STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT

Case Type: Other Civil
File No.: 62-CV-20-4498
Judge: John H. Guthmann

Drake Snell; Jesse Wiederholt; Jennifer Pine; Michelle Johnson; Angela Zorn; Arielle Brandenburg; Nourish Family Wellness, P.L.L.C.; Dr. Elizabeth Berg; Lisa Hanson; Jayne Huber; Christine Luetgers; Thomas O'Keefe; John Bruski; Northland Baptist Church of St. Paul, Minnesota; Aaron Kessler; and Diane Smith,

Petitioners,

v.

Tim Walz, Governor of Minnesota, in his official capacity and Attorney General Keith Ellison, in his official capacity;

Respondents.

ORDER GRANTING MOTION TO DISMISS PETITION FOR A WRIT OF QUO WARRANTO SEEKING TO ENJOIN THE PEACETIME EMERGENCY MASK MANDATES ISSUED BY GOVERNOR WALZ

The above-entitled matter came before the Honorable John H. Guthmann, Judge of District Court, on December 22, 2020, via Zoom. At issue was respondents' motion to dismiss petitioners' Petition for a Writ of Quo Warranto and petitioners' motion for the issuance of a Writ of Quo Warranto or a temporary injunction. James V. F. Dickey, Esq., appeared on behalf of petitioners. Minnesota Solicitor General Liz Kramer, Esq., and Alec Sloan, Esq., appeared on behalf of respondents. Other appearances were as noted on the record.[1] Based upon all of the files, records, submissions and arguments of counsel herein, the court issues the following:

ORDER

1. The Petition for issuance of a Writ of Quo Warranto is **DENIED.**

[1] Dakota County Attorney James Backstrom was named in the original Petition. However, he was dismissed by stipulation of the parties. The order of dismissal was filed on October 1, 2020.

2. Respondent's motion to dismiss the Petition for a Writ of Quo Warranto is **GRANTED**. The Petition is **DISMISSED** with prejudice.

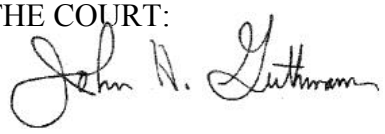
3. Because the Petition for a Writ of Quo Warranto is denied and dismissed, petitioner's motion for a temporary injunction is **DENIED**.

4. The following Memorandum is made part of this Order.

THERE BEING NO JUST REASON FOR DELAY, LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 15, 2021

BY THE COURT:



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John H. Guthmann
Judge of District Court

M E M O R A N D U M

I. STATEMENT OF FACTS RELEVANT TO MOTION TO DISMISS[2]

Petitioners are Minnesota citizens and businesses claiming that certain Executive Orders issued by Governor Walz in response to the COVID-19 pandemic have a deleterious impact on their rights. (Amended Petition for a Writ of Quo Warranto ("Am. Pet.") ¶¶ 5-9, 10-29, 95-111.) Specifically, they challenge the validity and constitutionality of Emergency Executive Order ("EO") 20-81, which mandates the use of face masks throughout Minnesota. (*Id*.; *see* EO 20-81 (Jul. 22, 2020).) One need look no further than EO 20-81 for a summary of the events leading to issuance of EO 20-81 as well as the scientific basis and legal authority Governor Walz relies upon for the action he took:

> The COVID-19 pandemic continues to present an unprecedented and rapidly evolving challenge to our State. Since the World Health Organization characterized

[2] For purposes of the motion to dismiss, the court relies only on the facts alleged in the Petition for a Writ of Quo Warranto and any documents specifically referenced therein, such the Emergency Executive Orders. The court was advised at the December hearing that the affidavits submitted by the parties were filed in support of their positions relative to the motion for injunctive relief and the defense of that motion.

the COVID-19 outbreak as a pandemic on March 11, 2020, confirmed cases of COVID-19 in Minnesota have rapidly increased. On March 15, 2020, Minnesota detected the first confirmed cases caused by "community spread"—infections not epidemiologically linked to overseas travel. By March 17, 2020, all fifty states had reported a confirmed case of COVID-19, and on March 21, 2020, the Minnesota Department of Health ("MDH") announced the first confirmed fatality due to COVID-19 in Minnesota.

The President declared a national emergency related to COVID-19 on March 13, 2020. Since then, and for the first time in history, the President has approved major disaster declarations for all fifty states and the District of Columbia. In concert with these federal actions and the actions of states across the nation, Minnesota has taken proactive steps to ensure that we remain ahead of the curve. On March 13, 2020, I issued Executive Order 20-01 and declared a peacetime emergency because this pandemic, an act of nature, endangers the lives of Minnesotans, and local resources were—and continue to be—inadequate to address the threat. After notifying the Legislature, on April 13, 2020, May 13, 2020, June 12, 2020, and July 13, 2020, I issued Executive Orders extending the peacetime emergency declared in Executive Order 20-01.

The need to slow the spread of the virus while we ensured that Minnesota had the resources and capacity to address a large outbreak initially required the closure of certain non-critical businesses in our economy. In Executive Order 20-33, seeking to balance public health needs and economic considerations, we began planning to allow more Minnesota workers to safely return to work. We drafted and implemented guidelines and requirements for appropriate social distancing, hygiene, and public health best practices. Executive Order 20-38 expanded exemptions for outdoor recreational activities and facilities, and Executive Orders 20-40, 20-48, 20-56, 20-63, and 20-74 allowed for the gradual reopening of certain non-critical businesses that planned for and provided safe workplaces.

The experience of other states shows that a COVID-19 surge can occur with little warning and disastrous consequences. Indeed, several states have had to reinstate limitations on businesses, gatherings, and activities as they have faced summer surges in COVID-19 cases. Although Minnesota had experienced a brief period of stable or decreasing numbers in COVID-19 cases, in the past week we have seen our cases begin to increase, with the largest single-day increase in cases in seven weeks reported on July 20, 2020. As such, we must continue to approach our reopening carefully, as the number of cases throughout the United States has increased rapidly in recent weeks. To that end, we know that certain public settings and establishments continue to pose a public health risk. In particular, the opportunities for COVID-19 transmission are elevated in confined indoor spaces, health care and congregate care facilities, settings where people gather and linger or where movement is unpredictable, and places where social distancing measures are not always possible. As we carefully consider and provide opportunities for a

variety of businesses and other venues to scale up their operations, safety in these settings is a key priority.

According to the Centers for Disease Control and Prevention ("CDC"), face coverings are effective in preventing the transmission of respiratory droplets that may spread COVID-19. Recognizing the utility of face coverings to prevent wearers who are asymptomatic or presymptomatic, the Federal Occupational Health and Safety Administration recommends that employers encourage workers to wear face coverings at work.

Ideally, face coverings should be worn in combination with other infection control measures, including social distancing, but face coverings are especially important in settings where social distancing is difficult to maintain. As the CDC has explained, face coverings are most effective when they are worn by all individuals in public settings when around others outside of their households because many people infected with COVID-19 do not show symptoms. Consistent with this guidance, Minnesota has strongly recommended widespread use of face coverings since April. An increasing number of states are now mandating face coverings in certain settings to control the spread of COVID-19. As of July 17, 2020, 28 states, Washington D.C., and Puerto Rico have implemented a face covering requirement. With this order, we do the same to protect Minnesota.

In Minnesota Statutes 2019, section 12.02, the Minnesota Legislature conferred upon the Governor emergency powers to "(1) ensure that preparations of this state will be adequate to deal with disasters, (2) generally protect the public peace, health, and safety, and (3) preserve the lives and property of the people of the state." Pursuant to Minnesota Statutes 2019, section 12.21, subdivision 1, the Governor has general authority to control the state's emergency management as well as carry out the provisions of Minnesota's Emergency Management Act.

Minnesota Statutes 2019, section 12.21, subdivision 3(7), authorizes the Governor to cooperate with federal and state agencies in "matters pertaining to the emergency management of the state and nation." This includes "the direction or control of . . . the conduct of persons in the state, including entrance or exit from any stricken or threatened public place, occupancy of facilities, and . . . public meetings or gatherings." Pursuant to subdivision 3 of that same section, the Governor may "make, amend, and rescind the necessary orders and rules to carry out the provisions" of Minnesota Statutes 2019, Chapter 12. When approved by the Executive Council and filed in the Office of the Secretary of State, such orders and rules have the force and effect of law during the peacetime emergency. Any inconsistent rules or ordinances of any agency or political subdivision of the state are suspended during the pendency of the emergency.

Petitioners seek issuance of a Writ of Quo Warranto to enjoin Governor Tim Walz and Attorney General Keith Ellison from enforcing EO 20-81 provisions mandating the use of face

coverings, from enforcing subsequent extensions of the EO 20-81 mask mandate, and from issuing new EOs mandating the use of masks. (Am. Pet. ¶¶ 5, 118.) Petitioners' stance is based interpretation of the Minnesota Emergency Management Act of 1996 ("MEMA") and a number of constitutional principles. *See* Minn. Stat. § 12.01 (2020) (titling Minnesota Statutes, chapter 12, as the "Minnesota Emergency Management Act of 1996"). Petitioners' primary assertions are:

1. EO 20-81 conflicts with and constitutes a "line-item veto" of Minn. Stat. § 609.735, which forbids the use of masks in public places. (Am. Pet. ¶ 6; Pet'rs' Mem. of Law in Supp. of Their Motion for Issuance of the Writ of Quo Warranto or a Temp. Inj. ("Pet'rs' 1st Mem.") at 13.) According to petitioners, Minn. Stat. § 12.32 does not authorize the Governor to set aside a statute. (Am. Pet. ¶ 6.)

2. Chapter 12 of Minnesota Statutes (MEMA) violates the non-delegation principle underlying the separation of powers established in Article III, section 1 of the Minnesota Constitution to the extent it is interpreted to permit the Governor to set aside a properly enacted statute, such as Minn. Stat. § 609.735. (*Id*. ¶¶ 7, 53.)

3. Minn. Stat. § 12.31 does not permit the Governor to declare a peacetime emergency for public health purposes, such as controlling the spread of COVID-19, because the pandemic does not result from an "act of nature." (*Id*. ¶ 8.)

4. The EO 20-81 mask mandate and exceptions thereto are "inherently unclear", leave "persons of common intelligence . . . to guess at the meaning" of the order, and "encourage arbitrary and discriminatory enforcement." (*Id*. ¶¶ 87-94.) As such, EO 20-81 is unconstitutionally vague and therefore void.

5. Mandating the use of masks constitutes an infringement of freedom of speech rights under the First Amendment to the United States Constitution. (*Id*. ¶¶ 9, 76-86, 120-32.)

6. Mandating the use of masks is an infringement on petitioner Michelle Johnson's right to exercise sincerely held religious beliefs in violation of the First Amendment to the United States Constitution and Article I, section 16 of the Minnesota Constitution. (*Id*. ¶¶ 9, 76-86, 133-42.)

Rather than filing an answer, respondents moved to dismiss the Amended Petition.[3] They argue that each of the legal assertions advanced by petitioners is without merit.

[3] In their motion to dismiss, respondents do not question venue or petitioners' standing. Accordingly, the court does not address either issue.

II. STANDARDS OF REVIEW

A. Nature of a Quo Warranto Proceeding.

A writ of quo warranto is an "ancient . . . remedy [used] to challenge official action not authorized by law." *Save Lake Calhoun v. Strommen*, 943 N.W.2d 171, 174 (Minn. 2020). "The writ of quo warranto is a special proceeding designed to correct the unauthorized assumption or exercise of power by a public official or corporate officer." *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 318 (Minn. Ct. App. 2007) (citing *State ex rel. Danielson v. Village of Mound*, 234 Minn. 531, 542, 48 N.W.2d 855, 863 (1951) ("quo warranto . . . [is a proceeding] to correct the usurpation, misuser, or nonuser of a public office or corporate franchise"[4])). "The writ requires an official to show before a court of competent jurisdiction by what authority the official exercised the challenged right or privilege of office." *Id*. (citing *State ex rel. Burnquist v. Village of North Pole*, 213 Minn. 297, 303, 6 N.W.2d 458, 461 (1942)).

Writs of quo warranto have both common law and statutory underpinnings. *Rice v. Connolly*, 488 N.W.2d 241, 243 (Minn. 1992); Minn. Stat. §§ 556.01-.13 (2018). Although the Supreme Court has original jurisdiction and discretion to issue writs of quo warranto as "'necessary to the execution of the laws and the furtherance of justice'", the discretion is "exercised . . . infrequently and with considerable caution" and the proceeding should first be filed in district court. *Rice*, 488 N.W.2d at 244 (quoting Minn. Stat. § 480.04 (1990)); *accord Save Lake Calhoun*, 943 N.W.2d at 174. The remedy is not available to challenge government conduct that is pending or has been completed. *See, e.g., Danielson*, 234 Minn. at 544, 48 N.W.2d at 864; *State ex rel.*

[4] The *Danielson* court defined "usurpation . . . as 'unauthorized arbitrary assumption and exercise of power'; 'misuser' . . . as 'use unlawfully in excess of, or varying from, one's right'; and 'nonuser' . . . as 'failure to use or exercise any right or privilege.'" *State ex rel. Danielson v. Village of Mound*, 234 Minn. 531, 543, 48 N.W.2d 855, 863 (1951) (quoting Webster's New International Dictionary).

Lommen v. Gravlin, 209 Minn. 136, 137, 295 N.W. 654, 655 (1941). There must be an ongoing unauthorized exercise of power. *State ex rel. Sviggum*, 732 N.W.2d at 319 (citations omitted).

B. Motions to Dismiss in the Context of a Quo Warranto Proceeding.

The Minnesota Rules of Civil Procedure apply to quo warranto petitions. *Save Lake Calhoun*, 943 N.W.2d at 176 n.5. Under Rule 12.02(e) of the Minnesota Rules of Procedure, a party may move to dismiss a claim in lieu of filing a formal answer to test the claim's legal sufficiency. *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). Like a complaint, a petition for a writ of quo warranto should be dismissed when it fails "to state a claim upon which relief can be granted." Minn. R. Civ. P. 12.02(e). A complaint fails to state a claim when there is no legal basis supporting the relief requested. *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 602 (Minn. 2014) (quotation omitted). Minnesota's liberal pleading rules are not "a substitute for substantive law." *N. Star Legal Found. v. Honeywell Project*, 355 N.W.2d 186, 188 (Minn. Ct. App. 1984).

When considering a motion to dismiss, the court must accept as true the factual allegations in the pleading, construing all reasonable inferences in favor of the non-moving party. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). Consequently, only documents embraced by the pleadings may be considered. *In re Hennepin Cty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995). Documents that are central to the parties' claims and referenced in the complaint are embraced by the pleadings. *Id.* at 497 ("[t]he court may consider the entire written contract when the complaint refers to the contract and the contract is central to the claims alleged."). Nevertheless, the court is not bound by any legal conclusions asserted in the pleading. *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010). A sufficient complaint "requires more than labels and conclusions." *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[L]egal

conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Id*. (quoting *Anspach v. City of Philadelphia, Dept. of Pub. Health*, 503 F.3d 256, 260 (3d Cir. 2007) (internal quotation omitted)).

Rule 8 of the Minnesota Rules of Civil Procedure requires every complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief sought." Minn. R. Civ. P. 8.01. Applying the Rule 8 standard, the Supreme Court stated in *First National Bank of Henning v. Olson*: "'[T]here is no justification for dismissing a complaint for insufficiency . . . unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim.'" 246 Minn. 28, 38, 74 N.W.2d 123, 129 (1955) (quoting *Dennis v. Vill. of Tonka Bay*, 151 F.2d 411, 412 (8th Cir. 1945)). In other words, a motion to dismiss should be denied "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *N. States Power Co. v. Franklin*, 265 Minn. 391, 394-95, 122 N.W.2d 26, 29 (1963) (citations omitted); *see Martens v. Minnesota Min. & Mfg. Co.*, 616 N.W.2d 732, 748 (Minn. 2000) (if complaint fails to state a claim upon which relief may be granted, dismissal is appropriate).

In *Walsh v. U.S. Bank, N.A.*, the Supreme Court reaffirmed the interpretation of Rule 8 by *Olson* and *Franklin* and rejected the "plausibility" standard applicable to federal cases:

> In our view, the plain language of Rule 8.01, its purpose and history, and its procedural context make clear that the rule means today what it meant at the time *Olson* and *Franklin* were decided. A claim is sufficient against a motion to dismiss for failure to state a claim if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded.

851 N.W.2d 598, 603 (Minn. 2014).

A motion to dismiss should be treated as a summary judgment motion once matters outside the pleadings are presented to the court. Minn. R. Civ. P. 12.02. "Rule 12.02 provides that such

a motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56 if matters outside the pleadings are submitted to the district court for consideration and not excluded." *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 490 (Minn. 2004).[5]

C. <u>Standard Applicable to Cases Involving Issues of Statutory Interpretation</u>.

A central issue that must be resolved in connection with the pending motions is whether and the extent to which there is a conflict between the parties' interpretation of the Minnesota Emergency Management Act of 1996 and Minn. Stat. § 609.735. Further, petitioners argue that the former statute unconstitutionally delegates power to the governor. Consequently, this case implicates principles of statutory interpretation.

When interpreting a statute, the court's objective "is to give effect to the legislature's intent as expressed in the language of the statute." *Goodyear Tire & Rubber Co. v. Dynamic Air, Inc.*, 702 N.W.2d 237, 242 (Minn. 2005) (quoting *Pususta v. State Farm Ins. Cos.*, 632 N.W.2d 549, 552 (Minn. 2001)); Minn. Stat. § 645.16 (2020) ("The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature."). The text of an unambiguous statute must be interpreted "according to its plain language." *Brua v. Minnesota Joint Underwriting Ass'n*, 778 N.W.2d 294, 300 (Minn. 2010) (citing *Molloy v. Meier*, 679 N.W.2d 711, 723 (Minn. 2004)). "[T]he court is prohibited from adding words to a statute and cannot supply what the legislature either purposely omitted or inadvertently overlooked." *Tracy State Bank v. Tracy-Garvin Coop.*, 573 N.W.2d 393, 395 (Minn. Ct. App. 1998) (citation omitted); *see* Minn. Stat. § 645.16 (2012) ("When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of

[5] Despite the submission of affidavits by both sides, the motion to dismiss was not converted into a summary judgment motion. *See* footnote 2, *supra*.

pursuing the spirit."). It is presumed that the legislature does not intend to violate the state or federal constitution and that "the legislature does not intend a result that is absurd, impossible of execution, or unreasonable." *Id*. § 645.17(1), (3).

A statute is ambiguous if it is reasonably susceptible to more than one interpretation. *Figgins v. Wilcox*, 879 N.W.2d 653, 656 (Minn. 2016) (citing *KSTP-TV v. Ramsey Cty.*, 806 N.W.2d 785, 788 (Minn. 2011); *Lietz v. N. States Power Co.*, 718 N.W.2d 865, 870 (Minn. 2006)). Absent an ambiguity, courts cannot resort to canons of construction or legislative history to determine legislative intent. *Id.*

In addition, "[e]very law shall be construed, if possible, to give effect to all its provisions." Minn. Stat. § 645.16 (2018); *see, e.g., Am. Fam. Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). "[N]o word, phrase, or sentence [of a statute] should be deemed superfluous, void, or insignificant." *Christianson v. Henke*, 831 N.W.2d 532, 538 (Minn. 2013) (citing *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999)). Accordingly, "[p]rovisos shall be construed to limit rather than to extend the operation of the clauses to which they refer. Exceptions expressed in a law shall be construed to exclude all others." Minn. Stat. § 645.19 (2018). Finally, "the context in which the phrase appears" is important when deciding its ordinary meaning. *See State v. Schouweiler,* 887 N.W.2d 22, 25 (Minn. 2016).

III. ANALYSIS OF LEGAL ISSUES

The court's consideration of the constitutional issues raised by petitioners is guided by the United States Supreme Court's review of a similar executive order issued in California. In *S. Bay United Pentecostal Church v. Newsom*, Chief Justice Roberts, concurring in the denial of injunctive relief, placed judicial review of an executive order designed to limit the spread of COVID-19 in perspective:

> Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." Where those broad limits are not exceeded, they should not be subject to second-guessing by [the judiciary], which lacks the background, competence, and expertise to assess public health . . ..

140 S. Ct. 1613, 1613-14 (2020) (Roberts, C.J., concurring) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905) and *Marshall v. United States*, 414 U.S. 417, 427 (1974)). The court is also mindful of Justice Jackson's admonition to the majority in *Terminiello v. City of Chicago*, 337 U.S. 1 (1949) (Jackson, J., dissenting) ("There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.").

A. MEMA Does Not Violate the Separation of Powers Principle Rooted in the Minnesota Constitution.

1. Key MEMA Provisions.

MEMA is premised upon legislative findings and a declaration of public policy that executive authority to undertake certain extraordinary measures may be necessary to protect the public in times of a defined emergency. In its findings, the legislature stated in part:

> Subdivision 1. **Findings**. 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 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(2) (2020) (emphasis in original). One of the means by which the governor may exercise the emergency and disaster powers delegated by the legislature is by declaring a peacetime emergency. MEMA authorizes the declaration of a peacetime emergency:

> 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. . . .

Id. § 12.31, subd. 2.

The statute places a number of procedural and temporal limitations on both peacetime emergency declarations and the governor's emergency powers:

> 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 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. . . .
>
> Subd. 3. Effect of declaration of peacetime emergency. A declaration of a peacetime emergency in accordance with this section authorizes the governor to exercise for a period not to exceed the time specified in this section the powers and duties conferred and imposed by this chapter for a peacetime emergency and invokes the necessary portions of the state emergency operations plan developed pursuant to section 12.21, subdivision 3, relating to response and recovery aspects and may authorize aid and assistance under the plan.

Id. § 12.31, subds. 2-3.

Once the governor's emergency authority is triggered by the declaration of a peacetime emergency, the governor is authorized to, among other things:

> make, amend, and rescind the necessary orders and rules to carry out the provisions of this chapter and section 216C.15 within the limits of the authority conferred by this section, with due consideration of the plans of the federal government and without complying with sections 14.001 to 14.69, but no order or rule has the effect of law except as provided by section 12.32.

Id. § 12.21, subd. 3(1). The governor's authority also extends to cooperation with federal and state officers and agencies regarding "emergency management of the state and nation, including the direction or control of . . . the conduct of persons in the state [and at] public meetings or gatherings. *Id*. § 12.21, subd. 3(7)(iv)-(v).

MEMA includes a provision defining the governor's enforcement authority. According to section 12.32:

> 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.

Id. § 12.32.

2. <u>What is Not at Issue</u>.

The Amended Petition makes no allegation that the governor's promulgation of EO 20-81 violated any of MEMA's procedural prerequisites or limitations. Thus, petitioners do not dispute that the governor declared a peacetime emergency pursuant to MEMA, he issued EO 20-81 under section 12.32, all necessary approvals from the Executive Council were obtained, and all applicable Executive Orders were filed in the Office of the Secretary of State. Moreover, petitioners do not dispute that the peacetime emergency and the mask mandate in EO 20-81 have been extended on numerous occasions since July 22, 2020 and that all applicable statutory procedural prerequisites were followed. Finally, there is no disagreement that the legislature has never exercised its authority to terminate the peacetime emergency declared by the governor.

Thus, if the statute passes constitutional muster, properly issued Executive Orders under section 12.32 are valid and, like administrative rules promulgated by executive branch agencies, must be treated the same as laws passed by the legislature. *See, e.g., U.S. W. Material Res., Inc. v. Comm'r of Revenue*, 511 N.W.2d 17, 20 n.2 (Minn. 1987) ("A duly adopted administrative rule

has the force and effect of law."). Violation of a properly issued Executive Order may also subject violators to criminal prosecution. *See, e.g.,* EO 20-04 ¶ 7 (Mar. 16, 2020) (citing Minn. Stat. § 12.45 ("a person who willfully violates [an] order having the force and effect of law issued under authority of this chapter is guilty of a misdemeanor")).

3. MEMA does not Unconstitutionally Delegate Purely Legislative Power.

Evaluating petitioners' claim that MEMA unconstitutionally delegates purely legislative power to the executive branch begins with the Minnesota Constitution.[6] Modeled after the federal constitution, our state constitution features three separate but equal branches of government:

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

MINN. CONST. art. III § 1; *see Ninetieth Minnesota State Senate v. Dayton*, 903 N.W.2d 609, 623-24 (Minn. 2017) (referencing Minnesota's "co-equal branches of government").

In *Lee v. Delmont*, the court elaborated on the non-delegation doctrine that flows directly from Article III, Section 1. 228 Minn. 112-15, 36 N.W.2d 530, 538-39 (1949). According to *Lee*, "except where expressly authorized by the constitution . . . [the legislature] cannot delegate purely legislative power to any other body, person, board, or commission." *Id*. at 112, 36 N.W.2d at 538. The court defined pure legislative power as "the authority to make a complete law—complete as to the time it shall take effect and as to whom it shall apply—and to determine the expediency of its enactment." *Id*. at 113, 36 N.W.2d at 538.

[6] It is not clear whether petitioners claim MEMA is generally void based on an unconstitutional delegation of purely legislative authority or whether delegation is an issue only if MEMA is interpreted to permit the governor to set aside a statute. The argument varies depending on whether you are looking at the Amended Petition or one of petitioners' three briefs. Yet, respondents make no claim that MEMA permits the governor to set aside statute. To be certain, the court examines both the general constitutionality of MEMA and whether EO 20-81 exceeded the governor's delegated authority by annulling Minn. Stat. § 609.735.

Notwithstanding the non-delegation doctrine it articulated, the *Lee* court still recognized that a delegation of power is proper if it provides a "reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies . . .." *Id*. "The policy of the law and the standard of action to guide the administrative agencies may be laid down in very broad and general terms." *Id*. at 114, 36 N.W.2d at 539. Moreover, just "because a power may be wielded by the legislature directly, or because it entails an exercise of discretion and judgment," it does not follow "that it is exclusively legislative." *Id*. at 113, 36 N.W.2d at 538.

When applying non-delegation principles after 1949, the Minnesota Supreme Court emphasized that the "modern tendency is to be more liberal in permitting grants of discretion to administrative officers in order to facilitate the administration of laws as the complexity of economic and governmental conditions increase." *Anderson v. Comm'r of Highways*, 267 Minn. 308, 311-12, 126 N.W.2d 778, 780-81 (1964); *accord Minnesota Energy & Econ. Dev. Auth. v. Printy*, 351 N.W.2d 319, 351 (Minn. 1984) (recognizing the validity of a delegation "particularly in a complex and fast-changing area"). For example, in *Rukavina v. Pawlenty*, the Court of Appeals found that the legislature's delegation of authority to the governor to approve executive branch unallotment of legislative appropriations did not constitute a delegation of purely legislative power. 684 N.W.2d 525, 535 (Minn. Ct. App.), *rev. denied* (Minn. 2004).

The court considers petitioners' challenge to MEMA's constitutionality through the lens of the presumption that "Minnesota statutes are constitutional" and the principle that the court's power "to declare a [statute] unconstitutional should be exercised with extreme caution." *Rukavina,* 684 N.W.2d at 535 (quoting *Asso. Builders & Contractors v. Ventura*, 610 N.W.2d 293, 308 (Minn. 2000)); *State v. Behl*, 564 N.W.2d 560, 566 (Minn. 1997) ("[the] power to declare a

statute unconstitutional should be exercised with extreme caution and only when absolutely necessary") (quoting *In Re Haggerty*, 488 N.W.2d 363, 364 (Minn. 1989)). The Supreme Court emphasized the heavy burden placed on parties seeking to overcome the presumption in *Fedzuik v. Comm'r of Pub. Safety*: "[A] party challenging a statute has the burden of demonstrating, beyond a reasonable doubt, that a constitutional violation has occurred." 696 N.W.2d 340, 344 (Minn. 2005) (citing *Heidbreder v. Carton*, 645 N.W.2d 355, 372 (Minn. 2002)).

Petitioners argue that EO 20-81 is the product of an unconstitutional delegation of power because "it commits the whole subject of wearing a mask to the Governor, rather than the discretion to act under and pursuant to a law related to mask-wearing passed by the Legislature." (Pet'rs' 1st Mem. at 16 (quoting *Brayton v. Pawlenty*, 781 N.W.2d 357, 369 (Minn. 2010) (Page, J., concurring) (quoting *State v. Great N. Ry. Co.,* 100 Minn. 445, 477, 111 N.W. 289, 293 (1907))).)[7] According to respondents, the question is not whether there was an improper delegation of mask-wearing authority to the governor; rather "[t]he question is whether, in delegating emergency management to the Governor—the actual authority delegated in MEMA—the Legislature gave constitutionally sufficient guidance to the Governor." (State Resp'ts' Combined Opp'n to Temp. Inj. & Reply Mem. in Supp. of Mot. to Dismiss ("Resp'ts' Reply Mem.") at 9.)

Respondents more accurately frame the delegation issue. Petitioners start with EO 20-81 and work backwards. However, the legal issue they raise is the constitutionality of MEMA, which requires working forward from the statute. In light of Minnesota appellate cases and the policies and standards embedded in MEMA by the legislature, the court concludes that petitioners cannot satisfy their burden of demonstrating the statute's unconstitutionality beyond a reasonable doubt.

[7] The majority opinion in *Brayton* was NOT premised on an unconstitutional delegation of legislative power to the governor. 781 N.W.2d at 363.

The legislature provided clear standards in MEMA beginning with its policy statement. The purpose of a peacetime emergency and the delegation of power is to address "the existing and increasing possibility . . . of natural and other disasters of major size and destructiveness" through (1) adequate preparation, (2) steps to "protect the public peace, health, and safety", and, (3) by preserving "the lives and property of the people." Minn. Stat. § 12.02, subd. 1(2) (2020). Consistent with the statement of policy, a peacetime emergency may be declared only in one of six prescribed circumstances, including "an act of nature."[8] *Id*. § 12.31, subd. 2. Moreover, even if one of the prescribed circumstances is found to exist, a peacetime emergency cannot be declared absent two additional findings—the condition must be one that "endangers life and property" and "local government resources [must be] inadequate to handle the situation." *Id*.

Layered on top of the legislative policies and standards defining and limiting when a peacetime emergency may be declared are strict limits on how long the delegated power exists and the means by which the legislature may terminate the authority. The controls employed by the legislature are similar to if not more limiting than those found in other regulatory contexts, such as rulemaking authority delegated to agencies under Minnesota's Administrative Procedure Act.

First, declaration of a peacetime emergency requires notice to the legislature. 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." *Id*. § 12.31, subd. 2(a).

Second, a declared peacetime emergency may only last five days unless there is approval by the Minnesota Executive Council. *Id*.; *see id*. § 9.011, subd. 1 (the Executive Council, chaired by the governor, consists of "the governor, lieutenant governor, secretary of state, state auditor,

[8] The parties agree that of the six bases for declaring a peacetime emergency, an "act of nature" is the only one that arguably applies.

and attorney general"). Approval by the Executive Council only extends the peacetime emergency for an additional twenty-five days. *Id*. § 12.31, subd. 2(a).

Third, the governor may not extend the peacetime emergency without approval from the Executive Council. *Id*. In that event, the extension may last only an additional thirty days. *Id*.

Fourth, if the Executive Council approves extension of the peacetime emergency beyond thirty days, legislative review is required. *Id.* § 12.31, subd. 2(b). The legislature may end the peacetime emergency, enact legislation curtailing or repealing actions taken by the governor during the ongoing peacetime emergency, or take no action.

Finally, if the legislature is not in session at the expiration of the thirty days, the governor must call a special session of the legislature so it may end the peacetime emergency, enact legislation curtailing or repealing actions taken by the governor during the peacetime emergency, or do nothing. *Id.* In fact, the statute requires legislative review whether it is in or out of session every thirty days as long as the peacetime emergency exists. *Id.*

In *Minnesota Energy & Econ. Dev. Auth. v. Printy*, the Minnesota Supreme Court noted that "decisions since *Lee* have consistently followed the principle that adequate statutory standards may be laid down in broad and general terms." 351 N.W.2d 319, 350 (Minn. 1984) (omitting citation to five cases upholding delegations of legislative power). The court continued, stating that "in a complex area it is necessary and appropriate for the legislature to delegate in broad and general terms" and citing the statute's provision for "close legislative monitoring" as a further basis to uphold the constitutionality of the statute under consideration.[9] *Id*. at 350-51. Here, MEMA provides clear policies and standards for the governor's exercise of emergency authority.

[9] *Printy* impliedly rebuts petitioners' suggestion that the legislature's failure to terminate the peacetime emergency somehow renders this statutory check illusory. (*See* Pet'rs' Mem. of Law in Opp'n to Resp'ts' Mot. to Dismiss ("Pet'rs' 2nd Mem.") at 11.)

The standards explicitly recognize and authorize the intricate decisions our leaders must make when a timely response to complex life-threatening events is necessary. Only upon compliance with the legislative definition of what triggers a valid peacetime emergency and the temporal and legislative oversight restrictions on the continuation of a peacetime emergency may the governor exercise the powers specifically delegated under section 12.21, subd. 3 and section 12.31, subd. 3. The standards and policies in MEMA are consistent with other court-approved delegations to the executive branch. Accordingly, the court holds that MEMA does not delegate pure legislative authority, there is no constitutional violation, and, absent action beyond the delegated authority, Governor Waltz was authorized to issue the mask mandate set forth in EO 20-81.

B. The COVID-19 Pandemic Qualifies as an Event that Could Trigger a Peacetime Emergency Under MEMA.

Petitioners next argue that Governor Walz exceeded his delegated authority by declaring a peacetime emergency under MEMA. Absent authority to declare a peacetime emergency, all of the Governor's executive orders, including EO 20-81, are void. (Am. Pet. ¶ 8.) Of the three findings necessary for the declaration of a peacetime emergency, petitioners contend that the declaration fails one based on the law and another based on the facts.[10] First, petitioners contend the emergency-triggering phrase "act of nature" excludes a "public health care emergency" as a matter of law. Minn. Stat. § 12.31, subd. 2 (2020). Tellingly, petitioners do not suggest what the term "act of nature" includes. Rather, they use the legislative history of a failed attempt to add the phrase "public health emergency" to MEMA in 2020, following its removal in 2005, as evidence of what the phrase does not include.[11] Yet, courts cannot resort to legislative history if the words

[10] Petitioners do not dispute Governor Walz' declaration that COVID-19 "endangers life and property", which is the third statutory trigger. Minn. Stat. § 12.31, subd. 2 (2020).

[11] Prior legislative treatment of the phrase "public health emergency" in MEMA could just as easily have resulted from legislators concluding that public health emergencies are already encompassed by the phrase

of the statute at issue are plain and unambiguous. *Figgins*, 879 N.W.2d at 656. Petitioners' argument seems to look everywhere except at the words of the subject statute.

To discern the plain meaning of words used in statutes, Minnesota courts "should look to the dictionary definitions of those words and apply them in the context of the statute." *See, e.g., State v. Haywood*, 886 N.W2d 485, 488 (Minn. 2016) (citing *A.A.A. v. MN Dept. of Human Srvs.*, 832 N.W.2d 816, 820-21 (Minn. 2013)); *see Shire v. Rosemount, Inc.*, 875 N.W.2d 289, 292 (Minn. 2016) (citing *Troyer v. Vertlu Mgmt. Co./Kok & Lundberg Funeral Homes*, 806 N.W.2d 17, 24 (Minn. 2011); Minn. Stat. § 645.08(1) (2020) ("words and phrases are construed according to rules of grammar and according to their common and approved usage"). The definition of "act of nature" reveals a broad phrase that encompasses the emergence from our natural world of deadly and highly contagious viruses such as COVID-19. Black's Law Dictionary defines an act of nature as synonymous with an act of god, which is "[a]n overwhelming, unpreventable event caused exclusively by forces of nature . . .." *Act of God*, BLACK'S LAW DICTIONARY (11th ed. 2019). The Merriam Webster Dictionary defines "act" as "something done voluntarily" and "the process of doing something." *Act*, MERRIAM-WEBSTER DICTIONARY (2021), https://www.merriam-webster.com/dictionary/act. The Merriam-Webster Dictionary defines "nature" as "the external world in its entirety" and as a "creative and controlling force in the universe." *Nature*, MERRIAM-WEBSTER DICTIONARY (2021), https://www.merriam-webster.com/dictionary/nature.

There is no disputing that COVID-19, a disease-causing virus, is of and from nature. Because COVID-19 is communicable and spreads from person to person, it is continuously in "the

"act of nature", thereby rendering the language redundant. That is one reason why courts do not "attribut[e] specific legislative intent to the legislature's failure to enact particular bills." *Star Tribune Co. v. Univ. of Minnesota Bd. of Regents,* 683 N.W.2d 274, 282 n.2 (Minn. 2004).

process of doing something." Accordingly, the plain and ordinary meaning of the phrase "act of nature" compels a conclusion that it encompasses the COVID-19 pandemic.

The same conclusion follows after examining the context of the phrase within MEMA. For example, one cannot read section 12.39 without concluding that the legislature intended to permit the governor to declare a peacetime emergency due to the public harm caused by a pandemic-inducing disease. The statute expressly authorizes quarantining people if they refuse treatment for a communicable disease if the "communicable disease is the basis for which the national security emergency or peacetime emergency was declared." Minn. Stat. § 12.39, subd. 1 (2020). Similarly, section 12.61 authorizes the governor to issue an emergency executive order

> [d]uring a national security emergency or a peacetime emergency . . . 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.

Id. § 12.61, subd. 2. Both provisions are meaningless if MEMA is found to prohibit governors from declaring a peacetime emergency to address the spread of deadly communicable diseases and the stress they place on Minnesota hospital systems and our public infrastructure. Minn. Stat. § 645.17(1) 2020) (it is presumed that "the legislature does not intend a result that is absurd"). Looking at MEMA as a whole, the court holds that the phrase "act of nature" is unambiguous and that Governor Walz properly exercised the authority delegated to him by the legislature when he declared a peacetime emergency due to the "act of nature" that is the COVID-19 pandemic.[12]

Second, petitioners contend that the facts do not support the third prerequisite for declaring a peacetime emergency—"local government resources are inadequate to handle the situation."

[12] In *Free Minnesota Small Business Coalition v. Walz*, No. 62-CV-20-3507 (Minn. Dist. Ct. Sept. 1, 2020), Judge Gilligan ruled that MEMA does not unconstitutionally delegate power to the governor and that the phrase "act of nature" encompasses the COVID-19 pandemic. The court finds the order persuasive and the parallels between the analysis in his order and this order are not a coincidence.

Minn. Stat. § 12.31, subd. 2 (2020). To advance their argument, the Amended Petition only references hospital resources while making the conclusory statement that the governor "provided no evidence to support his contrary declaration." (Am. Pet. ¶ 74; *see id*. ¶¶ 72-75.) Yet, in addition to petitioners' improper attempt to shift the burden of proof, hospitals are not local *government* resources and even if they were, hospitals certainly are not the only local government resource needed to fight a pandemic. The Amended Petition offers no facts suggesting that local government resources as a whole are adequate. Absent more than a conclusory statement that Governor Walz is wrong, the Amended Petition fails on its face. The peacetime-emergency-related executive orders issued by Governor Walz, starting with EO 20-01 on March 13, 2020, each cite facts supporting the three statutory triggers under section 12.31.[13] The Amended Petition fails to cite or reference any contradictory facts relevant to the statutory triggers. It is conclusory at most. As already stated, "legal conclusions masquerading as factual conclusions" are insufficient to survive a motion to dismiss. *Hebert*, 744 N.W.2d at 235 (quotation omitted). Governor Walz properly exercised the authority delegated to him by the legislature when he concluded that inadequate local resources warrant declaring a peacetime emergency.

C. <u>There is no Conflict Between the EO 20-81 and Minn. Stat. § 609.735</u>.[14]

Exercising delegated "emergency management" authority to "control . . . the conduct of persons in the state [and at] public meetings or gatherings, Minn. Stat. § 12.21, subd. 3(7)(iv)-(v) (2020), Governor Walz issued an executive order EO 20-81, which requires all Minnesotans to wear a face covering under certain conditions. Petitioners argue that EO 20-81 exceeds the

[13] For example, the Amended Petition ties the validity of the mask mandate in EO 20-81 to the validity of the extension of the peacetime emergency in EO 20-83. (Am. Pet. ¶ 71.)

[14] The Amended Petition does not seek to invalidate mask mandates established by other branches of government or other executive branch agencies, such as cities and counties. *See, e.g., Order Requiring Face Coverings at Court Facilities,* No. ADM20-8001 (Minn. July 7, 2020) (order of the Chief Justice).

authority delegated in MEMA because the mask mandate operates as a "line-item veto" of Minn. Stat. § 609.735, which forbids the use of masks in public places. (Pet'rs' 1st Mem. at 13.) While MEMA authorizes the governor to rescind orders and rules to further the purpose of the statute, the authority does not extend to other statutes. *Id*. (citing Minn. Stat. § 12.21, subd. 3(1) (2020)). Respondents contend that section 609.735 and EO 20-81 do not conflict, but they conceded at the motion hearing that petitioner's case would be much different if they did.

The operative language in EO 20-81 states: "Beginning on Friday, July 24, 2020 at 11:59 p.m., Minnesotans must wear a face covering in indoor businesses and indoor public settings, as described in this order . . .." EO 20-81 at 2. The executive order continues: "A 'face covering' must be worn to cover the nose and mouth completely, and can include a paper or disposable face mask, a cloth face mask, a scarf, a bandanna, a neck gaiter, or a religious face covering." *Id*. Section 609.735 states: "A person whose identity is concealed by the person in a public place by means of a robe, mask, or other disguise, unless based on religious beliefs, or incidental to amusement, entertainment, protection from weather, or medical treatment, is guilty of a misdemeanor." Minn. Stat. § 609.735 (2020).

The implications of a conflict between section 609.735 and EO 20-81 are more than academic, for if there is a conflict, compliance with both EO 20-81 and the statute is impossible. Citizens would face criminal liability mask or no mask. Obviously aware of section 609.735, Governor Walz included the following language in EO 20-81: "Wearing a face covering in compliance with this Executive Order or local ordinances, rules, or orders is not a violation of Minnesota Statutes 2019, section 609.735." EO 20-81 at 13. However, the Governor's pronouncement is meaningless if it is untrue as a matter of law. Hence the need for analysis.

1. The Plain Meaning of the Statute Requires Intent to Disguise.

According to the plain language of section 609.735, a violation occurs if a person's identity is "concealed . . . by means of a robe, mask, or other disguise." Minn. Stat. § 609.735 (2020). The statute's use of the words "or" and "other" means that a robe and mask must also be used to disguise one's identity. As such, the court agrees with Judge Schiltz when he concluded in *Minnesota Voters Alliance v. Walz* that section 609.735 makes "it unlawful to wear *disguises*" but it does not criminalize wearing masks or robes. No. 20-CV-1688 (PJS/ECW), 2020 WL 5869425, slip op. at *8 (D. Minn. Oct. 2, 2020) (emphasis in original). Consistent with respondent's characterization, section 609.735 truly is an anti-disguise statute.

The word "disguise" has its own connotation. The Merriam-Webster Dictionary defines "disguise" as "apparel assumed to conceal one's identity." *Disguise*, MERRIAM-WEBSTER DICTIONARY (2021), https://www.merriam-webster.com/dictionary/disguise. "Assumed" means "not true or real: deliberately pretended or feigned." *Assumed*, MERRIAM-WEBSTER DICTIONARY (2021), https://www.merriam-webster.com/dictionary/assumed. By definition, a person assuming a disguise deliberately conceals their identity. Accordingly, the common and ordinary meaning of the word "disguise" as used in section 609.735 evinces intent. If a violation of section 609.735 requires a specific intent to disguise one's identity, than complying with EO 20-81 with some other intent, such as public safety, cannot violate section 609.735. Therefore, there is no overlap and no conflict.[15]

[15] Respondents' plain meaning argument relies improperly on the headnote to section 609.735, entitled "Concealing identity." (Resp'ts' Reply Mem. at 15 (quoting Minn. Stat. § 609.735 (2020).) By statute, "[t]he headnotes printed in boldface type before sections and subdivisions in editions of Minnesota Statutes are mere catchwords to indicate the contents of the section or subdivision and are not part of the statute." *Id*. § 645.49; *see Associated Builders & Contractors v. Ventura*, 610 N.W.2d 293, 303 n.23 (Minn. 2000) (section 645.49 precludes consideration of headnotes in a statute).

2. Due Process Principles Compel a Conclusion that Section 609.735 is a Specific Intent Statute.

Although determining the plain and ordinary meaning of key phrases within the statute could be viewed as ending the issue, petitioners' additional arguments warrant consideration. Petitioners assert that section 609.735 cannot be construed as including a specific intent element. They argue that "general intent to wear a mask is all that is required to violate the law, *unless* one does so for a specific intent enumerated in the law."[16] (Pet'rs' 2nd Mem. at 19 (emphasis in original).) Absent specific intent, the statute conflicts with EO 20-81. (*Id*. at 22.)

Petitioners' basically argue that section 609.735 must be considered a general intent provision because it does not contain the statutorily required catchwords for denoting specific intent. (*Id*. at 19-21 (citing and discussing Minn. Stat. § 609.02, subd. 9 (2020).[17]) According to section 609.02, "[w]hen criminal intent is an element of a crime in this chapter, such intent is indicated by the term 'intentionally,' the phrase 'with intent to,' the phrase 'with intent that,' or some form of the verbs 'know' or 'believe.'" Minn. Stat. § 609.02, subd. 9(1) (2020).

The problem with petitioners' argument is the lack of any authority for their position that specific intent may only be found if the statute contains catchwords like those listed in section 609.02. In fact, Minnesota appellate cases demonstrate the opposite is true. Petitioners' argument also falters in the face of mens rea jurisprudence applying constitutional due process principles to Minnesota's criminal code.

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[16] A general intent criminal statute "simply prohibits a person from intentionally engaging in the prohibited conduct" while a specific intent statute requires "'intent to cause a particular result.'" *State v. Fleck*, 810 N.W.2d 303, 308-09 (Minn. 2012) (citations omitted).

[17] Petitioners' counsel backed off previous levels of reliance on section 609.02, subd. 9 at the motion hearing but the tenor of the argument did not change.

"Typically, criminal offenses require both a volitional act and a criminal intent, referred to as mens rea. A statute imposes strict liability when it dispenses with mens rea by failing to 'require the defendant to know the facts that make his conduct illegal.'" *State v. Moser*, 884 N.W.2d 890, 895 (Minn. Ct. App. 2016) (citation omitted; quoting *State v. Ndikum*, 815 N.W.2d 816, 818 (Minn. 2012)). In Minnesota, general intent crimes that create strict liability are disfavored by the law. *E.g., In re Welfare of C.R.M.*, 611 N.W.2d 802, 805 (Minn. 2000) (citing *Staples v. United States*, 511 U.S. 600, 606 (1994)). Although strict-liability crimes are generally disfavored, certain "public welfare offenses and crimes where the circumstances make it reasonable to charge the defendant with knowledge of the facts that make the conduct illegal" may pass constitutional muster. *Moser*, 884 N.W.2d at 897 (citations omitted). Absent one of the exceptions, Minnesota courts often imply a mens rea element "notwithstanding the absence of any express mens rea language in those statutes." *State v. Garcia-Gutierrez*, 844 N.W.2d 519, 522 (Minn. 2014) (citing *State v. Ndikum*, 815 N.W.2d 816, 821 (Minn. 2012) (crime of possessing pistol in public found to require knowing possession) and *In re. C.R.M.,* 611 N.W.2d 802, 810 (Minn. 2000) (crime of possessing knife on school property found to include requirement that defendant know he possesses the knife)).

Based on the foregoing principles, and notwithstanding section 609.02, Minnesota courts have taken "great care . . . to avoid interpreting statutes as eliminating mens rea where doing so criminalizes a broad range of what would otherwise be innocent conduct." *Garcia-Gutierrez*, 844 N.W.2d at 524 (quoting *In re C.R.M.*, 611 N.W.2d at 809). So, contrary to petitioners' argument, a statute may be found to require specific intent by implication even if none of the catchwords in section 609.02 are present.

Petitioner's reliance on *State v. Kjeldahl*, 278 N.W.2d 58, 61 (Minn. 1979) (escape from custody is a general intent crime), to support their position is misguided for several reasons. First, the case precedes the United States Supreme Court's decision in *Staples*, which is the foundation of Minnesota's current general rule that strict liability statutes are disfavored. Second, the case does not support petitioner's argument that specific intent catchwords are necessary for a criminal statute to require specific intent. *Kjeldahl* does not mention the concept or even cite section 609.02. Third, *Kjeldahl* recognizes the existence of general intent crimes without using the term, without an explanation of how the result was reached, and without any analysis of the constitutional implications. The decision is confined to the escape statute under consideration. Finally, petitioners misstate the *Kjeldahl* holding when they said in their reply brief: "By arguing that specific intent exists where there is no language indicating it, Respondents are arguing against 'the great weight of authority.'" (Pet'rs' Reply Mem. of Law in Supp. of their Mot. for a Temp. Inj. ("Pet'rs' 3rd Mem.") at 10 (quoting *Kjeldahl*, 278 N.W.2d at 61).) In *Kjeldahl*, the Supreme Court did not hold, or even discuss holding, that certain words are needed before a statute will be found to include specific intent. Moreover, the reference to "the great weight of authority" was to the interpretation of escape statutes in other states and not to a principle that specific intent statutes must contain certain triggering words. *Kjeldahl*, 278 N.W.2d at 61-62 (citing *Alex v. State*, 484 P.2d 677 (Alaska 1971) and *State v. Marks*, 92 Idaho 368, 442 P.2d 778 (1969)). In other words, *Kjeldahl* is offense specific and offers no assistance in resolving the issue before the court.

3. The Rules of Statutory Construction Compel a Conclusion that Section 609.735 is a Specific Intent Statute.

The rules of statutory construction serve to reinforce the court's conclusion that the plain meaning of the words used in section 609.735 require application of Minnesota's presumption in favor of specific intent crimes. Petitioners' presentation of section 609.735 as a general intent

crime would lead to absurd and unreasonable results, both of which are presumptively unintended by the legislature. Minn. Stat. § 645.17(1) (2020). Although the court could devise its own exhaustive list of illustrative examples, there is no need in light of the examples and persuasive discussion of the issue by Judge Schiltz in *Minnesota Voters Alliance*:

> A construction worker could not wear a dust mask while remodeling a public space, a government official could not wear a hazmat suit while cleaning up a chemical spill in a public place, an emergency medical technician could not wear a surgical mask while tending to a person injured on a public road, and a nail artist could not wear a mask while giving a manicure. . . .
>
> Indeed, as plaintiffs interpret the statute, 609.735 not only bars Governor Walz from *ordering* Minnesotans to wear face coverings in public places, but [it] bars Minnesotans from *voluntarily* wearing face coverings in public places if they are doing so to slow the spread of COVID-19.

Minnesota Voters Alliance, 2020 WL 5869425, slip op. at *9 (citing *In re Welfare of C.R.M.*, 611 N.W.2d at 809) (emphasis in original). The court shares Judge Schiltz' conclusions that the legislature did not intend to criminalize "such a broad range of commonplace conduct" and our appellate courts will not likely interpret section 609.735 to criminalize the wearing of face masks in public for the purpose of preventing the transmission of COVID-19.[18] *Id*.

Even if section 609.735 is viewed as unclear or ambiguous, the statute's legislative history resolves any final reason for confusion. As thoroughly summarized in *Minnesota Voters Alliance* and in respondent's initial moving brief, section 609.735 was born out of concern over the increasing activity and influence of the Ku Klux Klan in the 1920's. *Id*., 2020 WL 5869425, slip

[18] Petitioners also argue there is no reason for exceptions in section 609.735 if the wearer's specific intent is an element of the crime. (Pet'rs' 2nd Mem. at 22); Minn. Stat. § 609.735 (2020) (wearing a mask "based on religious beliefs, or incidental to amusement, entertainment, protection from weather, or medical treatment" is not a crime). The *Minnesota Voters Alliance* court convincingly rejected the same argument. While the exceptions are redundant in the context of a specific intent statute, "'[r]edundancy is not a silver bullet,' and '[s]ometimes the better overall reading of the statute contains some redundancy.'" *Minnesota Voters Alliance*, 2020 WL 5869425, slip op. at *9 (quoting *Rimini St., Inc. v. Oracle USA, Inc.*, ___ U.S. ___, 139 S. Ct. 873, 881 (2019)).

op. at *8 (citations omitted); (State Resp.'s Mem. of Law in Supp. of Mot. to Dismiss at 16-18.) The statute originally included both a specific "intent . . . to conceal" element and a presumption of intent. *Minnesota Voters Alliance*, 2020 WL 5869425, slip op. at *8 (citations omitted).

When the legislature adopted a comprehensive criminal code in 1963, the statute was re-enacted without either of the intent provisions. *Id*. (citations omitted). The Advisory Committee Comment to the recodification states that the presumption was removed based on case law and that the "substance" of the original statute was otherwise retained. *Id*. (citing *State v. Higgin*, 257 Minn. 46, 99 N.W.2d 902 (1960) and Minn. Stat. § 609.735, Adv. Comm. Cmt. (1963)). As noted in the *Minnesota Voters Alliance* decision, committee comments to the 1963 Criminal Code are regarded as a substantive source for discerning legislative intent by the Minnesota Supreme Court. *Id*. (citing *State v. Lopez*, 908 N.W.2d 334, 336 n.3 (Minn. 2018) and *State v. Vredenberg*, 264 N.W.2d 406, 407 (Minn. 1978)). In *Vredenberg*, the court relied upon the 1963 Advisory Committee Comment to conclude that despite removal of language to "streamline" the burglary statute, there was no intent to change the substantive law. *Vredenberg*, 264 N.W.2d 407. Similarly, the court concludes that despite removal of the "with intent . . . to conceal" clause in 1963, the legislature did not intend a change to the substance of the statute.

The court finds no conflict between EO 20-81 and section 609.735. Because section 609.375 is a specific intent statute, a person cannot be prosecuted for violating section 609.375 if the person simply intends to comply with EO 20-81. Accordingly, Governor Walz did not exceed the authority granted to him by the legislature when he issued EO 20-81.

D. <u>The Mask Mandate in EO 20-81 is not Unconstitutionally Vague</u>.

EO 20-81 exempts certain persons from the mask requirement, states the circumstances in which mask use is mandatory, lists when masks may be removed temporarily, and includes special

provisions for school settings. EO 20-81 ¶ 8 (exceptions), ¶ 9 (mandatory use), ¶ 10 (temporary removal), ¶ 12 (school rules). In addition, EO 20-81 provides that "[b]usinesses must require that all persons, including their workers, customers, and visitors, wear face coverings as required by this Executive Order."[19] *Id*. ¶ 15(a). Businesses must also accommodate persons whose "medical condition, mental health condition, or disability that makes it unreasonable for the person to maintain a face covering." *Id*. ¶ 15(b). But, "[b]usinesses may not require customers to provide proof of a medical condition mental health condition, or disability, or require customers to explain the nature of their conditions or disability." *Id*. ¶ 15(c). Businesses are considered compliant with EO 20-81 if:

> (1) their workers are wearing face coverings as required by this Executive Order; (2) the business has updated their COVID-19 Preparedness Plan to address the face covering requirements of this Executive Order; (3) the business has posted one or more signs that are visible to all persons—including workers, customers, and visitors—instructing them to wear face coverings as required by this Executive Order; and (4) the business makes reasonable efforts to enforce this order with respect to customers and visitors.

Id. ¶ 20(b)(i).

Petitioners allege that the above-referenced requirements are "inherently unclear", leave "persons of common intelligence . . . to guess at the meaning" of the order, and "encourage arbitrary and discriminatory enforcement." (Petition ¶¶ 87-94.) For these reasons, petitioners argue that EO 20-81 is unconstitutionally vague and therefore void. (Pet'rs' 2nd Mem. at 25-28.)

The due process clause of the Fourteenth Amendment prohibits unduly vague statutes. *State v. Hyland*, 431 N.W.2d 868, 871 (Minn. Ct. App. 1988) (citation omitted). The void for vagueness test asks whether the law "'defines an act in a manner that encourages arbitrary and

[19] The term "business" is "defined to include entities that employ or engage workers, including private-sector entities, public-sector entities, non-profit entities, and state, county, and local governments." EO 20-81 ¶ 3(b). Thus, churches obviously fall within the definition.

discriminatory enforcement', or the law is so indefinite that people 'must guess at its meaning.'" *Hard Times Café, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 171 (Minn. Ct. App. 2001) (quoting *Humenansky v. Minnesota Bd. of Md. Exam'rs*, 525 N.W.2d 559, 564 (Minn. Ct. App. 1994), *rev. denied* (Minn. Feb. 14, 1995) and *Ruzic v. Comm'r of Pub. Safety*, 455 N.W.2d 89, 91 (Minn. Ct. App. 1990), *rev. denied* (Minn. June 26, 1990)). The parties asserting a void for vagueness challenge "must show the [law] lacks specificity as to [their] own behavior rather than some hypothetical situation." *Id*. at 172 (quoting *Ruzic*, 455 N.W.2d at 92).

Vagueness jurisprudence comes with several caveats. First, courts should use "extreme caution" before invalidating a law on vagueness grounds. *Id*. at 171. Second, just because a law uses general language does not render it vague. *Id*. Finally, a law "should not be invalidated as vague merely because it is possible to imagine some difficulty in determining whether certain marginal fact situations fall within its language." *Humenansky*, 525 N.W.2d at 564 (citing *United States v. Nat'l Dairy Prods. Corp*., 372 U.S. 29, 32 (1963)).

Petitioners' vagueness challenge fails at each step. Contrary to their contention, EO 20-81 does not require businesses or individuals to "navigate" the exceptions contained in the order. (Pet'rs' 2nd Mem. at 28.) EO 20-81 outlines what the exceptions are in simple and understandable language. The executive order clearly states what businesses are expected to do and what they do not have to do. Significantly, businesses may avoid a violation based on the same reasonableness standard that is ubiquitous in our criminal law.[20]

Petitioners' also make the unsupported and hypothetical assertion that EO 20-81 may be enforced arbitrarily and discriminatorily. However, they allege no facts corroborating the bare

[20] Minnesota's criminal code even permits the taking of a life using a reasonableness standard. Minn. Stat. § 609.065 (the intentional taking of another's life is permitted when the actor is resisting or preventing an offense the actor "reasonably believes exposes the actor or another to great bodily harm or death . . .").

allegation nor do they cite any language within EO 20-81 lending itself to such an outcome. They also cite no language arguably requiring a reader to guess at the meaning of EO 20-81 or why the language should be so regarded. Ironically, when it comes to identifying constitutionally suspect language in EO 20-81, petitioners ask the court to guess.

The primary concern repeated in petitioners' briefs is they might be turned in by third persons who suspect a violation. They argue that EO 20-81 "sets up anyone for investigation and prosecution by the Attorney General if a third party uncharitably assumes the person allows violations of EO 20-81, even though the person is merely allowing patrons to exercise EO 20-81's written exemptions for medical or other reasons." (Pet'rs' 2nd Mem. at 27.) Yet, law enforcement regularly relies on citizen reports when initiating a criminal investigation. Once a report is investigated, action is taken if law enforcement concludes that the elements of a crime may be sufficiently proven to warrant a citation or a formal criminal complaint. For example, citizens regularly report erratic driving as driving under the influence or fast-moving cars as careless driving. Those reports do not render driving under the influence or careless driving statutes unconstitutionally vague.[21] Ultimately, petitioners cite nothing within the mask mandate or the exceptions therein that implicates void for vagueness jurisprudence. The void for vagueness claim in the Amended Petition is another example of "legal conclusions masquerading as factual conclusions." *Hebert*, 744 N.W.2d at 235 (quotation omitted). Respondents are therefore entitled to dismissal of the claim.

[21] Further weakening their argument, petitioners cite *281 CARE Committee v. Arneson*, as supporting the proposition that concern about third party complaints to law enforcement may support a void for vagueness challenge. (Pet'rs' 2nd Mem. at 26 (citing and quoting *281 CARE Comm v. Arneson* 766 F.3d 774, 789 (8th Cir. 2014)). However, as respondents accurately observed, *281 CARE Committee* is not even a void for vagueness case and speculative concern about arbitrary enforcement does not open a law to a void for vagueness challenge. (Resp'ts' Reply Mem. at 34 (discussing *281 CARE Committee* and quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503 (1982) ("The speculative danger of arbitrary enforcement does not render [a law] void for vagueness.").)

E. The Mask Mandate in EO 20-80 Does Not Constitute an Infringement of Petitioners' First Amendment Free Expression Rights.

Petitioners advance a First Amendment free expression claim. Their claim is premised on the notion that:

> [t]he absence of a mask must be regarded in the same way as the forced donning of one—it sends a message as to what the wearer or non-wearer believes and thinks. Not wearing a mask is speech, and EO 20-81 compels Petitioners to "virtue-signal" their supposed agreement that mask-wearing is right and good against their will.

(Pet'rs' 1st Mem. at 19.) Consequently, petitioners argue that EO 20-81 fails the applicable strict scrutiny test for government regulation of free expression. (*Id*. (citations omitted).) Respondents disagree, arguing, "[i]f this court were to accept Petitioners' argument, it would mean that any time someone disagrees with a law, they have a First Amendment right not to comply." (State Resp'ts' Mem. of Law in Supp. of Mot. to Dismiss at 23.)

The court must initially determine the accuracy of petitioners' premise. Does the mask mandate in EO 20-81 implicate the First Amendment by restricting expressive speech? The best example of protected expression is found in the seminal case of *Texas v. Johnson*, which protected flag burning. 491 U.S. 397 (1989). A government regulation of free expression does not pass constitutional muster unless it satisfies the test established in *United States v. O'Brien*:

> a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. 367, 377 (1968). Nevertheless, as Judge Schiltz accurately observed in *Minnesota Voters Alliance*, not "every law regulating conduct is subject to scrutiny under *O'Brien* whenever an individual decides to violate the law for the purpose of sending a message." 2020 WL 5869425, slip op. at *11. Thus, in *Rumsfeld v. F. for Acad. & Inst'l Rights, Inc.*, the United States Supreme

Court determined that the right to engage in expressive speech was not implicated by a law requiring colleges to grant military recruiters the same access to students as other recruiters:

> If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into "speech" simply by talking about it. For instance, if an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes, we would have to apply *O'Brien* to determine whether the Tax Code violates the First Amendment. Neither *O'Brien* nor its progeny supports such a result.

547 U.S. 47, 66 (2006).

Petitioners' expressive speech claim is not convincing. Their response to respondent's motion is to cite comments made by Governor Walz as an endorsement of the mask-wearing-is speech concept.[22] In *Minnesota Voters Alliance*, the court applied *Rumsfeld* to EO 20-81 and cogently reasoned why wearing or not wearing a face mask is not inherently expressive:

> Like the hypothetical observer in [Rumsfeld]—who, absent explanation, would have no idea why a military recruiter would be interviewing law students somewhere other than on a law-school campus . . . an observer would have no idea why someone is not wearing a face covering. Absent explanation, the observer would not know whether the person is exempt from EO 20-81, or simply forgot to bring a face covering, or is trying to convey a political message. That fact takes the conduct outside of the First Amendment protection afforded by *O'Brien*.

2020 WL 5869425, slip op. at *11. Per *Rumsfeld*, petitioners may not raise the First Amendment as a defense to non-compliance with EO 20-81 because mask wearing is not inherently expressive.

Assuming that the mask mandate in EO 20-81 infringes upon petitioners' First Amendment right to engage in inherently expressive speech, petitioners still cannot prevail for two reasons. First, EO 20-81 meets the *O'Brien* test. As already discussed, the legislature has the constitutional authority to enact MEMA and delegate certain power to the governor to protect the health and

[22] Petitioners' citation to Governor Walz' public statements does nothing to advance their position. (Pet'rs' 2nd Mem. at 28-30.) The Governor's view on the issue is no more determinative than his pronouncement in EO 20-81 that section 609.735 is not violated by wearing a mask in compliance with the executive order. Interpretation of the Federal and state constitutions is reserved to the judicial branch.

safety of Minnesota citizens. Based on the expert conclusions of the government health authorities cited in the various executive orders at issue in this case, EO 20-81 furthers the substantial government interest of controlling the spread of COVID-19, which is both deadly and highly transmittable through the air and by touch. In addition, petitioners make no claim that EO 20-81 is directed at free expression. Finally, the impact of the mask mandate on free expression is at most incidental. *Id*. If petitioners wish, they could engage in true First Amendment speech by printing "I am wearing this mask against my will" on the masks they wear. As stated by Judge Schiltz, the First Amendment does not grant citizens the right to put "at risk the lives and health of their fellow citizens." *Id*. Petitioners' argument quite literally implicates a version of the expression "[t]he right to swing my fist ends where your nose begins."[23]

Second, assuming the mask mandate in EO 20-81 fails the *O'Brien* test, it satisfies the *Jacobson* test. *Jacobson v. Massachusetts*, 197 U.S. 11, 120 (1905). Unfortunately, COVID-19 is not the first epidemic to challenge both our legal and medical systems simultaneously. *Jacobson* involved a criminal prosecution for violating a statute requiring smallpox vaccinations. The defendant argued that the statute violated his 14th Amendment protection from state laws abridging his privileges or immunities as a citizen, the right to due process, and the right to equal protection of the law. *Id*. at 14. While the court agreed that the defendant's constitutional rights were curtailed by the statute, it nevertheless held that, when facing a health crisis, states "may implement measures that infringe on constitutional rights, subject to certain limitations." *In re Rutledge*, 956 F.3d 1018, 1027 (8th Cir. 2020) (citing *Jacobson* to approve enforcement of an executive order prohibiting elective medical procedures, including abortions, due to the COVID-19 pandemic).

[23] Although the saying has been attributed to many, including Abraham Lincoln and Oliver Wendell Holmes, Jr., its true origin is subject to debate and is probably too obscure to accurately source. *See Quote Investigator*, https://quoteinvestigator.com/2011/10/15/liberty-fist-nose/ (last visited March 14, 2021).

The *Jacobson* court explained that the "liberty secured by the Constitution . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. 197 U.S. at 26. Instead, "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id*. at 29. Accordingly, individual rights "may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." *Id*. at 29.

Jacobson established a construct for evaluating the constitutionality of police powers employed by states attempting to curtail threats to public health. *See Minnesota Voters Alliance*, 2020 WL 5869425, slip op. at *11-12. The *Jacobson* construct was explained by the Fifth Circuit in *In re Abbott* and quoted by the *In re Rutledge* court:

> [W]hen faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some "real or substantial relation" to the public health crisis and are not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." Courts may ask whether the state's emergency measures lack basic exceptions for "extreme cases," and whether the measures are pretextual—that is, arbitrary or oppressive. At the same time, however, courts may not second-guess the wisdom or efficacy of the measures.

In re Rutledge, 956 F.3d at 1028 (quoting *In re Abbott*, 954 F.3d 772, 784-85 (5th Cir. 2020) (quoting *Jacobson*, 197 U.S. at 31, 38), *dismissed as moot*, ___ U.S. ___, 2021 WL 231539 (Jan. 25, 2021)).

Here, as already discussed, EO 20-81 has a real and substantial relation to controlling the spread of COVID-19. Its impact on petitioners' rights is at most incidental. There is no claim that EO 20-81 is pretexual and it includes a variety of reasonable exceptions. Petitioners do not contend that the exceptions are insufficient. Any way petitioners' First Amendment free expression claim is examined, it is without merit and must be dismissed.

F. The Mask Mandate in EO 20-80 Does Not Constitute an Infringement of Petitioners' First Amendment Right to Free Exercise of Religion.

Petitioner Michelle Johnson articulates the legal basis for her First Amendment Free Exercise of religion claim as follows:

> [B]ecause EO 20-81 is not "neutral" or of "general applicability" due to its significant exceptions for various secular purposes, such as gyms, testimony, speaking, performances, eating and drinking, and so on. An order that excepts [sic] secular conduct but fails to recognize religious claims of exemption is subject to strict scrutiny under *Church of Lukumi Babalu Aye, Inc. v. Hialeah Roman Catholic Diocese of Brooklyn*, 2020 WL 6948354, at *2[24] . . ..

(Pet'rs' 2nd Mem. at 30 (parenthetical omitted).) Respondents seek dismissal of the claim based on *Jacobson,* their view that EO 20-91 is neutral towards religion, and petitioner's mis-application of *Roman Catholic Diocese of Brooklyn v. Cuomo*. (Resp'ts' Reply Mem. at 35-37.)

The court already offered its *Jacobson* analysis. It applies equally to the free exercise claim. The mask mandate in EO 20-81 has even less of an arguable impact on the free exercise of religion than on free speech. Despite multiple briefs, petitioner never articulates how EO 20-81 impacts her free exercise of religion. Forty years after *Jacobson*, the United States Supreme Court considered government measures to control disease in the context of religious liberty. In *Prince v. Massachusetts*, the court stated that "[t] he right to practice religion freely does not include liberty to expose the community . . . to communicable disease." 321 U.S. 158, 166–67 (1944).

Without explaining how EO 20-81 impacts the exercise of her religion, or what kind of exception for religion is missing from EO 20-81, petitioner cites *Roman Catholic Diocese of Brooklyn v. Cuomo*, points to the list of exceptions in EO 20-81, and notes the absence of exceptions for religion. (Pet'rs' 2nd Mem. at 30.) The reference is misplaced for the reasons noted

[24] Petitioners' brief appears to conflate two cases in this citation. *Compare Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) *with Roman Catholic Diocese of Brooklyn v. Cuomo,* 141 S. Ct. 63 (2020) (the WestLaw citation number for this case is 2020 WL 6948354).

in respondent's reply brief. (Resp'ts' Reply Mem. at 35-36.) In *Roman Catholic Diocese of Brooklyn*, injunctive relief pending appeal was granted to a church and a synagogue for reasons decidedly absent in the present case. 141 S. Ct. 63 (2020) (per curiam). The Supreme Court concluded that the governor's regulations were not "neutral" or of "general applicability" because they "single out houses of worship for especially harsh treatment" by barring "the great majority" of religious people from attending religious services, which "strike[s] at the very heart of the First Amendment's guarantee of religious liberty." *Id*. at 67-68. The Supreme Court also characterized New York's 10 and 25-person limits for large houses of worship at issue as "disparate treatment" when compared to the lack of occupancy limits on "comparable secular facilities." *Id*. at 66.

Petitioner's invocation of *Roman Catholic Diocese of Brooklyn* offers a contrast that demonstrates why dismissal is warranted. Here, there is nothing to suggest that EO 20-81 disparately treats religion, singles out religion, or was meant to target religion. The EO 20-81 exceptions for speaking, eating, drinking, and performances apply equally to secular and church activity. In addition to failing to state a claim based on *Jacobson*, petitioner's claim fails because there is no basis to conclude that EO 20-81 was intended to or does regulate religion in some way. Like the free expression claim, the free exercise claim is without merit and must be dismissed.

IV. CONCLUSION

Based on its analysis of the issues raised by the Amended Petition, the cross motions, and the parties' multiple briefs, the court concludes it is not "possible on any evidence which might be produced, consistent with [petitioners'] theory" of the case, for the Petition to survive. *Walsh*, 851 N.W.2d 598, 603 (Minn. 2014). Accordingly, there is no need to consider the motion for injunctive relief. The Amended Petition is dismissed with prejudice.

J H G