Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF RAMSEY **SECOND JUDICIAL DISTRICT**

Free Minnesota Small Business Coalition, Representative Steve Drazkowski, Representative Jeremy Munson, Representative Cal Bahr, Representative Tim Miller, Southwest School of Dance L.L.C., Trev's Kitchen, Prestige Gymnastics, Yoga by Blisstopia LLC, Title Boxing Club Coon Rapids, Title Boxing Club Arden Hills, Title Boxing Club Rogers, Duff's LLC d/b/a Duffy's Bar and Grill, Flaherty's Arden Bowl, Inc., Three Rivers Fitness,

Petitioners,

vs.

Tim Walz, Governor of Minnesota,

Respondent.

Court File No. _____

PETITION FOR QUO WARRANTO

The above-named petitioners file this petition for information in the nature of quo warranto. The petitioners seek a writ of quo warranto to enjoin Governor Tim Walz from enforcing his COVID-19 executive orders using the emergency peacetime powers under Minnesota Statutes, Chapter 12, and from issuing new COVID-19 executive orders using the emergency peacetime powers under Minnesota Statutes, Chapter 12.

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

The Governor has exceeded his legal authority in three ways. First, the Governor's COVID-19 executive orders violate Minnesota's non-delegation doctrine because the executive orders are exercises of pure legislative power without legislative enactment or judicial oversight. Second, Minnesota Statutes § 12.31, subdivision 2, applying to the Governor's peacetime emergency powers, has a provision unconstitutionally authorizing a legislative veto on extension of peacetime emergencies beyond thirty days. There is no Minnesota Constitution provision authorizing such legislative vetoes and such provision is not judicially severable due to the legislative intent. Third, Minnesota Statutes § 12.31, subdivision 2, does not authorize the Governor to invoke emergency powers for public health purposes; the phrase "public health" is not mentioned in the enumerated situations where the Governor can invoke such emergency peacetime powers.

PARTIES

1. The Petitioner Free Minnesota Small Business Coalition is an association of businesses in Minnesota shut down by the Governor's executive orders. It has associational standing because its members have been damaged by being shut down by the Governor's executive orders. Also, as a taxpayer, Free Minnesota Small Business Coalition has taxpayer standing.

2. Petitioners Representative Steve Drazkowski, Representative Jeremy Munson, Representative Cal Bahr, and Representative Tim Miller are members of the Minnesota House of Representatives. They have individual legislator standing as the

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

Governor's executive orders usurp legislative power. Also, as taxpayer, each legislator has taxpayer standing.

3. The other Petitioners Southwest School of Dance L.L.C., Trev's Kitchen, Prestige Gymnastics, Yoga by Blisstopia LLC, Title Boxing Club Coon Rapids, Title Boxing Club Arden Hills, Title Boxing Club Rogers, Duff's LLC d/b/a Duffy's Bar and Grill, Flaherty's Arden Bowl, Inc., Three Rivers Fitness are all businesses in Minnesota shut down by the Executive Orders. The Petitioners have suffered damages caused by the Executive Orders. Therefore, the Petitioners have standing to challenge the constitutionality of the Executive Orders. Also, as taxpayers, each individual business has taxpayer standing.

4. The Respondent Tim Walz is Governor of Minnesota.

5. Although unnamed, the civil liberties of approximately five million and six hundred thousand (5,600,000) people of Minnesota are restricted by the Governor's unconstitutional executive orders.

JURISDICTION

6. The Minnesota Constitution, Article VI, Section 2, gives the Minnesota Supreme Court "original jurisdiction in such remedial cases as are prescribed by law." This includes the power to issue ancient writs including writs of quo warranto. Minn. Stat. § 480.04 (2018). *Save Lake Calhoun v. Strommen*, 2020 WL 2465541, at *3 (Minn. 2020).

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

7. Although the Minnesota Supreme Court has original jurisdiction to issue the writ of quo warranto, in *Rice v. Connolly*, the Minnesota Supreme Court instructed that petitions for the writ should be filed in the first instance in district court. 488 N.W.2d 241, 243–44 (Minn. 1992). *Save Lake Calhoun v. Strommen*, 2020 WL 2465541, at *3 (Minn. May 13, 2020)

8. Where the court finds that an administrative agency has exceeded its powers, it may declare the agency action invalid, but invalidity of agency action does not transfer the agency's legislative powers to the court which may then exercise them. *Minnesota Distillers Inc. v. Novak*, 265 N.W.2d 420 (Minn. 1978).

9. The Court of Appeals does not have jurisdiction under Minnesota Statutes § 14.44 to judicially review the Governor's executive orders. The Governor's emergency executive orders are not subject to review by this court under Minn. Stat. § 14.44. *Free Minnesota Small Business Coalition, et al. v. Tim Walz, Governor of Minnesota,* Case No. A20-0641 (Minn. App. May 26, 2020). Ex. 64 at 2-3.

STATEMENT OF FACTS

10. On March 13, 2020, the Governor issued Emergency Executive Order 20-01 declaring a peacetime emergency under Minnesota Statutes 2019, section 12.31, subdivision 2. Ex. 1.

11. Since then, the Governor has issued sixty-three executive orders, Nos. 20-01 through 20-63. Exs. 1-63.

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

12. The Governor's Executive Order No. 20-63 was issued on May 27, 2020. Ex. 63.

13. By this pattern of issuing executive orders, the Governor has claimed legal authority to issue executive orders under Minnesota Statutes 2019, section 12.31, subdivision 2:

> 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, 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. If the peacetime emergency occurs on Indian lands, the governor or state director of emergency management shall consult with tribal authorities before the governor makes such a declaration. Nothing in this section shall be construed to limit the governor's authority to act without such consultation when the situation calls for prompt and timely action. When the governor declares a peacetime emergency, the governor must immediately notify the majority and minority leaders of the senate and the speaker and majority and minority leaders of the house of representatives. A peacetime emergency must not be continued for more than five days unless extended by resolution of the Executive Council up to 30 days. An order, or proclamation declaring, continuing, or terminating an emergency must be given prompt and general publicity and filed with the secretary of state.
> (b) By majority vote of each house of the legislature, the legislature may terminate a peacetime emergency extending beyond 30 days. If the governor determines a need to extend the peacetime emergency declaration beyond 30 days and the legislature is not sitting in session, the governor must issue a call immediately convening both houses of the legislature…

14. In Executive Order 20-01, the Governor claimed his authority to declare a peacetime emergency was based on COVID-19 being an "act of nature":

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

> The infectious disease known as COVID-19, an act of nature, has now been detected in 118 countries and territories, including the United States.

Ex. 1 at 1.

15. In Executive Order No. 20-63, the Governor has restricted civil liberties including gatherings of more than 10 people at social, civic, community, faith-based, or leisure events, sporting or athletic events, performances, concerts, conventions, fundraisers, parades, fairs, and festivals:

> Gatherings. All gatherings of more than 10 people are prohibited, except as set forth below. Gatherings are groups of individuals, who are not members of the same household, congregated together for a common or coordinated social, civic, community, faith-based, leisure, or recreational purpose—even if social distancing can be maintained. This prohibition includes planned and spontaneous gatherings, public and private gatherings, and indoor and outdoor gatherings. Examples of prohibited gatherings include, but are not limited to, social, civic, community, faith-based, or leisure events, sporting or athletic events, performances, concerts, conventions, fundraisers, parades, fairs, and festivals that bring together more than 10 people from more than one household.

Ex. 63 at 4.

16. In Executive Order No. 20-63, the Governor has continued the closure of bars, restaurants and other places of accommodation:

> Extension of temporary closure of bars, restaurants, and other Places of Public Accommodation. Places of Public Accommodation are subject to the following restrictions:
>
> i. The following Places of Public Accommodation are closed to ingress, egress, use, and occupancy by members of the public, except as specified in this Executive Order:
>
> A. Restaurants, food courts, cafes, coffeehouses, and other Places of Public Accommodation offering food or beverage for on premises consumption, excluding institutional or in-house food cafeterias that serve residents, employees, and clients of

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

businesses, child care facilities, hospitals, and long-term care facilities.

B. Bars, taverns, brew pubs, breweries, microbreweries, distilleries, wineries, tasting rooms, clubs, and other Places of Public Accommodation offering alcoholic beverages for on premises consumption.

C. Hookah bars, cigar bars, and vaping lounges offering their products for on premises consumption.

D. Theaters, cinemas, indoor and outdoor performance venues, and museums.

E. Gymnasiums, fitness centers, recreation centers, indoor sports facilities, indoor exercise facilities, and exercise studios.

F. Amusement parks, arcades, bingo halls, bowling alleys, indoor climbing facilities, skating rinks, trampoline parks, and other similar recreational or entertainment facilities. 7 G. Country clubs, golf clubs, boating or yacht clubs, sports or athletic clubs, and dining clubs.

H. "Establishments Providing Personal Care Services," including tanning establishments, body art establishments, tattoo parlors, piercing parlors, businesses offering massage therapy or similar body work, spas, salons, nail salons, cosmetology salons, esthetician salons, advanced practice esthetician salons, eyelash salons, and barber shops. This includes, but is not limited to, all salons and shops licensed by the Minnesota Board of Cosmetologist Examiners and the Minnesota Board of Barber Examiners.

Ex. 63 at 6-7.

17. On April 13, 2020, the Governor in Executive Order No. 20-35 extended the peacetime emergency for an additional thirty days noting that his asserted authority could only be rescinded by "a majority vote of each house of the legislature pursuant to Minnesota Statutes 2019, section 12.31, subdivision 2(b)." Ex. 35 at 2.

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

18. On May 13, 2020, the Governor in Executive Order No. 20-53 extended the peacetime emergency for an additional thirty days noting that his asserted authority could only be rescinded by "a majority vote of each house of the legislature pursuant to Minnesota Statutes 2019, section 12.31, subdivision 2(b)." Ex. 53 at 2.

19. The current 30-day period for the Governor's executive orders ends on June 12, 2020.

20. It is anticipated that the Governor will call a special session of the state legislature for June 12, 2020 for the state legislature to consider rescinding the Governor's peacetime emergency by a majority vote of each house of the legislature pursuant to Minnesota Statutes 2019, section 12.31, subdivision 2(b).

21. All Petitioners are damaged by the Governor's executive orders restricting civil liberties because they cannot exercise movement and associate with others as they desire.

22. The Free Minnesota Small Business Coalition members and the individual business petitioners are damaged by the Governor's executive orders because their businesses have been closed down and shuttered.

ARGUMENT

The Governor has exceeded his legal authority in three ways. The writ of quo warranto should issue if the Court finds any one of the three arguments valid.

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

I. The Governor's executive orders violate the non-delegation doctrine because neither the legislative department nor the judicial department have a say.

The Governor's COVID-19 executive orders violate the non-delegation doctrine because the executive orders are an exercise of pure legislative power without judicial oversight.

A. Minnesota's non-delegation doctrine prohibits delegations of pure legislative power to the Governor as a violation of constitutionally-required separation of powers.

Throughout its history, the Minnesota Supreme Court has jealously guarded the constitutional division of powers. Justice Elliott, in *State v. Brill,* described at length the history of the doctrine of separation of powers with its limits on the executive and judiciary branches as well as the legislative branch:

> The tendency to sacrifice established principles of constitutional government in order to secure centralized control and high efficiency in administration may easily be carried so far as to endanger the very foundations upon which our system of government rests.
>
> * * *
>
> In speaking of the old Constitution of Virginia, Jefferson said: 'All the powers of government, legislative, executive, and judicial, result to the legislative body. The concentrating these in the same hands is the precise definition of a despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands and not a single one.' Jefferson, Notes on Virginia, p. 195; Story, Const. Law, vol. 1, § 525.[1]

[1] *State v. Brill,* 111 N.W. 639, 640-41 (1907).

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

The separation of powers doctrine is familiar to this Court, but bears repeating because of the significance of the doctrine's role in this controversy: "Under the Separation of Powers Clause, no branch can usurp or diminish the role of another branch."[2]

The three departments of state government, the legislative, executive, and judicial, are independent of each other. Neither department can control, coerce, or restrain the action or non-action of either of the others in the exercise of any official power or duty conferred by the Constitution, or by valid law, involving the exercise of discretion.

The Minnesota Constitution states in Article III that "[t]he 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."[3] Article III bars any department from assuming or asserting any "inherent powers"— powers not "expressly" given— that properly belong to either of the others. In short, no "department can control, coerce, or restrain the action or inaction of either of the others in the exercise of any official power or duty conferred by the Constitution."[4] Minnesota Supreme Court

[2] *See* Minn. Const. art. III, § 1; *Brayton v. Pawlenty,* 768 N.W.2d 357, 365 (Minn. 2010).
[3] *Id.,* emphasis added.
[4] *Id.*

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

precedent has "recognized that where the constitution commits a matter to one branch of government, the constitution prohibits the other branches from ... interfering with the coordinate branch's exercise of its authority."[5]

Arising from Article III is Minnesota's non-delegation doctrine. The state legislature cannot delegate pure legislative power to any government official—including the Governor. The Minnesota Supreme Court stated in *City of Richfield v. Local No. 1215, International Association of Fire Fighters*, a case where a party challenged the validity of a delegation of legislative authority:

> The non-delegation doctrine teaches that purely legislative power cannot be delegated. *Lee v. Delmont*, 228 Minn. 101, 112, 36 N.W.2d 530, 538 (1949). However, where a law embodies a reasonably clear policy or standard to guide and control administrative officers, so that the law takes effect by its own terms when the facts are ascertained by the officers and not according to their whim, then the delegation of power will be constitutional. 228 Minn. at 113, 36 N.W.2d at 538.

276 N.W.2d 42, 45 (1979). *See also State v. King*, 257 N.W.2d 693 (Minn. 1977); *City of Minneapolis v. Krebes*, 303 Minn. 219, 226 N.W.2d 617 (1975); *Thomas v. Housing and Redevelopment Authority*, 234 Minn. 221, 48 N.W.2d 175 (1951).

Four other Minnesota Supreme Court cases show the continued vitality of Minnesota's non-delegation doctrine. The Minnesota Supreme Court in *Francis v.*

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[5] *Limmer*, 819 N.W.2d at 627-28 (Minn. 2012) *citing In re Civil Commitment of Giem,* 742 N.W.2d 422, 429 (Minn. 2007); *see also State ex rel. Birkeland v. Christianson,* 179 Minn. 337, 340, 229 N.W. 313, 314 (1930) (explaining that no branch of government "can control, coerce or restrain the action or non-action of either of the others in the exercise of any official power or duty conferred by the constitution").

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

Minnesota Board of Barber Examiners held that a state board regulation requiring a showing of "public necessity" as a condition for the issuance of a license to operate a barber school was found to be beyond the scope of authority delegated to state board in its enabling statute. 256 N.W.2d 521 (Minn. 1977). The Minnesota Supreme Court in *Wallace v. Commissioner of Taxation*, noted that while the legislature has conferred upon the Commissioner of Taxation authority to enact regulations, it had not delegated to him "authority to determine what the law should be or to supply a substantive provision which he thinks the legislature should have enacted in the first place" 184 N.W.2d 588, 589 (1971). In *State ex rel Spurck,* the Minnesota Supreme Court held that jurisdiction of an administrative agency consists of the powers granted by statute, and a determination of an agency is void and subject to collateral attack where it is made without, or in excess of, statutory power. *State ex rel Spurck v. Civil Service Board*, 32 N.W.2d 583 (1948). The Minnesota Supreme Court in *Scheibel v. Pavlak*, 282 N.W.2d 843 (Minn. 1979) addressed the authority of the House of Representatives to determine the eligibility of its members. The court said that "since the very justification for this legislative authority is to resist encroachment, a necessary implication is that it is an absolute grant of constitutional power which may not be delegated to or shared with the courts. So the authorities universally hold." 282 N.W.2d at 847-48.

More recently, the Minnesota Court of Appeals, has confirmed the continued vitality of the non-delegation doctrine:

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

> The legislature "cannot delegate purely legislative power to any other body, person, board, or commission."

Coalition of Greater Minnesota Cities v. Minnesota Pollution Control Agency, 765 N.W.2d 159, 165 (Minn. App. 2009), *quoting Lee v. Delmont*, 228 Minn. 101, 112, 36 N.W.2d 530, 538 (1949) (citations omitted).

In addition, in cases involving civil liberties, delegations of legislative power are particularly apt to be closely scrutinized and narrowly construed. *See, e.g., I.N.S. v. Chadha*, 462 U.S. 919 (U.S. 1983) (a deportable alien had standing to challenge validity of law due to legislative veto).

B. The Governor's executive orders are unconstitutional as they are exercises of pure legislative power because there is a failure to follow the Chapter 14 rule-making process and the state legislature failed to enact laws authorizing judicial oversight of the Governor's executive orders.

Under the case law described above, the Governor's executive orders issued under Minnesota Statutes 2019, section 12.31, subdivision 2, are unconstitutional because they are exercises of pure legislative power.

The Governor's executive orders exercise legislative power. Section 12.32 describes that the executive orders and rules promulgated by the Governor have the "full force and effect of law":

> 12.32 GOVERNOR'S ORDERS AND RULES, EFFECT. Orders and rules promulgated by the governor under authority of section 12.21, subdivision 3, clause (1), when approved by the Executive Council and filed in the Office of the Secretary of State, have, during a national security emergency, peacetime emergency, or energy supply emergency, the full force and effect of law.

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

Legislative power is exercised by the Governor when he restricts civil liberties to gatherings of no more than 10 people and when he shuts down businesses and their operations. The Governor in Executive Order 20-63 states it is a crime to violate the Governor's executive order:

> Pursuant to Minnesota Statutes 2019, section 12.45, an individual who willfully violates this Executive Order is guilty of a misdemeanor and upon conviction must be punished by a fine not to exceed $1,000 or by imprisonment for not more than 90 days. Any business owner, manager, or supervisor who requires or encourages any of their employees, contractors, vendors, volunteers, or interns to violate this Executive Order is guilty of a gross misdemeanor and upon conviction must be punished by a fine not to exceed $3,000 or by imprisonment for not more than a year. In addition to those criminal penalties, the Attorney General, as well as city and county attorneys, may seek any civil relief available pursuant to Minnesota Statutes 2019, section 8.31, for violations of this Executive Order, including civil penalties up to $25,000 per occurrence from businesses and injunctive relief.

Ex. 63 at 17.

The Governor's executive orders violate the legislative prerogative of making laws under the Minnesota Constitution, Article IV, section 22:

> Sec. 22. Majority vote of all members to pass a law. The style of all laws of this state shall be: "Be it enacted by the legislature of the state of Minnesota." No law shall be passed unless voted for by a majority of all the members elected to each house of the legislature, and the vote entered in the journal of each house.

A majority of the respective state legislative bodies never voted to pass the Governor's executive orders.

The Governor's executive orders also violate the Presentment Clause of Minnesota Constitution, Article IV, section 23:

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

> Sec. 23. Approval of bills by governor; action on veto. Every bill passed in conformity to the rules of each house and the joint rules of the two houses shall be presented to the governor

The Governor's executive orders were not passed in conformity to the rules of each house and the joint rules of the two houses and subsequently presented to the Governor.

Importantly, the state legislature did not provide for judicial review of the Governor's executive orders under Minn. Stat. § 14.44 which provides judicial review of state agency rules. As the Minnesota Court of Appeals ruled on May 26, 2020, in a companion case:

> The [Emergency Executive Orders] were issued pursuant to the Governor's authority under the Minnesota Emergency Management Act of 1995, Minn. Stat. §§ 12.01-.61(2018). Petitioners assert that the EEOs are statements of general applicability and future effect and are therefore subject to review under Minn. Stat. § 14.44. However, [Minnesota Administrative Procedures Act] expressly excepts from its application "emergency powers in sections 12.31 to 12.37." Minn. Stat. § 14.03, subd. 1. And, consistent with the exception in MAPA, Minn. Stat. § 12.21, subd. 3(a) authorizes the governor to "make, amend, and rescind the necessary orders and rules to carry out the provisions of this chapter…without complying with sections 14.001 to 14.69." Thus, the EEOs were neither required to be formally promulgated under MAPA nor were they so promulgated. Accordingly, the EEOs are not subject to review by this court under Minn. Stat. § 14.44.

Free Minnesota Small Business Coalition, et al. v. Tim Walz, Governor of Minnesota, Case No. A20-0641. Ex. 64 at 2-3.

So, the Governor's executive orders which have the "full force and effect of law" are not subject to statutorily-provided review by the judicial department. The

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

state legislature's failure to provide judicial oversight of the Governor's executive orders is another aspect of the Governor exercising pure legislative power.

It is these types of circumstances that a writ of quo warranto is intended to address. *See Save Lake Calhoun v. Strommen*, 2020 WL 2465541, at *3 (Minn. May 13, 2020). The Governor's executive orders promulgated under section 12.31 do not comply with the Minnesota Constitution, Article III, which states "No person…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." The Governor's executive orders exceed his legal authority by exercising pure legislative power.

II. Minnesota Statutes § 12.31, subdivision 2, is unconstitutional because of its legislative veto provision.

Minnesota Statutes § 12.31 is unconstitutional because it provides for a legislative veto and the unconstitutional provision cannot be severed.

A. The Minnesota Constitution does not authorize the legislative veto in Minnesota Statutes § 12.31, subdivision 2.

The Minnesota Statutes § 12.31, applying to peacetime emergencies, is unconstitutional because it has a provision unconstitutionally authorizing a legislative veto on extension of peacetime emergencies beyond thirty days. Minnesota Statutes § 12.31, subdivision 2, provides that:

> (a)…A peacetime emergency must not be continued for more than five days unless extended by resolution of the Executive Council up to 30 days… (b) By majority vote of each house of the legislature, the legislature

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

> may terminate a peacetime emergency extending beyond 30 days. If the governor determines a need to extend the peacetime emergency declaration beyond 30 days and the legislature is not sitting in session, the governor must issue a call immediately convening both houses of the legislature.

And, there is no Minnesota Constitution provision authorizing legislative vetoes.

The legislative veto is a feature of statutes enacted by a legislative body. It is a provision whereby the state legislature passes a statute granting authority to the Governor to make or implement law and reserves for itself the ability to override, through simple majority vote, individual actions taken by the Governor pursuant to that authority.

Although there is not a Minnesota appellate case on point regarding the Minnesota Constitution and legislative vetoes, the U.S. Supreme Court has ruled under similar provisions in the U.S. Constitution that such a legislative veto is unconstitutional. The U.S. Supreme Court in *I.N.S. v. Chadha*, 462 U.S. 919 (U.S. 1983) held that a section of the Immigration and Nationality Act authorizing a legislative veto to invalidate decisions of the executive branch to allow a particular deportable alien to remain in the United States is unconstitutional, because action by a legislative body pursuant to that section is essentially legislative and thus subject to the constitutional requirements of passage by a majority of both Houses and presentation to the President.

The facts surrounding the Governor's executive orders even make a stronger case than *Chadha* for a constitutional violation under the analogous separation-of-

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

powers articles in the Minnesota Constitution. In *Chadha,* the statute provided the legislative veto under a duly-enacted law. Congress could veto executive action under that duly-enacted law. Whereas, with the Governor's executive orders, the Governor is making the so-called "duly-enacted" law, leaving the legislature with a legislative veto. Both are unconstitutional because the legislative veto violates the separation-of-powers articles in the respective constitutions.

Specifically, the legislative veto of the Governor's executive orders provided in section 12.31, subdivision 2, violates the legislative prerogative of making laws under the Minnesota Constitution, Article IV, section 22:

> Sec. 22. Majority vote of all members to pass a law. The style of all laws of this state shall be: "Be it enacted by the legislature of the state of Minnesota." No law shall be passed unless voted for by a majority of all the members elected to each house of the legislature, and the vote entered in the journal of each house.

Instead of a majority of the legislature enacting the laws, the Governor is making the "duly-enacted" laws by his executive orders.

The Governor's executive orders also violate the Presentment Clause of Minnesota Constitution, Article IV, section 23:

> Sec. 23. Approval of bills by governor; action on veto. Every bill passed in conformity to the rules of each house and the joint rules of the two houses shall be presented to the governor

Instead of the legislature presenting the passed bills to the Governor for signature, the Governor makes the so-called "duly-enacted" laws in the executive orders and presents them to the state legislature for a possible legislative veto.

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

Constitutionally, the Governor has put the cart before the horse. Under the Minnesota Constitution, the state legislature is to enact the bills and present them to the Governor to make law. Instead, in violation of the Minnesota Constitution, the Governor is making the laws by executive order and presenting them to the legislature for legislative veto.

B. The unconstitutional legislative veto provision cannot be severed from the statute because of legislative intent.

Importantly, since the unconstitutional legislative veto provision of Minnesota Statutes § 12.31, subdivision 2, cannot be severed, all of the Governor's emergency peacetime powers are unconstitutional. Minnesota Statutes § 645.20 on construction of severable provisions provides in relevant part:

> If any provision of a law is found to be unconstitutional and void, the remaining provisions of the law shall remain valid, unless the court finds the valid provisions of the law are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining valid provisions without the void one; or unless the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

The Minnesota Supreme Court has held that if the legislature would not have enacted the remaining provisions without those that are to be severed, the court may not sever the unconstitutional provision from the statute and leave the remaining language intact. *See Deegan v. State*, 711 N.W.2d 89, 98 (Minn. 2006) *State v. Shattuck,* 704 N.W.2d 131, 143 (Minn. 2005); *Chapman v. Comm'r of Revenue,* 651 N.W.2d 825, 836 (Minn.2002).

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

In this case, the legislative veto provision cannot be severed because of legislative intent. First, Minnesota Statutes, chapter 12 does not have a provision requiring severability. Second, the state legislature did not have the intent to give the Governor exclusive authority to make law through executive orders without legislative approval—as evidenced by the statutory provision for legislative veto. The legislature enacted the legislative veto to have a way to check the Governor's executive powers. The legislature would never have given the Governor these broad emergency powers without some legislative check. So, the legislative intent precludes severing the unconstitutional legislative veto provision from the rest of the statute. Accordingly, the Court cannot sever the unconstitutional legislative veto; it must hold that the entirety of section 12.31, subdivision 2 is unconstitutional.

III. Minnesota Statutes § 12.31, subdivision 2, does not authorize the Governor to invoke emergency powers for a public health emergency.

The legal issue here is statutory interpretation: whether the Governor exceeded his authority beyond the legislative-imposed legislative limits in section 12.31, subdivision 2, by invoking the emergency power for a public health emergency.

The object of statutory interpretation is to "ascertain and effectuate the intention of the legislature."[6] A court will apply the plain meaning of a statutory provision if the legislative intent "is clear from the unambiguous language of the

[6] Minn. Stat. § 645.16 (2018); *see also Linn v. BCBSM, Inc.*, 905 N.W.2d 497, 501 (Minn. 2018).

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

statute."[7] The court will also "give effect to all of the statute's provisions," and "no word, phrase, or sentence should be deemed superfluous, void, or insignificant."[8] "[The court] construe[s] nontechnical words and phrases according to their plain and ordinary meanings" and "look[s] to dictionary definitions to determine the plain meanings of words."[9]

In the absence of statutory definitions, the court may consider dictionary definitions to determine the meaning of a statutory term.[10] But the "relevant definition of a term depends on the context in which the term is used."[11] If, after applying these principles, the court concludes that the statute is not ambiguous, "our role is to enforce the language of the statute and not explore the spirit or purpose of the law."[12]

The Minnesota Supreme Court in *Dumont* held that an agency rule may not conflict with an enabling statute:

> While it is clear that the legislature can confer on administrative agencies rule-making functions to be performed in connection with their administrative duties, it is equally clear that it may not confer legislative power upon the administrative agency, and that if the legislature had acted in a specific area, the administrative agency may not adopt a rule in conflict with the statute.

Dumont v. Commissioner of Taxation, 278 Minn. 312, 154 N.W.2d 196 (1967). Neither

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[7] *Staab v. Diocese of St. Cloud,* 853 N.W.2d 713, 716–17 (Minn. 2014).
[8] *Allan v. R.D. Offutt Co.*, 869 N.W.2d 31, 33 (Minn. 2015) (quotation omitted).
[9] *Larson v. Nw. Mut. Life Ins. Co.*, 855 N.W.2d 293, 301 (Minn. 2014).
[10] *State v. Alarcon*, 932 N.W.2d 641, 646 (Minn. 2019) *citing Shire v. Rosemount, Inc.*, 875 N.W.2d 289, 292 (Minn. 2016).
[11] *State v. Nelson*, 842 N.W.2d 433, 437 n.2 (Minn. 2014).
[12] *Christianson v. Henke,* 831 N.W.2d 532, 537 (Minn. 2013).

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

agencies nor courts may, under the guise of statutory interpretation, enlarge the agency's powers beyond that which was contemplated by the legislative body. *In re Excelsior Energy, Inc.*, 782 N.W.2d 282 (Minn. Ct. App. 2010).

Under these legal standards, the Governor's executive enlarge his powers beyond that which was contemplated by the state legislature in Minnesota Statutes § 12.31, subdivision 2. This statute does not authorize the Governor to invoke emergency peacetime powers for a public health emergency. Public health emergency is not mentioned in the enumerated situations where the Governor can invoke emergency peacetime powers. Instead, Minnesota Statutes § 12.31, subdivision 2, provides that "A peacetime declaration of emergency may be declared only when an act of nature, a technological failure or malfunction, a terrorist incident, 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." Since a public health crisis is not "an act of nature, a technological failure or malfunction, a terrorist incident, an industrial accident, a hazardous materials accident, or a civil disturbance," and the word "only" is included in the statutory text to limit the statutes to the prescribed conditions only, the Governor did not have the legal authority to declare a peacetime emergency for a public health emergency like COVID-19.

The Governor in Executive Order 20-01 claims that COVID-19 is an "act of nature." Ex. 1. But, an "act of nature" is limited to catastrophic one-time

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

occurrences like an earthquake, flood or tornado. An "act of nature" does not cover a public health emergency. Black's Law Dictionary's definition of act of nature does not cover a public health emergency because an "act of nature" refers to a catastrophic one-time event such as an earthquake, flood or tornado. The Black's Law Dictionary's definition of "act of nature" refers to the definition of "act of god" and "vis major." Act, Black's Law Dictionary (11th ed. 2019). Both definitions refer to one-time occurrences. "Act of god" is defined as "[a]n overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado." Act of god, Black's Law Dictionary (11th ed. 2019). Vis major, Latin for "a superior force," is "a loss resulting immediately from a natural cause without human intervention and that could not have been prevented by the exercise of prudence, diligence, and care." Vis major, Black's Law Dictionary (11th ed. 2019). The Governor's executive order is in error that "act of nature" covers a public health emergency.

Two federal courts have recently refused to recognize the act of god defense based on the COVID-19 pandemic with respect to payment obligations. First, in *Lantino v. Clay LLC*, 2020 WL 2239957, at *3 (S.D.N.Y. 2020), the federal district court refused to apply the act of god defense because at most the defendants established financial difficulties arising out of the COVID-19 pandemic, not a legal excuse for non-payment. Second, in *Destiny Bailey v. Strippers, Inc.,* et al., 2020 WL 2616255, at *2 (M.D.Ga. 2020) did not apply the "act of God" excuse based on the

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

COVID-19 pandemic because the defendant-debtor had an independent obligation to pay regardless of income. So, for these courts the COVID-19 pandemic was not an act of god to automatically to excuse legal performance.

Further, a key state House committee agreed that Minnesota Statutes § 12.31, subdivision 2 did not cover a "public health emergency." In response to the COVID-19 pandemic, House File No. 4326 was introduced on March 9, 2020, more than 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.

> Section 1.
> Minnesota Statutes 2018, section 12.03, is amended by adding a subdivision to read:
>
> Subd. 12.
> Public health emergency.
>
> "Public health emergency" means a determination by the commissioner of health that the public health is affected by or under imminent threat from pandemic influenza or an outbreak of a communicable or infectious disease that:
>
> (1) is reasonably expected to require evacuation of the impacted population, relocation of seriously ill or injured persons or injured persons to temporary care facilities, or the provision of replacement essential community services;
>
> (2) poses a probability of a large number of deaths, serious injuries, or long-term disabilities in the affected population;
>
> (3) involves widespread exposure to an infectious agent that poses a significant risk of substantial future harm to a large number of people in the affected area; or
>
> (4) poses a significant risk of harm to a large number of people or a high rate of morbidity or mortality in the affected population.
>
> Sec. 2.
> Minnesota Statutes 2018, section 12.31, subdivision 2, is amended to read:

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

> 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 public health emergency, a technological failure or malfunction, a terrorist incident, 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…

Ex. 67. House File No. 4326 was approved by the Health and Human Services Finance Division on March 12, 2020, and was referred to the Ways and Means Committee where it has apparently died. There was no Senate companion. House File No. 4326 indicates that at least a committee of the state house thought the statutory provisions were inadequate to authorize the Government's use of emergency peacetime powers.

Finally, there is good reason that the state legislature has not included public health emergencies in section 12.31, subdivision 2. The state legislature did not want to give emergency powers to the Governor regarding public health emergencies. Instead, the legislature wanted the Governor and the agencies to follow the ordinary constitutional course when addressing public health emergencies.

Because section 12.31, subdivision 2 does not cover "public health emergency," the Governor's executive orders exceed his legal authority under section 12.31, subdivision 2.

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

IV. This petition should be adjudicated prior to the 30 day period for the Governor's current executive orders expire on June 12, 2020.

This matter should be expedited so that the petition is adjudicated prior to the 30 day period for the Governor's current executive orders expire on June 12, 2020. The civil liberties of approximately 5,600,000 Minnesotans are at stake. The livelihoods of Minnesota's small businesses are at stake.

Other states have managed to expedite such litigation and preserve civil liberties and their small businesses. The Wisconsin Supreme Court on May 13, 2020, in *State Legislature v. Secretary-Designee Andrea Palm, et al,* Case No. 2020AP765-OA, held that the Wisconsin executive officer's restrictions had exceeded her legal authority. Ex. 65. Also, in Illinois, a Clay County Judge in *Mainer v. Pritzker,* No. 2020-CH-10, held that the Illinois Governor's COVID-19 restrictions had exceeded his legal authority. Ex. 66. The Clay County state judge articulated:

> When laws do not apply to those who make them, people are not being governed, they are being ruled. Make no mistake, these executive orders are not laws. They are royal decrees. Illinois citizens are not being governed, they are being ruled. The last time I checked Illinois citizens are also Americans and Americans don't get ruled. The last time a monarch tried to rule Americans, a shot was fired that was heard around the world. That day led to the birth of a nation consensually governed based upon a document which ensures that on this day in this, [or] any American courtroom tyrannical despotism will always lose and liberty, freedom and the Constitution will always win.

Id. at 3-4.

Similarly, the people and business of Minnesota have a constitutional right not to be ruled by their Governor. The Ramsey County District Court, recognizing the

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

immediate importance of the proposed remedies for Minnesota's 5,600,000 residents and for its small businesses, should expedite this proceeding so that adjudication can be accomplished by June 12, 2020—the end of the Governor's current 30-day period under section 12.31, subdivision 2.

PRAYER FOR RELIEF

For the foregoing reasons, the petitioners request that the Court:

1. Grant the Petition for writ of quo warranto;
2. Issue an Order for a hearing on this Petition on or before June 12, 2020;
3. Issue an Order for the Respondents to respond to the Petition by 5 days before the scheduled hearing;
4. Issue an Order allowing the Petitioners to reply by 2 days before the scheduled hearing;
5. After the hearing, issue a writ of quo warranto enjoining the Governor from enforcing existing COVID-19 executive orders using the emergency peacetime powers under Minnesota Statutes, Chapter 12 and enjoining the Governor from issuing new COVID-19 executive orders using the emergency peacetime powers under Minnesota Statutes, Chapter 12.
6. To award to petitioners and their attorneys statutorily-allowed attorneys' fees and costs under the Equal Access to Justice Act, Minnesota Statutes § 15.471, et seq., or other applicable laws.

Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

7. And any other relief that the Court deems equitable or the petitioners are entitled to as matter of law.

Dated: May 28, 2020

/s/Erick G. Kaardal

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Filed in District Court
State of Minnesota
5/28/2020 12:19 PM

Minn. Stat. Sec. 549.211 Acknowledgement

The undersigned, hereby acknowledges that pursuant to Minnesota Statute §549.21(1), costs, disbursements, and reasonable attorney fees and witness fees may be awarded to the opposing party or parties in this litigation if the Court should find that the undersigned acted in bad faith, asserted a claim or defense that is frivolous and that is costly to the other party, asserted an unfounded position solely to delay the course of the proceedings; or committed fraud upon the Court.

Dated: May 28, 2020

/s/Erick G. Kaardal
Erick G. Kaardal