proposition that general terms like "calamity," "natural disaster," "Act of God," or "*force majeure*" never can encompass pandemic risk because a meaningful number of agreements make explicit connections among these terms. The fact that the Sale Agreement omitted an express reference to "pandemics"

> is therefore not dispositive, providing an additional reason to reject Buyer's argument.

If there is ambiguity in a legal provision subject to statutory interpretation, the Court should "may look to other factors, such as the occasion and necessity for the law, to determine legislative intent. Minn. Stat. §645.16." *Lietz v. N. States Power Co.*, 718 N.W.2d 865, 870 (Minn. 2006). Because there is no uniformly accepted definition of "act of nature" as encompassing or not encompassing a pandemic, the plain meaning of Chapter 12 does not control. The Court must therefore look to legislative intent, including legislative history. *See* Minn. Stat. §§645.08, 645.16. Pursuant to the canons of statutory construction, when "the words of a law are not explicit" (such as including "public health emergency" as a basis for gubernatorial power), "the intention of the legislature may be ascertained by considering, among other matters: (5) the former law, if any, including other laws upon the same or similar subjects." *Id.*

B. The Legislature Removed "a Public Health Emergency" From the Governor's Chapter 12 Powers in 2005 and Created More Surgical Public Health Crisis Remedies for the Executive Branch.

Because "act of nature" in Minn. Stat. §12.31 is ambiguous, the Court should turn to the law's legislative history to ascertain intent. The Legislature removed the provision for declaration of a "public health emergency" from the Governor's powers in 2005 by passing H.F. 1555, which modified Minn. Stat. §12.31. It reads as follows, in relevant part:

> Subd. 2. [DECLARATION OF PEACETIME EMERGENCY.] (a) The governor may declare a peacetime emergency. A peacetime

> declaration of emergency may be declared only when an act of nature, a technological failure or malfunction, a terrorist incident, ~~a public health emergency,~~ an industrial accident, a hazardous materials accident, or a civil disturbance endangers life and property and local government resources are inadequate to handle the situation.

When the Legislature made this change, it added new remedies for the Department of Health to specifically deal with public health matters like COVID-19. Minn. Stat. §§144.419-144.4199. These statutes govern: Isolation and Quarantine of Persons (§144.419); Due Process for Isolation or Quarantine of Persons (§144.4195); Employee Protections (§144.4196); Emergency Vaccine Administration; Legend Drug (§144.4197); Mass Dispensing Under Authority of Commissioner of Health (§144.4198); Public Health Response Contingency Account (§144.4199). Unlike the Governor's claim to be able to rule the state without check for months on end, these statutes limit the Department of Health's discretion to dealing with individual infected persons who may pose a pandemic threat, and they are specifically designed to protect individuals' due process rights. In contrast, the Governor's sweeping orders and the Attorney General's selective prosecutions of "offenders" deny wholesale the due process owed to Minnesota's citizens.

Tellingly as well, in response to the COVID-19 pandemic, House File No. 4326 was introduced on March 9, 2020, about a week before the Governor declared a peacetime emergency, to include "public health emergency" as a reason for the Governor to declare a peacetime emergency. That bill failed.

The repeal of the "public health emergency" text and the failure to re-enact this language means that there is no express statutory authority under Minn. Stat. §12.31 to declare a "public health emergency." Because the statute was amended to remove any authority to declare a "public health emergency," and the Legislature failed to re-enact that power, the Court should hold that this evinces intent to remove "public health emergencies" from the Governor's Chapter 12 powers.

VII. There Is an Irreconcilable Conflict Between EO 20-81 and Minn. Stat. §609.735.

Even if the Court holds that Chapter 12 is not a facially unconstitutional delegation of legislative power, EO 20-81 must still be set aside if the Court holds that EO 20-81 and Minn. Stat. §609.735 conflict. If they conflict, then either MEMA as applied via EO 20-81 is an unconstitutional delegation, or EO 20-81 exceeds the Governor's statutory authority based on Minn. Stat. §12.32. First, if the Court agrees that EO 20-81 and Minn. Stat. §609.735 conflict, and the Court holds that the order supersedes the statute, then MEMA unconstitutionally creates in Governor Walz a power that he simply does not have—the power to write out statutes that were passed by a prior Legislature and signed by a prior Governor. If so, EO 20-81 must be enjoined. Alternatively, because Minn. Stat. §12.32 only allows the Governor to set aside "rules and ordinances" via an executive order, if the provisions conflict, the statute wins. And because Minn. Stat. §609.735 is a general intent statute that criminalizes the wearing of a mask in the manner required by EO 20-81, there is an irreconcilable conflict, and EO 20-81 should be struck down.

A. Minn. Stat. §609.735 Is a General Intent Statute.

The District Court read a specific intent[7] requirement into Minn. Stat. §609.735 based on what the court claimed was its plain meaning, and based on principles of due process and statutory construction. Add. 24-29. Appellants believe the plain meaning of the statute, its structure, and the purpose of implied specific intent require the contrary.

1. The Plain Meaning of Minn. Stat. §609.735 Makes It Illegal to Wear a Mask in Public Absent Specific Intent to the Contrary.

Again, Minn. Stat. §609.735 states:

> A person whose identity is concealed by the person in a public place by means of a robe, mask, or other disguise, unless based on religious beliefs, or incidental to amusement, entertainment, protection from weather, or medical treatment, is guilty of a misdemeanor.

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[7] The Minnesota Supreme Court has, relatively recently, explained the difference between specific and general intent:

> When a statute simply prohibits a person from intentionally engaging in the prohibited conduct, the crime is considered a general-intent crime…. Unlike a general-intent crime, a specific-intent crime requires an "intent to cause a particular result."….Although "specific intent" is sometimes used to refer to the "mental state of intent," "the most common usage of 'specific intent' is to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime."….The phrase "with intent to" is commonly used by the Legislature to express a specific-intent requirement.[3] *State v. Mullen,* 577 N.W.2d 505, 510 (Minn.1998).

State v. Fleck, 810 N.W.2d 303, 308–09 (Minn. 2012) (citing Minn. Stat. §609.02, Subd. 9 in footnote 3 for specific intent language).

This law's plain meaning is: if someone "conceal[s]" himself "by means of" a "mask," unless he has a reason to do so listed in the statute, he is guilty of a misdemeanor. One of Merriam-Webster's two definitions of "conceal" is "to place out of sight." https://www.merriam-webster.com/dictionary/conceal. Governor Walz is fond of calling masks "face *coverings*." EO 20-81. There is an obvious reason for this—masks which comply with EO 20-81 "cover" one's nose and mouth—they conceal the face. EO 20-81 ¶3a.

Further, the District Court imported one possible implication of the word, "disguise," into the practical result of wearing one, and into every possible clothing item worn under section 609.735. Add. 24. However, the use of the noun "disguise" itself does not necessarily require intent—it could simply refer to an article of clothing which has the effect of disguising. In fact, the statute uses the phrase "by means of," which renders robes, masks, and other disguises mere instrumentalities of concealment. https://www.collinsdictionary.com/us/dictionary/english/by-means-of#:~:text=phrase,full %20dictionary%20entry%20for%20means ("If you do something **by means of** a particular method, instrument, or process, you do it using that method, instrument, or process. *This is a two-year course taught by means of lectures and seminars.*"). Put differently, the phrase "by means of" renders the inexhaustive list which follows mere nouns, not transitive verbs with intent behind them. At bottom, a "disguise" is mere "apparel" which "covers" or "conceals," just as a mask is "apparel" that "covers" or "conceals." https://www.merriam-webster.com/dictionary/disguise (Entry 2 of 2).

The District Court also erred by importing the definition-within-a-definition of the term "assumed" and using its adjective instead of verb form. Add. 24. Instead, the correct definition is to "put on, don" as in, "Mrs. Fairfax assumed her best black satin gown." https://www.merriam-webster.com/dictionary/assume.

The plain meaning of Section 609.735 is that it is illegal for a person to conceal him or herself "by means of" some sort of covering, unless they can show they had a good reason for it. Under this definition, the law conflicts with EO 20-81, and EO 20-81, MEMA, or both should be struck down.

2. The Affirmative Defenses to the Criminal Act in Section 609.735 Show That It Criminalizes a General Intent to Wear a Mask or Other Disguise.

Section 609.735 offers specific exceptions—affirmative defenses—to its application. These exceptions depend on the specific intent of the wearer. The requirement that an accused under the law prove his specific intent in wearing a mask as an affirmative defense strongly supports that a general intent requirement. Consistently, the Minnesota Supreme Court recently decided, agreeing with the Attorney General's position, that

> by establishing an affirmative defense, the Legislature demonstrated "that the absence of any specified mens rea element in [the statute] was not an inadvertent omission." *Schwartz*, 943 N.W.2d at 415. We agree with this conclusion. An affirmative defense is "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." *Affirmative Defense*, *Black's Law Dictionary* (11th ed. 2019). By providing an affirmative defense, the Legislature proactively addressed concerns about imposing strict criminal liability for any blameless conduct.

State v. Schwartz, 957 N.W.2d 414, 420 (Minn. 2021).

Similarly here, §609.735's affirmative defenses strongly support a lack of specific intent in the statute. The statute reads as a "no/unless" statement, and the general intent to wear a mask is all that is required to violate the law, *unless* one does so for a specific intent enumerated in the law. The Legislature would have no reason to include *exemptions* based on the specific intent of the mask-wearer if proof of the crime *required* specific intent to disguise for a conviction in the first place. For example, someone wearing a mask for medical treatment purposes would be doing so with the intent to comply with medical treatment, which they would have to show as part of their defense. The exemption for that purpose would be superfluous if the law required specific intent to disguise as an element of required proof beyond a reasonable doubt.

The District Court brushed by this structural defect in its argument, citing in a footnote the claim that making terms in a statute "redundant" could be the best reading of the law. Add. 28 n.18. But the Supreme Court case relied on by the *Free Minnesota Small Business* District Court only held that some redundancy is possible where reading a law *otherwise would create different redundancies*. *Rimini St. Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019). The District Court's reading did not just create a redundancy, however—it wrote affirmative defenses out of the law. As the *Schwartz* Court just held, affirmative defenses in a statute strongly support that general intent is the requisite *mens rea* absent the specific intent language provided in Minn. Stat. §609.02, Subd. 9. *Schwartz*, 957 N.W.2d at 418, 420.

3. Categorizing Minn. Stat. §609.735 As a Specific Intent Statute Would Turn Minnesota Criminal Law on Its Head.

Specific intent crimes in Minnesota typically include the appropriate language to show specific intent is required to violate it, as set forth in Minn. Stat. §609.02, Subd. 9. *Schwartz*, 957 N.W.2d at 418. The Legislature knows how to make a crime a specific intent crime. That law provides, in part:

> **Subd. 9.** Mental state.
> (1) When criminal intent is an element of a crime in this chapter, such intent is indicated by the term "intentionally," the phrase "with intent to," the phrase "with intent that," or some form of the verbs "know" or "believe."

The District Court wrongly asserts that Appellants' argument hinges on the existence of "catchwords" set forth in Minn. Stat. §609.02.[8] Add. 25-26. Rather, Appellants' position is consistent with *Schwartz*: that when the Legislature intends to make a specific intent crime, it knows what to write, and specific intent should not be implied in a criminal statute on a "slender reed." *E.g.*, Doc. 63 at 10-11.

Additionally, *State v. Kjeldahl* militates against reading a specific intent requirement into a criminal statute that doesn't use standard specific intent language. In *Kjeldahl*, the Minnesota Supreme Court examined the escape statute, which provided:

> "Subdivision 1. Definition. 'Escape' includes departure without lawful authority and failure to return to custody following temporary leave granted for a specific purpose or limited period.
> "Subd. 2. Acts prohibited. Whoever does any of the following may be sentenced as provided in subdivision 4:

[8] The undersigned is unsure what the District Court's footnote 17 means.

> "(1) Escapes while held in lawful custody on a charge or conviction of a crime; * * *

278 N.W.2d 58, 61 (Minn. 1979).

The Minnesota Supreme Court held that "[q]uite clearly, the statute does not include a requirement of specific intent. Rather, the only intent required to constitute the crime of escape is the intent to do the act which results in the departure from custody . . . . Such an interpretation of the statute is consistent with the great weight of authority." *Id.*

The District Court improperly held that *Kjeldahl* was limited to the facts of the escape statute and is of less relevance because it was decided before *Staples v. United States*, 511 U.S. 600 (1994). Add. 27. The District Court cites nothing to support the concept that the Supreme Court's method of interpretation in *Kjeldahl* is irrelevant to this matter. And, the District Court is wrong to invoke *Staples*, because *Staples* only applies to strict liability statutes, while Appellants argue that section 609.735 is a general intent statute. Even so, in *Schwartz*, the Minnesota Supreme Court just held that a statute could be a strict liability statute where there are affirmative defenses and absent legislative assertion of the intent language of section 609.02, subd. 9. Thus, the District Court was far off in its analysis.

The Legislature is presumed not to have written superfluous exemptions into a specific-intent crime. Minn. Stat. §§645.16 & 645.17. Where the language of section 609.02 is absent and there are affirmative defenses to a general intent crime,

the Court should not imply specific intent. Here, the Court should find that Minn. Stat. §609.735 conflicts with EO 20-81.

4. Requiring Prosecutors to Prove Specific Intent to Obtain a Conviction for Mask Wearing Would Have Gutted the Purpose of Stopping the Klan.

As discussed in the briefing below and by the District Court, the original purpose of section 609.735 was to stop the Ku Klux Klan from its violent, racist attacks on Minnesota minorities. *See* Add. 28-29. This supports the interpretation of the statute as one requiring only general intent, where prosecutors do not have to prove that a person is wearing a white robe and hood with a specific intent in mind.

Additionally, while it is true that the 1923 law originally contained intent language, it also contained an express presumption of specific intent. *Minnesota Voters Alliance*, 492 F. Supp. 3d 822, 834. In 1959, the Minnesota Supreme Court ruled that judges could not instruct juries on specific intent presumptions like the one in the 1923 law. *Id.* at 834 & n.11. As a result, in 1963, the statute was re-written, and the Legislature removed both the presumption of specific intent and the specific intent requirement but added affirmative defenses—thus keeping the "substance" of the prior law. *See* Minn. Stat. §609.735, 1963 Advisory Comm. Cmt. Removing the presumption and intent requirement and adding affirmative defenses makes the statute the same as a general intent statute.

In other words, the statute formerly supplied the presumption of intent and required the defendant to bear the burden of proving that his intent was different than the presumption. *Compare Minnesota Voters Alliance*, 492 F. Supp. 3d at 834

with State v. Higgin, 99 N.W.2d 902, 906 (Minn. 1959) ("presumptions are not of an evidentiary nature but a procedural device which shifts the burden of going forward with the evidence"). Now, since juries cannot be instructed on the presumption, the statute replaces the presumption and specific intent requirement with several affirmative defenses, where a defendant must do the identical thing he had to do under the original law—bear the burden of proof as to his specific intent in wearing the mask, or be found guilty. The "substance" of the law has not changed, and the District Court below and the *Minnesota Voters Alliance* court simply misinterpreted the change in the statute based on *Higgin*.

Given Minn. Stat. §609.735's purpose, text, and the principles of Minnesota criminal law, the statute must be a general intent law. This Court should so hold.

B. Because Minn. Stat. §609.735 Is a General Intent Statute, It Conflicts With EO 20-81.

Conflict preemption exists "when a[n] ordinance permits what a state statute forbids or forbids what a statute permits." *State v. Kuhlman*, 722 N.W.2d 1, 4 (Minn. Ct. App. 2006), *aff'd*, 729 N.W.2d 577 (Minn. 2007). Simply put, EO 20-81 orders Minnesotans to cover their faces with a mask, which Minn. Stat. §609.735 forbids. Under Minn. Stat. §12.32, an executive order cannot set aside a contrary statute. The Order is therefore conflict preempted and invalid.

Alternatively, if an order can set aside a contrary statute, MEMA and EO 20-81 would be an unconstitutional delegation of legislative authority—the authority to repeal or amend a statute. Either way, the Court should set aside EO 20-81.

VIII. EO 20-81 Is Unconstitutionally Vague.

As detailed above, EO 20-81 had a series of exemptions that businesses and churches had to evaluate and follow. EO 20-81 forced businesses and churches to "require" masking by customers, but customers could simply state that they had medical conditions exempting them from mask-wearing, and businesses could not inquire further, under either EO 20-81 or, arguably, the Americans with Disabilities Act. Yet any person could complain to Attorney General Ellison about the business or church based on the same person with an exemption not wearing a mask, which Ellison affirmatively encouraged. In addition, EO 20-81 purports to give Ellison substantial discretion as to when and to what degree to impose penalties on businesses—up to $25,000, at his discretion. Because this system (i) criminalizes not knowing whether a third-party customer is lying about mask exemptions and (ii) gives too much leeway to Attorney General Ellison and thus creates a danger of arbitrary enforcement, it is vague and unconstitutional.

"A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). "Where…there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting

officials, against particular groups deemed to merit their displeasure.'" *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972).

The problem with EO 20-81 is not with Appellants' own subjective interpretations of the exceptions to it, but that it is impossible to enforce and creates an environment fraught with problems because of random third parties' interpretations of whether they believe that Appellants are complying with the Order. In fact, as described in the briefing below, Attorney General Ellison has investigated businesses for EO violations even when the events in which there *might* be violations have yet to occur. *Voter Fraud: The Issue They'd Rather You Didn't Talk About*, available at https://www.powerlineblog.com/archives/2020/10/voter-fraud-the-issue-theyd-rather-you-didnt-talk-about.php. With respect to Center of the American Experiment, Ellison investigated a future event that had only been announced eight hours before and which had expressly limited its attendance to the prevailing 250-person requirement.

Additionally, Governor Walz' executive agencies, like the MNOSHA, have descended on legitimate businesses like SWAT teams, interrogated employees, taken pictures, and then assessed penalties for allegedly noncompliance with EO 20-81 based on reports from unidentified third parties. *See Hastings grill owner fights mask fine*, KARE11, https://www.kare11.com/article/news/local/hastings-grill-owner-fights-mask-fine/89-033250f8-b992-4d86-9bb7-d8b8ea27b23f.

The District Court held that EO 20-81 was definite enough for people to understand. Add. 31-32. The Court held that it is not vague because it is akin to

people calling police to report drunk drivers, and so on. *Id.* But there is nothing about drunk driving or other random crimes that would lead a political figure, such as a constitutional officer elected via partisan election, like the Attorney General, to turn a spotlight on political enemies. Police officers are not elected officials scouring pictures and reports of drunk drivers looking for people who don't support them politically, generated through a website created to gather such complaints.

Moreover, EO 20-81's business requirements forced businesses to try to delve into the minds of random customers, who may lie about having an exception to the mandate. And even if those third parties were telling the truth, which the business owner could not know, people wishing to prove their loyalty to their tribe turned them in for investigation by the AG. *See* https://www.ag.state.mn.us/Office/Communications/2020/07/31_NorthStarRanch.asp; https://www.powerlineblog.com/archives/2020/10/voter-fraud-the-issue-theyd-rather-you-didnt-talk-about.php ("I am an Assistant Attorney General with the Minnesota Attorney General's Office. This Office has received a report that you are planning on hosting an event that may exceed the gathering limit currently in place under Executive Order 20-74."). Businesses in compliance with EO 20-81 (who asked and were told there was a medical condition) and businesses not in compliance (who did not ask), looked exactly the same—but a third party may not have a clue whether they complied, and might report both anyway.

In addition, EO 20-81 supposedly creates a mechanism for Attorney General Ellison to shut down businesses that he deems not in compliance with the order and

bring legal actions against them. Businesses must be represented by counsel in Minnesota courts, so while the District Court and Respondents took issue with Appellants' citation to *281 CARE Committee v. Arneson*, the situation created by EO 20-81—inviting complaints against businesses from which the AG can pick and choose—is much like the offensive statutory scheme in Minn. Stat. §211B.06, which allowed political actors to hale their political opponents into court and force them to "lawyer up" to defend political speech. *281 CARE Comm. v. Arneson*, 766 F.3d 774, 782 (8th Cir. 2014) ("denying this judicial review would impose a substantial hardship on Appellants, "forcing them to choose between refraining from core political speech on the one hand, or engaging in that speech and risking costly [OAH] proceedings and criminal prosecution on the other"). The point of the citation in this context is that EO 20-81 invites arbitrary enforcement as well as chilling political speech, discussed *infra*.

The District Court also claimed that Appellants did not allege anything that implicates void for vagueness jurisprudence. Add. 32. In addition to the above, Appellants alleged specifically in the First Amended Petition, at paragraphs 87 through 94, 101, and 108, supported by affidavits, that they feared prosecution in part for arbitrary enforcement and that they were unsure of their responsibilities for compliance with the order and how to avoid prosecution despite compliance. Further, Appellants alleged that important terms like "unreasonable" or "job hazard" are left undefined by EO 20-81. Am. Pet. ¶¶39-40.

Vagueness problems are inherent in an order that authorizes the AG to collect complaints via phone calls and the Internet from intrusive neighbors. For those who wish to exercise their First Amendment rights to oppose EO 20-81, or who simply fail to force someone to wear a mask against their will to the degree adequate to satisfy the AG, Ellison "encourages Minnesotans . . . to report suspected violations." He and other executive branch agencies have followed through by prosecuting "bad" actors. These are the hallmarks of arbitrary enforcement, where "[a] presumption that people . . . who look suspicious to the police are to become future criminals." This is "too precarious for a rule of law." *Papachristou*, 405 U.S. at 171.

IX. EO 20-81 Infringes Appellants' First Amendment Speech Rights.

EO 20-81 compels Appellants to engage in political speech with which they disagree. Compelled speech is antithetical to the First Amendment, and this Court should reverse the District Court on Appellants' free speech claims.

A. Mask-Wearing or Refusal to Wear a Mask Is Political Speech.

Wearing a mask has become symbolic of an agreement with the policy determination that mask-wearing is necessary for combating COVID-19. Masks are "communicative," as is not wearing one, as with other contexts in which masks are seen as a "symbol of opposition." *Aryan v. Mackey*, 462 F. Supp. 90, 92 (N.D. Tex. 1978). Governor Walz has admitted in public statements that mask-wearing is a "political statement." https://www.mprnews.org/story/2020/07/17/gov-walz-hoping-for-more-buyin-on-masks-before-mandate ("It's unfortunate that around masks, it became somewhat of a political statement rather than a public health

statement."). A brief stroll through Twitter provides ample evidence that people on both sides of the political aisle consider mask-wearing or refusal to be political speech.*E.g.*, https://twitter.com/davidhogg111/status/1393191013808754688?lang=en; https://twitter.com/StephenM/status/1387110038779711493. Because masks or being maskless is political speech, the Court should apply strict scrutiny to the challenged regulation.

B. The District Court Erred by Applying *Jacobson* and Its Misguided 2020 Progeny.

By the time the District Court made its decision below, the Supreme Court had already rejected the *Jacobson* test heavily relied on by Respondents in this case and others. *See* Add. 37 (citing *Roman Catholic Diocese*). Yet the District Court inexplicably held that *Jacobson* applies to Appellants' constitutional claims. Add. 35, 37. The United States Supreme Court yet again rejected this position in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), emphatically establishing that normal constitutional scrutiny applies, even in a pandemic. The Court held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." 141 S. Ct. at 1296. As Judge Wright in the District of Minnesota held, "[n]otably, the majority in *Roman Catholic Diocese* did not apply the *Jacobson* framework when analyzing the constitutionality of the executive orders in question. Instead, the majority opinion applies the traditional tiers of constitutional scrutiny." *Northland*

Baptist Church, 2021 WL 1195821, at *10. Thus, to the extent the District Court applied *Jacobson*, it clearly erred.

C. Under Traditional Constitutional Scrutiny of Compelled Speech, EO 20-81 Violates Appellants' Free Speech Rights.

Because mask-wearing is political speech, strict scrutiny applies. "the right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Thus, in *Wooley*, the Supreme Court held that individuals could not be forced to use license plates that said "Live Free or Die," even though the license plate law applied to all citizens of New Hampshire. *Id.* EO 20-81 is thus subject to strict scrutiny under *Wooley*, and must be narrowly tailored to achieve a compelling state interest. "The State must specifically identify an "actual problem" in need of solving,…and the curtailment of free speech must be actually necessary to the solution….That is a demanding standard." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799 (2011). EO 20-81 does not measure up to that standard.

First, there is no compelling interest in forcing citizens to wear masks because Minnesota's own experience with mask-wearing shows that it was ineffective as a means to stop the spread of COVID-19. To that end, Minnesota had more reported COVID-19 "cases" in the month after the mask mandate was issued than the month before it was issued.[9] While the number of tests increased, the

[9] https://www.health.state.mn.us/diseases/coronavirus/situation.html#cases1. From June 22 through July 22, there were 17,326 reported cases. From July 22 to August 22, there were 20,430 reported cases. From June 22 through July 22, there were

positivity rate of testing did not change to any significant degree. The weather was the same, and there were even July 4th celebrations several weeks before the mask mandate. Yet "cases" increased after the mandate issued. This Court need not reach any conclusion about the effectiveness of face coverings in Minnesota, but it should conclude that absent evidence that masks are actually necessary to slow the spread of COVID-19, there is no compelling state interest in forcing people to wear masks of wildly varying types.

Second, and more important, EO 20-81 fails narrow tailoring because it is both overbroad and underinclusive. It broadly requires masking in all indoor public places, but it includes a host of exceptions in places where the chance for COVID spread is just as likely as sitting in a chiropractor's office, like gyms, restaurants while seated, and so on. In addition, the mask mandate is so unimportant to Respondents that broad swaths of people within the State are exempted without any difference between them and Appellants in terms of their ability to spread COVID-19. Respondents have exempted anyone who isn't a citizen of Minnesota or is on tribal land. EO 20-81 only applied to "Minnesotans," who are "the citizens of Minnesota." *Compare* EO 20-81 *with* https://dictionary.cambridge.org/us/dictionary/english/minnesotan. Apparently, South Dakotans, North Dakotans, Wisconsinites, and Iowans could be mask-free in

388,433 reported COVID tests. From July 22 to August 22, there were 475,843 reported tests. The positivity rate for June to July was 4.46%, and the rate from July to August was 4.29%.

the State. Also, tribal lands are exempt from EO 20-81. EO 20-81, ¶7. This is in spite of the Governor's authority under Public Law 280 and, purportedly, Minn. Stat. §12.31, which allow the Governor to impose true emergency mandates in "exceptional" circumstances on tribal lands other than Red Lake Nation. Pub. L. 280; Minn. Stat. §12.31, Subd. 2 ("Nothing in this section shall be construed to limit the governor's authority to act without such consultation [with tribal authorities] when the situation calls for prompt and timely action."); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983). There apparently is no "exceptional" harm caused to residents and visitors to tribal lands by not mandating masks there.

This underinclusiveness is fatal to the government's claim that its interest is truly compelling. *See Republican Party of Minnesota v. White*, 416 F.3d 738, 777 (8th Cir. 2005) ("[T]he sort of underinclusiveness that is fatal in strict scrutiny is arbitrary underinclusiveness, not underinclusiveness that results from attempting to focus the restriction on only the severest form of the threat to a compelling governmental interest.").

D. EO 20-81 Also Fails the *O'Brien* Test.

Under *United States v. O'Brien*, a government regulation of free expression may only be justified where "it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. 367, 377 (1968).

First, because MEMA and EO 20-81 violated the Minnesota Constitution and exceeded Governor Walz' statutory authority, they are not "within the constitutional power of the Government," and they fail *O'Brien*. *See Nite Moves Ent. v. City of Boise*, 153 F. Supp. 2d 1198, 1205 (D. Idaho 2001) (state constitution and statutes define scope of "constitutional power of government").

Second, Governor Walz has admitted that mask-wearing is expressive conduct, and it is largely understood by the public to be exactly that, so *O'Brien* should not apply. Third, as Appellants' strict scrutiny analysis indicates, EO 20-81 did not further the interest in combating COVID-19 because the data on the ground shows that EO 20-81 did nothing to stop COVID-19 transmission in Minnesota. Fourth, EO 20-81 broadly required masks in indoor spaces, but then left a broad swath of indoor spaces open to non-mask-wearing—even in places that Governor Walz shut down for four weeks because of alleged COVID threats they pose. *Compare* EO 20-81, ¶10b *with* EO 20-99 (exempting mask wearing in gyms and then shutting gyms down entirely). And again, EO 20-81 left tribal lands and places where non-Minnesotans ventured totally open to maskless patrons. The Court should hold that EO 20-81 fails the *O'Brien* test.

X. EO 20-81 Violates Appellant Johnson's Free Exercise Rights.

As noted above, the Supreme Court's recent COVID-19 free exercise jurisprudence requires, at very minimum, equal treatment between people exercising secular privileges and immunities and those exercising their religious

freedom. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). As *Tandon* held, in relevant part here:

> First, government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.…It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue…Second, whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue.…Comparability is concerned with the risks various activities pose, not the reasons why people gather.

141 S. Ct. at 1296-97.

The District Court somehow claims that Appellant Johnson failed to "explain[] how EO 20-81 impacts the exercise of her religion, or what kind of exception for religion is missing from EO 20-81." Add. 37. Appellant Johnson clearly alleged that "she sincerely believes that wearing a mask would be sinful and a violation of her conscience and her religious beliefs as a Christian," and "wearing a mask would cause Ms. Johnson to violate her conscience." Am. Pet. ¶¶82-83. Yet she was told that she must wear a mask, while Governor Walz left a broad swath of indoor spaces, like gyms, open to non-mask-wearing, and left tribal lands and places where non-Minnesotans ventured totally open to maskless patrons. A tribal land is not entitled to greater deference than a person in non-tribal land seeking to exercise her freedom of religion.

CONCLUSION

The Minnesota Emergency Management Act violates the Minnesota Constitution's nondelegation doctrine, Governor Walz' orders exceed his constitutional and statutory authority, and EO 20-81—the mask mandate—conflicts with existing state law. Respondents' power plays have forced Appellants to speak against their will and infringed on their free exercise of religion. This Court should return the legislative authority in Minnesota to the Legislature by reversing the District Court and instructing it to issue the Writ of Quo Warranto.

STATEMENT REGARDING PRECEDENCE

Appellants believe that the Court's opinion on this matter should be precedential. This Court's opinion could establish a new principle of law or clarify existing caselaw related to the Minnesota Constitution's nondelegation doctrine and the extent of the Governor's peacetime emergency powers.

Respectfully submitted,

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Dated: June 14, 2021

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TIM WALZ, etc., et al.,

CERTIFICATION OF LENGTH OF DOCUMENT

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