NO. A21-0626

State of Minnesota

In Supreme Court

Drake Snell, et al.,

Appellants,

vs.

Tim Walz, Governor of Minnesota, in his official capacity, et al.,

Respondents.

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

REPLY ARGUMENT

The question on which the Court granted review is: "Whether the Minnesota Emergency Management Act of 1996 ["MEMA"] authorizes the Governor to declare a peacetime emergency based on a public-health emergency such as the COVID-19 pandemic." Pet. for Further Review 1 (hereinafter "PFR").

The answer is no. Governor Tim Walz did not have the authority to declare a peacetime emergency based on COVID-19 because he did not substantiate the factual prerequisites for such a declaration. No Governor of Minnesota, now or in the future, can declare a peacetime emergency for a pandemic like COVID-19 without affirmatively showing facts satisfying these criteria:

1) An act of nature has occurred;
2) That act of nature endangers life;
3) That act of nature endangers property;
4) Local government resources are inadequate to handle the act of nature.

Respondents would have this Court answer a truncated question different from the one remanded to the court of appeals back in February 2023: only whether a "public health emergency" *could* be the statutory basis for a peacetime emergency. This formulation makes no sense given that Appellants acknowledged below that a viral outbreak *could* be an "act of nature" if it meets other statutory requirements. Respondents' proposed limitation of the Court's review would also do a disservice to the people of Minnesota; it would maintain

just enough confusion about the Governor's authority to enable future abuses of power.

Respondents are wrong about the scope of review. In both their PFR and their principal brief, Appellants accurately recite the issue this Court remanded to the court of appeals back in February of 2023. *Compare* PFR 1 *and* Appellants' Br. 15 *with Snell v. Walz*, 985 N.W.2d 277, 280-81 (Minn. 2023) ("whether [MEMA] authorizes a peacetime emergency for a public health emergency—such as the COVID-19 pandemic.").

This "straightforward [question] of statutory interpretation ask[s] the court to decide the scope of the power the Legislature delegated to the Governor in [MEMA]." *Snell*, 985 N.W.2d at 286. In other words, when can the Governor declare an emergency, and how broad are the powers he assumes? Appellants have consistently argued that the Governor did not meet the statutory thresholds for declaring an emergency for the COVID-19 pandemic, and the powers he assumed were beyond his constitutional authority. *See* Minn. Stat. §12.31, subd. 2(a); Appellants' Br. Arguments II, III, and IV.

Further, in interpreting statutes, Minnesota courts will choose the reasonable interpretation that passes constitutional muster, even if it appears "less natural." *See* Minn. Stat. § 645.17(3); *State ex rel. Forslund v. Bronson*, 305 N.W.2d 748, 751 (Minn. 1981). Therefore, inherent in the Court's statutory-interpretive duties is consideration of whether a proposed interpretation of

MEMA is unconstitutional. *See* Appellants' Br. Argument V.

Respondents misconstrue the remanded issue as omitting consideration of MEMA's threshold requirements and the constitutionality of its interpretation, going so far as to frame the issue as entirely divorced from the factual circumstances of this case: "The factual issues specific to COVID-19 were no longer relevant, but instead the pure legal question of whether a public health crisis *could ever* serve as the basis of a peacetime emergency." Resp'ts' Br. 18 (emphasis added); *see also id.* at 16 ("whether a public health crisis can *ever* satisfy the conditions of Section 12.31.") (emphasis added); *id.* ("whether a public health emergency can *ever* provide the basis for a peacetime emergency in MEMA.") (emphasis added); *id.* at 19 (identifying the "functionally justiciable" "single issue" identified by this Court as "the governor's power to declare a *future* peacetime emergency for a public health crisis") (emphasis added); *id.* (stating that the Court "repeatedly phrased the question in the present and universal sense . . . instead of in the past tense with reference to the facts or circumstances the Governor faced.").

But the constitutionality of a statute is a guiding principle of statutory interpretation. Minn. Stat. § 645.17(3). Thus, the facts of *this* case are still relevant to the question of whether the Governor, or any future Governor, can declare a peacetime emergency in situations akin to the COVID-19 pandemic.

MEMA's plain language requires the Governor to demonstrate certain predicate conditions to declare a peacetime emergency, and the Governor failed to do so during the COVID-19 pandemic. Likewise, any future Governor faced with a pandemic must meet MEMA's empirical predicates to declare a peacetime emergency—or else resort to more targeted emergency declarations or the tools available to the Department of Health in Chapter 144. The Court should reverse and so hold.

I. Respondents Misconstrue the Legal Issue Presented.

In February 2023, this Court found the issue of "whether [MEMA] authorizes the Governor to declare a peacetime emergency to respond to a global pandemic" functionally justiciable and remanded it to the court of appeals. *Snell*, 985 N.W.2d at 286. The Court described this issue as "a straightforward [question] of statutory interpretation asking the court to decide the scope of the power the Legislature delegated to the Governor in [MEMA]." *Id.*; *see also id.* at 284 ("[W]e conclude that the claim Snell raises regarding the scope of the Governor's authority under [MEMA] is an important issue of statewide significance that should be decided now."). Accordingly, the issue on remand was whether MEMA "allow[s] the Governor to declare a peacetime emergency in response to the COVID-19 pandemic." *Id.* at 291; *see also id.* at 280–81.

As Appellants already argued, the answer to this question is "No" because

the plain reading of section 12.31 requires a Governor to meet specific threshold conditions to declare a peacetime emergency, and the Governor did not make any showing, either at the time of his declaration or during the course of the present litigation, that the COVID-19 pandemic met those evidentiary thresholds. Appellants' Br. 20–23, 30–39.

According to Respondents, however, the present issue boils down only to whether, following the 2005 amendment that removed "public health emergency" from section 12.31, MEMA still permits the declaration of a peacetime emergency in response to a "public health emergency" under an "act of nature" situation. *See* Resp'ts' Br. 16, 20–24. Because Appellants have conceded that MEMA does still so permit such a declaration for a pandemic, *see* Appellants' Br. 16; Suppl. Br. 3–5 (Mar. 3, 2023), Respondents claim Appellants have conceded "the only preserved issue," Resp'ts' Br. 16.

This is, however, but one facet of the remanded issue. *See* Appellants' Br. 16–18. The scope of the remanded issue concerns the Governor's power under MEMA "to declare a peacetime emergency *in response to the COVID-19 pandemic*." *Snell*, 985 N.W.2d. at 291 (emphasis added). Thus, the question is not only whether the Governor may declare a peacetime emergency for a pandemic as an "act of nature," but specifically whether MEMA authorized the Governor to declare a peacetime emergency in response to *this* pandemic, COVID-19. The question requires Court to interpret section 12.31, subd. 2(a), to determine

whether the Governor must meet its explicit threshold conditions. *See* Appellants' Br. 18–29. This interpretation will bind future Governors in a way that avoids confusion.

According to Respondents, this cannot have been the issue remanded because "the factual issues" of this case are "no longer relevant," so the only issue is the "pure legal question of whether a public health crisis *could ever* serve as the basis of a peacetime emergency." Resp'ts' Br. 18 (emphasis added). Respondents strain to divorce the issue from the facts of the case by framing the Court's decision as a fact-free opinion on a "universal," "forward-looking," "pure legal question" to "provide guidance to courts in hypothetical future cases." *Id.* at 18–19. The actual text of the Court's remand, however, signals otherwise. *See Snell*, 985 N.W.2d. at 291.

Respondents also attempt to narrow the issue by arguing that the "constitutional issues" Appellants discuss are moot. Resp'ts' Br. 18. This improperly conflates two issues. Yes, the Court held that Appellants' constitutional issues "*specific to EO 20-81*"—"those alleging that *EO 20-81* violates the constitution and conflicts with statute"—were moot, because "*EO 20-81* is unlikely to arise in the same way again." *Snell*, 985 N.W.2d at 286–87 (emphasis added) (referring to Minn. Stat. § 609.735); *see also id.* at 291 ("[W]e hold that the voluntary-cessation exception to mootness does not apply to Snell's claims *relating to EO*

20-81. Accordingly, Snell's claims *relating to EO 20-81* are moot.") (emphasis added).

The Court did not eliminate any consideration of the constitutionality of a proposed statutory interpretation of the MEMA broadly, as opposed to its progeny like EO 20-81. Appellants' argument at this stage is *not* that *EO 20-81* demonstrates a nondelegation problem—this Court determined that this issue is moot. Instead, Appellants argue that interpreting *MEMA* to allow the Governor to declare a peacetime emergency for the COVID-19 pandemic without showing that the threshold predicates are met violates the separation of powers principle of Article III, section 1 of the Minnesota Constitution). *See* Appellants' Br. 40.

Not only is this constitutional question integral to MEMA's statutory construction, Minn. Stat. § 645.17(3), but the Court's explanation of the remanded issue as "decid[ing] the scope of the power the Legislature delegated to the Governor in the Act" inherently considers this constitutional-delegation issue. *Snell*, 985 N.W.2d at 286. The Court routinely considers the constitutionality of a statutory interpretation when deciding the scope of statutorily delegated authority. *E.g.*, *Quam v. State*, 391 N.W.2d 803, 809 (Minn. 1986).

In *Quam*, for example, the Court interpreted the Workers Compensation Court of Appeals to have exceeded its statutory authority when it "adjudicate[d] the adherence of agency rules to their statutory parameters" because

that "function is solely within the judicial province and cannot be assumed by an agency tribunal without violating constitutional principles of separation of powers." *Id.* The Court held that the legislature's delegation of authority to the WCCA necessarily did not include that power, so by exercising that power the WCCA had "exceeded the scope of adjudicative power the legislature delegated to the agency consistent with the constitutional doctrine of separation of powers." *Id.*

This is essentially what Appellants are asking the Court to do again here—decide that Governor Walz's authority, and any future Governor's authority, does not include the power to declare an emergency absent satisfaction of section 12.31's threshold empirical requirements. If it is otherwise, then we have a nondelegation problem.

Respondents attempt to sideline the Court's "scope" of "delegated" "power" statement, casting it as not controlling on the scope of the issue remanded. Resp'ts' Br. 18–19. Respondents must be reading a different case; the Court makes the same observation elsewhere when it describes the issue as "regarding the scope of the Governor's authority under the Act." *Snell*, 985 N.W.2d at 284; *see also id*. at 287 ("we held above that the claim involving the scope of the Governor's power under the Act is justiciable"); *see also* Appellants' Br. 40–42.

The Court's remanded issue requires determination of whether a Governor must satisfy MEMA's threshold predicates before declaring an emergency, and

how he or she must do that. Whether the MEMA is unconstitutional if a Governor may make such a declaration without satisfying those predicates is a necessary part of the Court's statutory interpretation. Minn. Stat. § 645.17(3); *Bronson*, 305 N.W.2d at 751.

II. Appellants' Arguments Concerning MEMA's Threshold Requirements and Constitutionality Are Properly Before the Court.

Respondents raise three arguments for why this Court may not decide the statutory and constitutional arguments put forward by Appellants in their principal brief. Fatal to those arguments, Respondents presume that the issue previously remanded by this Court only concerned the relevance of a public health emergency under MEMA and the definition of the COVID-19 pandemic as an act of nature. Appellants address this apparent misunderstanding above. Because Respondents' presumption is wrong, their arguments are wrong.

A. Appellants' arguments about the power granted to the Governor under the MEMA were neither dismissed nor declared moot.

First, Respondents claim that *Snell* held that "all other issues Snell raised were moot and properly dismissed" except for the issue of "whether MEMA gives the governor authority to declare a peacetime emergency for a public health crisis"; therefore, the law-of-the-case doctrine bars the Court from deciding anything further or different. Resp'ts' Br. 25.

As explained above, the Court only declared moot and affirmed dismissal of

Appellants' "claims relating to EO 20-81." *Snell*, 985 N.W.2d at 291. Those claims did not concern the statutory interpretation of MEMA. The issue on remand did. *See id.* at 286. Whether a Governor must meet MEMA's threshold predicates, how he or she must do so, and the constitutionality of any proposed interpretation of MEMA, easily belong to that remanded issue. They are straightforward statutory interpretation. *See* Minn. Stat. § 645.17(2)-(3). Therefore, the law-of-the-case doctrine is irrelevant.

B. The Petition for Further Review included Appellants' arguments about the power granted to the Governor under MEMA.

Second, Respondents claim that the PFR did not contain the "other issues" Appellants argue about in their principal brief. Resp'ts' Br. 26–27.

Wrong. These issues are "nested" in the issue presented. Answering whether MEMA "authorizes the Governor to declare a peacetime emergency based on a public-health emergency such as the COVID-19 pandemic," *Snell*, 985 N.W.2d. at 281, requires the Court to interpret MEMA's text, and any such interpretation must address MEMA's threshold predicates and satisfy the constitution. In other words, the Court's interpretation of MEMA requires it to determine what the Governor must do to declare a peacetime emergency (i.e., the threshold predicates); and the Court's interpretation must not violate the state or federal constitutions (i.e., Article III, section 1). *See* Minn. Stat. § 645.17(3).

Respondents claim that this Court "expressly" found that the nondelegation issue "did not meet any exception to mootness in its earlier opinion." Resp'ts' Br. 27. Once again, this is just not true. After enumerating Appellants' legal challenges to EO 20-81, the *Snell* Court distinguished "two kinds of issues." 985 N.W.2d. at 282. First, there were "the issues that relate to the specific language and circumstances of EO 20-81," that is, "that EO 20-81 violates Snell's constitutional rights, that EO 20-81 is unconstitutionally vague, and that EO 20-81 conflicts with a state criminal statute, Minn. Stat. § 609.735." *Id*. The Court declared these issues moot. But MEMA's delegation of power and the corresponding scope of the Governor's statutory authority was not among them.

The second kind of issue the *Snell* Court identified was the issue it remanded: "Specifically, Snell alleges that the Act does not authorize the Governor to invoke emergency powers for public health purposes." *Id*. (citing Minn. Stat. § 12.31, subd. 2). Later, the Court framed the question thusly: "The question Snell brings is a straightforward one of statutory interpretation asking the court to decide the scope of the power the Legislature delegated to the Governor in the Act." *Id*. at 286.

Thus, the statutory-interpretive issue remanded in *Snell* and presented here rightly encompasses the nondelegation doctrine and the threshold predicates of section 12.31.

C. Appellants have preserved their argument concerning MEMA's threshold predicates.

Third, Respondents claim Appellants have failed to preserve "the argument that the 'empirical predicates' of a peacetime emergency were not met" because Appellants supposedly did not raise this issue below. Resp'ts' Br. 27. Wrong yet again. Respondents themselves cite many of the court documents in which Appellants presented this argument, yet they somehow assert that the argument was either "not made," "not supported," or not raised in the first petition for review. *Id*. at 28. On the contrary, Appellants have consistently raised the issue of MEMA's threshold predicates throughout the course of this litigation.

Beginning with their Amended Petition, Appellants quote section 12.31, subd. 2(a) which contains the threshold predicates, stating that MEMA "allows the Governor to declare a peacetime emergency in limited circumstances." Doc. 21, Am. Pet. ¶¶ 63, 66. In that same document, Appellants also allege that "[t]he governor has provided no evidence to support his contrary declaration, in EOs 20-81 and 20-83, that local government resources are inadequate to address COVID-19." *Id*. at ¶ 74; *see also id*. ¶¶ 72-75.

Appellants maintained their position that MEMA authorizes a peacetime declaration only in "limited circumstances" in their memorandum in support of issuance of the writ of quo warranto or a temporary injunction in the district

court. Doc. 39, Pet'rs' Mem. 7 (Nov. 24, 2020). And in their memorandum opposing dismissal, they argued that the Governor had provided no "support of his claim that local government resources to combat COVID-19 are inadequate." Doc. 54, Pet'rs' Mem. 17 (Dec. 8, 2020). Further, in their reply memorandum supporting issuance of the writ or a temporary injunction, they again reference that the Governor has not made a sufficient showing "that local resources were inadequate." Doc. 63, Pet'rs' Reply 8 (Dec. 18, 2020). In response to this argument, the district court held that

> even if one of the prescribed circumstances is found to exist [e.g., "an act of nature"], 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.

Snell v. Walz, No. 62-CV-20-4498, at 17 (March 16, 2021); Doc. 69. The district court held MEMA to be a constitutional delegation in part because of the presence of these requirements. Appellants' Br. 26 (June 14, 2021).

When Appellants appealed, they continued to argue that the Governor had not shown that local resources were inadequate, *id*. at 26-27, and that life and property were not *both* endangered by the pandemic, *id*. at 26; *see also* Appellants' Reply Br. 14–15 (August 11, 2021).

Appellants have argued from the beginning, and maintained the argument, that "life and property" and the inadequacy of "local government resources" were necessary conditions for a peacetime emergency declaration. The court of

appeals did not address these preserved issues because it found them moot. *See Snell v. Walz*, No. A21-0626, 2021 Minn. App. Unpub. LEXIS 925 at *14 (Dec. 6, 2021).

Appellants' first Petition for Review to this Court contemplated these predicate conditions in issues two and three, concerning whether MEMA constitutes "an unconstitutional delegation of authority to the Governor" and whether it "allow[s] the Governor to declare a peacetime emergency based on public health emergencies." Pet. for Review 2–3 (Jan. 5, 2022). This Court accepted for review only the first issue, concerning mootness, Order Granting Review 1 (Feb. 23, 2022), decided that the claims relating to EO 20-81 were moot, *Snell*, 985 N.W.2d. at 291, and remanded to the court of appeals the "straightforward [question] of statutory interpretation asking the court to decide the scope of the power the Legislature delegated to the Governor in the Act," *id*. at 280–81.

In their supplemental brief to the court of appeals, Appellants argued how the scope of review necessarily included (1) the constitutionality of the court's interpretation of MEMA, Appellants' Supp. Br. 1 (March 3, 2023) (citing Minn. Stat. § 645.17(3)); *id*. at 8 n.8, (2) that MEMA requires evidence of the threshold predicates contained therein, *id*. at 5–8, and (3) how Governor Walz has not shown any facts substantiating the threshold predicates, going so far as to assert that "he need not make any factual showing *at all* to invoke emergency

powers," *id.* at 5–6 (citing *Northland Baptist Church v. Walz*, 530 F. Supp. 3d 790, No. 20-CV-1100-WMW-BRT, ECF No. 56, at 32-33, 35 (July 13, 2020)).

Finally, Appellants invoked MEMA's threshold predicates in their PFR to this Court in this iteration of the appeal. PFR 2–4. Therefore, this argument has been preserved under any reasonable standard for what a litigant must raise and argue to preserve an issue for this Court's review.

Respondents also complain that Appellants have not supported their argument concerning the factual predicates with "citation to authority or facts," supposedly also causing forfeit. Resp'ts' Br. 28 n.10. But Appellants have argued from the plain meaning of the statute and from the legislative history, *e.g.,* Appellants' Br. 18–30, and have cited news sources that demonstrate that local resources were adequate to respond to the COVID-19 pandemic, *see* Doc. 21, Am. Pet. ¶¶ 72-75 (hospital bed capacity); Doc. 54, Pet'rs' Mem. 17–18, n. 4, 6 (Dec. 8, 2020) (re: hospital resources).

Moreover, the issues raised in this case are of first impression, which is why the Court is reviewing them. It is disingenuous for Respondents to demand that to preserve an issue on appeal, Appellants had to cite pre-existing authority which does not exist. That's an impossible objective: to Respondents, Appellants' failure to cite pre-existing authority forecloses review, even if there is none to cite. If so, no new authority could arise for future citation, rendering it impossible to ever gain clarity on the meaning of MEMA and the Governor's

authority. That's just not fair, and it leaves the scope of the Governor's powers shrouded in confusion. The Court should not take the bait.

In another sense, however, Respondents' call for "facts" begs Appellants' very argument: with what facts can a petitioner rebut a peacetime emergency declared without any reference to facts? This goes to the heart of why MEMA requires the Governor to provide some evidence of which local government resources are inadequate. Otherwise, MEMA would place an absurd burden on a petitioner challenging a peacetime declaration to either read the mind of the Governor or else show evidence of how every type of conceivable local government resource is adequate. As Appellants have argued, MEMA places the burden of facts on the Governor; that is how section 12.31 serves as a standard by which to control the Governor's discretion. *See* Appellants' Br. 42–45; *Lee v. Delmont*, 36 N.W.2d 530, 538 (Minn. 1949) (stating "the legislature may confer upon a board or commission a discretionary power to ascertain, *under and pursuant to the law, some fact or circumstance* upon which the law by its own terms makes, or intends to make, its own action depend.") (emphasis added).

D. The Court should consider Appellants' arguments as a matter of fairness and justice.

Finally, even if Respondents had a point in their forfeiture arguments (they don't), the Court should consider all of Appellants' arguments in the interest of fairness and justice. While it is true that "[a]n appellate court can generally

consider only such issues as were raised by the pleadings or litigated by consent in the trial court below," *Antonson v. Ekvall*, 186 N.W.2d 187, 189 (Minn. 1971), "[t]his is not, however, an ironclad rule." *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 403 (Minn. 2000); *see* Minn. R. Civ. App. P. 103.04 (giving appellate courts the discretion to "review any other matter as the interest of justice may require").

"[W]here the question raised for the first time on appeal is plainly decisive of the entire controversy on its merits" and the case involves undisputed facts, the Court considers four "[f]actors favoring review" to determine whether to exercise its discretion to hear an argument not presented below:

> the issue is a novel legal issue of first impression; the issue was raised prominently in briefing; the issue was "implicit in" or "closely akin to" the arguments below; and the issue is not dependent on any new or controverted facts.

Watson v. United Servs. Auto. Ass'n, 566 N.W.2d 683, 687–88 (Minn. 1997) (quotation omitted).

As discussed above, Appellants' arguments are decisive of the very question the Court asked the parties to answer: the "straightforward [question] of statutory interpretation asking the court to decide the scope of the power the Legislature delegated to the Governor in the Act," which is "whether [MEMA] authorizes a peacetime emergency for a public health emergency—such as the COVID-19 pandemic," *Snell*, 985 N.W.2d. at 280–81. These questions are legal

questions of first impression that Appellants clearly presented in their principal brief, *e.g.*, Appellant's Br. 15–18, and they are closely related to the arguments below and depend only on the application of the law to the facts available. *See* Argument Sections I and II, *supra*.

Further, like in *Oanes*, in this case "there is no possible advantage or disadvantage to either party by not having a prior lower court ruling." 617 N.W.2d at 403. In *Oanes*, the appellant raised an issue for the very first time in the PFR, and the Court still reviewed it. Even if Appellants had raised their arguments for the first time in this Court (they haven't), the Court can still review these legal arguments which are decisive of the issue presented. Respondents cannot credibly claim prejudice to them for having to respond in this Court to legal arguments on functionally justiciable matters of urgent statewide importance.

At the end of the day, this Court has plenary authority over how it manages the questions presented to it. Justice and fairness counsel the Court's consideration of Appellants' arguments regardless of its determination as to whether the issues were perfectly preserved below.

III. If the Governor May Declare a Peacetime Emergency Without Any Evidentiary Showing that MEMA's Threshold Requirements Are Met, Then MEMA Is Unconstitutional.

Appellants explain in their principal brief how, if MEMA is not interpreted

as requiring the Governor to show facts that demonstrate its threshold predicates, then MEMA is an unconstitutional delegation of legislative authority under Article III, section 1 of the Minnesota Constitution. *See* Appellants' Br. 39–51. Here, Appellants rebut Respondents' arguments defending MEMA as constitutional even absent this requirement.

A. If the Governor need not show evidence for MEMA's threshold predicates, MEMA does not contain sufficient safeguards.

Invoking "both the guardrails built into MEMA as well as those inherent in our legal and political system," Respondents claim that Appellants' arguments defending the constitutional separation of powers "use[] hyperbole," Resp'ts' Br. 29, to suggest that absent MEMA's threshold predicates "there is no procedural safeguard against the Governor seizing all legislative power." Appellants' Br. 39.

This is not hyperbole; look at what the Governor *did*, for starters. *See* Appellants' Br. 4–6 (discussing breadth of Governor's use of emergency power). Neutering MEMA's threshold predicates, as the court of appeals' interpretation does, does indeed "invite unchecked tyranny." *Cf.* Resp'ts' Br. 29. The drafters of our Minnesota and federal constitutions understood this, which is

why they explicitly provided for the separation of powers.[1] *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."); *Brayton v. Pawlenty*, 781 N.W.2d 357, 369 (Minn. 2010) ("Separation of powers is a core feature of our governmental structure, included in our state constitution based on the model of the United States Constitution. The principle originates from the concern 'that if all power were concentrated in one branch of government, tyranny would be the natural and probable result.'" (citation omitted)).

Respondents refer to "constitutional guardrails," Resp'ts' Br. 30, stating that the Supreme Court has upheld the constitutional rights of people even during an emergency. *Id.* (citing *Tandon v. Newsom*, 593 U.S. 61, 64 (2021)).

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[1] After claiming Appellants' argument is hyperbolic, Respondents unironically argue that MEMA's use of the word "proclamation" "connotes complete discretion" for the executive to declare emergencies without following any procedures. Resp'ts' Br. 32. Respondents go on to state that "[g]overnors act with the greatest latitude when safeguarding life and property." *Id. And*, Appellants would add, that is precisely why the Legislature saw fit to impose the threshold requirement that the Governor factually demonstrate the danger to life and property and the inadequacy of local government resources in order to invoke so great a power.

But the first line of constitutional defense in Minnesota lies in the Minnesota Constitution's separation of powers, Article III, section 1, not the courts. The courts only come in *after* alleged violations have occurred, and the existence of judicial review is not a panacea—all kinds of actions which could be subject to judicial review often evade it, and sometimes by doctrines like the very mootness doctrine applied by this Court in *Snell*. 985 N.W.2d at 288–91. Respondents attempt to jump this rail by allowing the Governor to assume all legislative power without any evidentiary demonstration of MEMA's predicates. Further, as Appellants' three-year-long case has shown, relief for constitutional violations is not as easy to come by as Respondents claim. Moreover, Appellants argue that the Governor had other available means—in Chapter 144, which contains specific due process protections—to address the COVID-19 pandemic in a more targeted manner. *See* Appellants' Br. 51–53.

Ironically, with reference to MEMA's statutory guardrails, Respondents include "[t]he three *preconditions* for peacetime emergency: one of seven enumerated types of emergencies; plus *life and property in danger*; plus *local [government] resources inadequate*." Resp'ts' Br. 29 (citing Minn. Stat. § 12.31, subd. 2(a)) (emphasis added). Respondents make Appellants' point for them: Appellants agree that the *only* way MEMA is constitutional is if these preconditions *must actually be met* for an emergency to be declared. But Respondents' interpretation of MEMA reads them out of the law by claiming the Governor need

not actually meet them. *Compare* Resp'ts' Br. 29 *with id.* at 31–32. Respondents are thus in a paradox of their own making: if they're right that the law is constitutional, then they failed to comply with it; if they're right that they complied with the law, the law is unconstitutional because there is nothing *to comply with* to safeguard against the seizure of all legislative power.

The Governor has merely asserted the preconditions were met or otherwise has denied he must show any evidence at all that they were met, *see* Appellants' Supp. Br. 5–6 (March 3, 2023) (citing *Northland Baptist Church*, 530 F. Supp. 3d 790, No. 20-CV-1100-WMW-BRT, ECF No. 56, at 32–33, 35 (July 13, 2020)). Respondents would have the Court interpret those preconditions as toothless safeguards, but Appellants maintain they have teeth and MEMA requires the Governor to show evidence that they are met before declaring a peacetime emergency.

Likewise, as another statutory guardrail, Respondents refer to "[t]he statutory and constitutional requirements to only exercise emergency powers that further the policy statement set forth in Section 12.02." Resp'ts' Br. 29. If section 12.31 is toothless, this is all gums, too. If section 12.31's clear language requiring a showing of danger to life and property and the inadequacy of local government resources does not actually require the Governor to show those conditions, then MEMA's policy statement, which provides no firm threshold

for action, cannot offer any protection against the Governor's unchecked discretion to declare a peacetime emergency.

The remaining statutory guardrails Respondents cite all refer to post-declaration procedures. *See* Resp'ts' Br. 29–30. Appellants explain in their principal brief the inadequacy of such protections "to protect against the injustice that results from uncontrolled discretionary power." *Hubbard Broad., Inc. v. Metro. Sports Facilities Com.*, 381 N.W.2d 842, 847 (Minn. 1986); s*ee* Appellants' Br. 45–48.

Finally, Respondents point to "political limits" and elected officials' "incentive to be responsive to voters." Resp'ts' Br. 30. However, Respondents overlook how the "political limits" have already been established in the statute itself: elected officials, on behalf of their constituents, wrote MEMA to guard against executive overreach by implementing empirical predicates to limit the Governor's discretion in declaring a peacetime emergency. *See* Minn. Stat. § 12.31. The Court should enforce MEMA's predicates, as Appellants describe them.

B. MEMA contains no policy to suggest that the Governor may waive the threshold procedures for declaring a peacetime emergency, and if it did, that would assure its unconstitutionality.

Respondents claim that because MEMA does not require the Governor to follow the letter of the Administrative Procedures Act (MAPA) when he issues orders and rules to carry out the provisions of MEMA, the legislature would

not have intended to "slow down" the Governor by "[r]equiring some level of written proof in support of an emergency executive order." Resp'ts' Br. 31–32; *compare* Minn. Stat. § 12.21, subd. 3(1), (10) (not required to follow MAPA for orders issued "within the limits of the authority conferred by this section"); *id.* § 12.31, subd. 2(a) (not always required to confer with tribal leaders). Respondents infer from the existence of these two provisions that the legislature "prioritized the governor's ability to act quickly . . . over requiring a governor to follow a prescribed set of procedures." *Id.*

Respondents' reasoning is circular and pure bootstrapping. The procedural shortcuts allowed by sections 12.21 and 12.31 are predicated on the Governor *already* having declared a *legitimate* emergency: that is, already having satisfied the threshold procedures of section 12.31. If there's no legitimate emergency that satisfies the threshold requirements, then there's no basis to skip the MAPA to implement it. In other words, Respondents' argument confuses the procedures *to declare* a peacetime emergency and the procedures *after* and *during* a legitimate, declared peacetime emergency.

Moreover, MEMA's legislative history supports Appellants' position that the legislature actually did intend the Governor to provide some evidence of the threshold predicates before declaring an emergency. *See* Appellants' Br. 24–27. Nowhere do Respondents even attempt to rebut this legislative history.

If the Court finds the relevant language of the MEMA ambiguous, Respondents' failure to provide contrary legislative history dooms their reading. *See, e.g.*, *Spann v. Minneapolis City Council*, 979 N.W.2d 66, 76 (Minn. 2022) ("Tellingly, the City effectively conceded as much in its brief, by making no argument that its interpretation of the current Charter could stand if ambiguity were found.")

C. If the MEMA's threshold conditions do not require any showing at all, then they provide no safeguard against uncontrolled discretionary power.

Finally, Respondents argue that MEMA is not an unconstitutional delegation of authority because, per the Ramsey County District Court in an unpublished opinion, MEMA "furnishes a reasonably clear standard by which the Governor may declare a peacetime state of emergency"; specifically:

> Under MEMA, the Governor may only declare a peacetime state of emergency due to: (1) an act of nature, (2) a technological failure or malfunction, (3) a terrorist incident, (4) an industrial accident, (5) a hazardous materials accident, or (6) a civil disturbance. Minn. Stat. §12.31, subd. 2(a). After determining one or more of those six limited circumstances exist, the Governor must also determine both that: (1) the emergency endangers life and property; and (2) local government resources are inadequate to handle the situation. Minn. Stat. § 12.31, subd. 2.

Free Minnesota Small Business Coalition, et al. v. Walz, No. 62-CV-20-3507, at 27 (Sept. 1, 2020); *see* Resp'ts' Br. 33–34.

Appellants acknowledge that this is what the law says and have never argued otherwise. This appeal is about what these requirements actually *mean*.

And these "requirements" mean *nothing* unless read to actually require the Governor to provide evidence that an emergency actually, factually exists. *See* Appellants' Br. 39–48.

A constitutional delegation of power consists of a law which 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, so that the law takes effect *upon these facts* by virtue of its own terms." *Lee*, 36 N.W.2d at 538 (emphasis added). That is, such a law confers "a discretionary power *to ascertain, under and pursuant to the law, some fact or circumstance* upon which the law by its own terms makes, or intends to make, its own action depend." *Id.* (emphasis added).

By contrast, an unconstitutional delegation of power confers on a party "the arbitrary right to exercise an option to make a law operative *on his own terms*." *Remington Arms Co. v. G. E. M. of St. Louis, Inc.*, 102 N.W.2d 528, 534 (Minn. 1960) (emphasis added). That is, an unconstitutional law *does not* require the empowered authority to identify facts that spring the law into action, but rather allows the authority to exercise the law as he sees fit, "on his own terms," according to whatever facts he thinks relevant.

Thus, when analyzing a delegation of power, the Court asks "whether adequate legislative or administrative safeguards exist to protect against the injustice that results from uncontrolled discretionary power." *Hubbard Broad.,*

Inc., 381 N.W.2d at 847.

While Respondents, like the district court to which they cite, acknowledge the factual conditions contained in MEMA and identify them as the standard by which MEMA controls the Governor's discretion in exercising the law, they then assign no meaning to those conditions at all. Respondents' position is that the Governor need not actually demonstrate the existence of those conditions; the language of the MEMA is, under Respondents' reading, merely a paper tiger in terms of its limitation on executive authority. In fact, Respondents argue that the text of MEMA "recognizes that in that emergency context, the executive branch does not have to comply with otherwise-applicable procedures," suggesting that the Governor has "complete discretion" to merely "proclaim" that the emergency conditions exist. Resp'ts' Br. 31–32.

And this is exactly what the Governor did in response to the COVID-19 pandemic. *See, e.g.*, EO 20-01 (without factual elaboration, proclaiming "Local resources are inadequate to fully address the COVID-19 pandemic.")[2]; EO 20-02

[2] In all the Governor's COVID-19-related EOs Appellants have reviewed, the Governor consistently refers only to the inadequacy of "local resources" and the danger to human life. He does not reference local *government* resources, nor does he refer to the danger to property. *See* Minn. Stat. § 12.31, subd. 2(a); *see also Snell*, No. 62-CV-20-4498, at 22 (March 16, 2021), Doc. 69 (erroneously claiming the Governor cited facts in EO 20-01 supporting the three statutory triggers; and inconsistently referring to "local resources" and "local government resources").

(reiterating the same without factual elaboration); EO 20-81 (same).[3]

Merely proclaiming MEMA's conditions met is insufficient. As *Lee* and its progeny emphasize, constitutional delegations of authority require the ascertainment of *facts*. If an emergency presents ascertainable facts, requiring the Governor to state them does not "slow down" the emergency response, it legitimizes it.[4] That is what a plain reading of MEMA requires. If the Court finds

[3] Appellants think the Court may find important what type of "proof" must be shown to satisfy these requirements. Appellants do not believe the executive must show some sort of overwhelming scientific consensus which must be developed over a long time. Rather, Appellants suggest that existing facts must be shown sufficient to demonstrate the "thresholds" identified in the MEMA. An example would be sworn declarations from local government agencies, which could be drafted within hours by county attorneys or other local government attorneys, testifying that their local government does not have sufficient resources to deal with the pandemic, including basic statistics about their emergency response abilities and local government hospital resources relative to the number of people being admitted to the hospital, etc. No competent executive could legitimately object to gathering such a modicum of proof to support an emergency declaration that shuts down and/or controls an entire state.

[4] The Respondents make much of how "[r]equiring some level of written proof in support of an emergency executive order would necessarily slow down" the process of responding to an emergency requiring "'*immediate* action,'" Resp. Br. 31 (quoting Minn. Stat. §12.31, subd. 3). Really? In the first week of the Governor's COVID-19 response (March 13 through March 19), he issued nine single-spaced, multiple-page EOs. It is disingenuous to suggest that complying with MEMA by including in one of those EOs documentation of the facts that meet the statutory conditions would have slowed down this breakneck response. And at the same time, the Minnesota Department of Health could have begun quarantining sick individuals without a statewide emergency declaration pursuant to Chapter 144. *See* Appellants' Br. 51–53.

the text ambiguous on this point, the legislative history overwhelmingly supports Appellants' interpretation. *See* Appellants' Br. 24–29.

Moreover, Respondents claim that "even without an evidentiary showing in the executive order itself, litigants may challenge in court whether the preconditions for peacetime emergency exist." Resp'ts' Br. 32. But this litigation represents Appellants doing just that—and the district court dismissed Appellants' claims because they did not rebut so-called "cited facts" in the Governor's executive orders that supposedly "support[ed] the statutory triggers." *Id.* (citing *Snell*, No. 62-CV-20-4498, at 22 (March 16, 2021); Doc. 69). Only there were no such cited facts in the Governor's executive orders—if there were, Respondents would have cited them to dispel Appellants' argument. Instead, the executive orders merely recited in conclusory fashion the predicates themselves.

Respondents want it both ways: they admit that the factual conditions in section 12.31 are "statutory guardrails" and make up the standard guiding the Governor's discretion, yet they maintain that the Governor need not demonstrate their existence in any way and the burden is on the challenger to identify which facts do not satisfy the statutory conditions. Appellants submit that this is characteristic of "uncontrolled discretionary power," *Hubbard Broad., Inc.,* 381 N.W.2d at 847, and of "whim or caprice," *Lee*, 36 N.W.2d at 538. Respondents' own arguments demonstrate the insufficient protection MEMA's predicates offer absent an interpretation that requires the Governor to show facts

demonstrating that MEMA's predicates are met.

CONCLUSION

For the foregoing reasons, as well as those stated in their principal brief, Appellants ask this Court to hold that MEMA requires the Governor to demonstrate certain predicate conditions to declare a peacetime emergency, and the Governor failed to do so during the COVID-19 pandemic. Appellants thus ask the Court to reverse and issue or direct the issuance of the writ of quo warranto.

UPPER MIDWEST LAW CENTER

Date: January 19, 2024

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document conforms to the requirements of Minn. R. Civ. App. P. 132.01, is produced with a proportional 13-point font, and the length of this document is 6,945 words. This Brief was prepared using Microsoft Word 365, Version 2312.

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