Filed in District Court
State of Minnesota
6/18/2020 2:22 PM

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

Court File No. 62-CV-20-3507
Court File Type: Civil Other/Misc.

Free Minnesota Small Business Coalition, et. al.,

Petitioners,

vs.

Tim Walz, Governor of Minnesota,

Respondent.

MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS AND RESPONSE TO ORDER TO SHOW CAUSE

INTRODUCTION

On March 13, 2020, Respondent Tim Walz, Governor of the State of Minnesota, declared a peacetime emergency in response to the unprecedented threat of COVID-19. In the days and weeks that followed, using authority conferred to him by the legislature under the Minnesota Emergency Management Act, the Governor set gathering limits in certain circumstances and temporarily closed schools, bars, restaurants, gyms, athletic clubs, dance studios, and other places of accommodation. These restrictions were consistent with guidance from the federal government, as well as similar actions in nearly every other state. The Governor's swift actions were necessary not only to slow the spread of COVID-19, but also to give the State time to acquire lifesaving PPE, ventilators, ICU beds, and other capacity-building equipment needed to handle the surge in cases.

Those measures have been successful. The State partnered with public and private entities to ramp up testing, acquire PPE and ventilators, and make ICU beds available. A recent article in the Journal of the American Medical Association suggests that Governor Walz's efforts

drastically reduced the hospitalizations Minnesota otherwise would have seen without the stay-at-home order.[1] Having increased the health care capacity, Governor Walz has taken steps over the past two months to reopen affected businesses in a manner that continues to protect the public health and safety of Minnesotans.

The danger has not passed, however. In fact, approximately 1,000 Minnesotans have died of COVID-19 since Petitioners first filed suit in the Court of Appeals.[2] The total number of Minnesotans hospitalized continues to climb steadily, with the number hospitalized standing at 3,718 on June 18.[3]

Governor Walz understands that the measures necessitated by the COVID-19 pandemic have not been easy or painless for Minnesotans. Emergencies like this pandemic call for temporary collective sacrifices to protect our neighbors. This shared sacrifice forms the context of this lawsuit. Petitioners include small business owners whose businesses were temporarily closed by the emergency orders and individual legislators. Petitioners assert that the Governor lacked authority to issue the peacetime emergency and all the emergency orders that followed.

Petitioners' arguments fail. Throughout this public health crisis, which has caused the deaths of over 1,300 Minnesotans, the Governor has acted pursuant to his constitutional and statutory authority. Indeed, the only court to have addressed Governor Walz's authority to date concluded that Governor Walz acted within his statutory authority in declaring a peacetime

[1] Soumya Sen, Pinar Karaca-Mandic, & Archelle Georgiou, *Association of Stay-at-Home Orders with COVID-19 Hospitalizations in 4 States*, JAMA (May 27, 2020), *available at* https://jamanetwork.com/journals/jama/fullarticle/2766673.

[2] *Compare* Pet., Ex. 48 (Exec. Order 48), *also available at* https://www.leg.state.mn.us/archive/execorders/20-48.pdf (343 fatalities as of April 30) *with* Decl. of Liz Kramer (Kramer Decl.) ¶ 3 (1,344 fatalities), dated June 18, 2020.

[3] *Id*.

emergency in response to the COVID-19 pandemic and issuing Executive Orders that closed certain businesses. *State v. Schiffler*, Order at 12-14, Court File No. 73-cv-20-3556 (Stearns Cty. Dist. Ct. June 2, 2020).[4] Petitioners do not state a claim for which relief may be granted for four primary reasons: the quo warranto process is not appropriate here; Petitioners lack standing; the Emergency Management Act does not violate separation of powers principles; and a pandemic is an "act of nature" within the meaning of the Emergency Management Act. Therefore, the Petition must be dismissed.

FACTUAL BACKGROUND[5]

On January 31, 2020, the United States Department of Health and Human Services declared a public health emergency for the entire United States as a result of the spread of COVID-19.[6] On March 6, the Minnesota Department of Health confirmed Minnesota's first case of COVID-19.[7]

---

[4] Kramer Decl., ¶ 4, Ex. 1. In addition, on June 15, 2020, the Chief Justice dismissed a proposed petition to recall the Governor. In response to an allegation that the Governor had exceeded his authority, the Chief Justice concluded that the Governor's actions in issuing the executive orders could not amount to "malfeasance." *Id*. at ¶ 5, Ex. 2.

[5] In reviewing a motion to dismiss, a court can take judicial notice of or otherwise refer to public documents without converting the motion to one for summary judgment. *See State v. Rewitzer*, 617 N.W.2d 407, 411 (Minn. 2011) (denying motion to strike documents that were matters of public record and stating that court was therefore free to refer to them in the course of its own research).

[6] U.S. Dep't of Health and Human Services, *Determination that a Public Health Emergency Exists* (January 31, 2020), https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx.

[7] Minn. Pub. Radio, *Minnesota's first COVID-19 case confirmed in cruise ship traveler*, (Mar. 6, 2020, 9:12 p.m.), https://www.mprnews.org/story/2020/03/06/minnesota-confirms-first-case-of-covid19-virus.

Filed in District Court
State of Minnesota
6/18/2020 2:22 PM

One week later, on March 13, Governor Walz declared a peacetime emergency pursuant to Minnesota Statutes sections 4.035 and 12.31.[8] In doing so, the Governor found that "[t]he infectious disease known as COVID-19, an act of nature, has now been detected in 118 countries and territories, including the United States. COVID-19 has been reported in 42 states. There are over 1,600 confirmed cases nationwide, including fourteen in Minnesota."[9] That same day, President Trump declared the COVID-19 outbreak a national emergency.[10]

Since declaring a peacetime emergency, Governor Walz has issued over sixty emergency executive orders related to COVID-19 and directed at protecting the health and safety of Minnesotans.[11] On March 16, noting that certain places of public accommodation "in which Minnesotans congregate" threatened "the public health by providing environments for the spread of COVID-19," the Governor ordered the temporary and partial closure of all bars, restaurants, and other places of public accommodation.[12] Under this order, places of public accommodation were permitted to offer food and beverages either "to go" or through delivery.[13] On March 25, Governor Walz issued Minnesota's Stay Home Order, which prohibited Minnesotans from leaving their homes unless engaging in permitted work or leisure activities.[14] The Governor extended and modified the Stay at Home Order in subsequent executive orders, allowing for

[8] Pet. for Quo Warranto, Ex. 1 (Exec. Order 20-01), p. 3, Doc. 1, *also available at* https://www.leg.state.mn.us/archive/execorders/20-01.pdf.
[9] *Id*. at Ex. 1, p. 1.
[10] Donald J. Trump, Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15337 (Mar. 13, 2020).
[11] Pet. 4 ¶ 11, Exs. 1-63, *also available t* https://www.leg.state.mn.us/lrl/execorders/eoresults?gov=44.
[12] Pet., Ex. 4 (Exec Order 4) *also available at* https://www.leg.state.mn.us/archive/execorders/20-04.pdf.
[13] *Id*. p. 2.
[14] Pet., Ex. 20 (Exec. Order 20-20), *also available at* https://www.leg.state.mn.us/archive/execorders/20-20.pdf.

additional activities and work to restart safely. Upon determining that further reopening could be done safely, the Governor rescinded the Stay Home Order as of May 17 at 11:59 p.m.[15]

Following the end of the Stay Home Order, Governor Walz has taken additional steps to reopen Minnesota in phases by balancing "public health needs and economic considerations[.]"[16] On June 1, restaurants and bars could begin outdoor seated service.[17] On June 5, restaurants could reopen for indoor service at 50% capacity using social distancing requirements.[18] Gymnasiums, fitness centers, recreation centers, indoor and outdoor sports facilities, indoor and outdoor exercise facilities, and exercise studios were also permitted to open as long as they comply with industry guidance located on the Stay Safe Minnesota website.[19] The industry guidelines currently require social distancing measures and limit indoor gymnasiums and other fitness centers to 25% of their building's fire code capacity.[20] Currently, the state is in Phase III of the Stay Safe Plan.[21] Phase IV will continue to open Minnesota businesses and may allow for additional capacity for restaurants, bars, gymnasiums, other athletic businesses.[22]

[15] Exec. Order 20-56, p. 2 ¶ 1.
[16] Pet., Ex. 63 (Exec. Order 63) p. 1, *also available at* https://www.leg.state.mn.us/archive/execorders/20-63.pdf.
[17] *Id*. at pp. 8-9.
[18] Timothy J. Walz, Exec. Order 20-74, pp. 7-8, 44 SR 1464-76 (June 8, 2020), *available at* https://www.leg.state.mn.us/archive/execorders/20-74.pdf.
[19] *Id*. at p. 8.
[20] Minn. Dep't of Emp't and Econ. Dev., Industry Guidance for Reopening: Gyms and Fitness Centers, *Employer Preparedness Plan Requirements Checklist* (June 4, 2020), *available at* https://mn.gov/deed/assets/gym-fitness-center-industry-guidance-acc_tcm1045-434834.pdf.
[21] Minnesota COVID-19 Response, *Minnesota's Stay Safe Plan*, https://mn.gov/covid19/for-minnesotans/stay-safe-mn/stay-safe-plan.jsp (last visited June 15, 2020).
[22] *Id*.

On April 13 and May 13, the Governor extended the peacetime emergency with the approval of the Executive Council.[23] On June 12, Governor Walz again extended the peacetime emergency and, because the Minnesota legislature was no longer sitting in regular session, called a special session of the legislature.[24] Although the legislature has had the authority to terminate the peacetime emergency since April in both regular and special session, it has declined to exercise that authority. As of June 18, Minnesota has seen over 31,675 COVID-19 cases, 3,718 hospitalizations, and 1,344 fatalities.[25]

PROCEDURAL BACKGROUND

On April 29, Free Minnesota Small Business Coalition, 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, and Title Boxing Club Rogers attempted to bring a declaratory judgment action under Minnesota Statutes section 14.44 with the court of appeals.[26] The petitioners in that case challenged the constitutionality of Executive Orders 20-20, 20-33, 20-38, and 20-40.[27] After the parties briefed jurisdictional issues, the court dismissed the case on May 26 for two reasons.[28] First, executive orders do not constitute "rules" subject to review under the Minnesota Administrative Procedures Act ("MAPA").[29] Second, both MAPA and the

[23] Exec. Orders 20-35 and 20-53, and corresponding Executive Council Resolutions, *available at* https://www.leg.state.mn.us/archive/execorders/20-35.pdf and https://www.leg.state.mn.us/archive/execorders/20-53.pdf
[24] Timothy J. Walz, Exec. Order 20-75 (June 12, 2020), *available at* https://www.leg.state.mn.us/archive/execorders/20-75.pdf .
[25] Kramer Decl. ¶ 3.
[26] *Id*. at ¶ 6, Ex. 3.
[27] *Id*.
[28] *Id*. at ¶ 7, Ex. 4.
[29] *Id*. at ¶ 7, Ex. 4, p. 2.

Filed in District Court
State of Minnesota
6/18/2020 2:22 PM

Minnesota Emergency Management Act expressly exempt executive orders issued pursuant to the Governor's emergency authority from MAPA requirements.[30]

On May 28, the petitioners in the prior case, along with Representatives Steve Drazkowski, Jeremy Munson, Cal Bahr, and Tim Miller ("Petitioners"), filed a Petition for Quo Warranto in this court seeking a writ that would prohibit the Governor from enforcing previous executive orders and issuing new ones. Pet. 27. After consultation with the parties, the Court issued an Order to Show Cause on June 8 directing Governor Walz to address the following issues raised in the Petition:

a. That when Respondent issued his COVID-19 executive orders, he did not exceed his authority under the Minnesota Constitution's separation of powers principle regarding the non-delegation doctrine;

b. Whether the Governor's COVID-19 executive orders exceeded his authority because the statutory authority relied upon, Minnesota Statutes § 12.31, is unconstitutional because the provision authorizes a legislative veto on the extension of peacetime emergencies beyond 30 days;

c. Whether the Governor's COVID-19 executive orders exceeded his authority because Minnesota Statutes § 12.31, subdivision 2 does not authorize the Governor to invoke emergency powers for a public health emergency; and

d. To provide any other rationale under which an argument can be made that would show why this court should not grant the Petition.

Order to Show Cause 3, June 8, 2020, Doc. 13.

In response to the Court's Order to Show Cause, and pursuant to Rule 12 of the Minnesota Rules of Civil Procedure, the Governor now responds and brings this motion to dismiss the Petition. As explained below, in addition to Petitioners lacking standing, the Governor's declaration of a peacetime emergency and issuance of executive orders fall squarely

---

[30] *Id.*

Filed in District Court
State of Minnesota
6/18/2020 2:22 PM

within his constitutional and statutory authority. Because Petitioners fail to state a claim for which relief may be granted, the Petition must be dismissed. Minn. R. Civ. P. 12.02(e).

STANDARD OF REVIEW

This Court must determine whether the Petition states a sufficient legal basis for the relief sought. *Brakke v. Hilgers*, 374 N.W.2d 553, 555 (Minn. Ct. App. 1985). Appellate courts "review de novo whether a complaint sets forth a legally sufficient claim for relief." *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014) (citation omitted). All facts in the complaint must be accepted as true and all reasonable inferences are construed "in favor of the nonmoving party." *Id*. Dismissal under Rule 12 is appropriate in cases which are fatally flawed in their legal premises and certain to fail, thereby sparing litigants the burden of unnecessary pretrial and trial activity. *Neitzke v. Williams*, 490 U.S. 319, 326–27 (1989). While modern pleading rules are liberal, they are not, however, "a substitute for substantive law." *N. Star Legal Found. v. Honeywell Project*, 355 N.W.2d 186, 188 (Minn. Ct. App. 1984). Additionally, although factual allegations are entitled to some deference, legal conclusions contained in a petition are not binding on the Court. *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010).

A writ of quo warranto is a limited remedy "to challenge whether an official's action exceeded the official's statutory authority." *Save Lake Calhoun v. Strommen*, 943 N.W.2d 171, 176 (Minn. 2020). "Where the party aggrieved may obtain full and adequate relief in either a common-law or equitable action, a writ of quo warranto is not available." *State ex rel. Danielson v. Vill. of Mound*, 48 N.W.2d 855, 861 (Minn. 1951). "Since the writ is an extraordinary legal remedy, it is not granted where another adequate remedy is available." *State ex rel. Burnquist v. Vill. of North Pole*, 6 N.W.2d 458, 460 (Minn. 1942).

ARGUMENT

Petitioners' challenge to the legal basis of Governor Walz's response to the COVID-19 pandemic and the executive orders related to his emergency declaration fail for multiple reasons. First, Petitioners lack standing to challenge the Governor's Chapter 12 authority. Second, the writ of quo warranto, a form of extraordinary relief, is not available for Petitioners' constitutional claims in Counts I and II because an adequate remedy is provided by statute for those claims. Third, the emergency declaration statute does not violate constitutional separation of powers because it is a proper delegation of authority from the legislative to the executive branch. Finally, a pandemic constitutes an "act of nature" authorizing the Governor to declare a peacetime emergency.

I. PETITIONERS LACK STANDING TO CHALLENGE THE EMERGENCY DECLARATION STATUTE AND THE GOVERNOR'S EXECUTIVE ORDERS.

Petitioners must have standing for the court to exercise jurisdiction in this matter. *See Sec. Bank & Tr. Co. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 916 N.W.2d 491, 496 (Minn. 2018) (discussing standing as a prerequisite for a court's exercise of jurisdiction). "Standing is a legal requirement that a party have a sufficient stake in a justiciable controversy[.]" *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 338 (Minn. 2011) (internal quotation omitted). "A party may acquire standing either as the beneficiary of a statutory grant of standing or by suffering an injury-in-fact." *Sec. Bank & Tr. Co.*, 916 N.W.2d at 496 (internal quotation omitted).

Standing focuses on the party seeking to have their complaint resolved by the court. *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 321 (Minn. Ct. App. 2007). "The constitutional function of Minnesota courts is to resolve disputes and to adjudicate private rights." *Id.* When standing is challenged, and in the absence of a statutory basis for their claim, a party must demonstrate an "injury that a court can redress[.]" *Id.*

In this matter, neither the individual legislators nor any other Petitioner has pled a sufficient individual injury, nor can they satisfy the test for taxpayer standing.

A. The Individual Legislators Named in the Petition Lack Standing.

The four members of the Minnesota House of Representatives identified in the Petition should be dismissed as parties to this proceeding because they lack standing.[31] The legislators assert that they have "individual legislator standing." Pet. ¶ 2.

Legislative standing can only be established in rare circumstances, and those circumstances are not present in this case. To satisfy standing requirements in their legislative capacity, a legislator must show a claimed injury that "is personal, particularized, concrete, and otherwise judicially cognizable." *Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143, 150 (Minn. Ct. App. 1999), *review denied* (Minn. Mar. 14, 2000) (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (1997)). A legislator typically does not meet their burden to prove standing when the alleged injury is institutional rather than personal. *Id*. In this case, the legislators allege the executive orders usurp their legislative power, an injury that is institutional instead of personal and cannot establish standing.[32] Pet. ¶ 2. The four members of the Minnesota House of Representatives should be dismissed from this proceeding.

---

[31] The members of the Minnesota House of Representatives identified as parties are Representative Steve Drazkowski, Representative Jeremy Munson, Representative Cal Bahr, and Representative Tim Miller. Pet. ¶ 2.

[32] To the extent the individual legislators intended to base their standing on the Petition's statement that they "are damaged by the Governor's executive orders restricting civil liberties because they cannot exercise movement and associate with others as they desire," Pet. ¶ 21, that also fails. That type of conclusory assertion is insufficient to establish standing; Petitioners offer no facts suggesting the activities that they would like to do that are precluded.

Filed in District Court
State of Minnesota
6/18/2020 2:22 PM

B. Petitioners Fail to Allege Sufficient Facts Supporting an Injury in Fact.

It is not only the individual legislators who fail to allege facts sufficient to show standing; the same is true of all Petitioners. As stated above, parties gain standing either through "a statutory grant of standing or by suffering an injury-in-fact." *Sec. Bank & Tr. Co.*, 916 N.W.2d at 496 (internal quotation omitted). Because Petitioners do not allege any statutory grant of standing, they all must allege sufficient facts to support an "injury-in-fact."

Minnesota law defines an "injury-in-fact" as "a concrete and particularized invasion of a legally protected interest." *Webb Golden Valley, LLC v. State*, 865 N.W.2d 689, 693 (Minn. 2015) (quotation and citation omitted). A disagreement with the government's interpretation of a statute is insufficient to establish an injury-in-fact. *In re Sandy Papas Senate Comm.*, 488 N.W.2d 795, 797 (Minn. 1992).

Here, Petitioners fail to allege facts that support the existence of an injury-in-fact. With the exception of the individual legislators and their standing addressed *supra*, the totality of the remaining Petitioners' alleged facts supporting standing is that they are businesses that have closed due to the Governor's executive orders and have suffered damages.[33] Pet. 2-3, ¶¶ 1, 3. Petitioners do not identify what kind of damages they have sustained, i.e. monetary damages, deprivation of statutory or constitutional rights, etc. Petitioners do not identify the "legally

[33] Not only do Petitioners fail to plead a valid injury-in-fact, but the one pled by Petitioners—closure of their businesses—is no longer applicable. As of June 5, 2020, all of the Petitioners affected by the Governor's executive orders closing businesses are now able to reopen. *See* Exec. Order 74. Had Petitioners pleaded facts sufficient to establish damages and how the executive orders have affected the different aspects of their businesses, it is possible that the Court could discern how under the most current executive orders the Petitioners continue to suffer an injury-in-fact. However, as Petitioners only alleged damages are due to closure, the matter before the Court is moot. *See Kahn v. Griffin*, 701 N.W.2d 815, 821 ("the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)") (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)).

protected interest" that the Governor's executive orders invade or violate. Merely stating that because Petitioners have suffered "damages" they have a right to challenge the constitutionality of the Governor's executive orders is insufficient to confer individual standing. *See Sec. Bank & Tr. Co.*, 916 N.W.2d at 496 (allegedly negligent legal advice during estate planning process did not confer standing because no concrete harm occurred until after decedent's death); *Byrd v. Indep. Sch. Dist. No. 194*, 495 N.W.2d 226, 231 (Minn. Ct. App. 1993) (a trade union did not have standing to challenge school district's contracting procedures because it failed to demonstrate an injury in fact).

C. Petitioners Lack Taxpayer Standing.

In addition to failing to establish individual standing, Petitioners also fail to allege sufficient facts to support taxpayer standing. Minnesota taxpayers have "a real and definite interest in preventing an illegal expenditure of [tax] money[.]" *Conant*, 603 N.W.2d at 147. Indeed, the Minnesota Supreme Court has recognized that "the right of a taxpayer to maintain an action in the courts to restrain the unlawful use of public funds cannot be denied." *McKee v. Likins*, 261 N.W.2d 566, 571 (Minn. 1977). However, taxpayer standing in Minnesota has limitations. *Olson v. State*, 742 N.W.2d 681, 684 (Minn. Ct. App. 2007). A party must establish both an injury-in-fact distinct from the public and an illegal expenditure of public funds.

First, the party alleging taxpayer standing must have suffered an injury in fact that is "special or peculiar and different from damage or injury sustained by the general public." *Channel 10, Inc. v. Indep. Sch. Dist. No. 709*, 215 N.W.2d 814, 820 (1974). As discussed above, Petitioners fail to allege a sufficient individual injury-in-fact, let alone one that is separate and distinct from other Minnesotans. Many Minnesotans and Minnesota-owned businesses have suffered from the COVID-19 pandemic and resulting public health safety measures. Indeed,

Filed in District Court
State of Minnesota
6/18/2020 2:22 PM

Petitioners admit this in their Petition. *See* Pet. 3, ¶ 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."). Simply stating that Petitioners are businesses (or a coalition of small businesses) located in Minnesota that have suffered unquantified or unidentifiable "damages" due to a pandemic is insufficient to confer taxpayer standing. *See Channel 10*, 215 N.W.2d at 820 ("Rights of a public nature are to be enforced by public authority rather than individual citizens so as to avoid multiplicity of suits.").

Second, taxpayer standing requires Petitioners allege an illegal expenditure of public funds. *McKee*, 261 N.W.2d at 570-71. *Compare McKee,* 261 N.W.2d at 570-71 (taxpayer standing available to challenge welfare medical payments made pursuant to government bulletin that was issued in violation of the Minnesota Administrative Procedures Act) *with In re Sandy Pappas Senate Comm.*, 488 N.W.2d at 798 (taxpayer standing not available to challenge disagreement with election board's handling of a campaign violation); *St. Paul Area Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585, 589 (Minn. 1977) (no taxpayer standing where challenged illegal expenditures were a "waste" of public funds that, if not used, would remit back to the federal government and not the state); *Olson*, 742 N.W.2d at 685 (challenge to legislative actions that would increase appellants' taxes was not a sufficient "link between that challenge and an illegal expenditure of tax monies" to support taxpayer standing); *Rukavina v. Pawlenty*, 684 N.W.2d 525, 532 (Minn. Ct. App. 2004), *review denied* Oct. 19, 2004, 684 N.W.2d at 531 ("disagreement with policy or the exercise of discretion by those responsible for executing the law [ ] do not fall within the ambit of cases giving standing to taxpayers to challenge illegal expenditures").

Here, the Petition contains no mention of any expenditures of funds. It simply asserts "taxpayer standing" without ensuring the bare minimums were met for conveying that unique standing. Without an allegation of illegal expenditures, there can be no taxpayer standing.

As Petitioners fail to allege both an injury-in-fact distinct from the public and an illegal expenditure of public funds, taxpayer standing is not available.

D. Free Minnesota Cannot Obtain Associational Standing by Forming for the Sole Purpose of Challenging the Governor's Executive Orders.

In addition to lacking individual and taxpayer standing, Free Minnesota lacks associational standing. Minnesota courts recognize associational standing, which permits organizations to sue for injuries to itself or its members. *State ex rel. Humphrey v. Philip Morris, Inc.*, 551 N.W.2d 490, 497-98 (Minn. 1996). As discussed above, neither Free Minnesota nor the individual Petitioners allege facts sufficient to support an individual injury-in-fact or injuries separate and distinct from the general public. Without some type of cognizable injury, associational standing is not available. *Id*.

Further, Minnesota jurisprudence prohibits individuals from circumventing standing requirements through the improper use of special interest groups. *St. Paul Area Chamber of Commerce*, 258 N.W.2d at 589. Normally, special interest groups whose specific mission is affected by government actions will be able to assert associational standing. *See All. for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 914 (Minn. 2007) (special interest groups whose mission is to promote affordable housing had standing to challenge government's failure to implement a state land use law because it forced the group to "divert resources from activities it would otherwise undertake" and harmed its advocacy efforts); *Rukavina*, 684 N.W.2d at 533 (special interest group, whose stated mission was "to promote economic development of the

mining regions of Minnesota" had standing to challenge transfer of monies out of the state's mineral fund to the general fund).

However, special interest groups may not gain standing if they form for the sole purpose of disagreeing with government action. In *St. Paul Area Chamber of Commerce*, a group called "Drive 35E" formed to fight a legislative action that prohibited the completion of I-35E in St. Paul. 258 N.W.2d at 588. The group was comprised "of representatives of business and labor, and established for the purpose of promoting and supporting the completion of a certain portion of the freeway grid in Minnesota." *Id*. The court found Drive 35E could not bootstrap its way into creating a justiciable controversy and gaining standing by forming for the sole purpose of disputing the government action at issue. *Id*. at 589.

Here, Free Minnesota is unlike many special interest groups, such as ones promoting affordable housing, whose mission is later affected by government action. *See All. for Metro. Stability*, 671 N.W.2d at 914. Instead, it is akin to Drive 35E in that its sole mission is to challenge the Governor's executive orders. Pet. 2, ¶ 1 ("[Free Minnesota] is an association of businesses in Minnesota shut down by the Governor's executive order.") Free Minnesota cannot create associational standing in this manner.

Petitioners have failed to establish grounds for legislative standing, individual standing, taxpayer standing, and associational standing. Because Petitioners fail to allege sufficient facts giving rise to standing in any context, the Petition must be dismissed.

Filed in District Court
State of Minnesota
6/18/2020 2:22 PM

II. A Writ of Quo Warranto Is Not Available For Petitioners' Constitutional Claims in Counts I and II.

Petitioners' constitutional claims are inappropriate for a quo warranto action because a declaratory judgment is available by statute for these claims.[34] "Where the party aggrieved may obtain full and adequate relief in either a common-law or equitable action, a writ of quo warranto is not available." *State ex rel. Danielson*, 48 N.W.2d at 861; *see also Save Lake Calhoun*, 943 N.W.2d at 175-76 (describing quo warranto as a limited remedy to challenge whether a government official exceeded the authority granted to them pursuant to a statute). Petitioners' constitutional claims should be adjudicated as seeking a declaratory judgment pursuant to Minnesota Statutes chapter 555. Regardless, Respondent addresses herein the merits of Petitioners' constitutional claims and demonstrates why they should be dismissed with prejudice. However, in so doing, Respondent does not waive, and expressly reserves, claims or defenses which may be available to him as a result of Petitioners incorrectly seeking constitutional relief through a quo warranto petition.

III. Section 12.31 of the Minnesota Emergency Management Act Does Not Violate Separation of Powers Under the Minnesota Constitution.

The legislature passed the Minnesota Emergency Management Act to "generally protect the public peace, health, and safety" and to "preserve the lives and property of the people of the state[.]" Minn. Stat. § 12.02, subd. 1; *see also* Minn. Stat. § 12.01. The provisions of this law respond to the "increasing possibility of the occurrence of natural and other disasters," Minn.

[34] Count I of the Petition alleges the emergency declaration statute, Minnesota Statutes section 12.31, amounts to a legislative delegation of authority to the Governor that violates the separation of powers required by the Minnesota Constitution. Count II asserts the legislative oversight in section 12.31, subdivision 2 (allowing for the legislature to terminate a governor's emergency declaration) is as a legislative veto provision that also violates separation of powers.

Filed in District Court
State of Minnesota
6/18/2020 2:22 PM

Stat. § 12.02, subd. 1, and they confer upon the Governor the emergency powers set forth in Minnesota Statutes chapter 12. *See id*., subd. 1(2).

In this proceeding, Petitioners challenge the constitutionality of the emergency declaration statute, Minnesota Statutes section 12.31. *See* Pet. 13-20. The statute authorizes the Governor to respond to either a national security emergency or a peacetime emergency. *See* Minn. Stat. § 12.31, subds. 1 and 2. Petitioners assert that, by granting the Governor authority to declare and respond to a peacetime emergency pursuant to section 12.31, including the emergency declaration at issue and the executive orders addressing the COVID-19 pandemic, the statute violates the separation of powers requirements of the Minnesota Constitution. Pet. 9-13, 16-19; *see also* Order to Show Cause at 2. Petitioners cannot meet their heavy burden to establish the statute is unconstitutional because section 12.31 is an appropriate delegation of authority with a reasonably clear standard for the Governor's implementation and continued complementary authority of the legislature.

A. Petitioners Carry a Heavy Burden to Overcome Section 12.31's Presumed Constitutionality, Especially When Considering That Legislative Delegations Are Liberally Permitted to Facilitate the Administration of State Laws.

Statutes are presumed constitutional. *Kimberly-Clark Corp. & Subsidiaries v. Comm'r of Revenue*, 880 N.W.2d 844, 848 (Minn. 2016). The challenging party bears a "heavy" burden to overcome this presumption. *Id*.; *see also Caterpillar, Inc. v. Comm'r of Revenue*, 568 N.W.2d 695, 697-98 (Minn. 1997) (requiring a demonstration of unconstitutionality beyond a reasonable doubt). Reviewing courts, therefore, should exercise "extreme caution" and should declare a statute unconstitutional "only when absolutely necessary." *Olson v. One 1999 Lexus MN License Plate No. 851LDV*, 924 N.W.2d 594, 601 (Minn. 2019) (quoting *State v. Rey*, 905 N.W.2d 490, 493 (Minn. 2018)).

Filed in District Court
State of Minnesota
6/18/2020 2:22 PM

Legislative delegations of authority are viewed liberally "in order to facilitate the administration of laws which…are complex in their application." *State v. King*, 257 N.W.2d 693, 697 (Minn. 1977).[35] The Minnesota Constitution expressly divides the powers of government into the legislative, executive, and judicial departments. Minn. Const. art. III, § 1.[36] A legislative delegation may grant discretion to the executive branch "in order to facilitate the administration of laws as the complexity of economic and governmental conditions increase." *Anderson v. Comm'r of Highways*, 126 N.W.2d 778, 780-81 (Minn. 1964). As stated in *Anderson*, "it is impossible for the legislature to deal directly with the many details in the varied and complex conditions on which it legislates[.]" *Id.* at 781. It is well established that the legislature can enact statutes which provide flexibility for the executive branch officials to implement, and the legislature frequently leaves details and particular decisions pursuant to a law to the "reasonable discretion" of the executive branch. *Id.*

B. The Governor Can Respond to Emergencies Pursuant to Minnesota Statutes Section 12.31 as an Appropriate Exercise of Delegated Authority.

In discussing separation of powers, the Minnesota Supreme Court has emphasized that "[t]here are many instances in the operation of government…where the function at issue requires responsible effort from both of the political branches." *Brayton v. Pawlenty*, 781 N.W.2d 357, 377 (Minn. 2010). These "cooperative ventures" do not violate the separation of powers. *Id.*

[35] Since the decision in the seminal legislative delegation case of *Lee v. Delmont*, 36 N.W.2d 530 (Minn. 1949), the Minnesota Supreme Court has found only two instances of a legislative delegation which violated separation of powers. Those cases have no bearing here. *Remington Arms Co. v. G.E.M. of St. Louis, Inc.*, 102 N.W.2d 528 (Minn. 1960) (invalidating statutory provision that delegated legislative powers to private parties); *Foster v. City of Minneapolis*, 97 N.W.2d 273, 275-76 (Minn. 1959) (invalidating statutory provision that conditioned rezoning decisions on consent of neighboring private property owners); *see also In re Griepentrog*, 888 N.W.2d 478, 487 (Minn. Ct. App. 2016) (discussing *Remington Arms Co.* and *Foster*).

[36] Under the separation of powers, a branch of government cannot exercise "the powers properly belonging to either of the others[.]" Minn. Const. art. III, § 1.

Rather, where a governmental function falls within an area of joint responsibility, such as the response to an emergency presented here, it "provides an opportunity for the political branches to work cooperatively within the confines of our constitution." *Id.* (footnote omitted).

Separation of powers is preserved unless the legislature "delegate[s] purely legislative power" to the executive branch. *Lee v. Delmont*, 36 N.W.2d 530, 538 (Minn. 1949). However, "[i]t does not follow, because a power may be wielded by the legislature directly, or because it entails an exercise of discretion and judgment, that it is exclusively legislative." *Id.*

1. The Legislature Is Permitted to Enact Laws That Provide Broad and Flexible Standards for the Executive Branch to Implement.

Discretionary authority delegated by the legislature satisfies separation of powers and does not amount to a delegation of pure legislative power, when the law furnishes "a reasonably clear policy or standard" for the executive branch to implement. *City of Richfield v. Local No. 1215, Int'l Ass'n of Fire Fighters*, 276 N.W.2d 42, 45 (Minn. 1979). The policy or standard can be expressed in "very broad and general terms." *Lee*, 36 N.W.2d at 539. The Minnesota Supreme Court has also recognized that there are "exceptions" to this general rule, such that no specific standard is required, because a standard could "straitjacket and interfere with the fair and efficient administration" of the law. *Anderson*, 126 N.W.2d at 781.

The legislature has wide latitude in articulating a standard when it delegates authority because, for practical purposes, a particular law must be "adapted to complex conditions involving a host of details with which the legislature cannot deal directly." *Lee*, 36 N.W.2d at 539. Broad and flexible standards are necessary to preserve "the administrative flexibility necessary to effectively carry out the legislative purpose" contemplated by the law. *State ex rel. Brown v. Johnson*, 96 N.W.2d 9, 14 (Minn. 1959). A flexible standard is also necessary to leave room for the executive branch to work out the "details" pursuant to a particular law, "particularly

in a complex and fast-changing area[.]" *Minn. Energy & Econ. Dev. Auth. v. Printy*, 351 N.W.2d 319, 351 (Minn. 1984).

Past decisions of the Minnesota Supreme Court illustrate the broad and general standards that are permissible in the area of legislative delegation. The Minnesota Supreme Court has upheld, as providing a sufficient standard under the legislative delegation doctrine, statutes delegating authority to:

- the Board of Optometry to determine what constitutes "unprofessional conduct," *Reyburn v. Minn. State Bd. of Optometry*, 78 N.W.2d 351, 354-55 (Minn. 1956);
- the Commissioner of Highways to suspend the license of a "habitual violator" of traffic laws, *Anderson*, 126 N.W.2d at 781;
- a municipal fire department to determine a "hazardous condition," *City of Minneapolis v. Krebes*, 226 N.W.2d 617, 619-21 (Minn. 1975); and
- the Commissioner of Health to determine whether there exists a "significant health problem" presented by the use of building materials that emit formaldehyde gases, *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 242 (Minn. 1984).

Consistent with these decisions, the Minnesota Supreme Court recognizes that the standard of "in the public interest" can provide constitutionally sufficient guidance. *See Minn. Energy & Econ. Dev. Auth.*, 351 N.W.2d at 349 n.10; *see also Lee*, 36 N.W.2d at 539 n.11; *State ex rel. Interstate Air-Parts v. Minneapolis-St. Paul Metro. Airports Comm'n*, 25 N.W.2d 718, 727-28 (Minn. 1947).

2. The Peacetime Emergency Declaration Statute Furnishes a Reasonably Clear Policy or Standard.

Given the complexity of dealing with an emergency, the standards in Minnesota Statutes section 12.31, subdivision 2 adequately guide the Governor's response when one arises. The statute prescribes six conditions for when it may be invoked, it establishes a proscribed time period for the Governor's exercise of the specified duties and powers, it requires review and

Filed in District Court
State of Minnesota
6/18/2020 2:22 PM

approval by the Executive Council after a short period of time, and it gives the legislature the ability to override the Governor's declaration. *See generally* Minn. Stat. § 12.31, subd. 2. Accordingly, the emergency declaration statute provides enumerated standards that satisfy constitutional scrutiny.

In particular, section 12.31, subdivision 2 can be invoked only when there is "an act of nature, a technological failure or malfunction, a terrorist incident, an industrial accident, a hazardous materials accident, or a civil disturbance." But even that is not a sufficient condition. Two additional conditions must be met: life and property must endangered and local government resources must be inadequate to "handle the situation." Minn. Stat. § 12.31, subd. 2(a). These conditions are required to trigger the governor's authority. *Id.*; *see, e.g., King*, 257 N.W.2d at 697 (stating that the legislature may constitutionally authorize the executive branch "to determine those facts that will make a statute effective"). Only then is the governor authorized to declare and respond to a peacetime emergency.

A peacetime emergency declaration, including the actions a governor may take pursuant to such a declaration, is also subject to strict temporal limitations. *See* Minn. Stat. § 12.31, subds. 2-3. Extending a peacetime emergency declaration beyond the first five days requires Executive Council approval. Minn. Stat. § 12.31, subd. 2(a).[37] And, when the legislature is not in session, the Governor is expressly required to call the legislature into session when a peacetime emergency is extended beyond 30 days. This provides the legislature an opportunity to exercise its authority to end the peacetime emergency or to enact legislation that could otherwise restrict or guide the Governor's actions during a peacetime emergency. The Governor is

[37] The Executive Council consists of the governor, lieutenant governor, secretary of state, state auditor, and attorney general. Minn. Stat. § 9.011, subd. 1.

expressly prevented from exercising the specified powers to respond to a peacetime emergency beyond the statute's time limitations. *See* Minn. Stat. § 12.31, subd. 3.

The COVID-19 pandemic presents one of the most complex and rapidly-evolving crises in Minnesota's history. This is the type of situation for which the legislature should, and frequently does, delegate authority to the Governor to respond. The legislature is not capable of responding to an emergency as quickly as the executive branch, and as quickly as the situation necessitates, and this is recognized throughout the delegation of authority to the Governor in chapter 12. *See, e.g.,* Minn. Stat. § 12.36 (authorizing various methods by which a governor can fast provide aid during an emergency); *see also Minn. Energy & Econ. Dev. Auth.*, 351 N.W.2d at 351 (emphasizing the need for executive branch flexibility when the legislature delegates in a complex and "fast-changing area").

The Governor is guided by sufficient standards in section 12.31 to declare a peacetime emergency and carry out his duties in responding to the emergency. Indeed, the statute's standards provide the Governor with the "flexibility necessary to effectively carry out the legislative purpose" of protecting public health and safety when threatened by various types of emergent situations. *Brown*, 96 N.W.2d at 14. As a result, the emergency declaration statute meets, and exceeds, any minimum standard necessary to satisfy the Minnesota Constitution.

C. The Legislative Oversight in Section 12.31 Supports Its Constitutionality.

The provisions in section 12.31, subdivision 2(b) by which the legislature can terminate a peacetime emergency bolster the statute's constitutionality within the framework of separation of powers. "[T]he legislature may terminate a peacetime emergency extending beyond 30 days" with a "majority vote of each house[.]" Minn. Stat. § 12.31, subd. 2(b). Further, 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

Filed in District Court
State of Minnesota
6/18/2020 2:22 PM

houses of the legislature." *Id*. The legislature was sitting in session the first two times that peacetime emergency was declared and, most recently, the Governor called the legislature into a special session on June 12, 2020, when he most recently extended the peacetime emergency. As a result, the legislature has had the opportunity in April, May, and June to terminate the peacetime emergency and has not done so.

The legislature's ability to override a peacetime emergency declaration constitutes a significant check on the manner with which a Governor responds to an emergency. It also reflects the need for responsible effort on the part of the two political branches of government in the area of emergency response. *See*, *supra* § III.B. The legislative and executive branches are encouraged by section 12.31 to work cooperatively to protect public health and safety when responding to an emergency. Minn. Stat. § 12.31, subd. 2(b); *see also Minn. Energy & Econ. Dev. Auth.*, 351 N.W.2d at 351 (emphasizing a statute's provision for "close legislative monitoring" in rejecting a separation of powers concern).

Although they characterize it as a "legislative veto," Petitioners fail to reference any legal authority which would suggest that the legislature's ability to terminate an emergency declaration pursuant to section 12.31, subdivision 2(b) is unconstitutional. Pet. 16-19; Order to Show Cause ¶2b. The only case cited by Petitioners for this proposition, *I.N.S. v. Chadha*, 462 U.S. 919 (1983), is inapplicable. *See id.* at 17. *Chadha* involved a federal legislative delegation to the executive branch, pursuant to the Immigration and Nationality Act ("INA"), to determine whether an individual subject to deportation should nevertheless be granted relief from deportation and allowed to remain in the country. *See* 462 U.S. at 923-24, 952-54. At issue was a "one-House veto" provision in the INA which allowed just one of the houses of Congress to pass a resolution to override an immigration judge's decision to grant relief from deportation to a

particular individual. *Id*. at 925-28. The United States Supreme Court struck down the "one-House veto" provision because it amounted to an exercise of legislative power by Congress that did not comply with the bicameral requirements of the United States Constitution (i.e. requiring passage by both houses of Congress). *Id*. at 945-46, 956-58 (referencing U.S. Const. art. 1, § 1 and § 7, cls. 2, 3).

Unlike *Chadha*, the provision in section 12.31 which allows the legislature to terminate a peacetime emergency complies with the standards in Minnesota's Constitution for legislative action, because it requires a majority of both houses of the legislature. *See* Minn. Stat. § 12.31, subd. 2(b); *cf*. Minn. Const. art. IV, § 22 ("No law shall be passed unless voted for by a majority of all the members elected to each house of the legislature[.]").

In addition, courts in other states addressing separation of powers challenges to an emergency response to COVID-19 have concluded that similar statutes do not amount to an unconstitutional delegation of authority. *See Friends of Danny DeVito v. Wolf*, --- A.3d ---, 2020 WL 1847100 at *14-15 (Pa. Apr. 13, 2020), *cert. filed* Apr. 27, 2020 (executive order upheld because broad powers authorized by General Assembly did not violate separation of powers doctrine); *Elkhorn Baptist Church v. Brown*, --- P.3d ---, 2020 WL 3116543 at *10-11 (Or. June 12, 2020) (discussing statutory grant of authority to governor to respond to an emergency and constitutional limitations on that authority); *Mich. United for Liberty v Whitmer*, No. 20-000061-MZ at 2-7 (Mich. Ct. Cl. May 19, 2020) (emergency response authority delegated to governor by statute did not violate separation of powers);[38] *see also Wis. Legislature v. Palm*, 942 N.W.2d 900, 914 (Wis. May 13, 2020) (noting that "[c]onstitutional law has generally permitted the Governor to respond to emergencies without the need for legislative approval" and that the

[38] *See* Kramer Decl. ¶ 8, Ex. 5.

Filed in District Court
State of Minnesota
6/18/2020 2:22 PM

Governor's emergency powers were not at issue in the case). Minnesota's emergency declaration statute adequately and appropriately delegates authority to the governor to respond to an emergency such as the COVID-19 pandemic.[39]

D. None of the Other Allegations in the Petition State a Claim That Section 12.31 Violates Separation of Powers or Is Otherwise Unconstitutional.

As discussed above, the Governor's ability to issue executive orders and rules during a peacetime emergency falls within the permissible framework for the executive to determine and implement pursuant to a legislative delegation. *See*, *supra* § III.B. The legislature has expressly chosen not to subject the issuance of such orders and rules to the rulemaking requirements of the Minnesota Administrative Procedure Act ("MAPA"). *See* Minn. Stat. § 12.21, subd. 3(1) (authorizing the governor, while performing duties under chapter 12, to issue orders and rules "without complying with sections 14.001 to 14.69"). Given the contemplated immediacy of the need for the governor to put rules in place to protect public health and safety in the face of an emergency, the full process of MAPA rulemaking and review is impractical. While Petitioners complain about the legislature's choice to omit emergency executive orders from the MAPA rulemaking process, they cannot show that this decision violates Minnesota's Constitution. Pet. 13, 15; *see also Lee* 36 N.W.2d at 539 ("The discretionary power to ascertain the operative facts normally carries with it the power to make rules and regulations pursuant to which the power is exercised.") The legislative grant of discretion to the Governor to determine how to deal with an

---

[39] Even if the Court considers some aspect of the legislative oversight provisions in section 12.31, subdivision 2(b) to be unconstitutional, the remedy is to sever only that portion of the statute. *See* Minn. Stat. § 645.20; *see also State v. Cannady*, 727 N.W.2d 403, 408 (Minn. 2007) ("When we hold a statute to be unconstitutional, we invalidate only as much of the law as is unconstitutional.") The remainder of section 12.31 should not be invalidated as a result. Notably, this would still leave the legislature with the ability to check the Governor's emergency response authority by passing legislation to either amend chapter 12 or take some other action in response to the COVID-19 pandemic.

Filed in District Court
State of Minnesota
6/18/2020 2:22 PM

emergency, without going through MAPA rulemaking, is both "permissible and desirable[.]" *See Coal. of Greater Minn. Cities v. Minn. Pollution Control Agency*, 765 N.W.2d 159, 166 (Minn. Ct. App. 2009).

Although disliked by Petitioners, the legislature's similar choice to exempt emergency executive orders from the judicial review typically available for MAPA rulemaking does not give rise to a constitutional claim. *See* Pet. 15-16. Minnesota Statutes section 14.44 generally subjects state agency rules to judicial review; however, executive orders issued during an emergency are exempted from MAPA under the express language of both the Minnesota Emergency Management Act and MAPA itself. *See* Minn. Stat. § 12.21, subd. 3(1); Minn. Stat. § 14.03, subd. 1.[40] Petitioners fail to demonstrate how this choice by the legislature to exempt a governor's actions during an emergency from the judicial review generally applicable to MAPA rulemaking is unconstitutional. *See Ninetieth Minn. State Senate v. Dayton*, 903 N.W.2d 609, 624 (Minn. 2017) ("[O]ur constitution does not require that the Judicial Branch referee political disputes between our co-equal branches of government…when those branches have both an obligation and an opportunity to resolve those disputes between themselves."); *City of Richfield*, 276 N.W.2d at 48 ("Courts are not arbitrators of legislative wisdom but check to determine if there has been an unauthorized or unconstitutional delegation of power…Even if a law is unwise, that is not a basis for our declaring the Act invalid.").

[40] In addition to emergency executive orders, MAPA rulemaking requirements (including the availability of judicial review) expressly do not apply to (1) agencies directly in the legislative or judicial branches, (2) the Department of Military Affairs, (3) the Comprehensive Health Association, or (4) the regents of the University of Minnesota. *See* Minn. Stat. § 14.03, subd. 1.

IV. A PANDEMIC IS AN ACT OF NATURE AUTHORIZING THE DECLARATION OF A PEACETIME EMERGENCY.

Outside of their constitutional claims, Petitioners' final challenge is to the Governor's authority to declare a peacetime emergency due to a pandemic or other public health crisis. The enabling statute, section 12.31, lists triggering events that permit the declaration of a peacetime emergency. At issue here is the phrase "act of nature" and whether that includes pandemics. Despite Petitioners' arguments and their reliance on inapplicable federal case law, both the plain text of chapter 12 and its legislative history clearly authorize the Governor to declare a peacetime emergency due to COVID-19.

A. The Plain Language of the Governor's Peacetime Emergency Powers Includes the Authority to Protect Minnesotans From Pandemics.

If statutory language is not ambiguous, it is unnecessary to go beyond the plain language to understand its meaning and application. *See In re Reichmann Land & Cattle, LLP*, 867 N.W.2d 502, 509 (Minn. 2015). Here, the plain language of section 12.31 authorizes the governor to declare a peacetime emergency in the face of a pandemic. Minnesota statute section 12.31 gives the governor the power to declare a peacetime emergency "when an act of nature, a technological failure or malfunction, a terrorist incident, industrial accident, a hazardous materials accident, or a civil disturbance endangers life and property . . . ." Minn. Stat. § 12.31, subd. 2. Petitioners do not dispute that COVID-19 endangers life and property nor that local resources are inadequate. Rather, Petitioners take umbrage with Governor Walz's determination that an "act of nature" includes a worldwide pandemic. This position holds little merit. Former Governor Mark Dayton declared peacetime emergencies due to a worldwide virus. *See* Mark B. Dayton, Emergency Exec. Order 15-09, 39 S.R. 1542-44 (May 2015), *available at* https://www.leg.state.mn.us/archive/execorders/15-09.pdf (declaration of peacetime emergency

due to the presence of avian flu in Minnesota). Earlier this month, the Stearns County District Court found Governor Walz properly exercised his authority under section 12.31 by declaring a peacetime emergency due to COVID-19, i.e. an "act of nature." Order at 12, *Minnesota v. Schiffler*, Stearns Cty. Ct File No. 73-CV-20-3556, Doc. 57 (June 2, 2020). Indeed, even the federal government defines "act of nature" to include pandemics. *See*, *e.g.*, Office of Emergency Operations, U.S. Dep't of Energy, 151.1D, Comprehensive Emergency Mgmt. Sys. (2016) (emergency management system order defining "acts of nature" as "hurricanes, earthquakes, tornadoes, animal disease outbreak, **pandemics**, or epidemics") (emphasis added).

An "act of nature" is synonymous with the term "act of god" which covers a variety of events, including a pandemic. Petitioners agree that the terms "act of nature" and "act of god" are interchangeable. Pet. 23. However, Petitioners point to two cases to argue that a pandemic is not an "act of god." Petitioners misrepresent the holdings in those cases; neither case found that a pandemic is not an act of god. In *Bailey v. Strippers, Inc.*, the court found the "act of god" defense could not be invoked due to COVID-19 when the party had the ability to pay her debts regardless of the pandemic. 5:18-cv-00128, 2020 WL 2616255, at *2 (M.D. Ga. May 22, 2020). In *Lantino v. Clay, LLC*, the court acknowledged that New York law does not offer an "act of god" defense in any case where the inability to perform is solely due to financial hardship. 1:18-cv-12247, 2020 WL 2239957, at *3 (S.D.N.Y. May 8, 2020). Instead, courts examining the term "act of god" have routinely concluded it encompasses a pandemic. *See Rio Props. v. Armstrong Hirsch Jackoway Tyerman & Wertheimer*, 94 Fed.Appx. 519, 521 (9th Cir. 2004) (act of god included illness outside of one's control); *Poston v. W. Union Tel. Co.*, 107 S.E. 516, 517 (S.C. 1920), *rev'd on other grounds*, *W. Union Tel. Co. v. Poston*, 256 U.S. 662 (1921) (influenza

epidemic was an "act of god"); *Grover v. Zook*, 87 P. 638, 640 (Wash. 1906) (tuberculosis infection constituted an "act of god").

To accept Petitioners' interpretation of "act of nature" would mean that the Governor can act swiftly to protect the health and safety of Minnesotans during severe weather events, terrorist attacks, periods of civil unrest, and other dangerous events, but must leave Minnesotans unprotected and to their own devices during worldwide pandemics. Minnesota jurisprudence bars such an absurd result. *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003) (when courts ascertain legislative intent, they must "assume that the legislature does not . . . intend absurd or unreasonable results"). The presence of COVID-19 in Minnesota is an act of nature that authorizes the Governor to exercise his peacetime emergency powers.

B. Statutes Addressing Similar Subject Matter and Legislative Intent Support the Governor's Authority to Declare a Peacetime Emergency During a Pandemic.

Unless this Court agrees with Governor Walz that the plain language of section 12.31 permits the declaration of a peacetime emergency during a pandemic, the Court must employ the canons of statutory construction to determine the statute's purpose.

As stated above, when a statute is ambiguous or the plain language leads to an absurd result, courts must determine the "intention of the legislature." Minn. Stat. § 645.16. Courts may determine legislative intent by considering "the legislative history . . . the subject matter as a whole, the purpose of the legislation, and objects intended to be secured thereby." *Mattson v. Flynn*, 13 N.W.2d 11, 14 (Minn. 1944); *see also Staab v. Diocese of St. Cloud*, 853 N.W.2d 713 716-17 (Minn. 2014) (discussing need to determine legislative intent in the case of an ambiguous statute). The Minnesota Supreme Court has been clear that the "[l]ogic of words should yield to the logic of realties." *Mattson*, 13 N.W.2d at 15. Here, similar statutes addressing emergency

Filed in District Court
State of Minnesota
6/18/2020 2:22 PM

powers, as well as section 12.31's legislative history, support a finding that an "act of nature" includes COVID-19.

1. Numerous Sections of Chapter 12 Contemplate Diseases and Medical Emergencies as a Basis for Exercising Emergency Powers.

When addressing ambiguous statutory language, Minnesota courts may employ "*in pari materia*" or the "related-statutes canon." *State v. Thonesavanh*, 904 N.W.2d 432, 437 (Minn. 2017). This tool of statutory interpretation allows courts to discern ambiguous language by reviewing other statutes addressing the same issue or that share a common purpose. *Eischen Cabinet Co. v. Hildebrandt*, 683 N.W.2d 813, 816 (Minn. 2004) ("[S]tatues relating to the same person or thing or having a common purpose should be construed together."); *Kaljuste v. Hennepin Cty. Sanatorium Comm'n*, 61 N.W.2d 757, 762 (Minn. 1953) ("Statutes are *in pari materia* when they relate to the same matter or subject even though some are specific and some general and even though they have not been enacted simultaneously and do not refer to each other expressly.") (internal citation and quotation omitted). The theory behind *in pari materia* "is that related statutes, although separate, should be considered as one systematic body [of] law." *Thonesavanh*, 904 N.W.2d at 437-38 (internal citation and quotation omitted). Courts have used this canon, for example, to interpret ambiguous gambling laws. *See*, *e.g.*, *Foley v. Whelan*, 17 N.W.2d 367, 369 (Minn. 1945) (all statutes addressing gambling should be read as a whole).

When read *in pari materia* with the remainder of Minnesota Statutes chapter 12, the phrase "act of nature" clearly includes public health emergencies like a pandemic. In section 12.02, the legislature states its policy goals in enacting chapter 12:

> Because of the existing and increasing possibility of the occurrence of natural **and other disasters** of major size and destructiveness and in order to (1) ensure that preparations of this state will be adequate to deal with disasters; (2) generally

Filed in District Court
State of Minnesota
6/18/2020 2:22 PM

> protect the **public peace**, **health**, and safety, and (3) **preserve the lives** and property of the people of the state, the legislature finds and declares it necessary:
> …
> (2) to confer upon the governor and upon governing bodies of the political subdivisions of the state the emergency and disaster powers provided in this chapter; . . . .

Minn. Stat. § 12.02, subd. 1 (emphasis added). Those stated goals evidence the legislative intent to authorize a governor to use emergency declarations to protect public health, but also to address "other disasters" that may not have been foreseen by the legislature.

More specifically, section 12.39 contemplates that a peacetime emergency may be declared due to a communicable disease like COVID-19:

> An individual who has been directed by the commissioner of health to submit to medical procedures and protocols because the individual is infected with or reasonably believed by the commissioner of health to be infected with or exposed to a toxic agent that can be transferred to another individual or a communicable disease, **and the** agent or **communicable disease is the basis for which the national security emergency or peacetime emergency was declared**, and who refuses to submit to them may be ordered by the commissioner to be placed in isolation or quarantine according to parameters set forth in section 144.419 and 144.4195.

Minn. Stat. § 12.39, subd. 1 (emphasis added).

Additionally, section 12.61 provides that during a peacetime emergency, "the governor may issue an emergency executive order upon finding that the number of seriously ill or injured persons exceeds the emergency hospital or medical transport capacity of one or more regional hospital systems and that care for those persons has to be given in temporary care facilities." Minn. Stat. § 12.61, subd. 2(a). Section 13.381 provides the Governor with powers to safely dispose of deceased individuals, "in connection with deaths related to a declared emergency." This provision expressly contemplates a medical emergency.

The above statutory provisions read *in pari materia* with section 12.31 support the conclusion that a public health emergency or pandemic is included within the phrase "act of

nature." If the court should require additional support, section 12.31's legislative history confirms that the governor's peacetime emergency powers include the ability to respond to a pandemic.

2. The Minnesota Legislature Intended to Preserve the Governor's Ability to Declare a Peacetime Emergency in Response to a Public Health Crisis.

Since its inception in the mid-1950s, the governor's powers under chapter 12 have evolved from limited military defense involvement to broad authority to address a variety of peacetime emergencies. Although the legislature previously removed the phrase "public health emergency" from section 12.31, they did so in favor of a broader "all hazard approach" meant to give the governor greater flexibility in protecting public health and safety. Legislative testimony from the past eighteen years demonstrates that the legislature has always intended to preserve the governor's authority to protect Minnesotans during a public health crisis.

i. The Minnesota Civil Defense Act of 1951

When the Minnesota legislature first codified the governor's emergency powers in 1951, it did so in the "Minnesota Civil Defense Act." H.F. 1748, 1951 Leg., 57th Reg. Sess. (Minn. 1951). At that time, the Act was focused on providing the governor emergency power to address "disasters of unprecedented size and destructiveness resulting from enemy attack, sabotage, or other hostile action . . . ." *Id.* The governor's powers included "general direction and control of the Civil Defense Agency," "the power and duty to carry out the provisions of th[e] act[,]" and during a Civil Defense Emergency, to "assume direct operational control over all or any part of the civil defense functions within this state." *Id.* at § 201, subd. 1.

Filed in District Court
State of Minnesota
6/18/2020 2:22 PM

ii. Amendments to the Act

In 1979, the Minnesota legislature broadened the scope of the governor's emergency powers. It amended the Act, now codified in chapter 12, to remove the requirement that a disaster be "unprecedented," and instead required that it be a disaster of "major size and destructiveness." S.F. 2, 1979 Leg., 71st 1st Special Sess. § 1 (Minn. 1979). It also struck the expanded requirement that such disaster be caused by "enemy attack, sabotage, or other hostile action, or from fire, flood, earthquake, or other natural causes."[41] *Id*. By removing the foregoing language, chapter 12 became applicable to all "disasters of major size and destructiveness." *Id*.

That same year, the legislature also revised the governor's authority from the direction and control of "civil defense" to the direction and control of "emergency services." *Id*. at § 4. This amendment broadened the scope of the governor's authority from civilly defending the state from hostile human forces, to directing and controlling emergency services overall. *Id*.

The next applicable revision to chapter 12 came in 1996. First, the legislature amended its grant of authority for the governor to direct "emergency services," to the governor's control of "emergency management." S.F. 2319, 1996 Leg., 79th Reg. Sess. § 3, subd. 4 (Minn. 1996). Next, the legislature amended the governor's specific authority to shift from a "civil defense" based statute to one involving "emergency management." *See* S.F. 2319, 1996 Leg., 79th Reg. Sess. (Minn. 1996) (all mentions of "civil defense" removed); *see also, e.g.*, *id*. at § 3, subd. 3(8)(a)-(b) (removing "blackouts and practice blackouts, air raid drills, mobilization of civil defense forces, and other tests" and replacing with "emergency preparedness drills", as well as removing "attack" and replacing with "actual emergencies").

---

[41] The phrase "fire, flood, earthquake, or other natural causes" was added in 1953. *See* H.F. 1930, 1953 Leg., 58th Reg. Sess. (Minn. 1953).

iii. 9/11 and anthrax amendments to chapter 12

Several decades later, in the aftermath of 9/11 and anthrax threats, legislators feared for Minnesota's ability to act in the event of a bioterrorism emergency. *See* H.F. 3031, 2002 Leg., 82nd Reg. Sess. (Minn. May 16, 2002) (statement of Rep. Mulder) (2:46-3:03), https://www.house.leg.state.mn.us/hjvid/82/2419 ("[B]ecause of the anthrax scares last fall, and because of bioterrorism events around the world the law few years we find we are not ready to handle a bioterrorism event."). As a result, in 2002, the legislature amended section 12.31 to expressly state that the governor's ability to declare a peacetime emergency extended to a public health emergency. H.F. 3031, 2002 Leg., 82nd Reg. Sess. § 8, subd. 2 (Minn. 2002). The amendment including the language "public health emergencies" contained a sunset provision to expire on August 1, 2004. *See id.* at § 21 ("Sections 1 to 19 expire August 1, 2004"). The legislature included the sunset provision due to a disagreement over how to address issues of bioterrorism. As noted by Representative Richard Mulder,

> we have to try to understand what is in current law and that has taken a great deal of time . . . . We had to understand some of the rationale behind those bills while we were doing this bill . . . . We are not ready to handle a bioterrorism event if that happens in this state. The house definition of a peacetime emergency is a little different then the senate. The house just had the word bioterrorism and the senate had a qualifying emergency.

H.F. 3031, 2002 Leg., 82nd Reg. Sess. (Minn. May 16, 2002) (statement of Rep. Mulder) (3:49-5:21), https://www.house.leg.state.mn.us/hjvid/82/2419.

As part of this discussion, Representative Tom Huntley noted that the inclusion of "public health emergency" in chapter 12 did not extend any new powers to the governor, but rather, clarified the governor's already existing powers. *See id*. (statement of Rep. Huntley) (14:10-14:39; 16:14-16:39). Specifically, Representative Huntly stated

> the bill we are talking about today adds no powers to the governor. I think the governor already has all of the powers that he would need to deal with a bioterrorist or health emergency. The trouble is there is not clarity in the law and is rather ambiguous to what his powers are. I don't think we are adding any powers, but we are certainly adding some clarity to chapter 12 . . . . [There are] two parts to the bill. One is clarifying the governor's powers in section 12 to declare these two emergencies and the things that he can do with that emergency and then there is a separate section that defines the quarantine powers of the governor and the commissioner of healthcare.

Id.

In 2004, the legislature extended the sunset provision relating to bioterrorism from August 1, 2004 to August 1, 2005 due to a lack of time to thoroughly address the issue. *See* Hearing on H.F. 2175 Before the H. Health & Human Svc. Finance Comm., 2004 Leg. 83rd Reg. Sess. (Minn. 2004) (statement of Rep. Bradley) (27:46-28:24), https://www.leg.state.mn.us/lrl/media/file?mtgid=836366 ("[It] has been a very unusual session in terms of deadlines and schedules and good provisions getting delayed along the way. Next year . . . I believe the senate will see . . . the language crafted in this amendment has been carefully mocked and in good concept with . . . groups from the Department of Health . . . .").

When the legislature reconvened in 2005, it did several things. First, it reduced the number of sections subject to the sunset provision. *See* H.F. 1507, 2005 Leg., 84th Reg. Sess. § 21 (Minn. 2005) ("Sections 1 ~~to 19~~, *2, 5, 10, and 11* expire August 1, 2005.").[42] This removed the statute at issue here—section 12.31 (a/k/a section 8)—from the sunset provisions. Second, the legislature then struck the phrase "public health emergency" from the governor's peacetime powers under section 12.31. H.F. 1555, 2005 Leg., 84th Reg. Sess. § 6, subd. 2 (Minn. 2005).

[42] The sections subject to the sunset provision included section 1 (title of Act as "Minnesota Emergency Health Powers Act"); section 2 ("bioterrorism"); section 5 ("public health emergency"); section 10 ("declaration due to a public health emergency"); and section 11 ("termination of declaration; public health emergency"). H.F. 1507, 2005 Leg., 84th Reg. Sess. (Minn. 2005).

Filed in District Court
State of Minnesota
6/18/2020 2:22 PM

Representative Duke Powell explained the removal of "public health emergency" from section 12.31 by stating that it

> would better protect public health and safety in any type of an emergency and **reflect an all hazard approach** to planning and response. This model is being used in recognition of the fact that **many kinds of emergencies have public health components in common**. The all hazard model provides a coordinated systemic approach to meeting the needs of people . . . . [T]his bill sunsets the public health emergency language from chapter 12, allowing the governor and emergency managers to address **emergencies of all types** with the same broad ray of authority.

H.F. 1555, 2005 Leg., 84th Reg. Sess. (Minn. 2005) (statement of Rep. Powell) (emphasis added) (35:00-35:25; 36:11-36:25), https://www.house.leg.state.mn.us/hjvid/84/1508.

iv. Current legislative actions involving chapter 12

As noted by Petitioners, the legislature currently has before it several bills that would again amend chapter 12 to include "public health emergency" as an event authorizing the governor's declaration of a peacetime emergency. Specifically, one house file would amend section 12.03 to include a definition of a "public health emergency." H.F. 4326, 2020 Leg., 91st Sess. (Minn. 2020). The bill would also amend section 12.31, subdivision 2 to include "a public health emergency" as a basis for the governor to declare a peacetime emergency. *Id*. Again, house testimony confirms legislators' comments in 2002 that chapter 12 was always intended to include such emergencies:

> What we are doing in the bill is clarifying that a peacetime emergency includes a public health emergency. So if you notice in the current language, it says a peacetime declaration of an emergency may be declared only when an act of nature, a technological failure, etc. etc. **I think it is pretty logical that an outbreak is an act of nature so our contention is that it is** . . . But [it is] not a new definition meant to constrain and make it clear that a public health emergency is included in an act of nature but to also make sure that it is not so broad because the chapter 12 powers are pretty extensive.

Filed in District Court
State of Minnesota
6/18/2020 2:22 PM

Hearing on H.F. 4326-27 Before the Judiciary Finance and Civil Law Div., 2020 Leg., 91st Reg. Sess. (Minn. 2020) (statement of Rep. Liebling) (emphasis added) (59:54-1:01:28), https://www.youtube.com/watch?v=H_-AUZT43Ok.

Further support for the legislature's longstanding interpretation of the governor's peacetime powers is found throughout the many pieces of new legislation passed during the most recent session. These new or amended laws all define "peacetime public health emergency period," "peacetime public health emergency," or "peacetime emergency" as "any peacetime emergency declared by the governor in an executive order **that relates to the infectious disease known as COVID-19**." *See* S.F. 2939, 2020 Leg., 91st Sess. art. 5, § 1; H.F. 426, 2020 Leg., 91st Sess. § 28 (Minn. 2020); H.F. 4326, 2020 Leg., 91st Sess (Minn. 2020); H.F. 4556, 2020 Leg., 91st Sess. art. 1, § 7 (Minn. 2020); H.F. 4605, 2020 Leg., 91st Sess. § 1 (Minn. 2020)

Section 12.31's history demonstrates the legislature's intent to allow the governor broad authority to address all emergencies, including those with public health components. Not only is this supported by an *in pari materia* reading of chapter 12 and recent legislative actions, but also by the entirety of section 12.31's legislative history. Under any reasonable interpretation of section 12.31, Governor Walz had authority to declare a peacetime emergency to combat the COVID-19 pandemic.

Filed in District Court
State of Minnesota
6/18/2020 2:22 PM

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Court dismiss Petitioners' Petition for Writ of Quo Warranto.

Dated: June 18, 2020

Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

/s/ Liz Kramer
LIZ KRAMER
Solicitor General
Atty. Reg. No. 0325089

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1010 (Voice)
(651) 282-5832 (Fax)
liz.kramer@ag.state.mn.us

ATTORNEY FOR GOVERNOR TIM WALZ