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NO. A21-0626

State of Minnesota

In Court of Appeals

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,

Appellants,

vs.

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

Respondents.

APPELLANTS' REPLY BRIEF

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I. This Appeal Continues Because Respondents Refuse to Agree That a COVID-19 Mask Mandate Will Not Be Reimposed on the People of Minnesota.

Respondents cast blame in their facts section on Appellants for "persist[ing] with this appeal" despite Respondents claiming in their Statement of the Case that they believe this appeal is moot. Resp. Br. 10. Appellants have already offered to dismiss this appeal with no costs to either party. *See* App. Br. 18. Appellants will re-state their rejected offer here: Appellants will dismiss this appeal if Respondents agree not to reimpose a COVID-19 mask mandate like that in Emergency Executive Order 20-81 ("EO 20-81" or "mask mandate"). If this case really is moot, Respondents will accept this reiterated offer because they have literally nothing to lose by it. The parties will then walk away, and this matter will be done. Respondents' expected refusal to accept this offer conclusively shows they do not believe their own mootness argument.

Further, Respondents' characterization of this lawsuit as proceeding at a "leisurely" pace is unfair. Appellants brought the suit within a month of the issuance of EO 20-81, and subsequently moved for a temporary injunction at the same time that Respondents scheduled their motion to dismiss. Even if Appellants had sought expedited review of this appeal, there is little chance it could have been fully decided on the merits by the termination of either the mask mandate or the COVID-19 peacetime emergency. And in any event, Respondents themselves asked this Court for an extra two weeks to file their response brief. Respondents cannot schedule a motion to dismiss months out from the filing of the Petition, ask for more time before this Court, and then complaint about mootness.

II. Respondents Terminated the Mask Mandate Three Days After Appellants Filed This Appeal.

While Respondents point to CDC recommendations as their reason for ending the mask mandate—for now—they fail to present to the Court the fact that Appellants filed their Notice of Appeal on May 11, three days prior to the termination of the mask mandate. Respondents' voluntary cessation of illegal conduct during the pendency of this lawsuit further undermines their mootness claims, as discussed below.

REPLY ARGUMENT AND AUTHORITIES

I. This Appeal Is Not Moot Because Respondents Are Capable of Repeating Their Unlawful Actions, and the Scope of the Governor's Power Under Chapter 12 Is of Substantial Statewide Importance.

Respondents control the levers of power in Minnesota, and they have broadly wielded those powers during the COVID-19 pandemic. Throughout their response to the pandemic, they have issued executive orders and then repeatedly changed those orders. Thereafter, when citizens have challenged their orders, they have argued to this Court and to the federal courts sitting in this district that because they changed the orders or eliminated some of them, the courts should not review the constitutionality of their actions. The exceptions to the mootness doctrine are tailor-made for litigants like Respondents, and this Court should reject Respondents' attempt to evade review of their actions.

A. Respondents' Actions Are Capable of Repetition, Yet Evading Review.

Tandon v. Newsom should be highly persuasive to this Court. In *Tandon*, the U.S. Supreme Court directly held that requests for injunctive relief against orders which have been modified or rescinded are still reviewable. *Tandon v. Newsom*, 141 S. Ct. 1294, 1297

(2021). There is no reason to depart from that view as applied here. Further, the Supreme Court's *Tandon* decision is consistent with the Minnesota Supreme Court's application of the capable-of-repetition exception in *Kahn v. Griffin*, 701 N.W.2d 815 (Minn. 2005).

In *Kahn*, our Supreme Court held, in 2005, that it could respond to a certified question from the federal district court based on a challenge to the failure to redistrict Minneapolis' malapportioned wards based on the 2000 Census in time for the 2001 city election. *Id.* at 820. By the time the Court decided the case in 2005, the 2000 Census' redrawing of the ward lines had long been accomplished and was ready for the 2003 and 2005 elections. Yet, the Court held that the case was not moot because the question presented—whether allowing City Council members to serve out full terms based on malapportioned districts violates the one-person-one-vote provision of the Minnesota Constitution—was one that was both important and would recur each decade. *Id.* at 823. The impossibility of proving with absolute certainty that malapportionment would recur in future decades did not prevent the Court from addressing the merits of the certified question.

Under *Kahn*, Minnesota courts entertain cases even where the official action challenged has passed, so long as the matters are capable of repetition and evading review, or of enough importance and functionally justiciable. *Id.* at 821-22. The capable of repetition yet evading review doctrine is applicable where "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.* at 821. Important here, the *Kahn* Court looked to federal mootness

doctrine to make its decision. *Id.* at 822-23 (citing *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974)).

1. The Mask Mandate Was Too Long for the People of Minnesota, But Too Short to Be Fully Litigated Prior to Its Cessation.

Respondents wrongly claim that a lawsuit brought within a month of the issuance of EO 20-81 and appealed within the normal appellate window is a "leisurely" pace of litigation, and somehow the merits of this lawsuit could normally be completed within 9 months—the duration of EO 20-81. Resp. Br. 16. Lawsuits simply do not progress on the merits that quickly. Even those decisions of the United States Supreme Court which are so persuasive related to COVID-19 cases, like *Tandon v. Newsom*, are the result of emergency applications for temporary relief as the merits of the case progresses, not merits decisions. Resp. Br. 12 (citing *Tandon* as related to preliminary relief).

In addition, *Dean v. City of Winona* is easily distinguishable here, because *Dean* itself held that mootness exceptions depend on whether the *character* of the challenged action make it "of an inherently limited duration." 868 N.W.2d 1, 5 (Minn. 2015). This case challenges an *emergency order*. "Emergency" orders "inherently" deal with "emergent" circumstances and are supposed to be of limited duration. This case easily satisfies this prong.

2. Appellants Have a Reasonable Expectation That the Mask Mandate Will Be Reimposed.

Appellants have a reasonable expectation that they will be subjected to the same action again. Governor Walz has shown a substantial willingness to subject the people of Minnesota to broad restrictions when he believes a peacetime emergency exists. As written

now, Chapter 12, in Governor Walz' eyes, gives him the ability to totally control the entire lives of the people of Minnesota, with no subject-matter or time-based restrictions. App. Br. 11-12, 24, 28. Governor Walz could, at any point, declare another COVID-19 emergency—after all, the news is replete with stories about the "Delta variant" and its role in decreasing hospital bed availability in Florida.[1] Several cities, including Minneapolis, St. Paul, Duluth, and Rochester, have all reimposed mask mandates. And again, Appellants have offered to dismiss this case if Respondents agree not to reimpose the mask mandate. If there were no threat of recurrence, this case would have settled already. Appellants have a "reasonable expectation" that they will be subjected to another mask mandate.

B. The Imposition of a Mask Mandate on the Entire State Is Important, and This Case Is Functionally Justiciable.

The *Kahn* Court also noted that it could decide the merits of the question presented if it was "functionally justiciable" and "an important public issue of statewide significance that should be decided immediately." 701 N.W.2d at 821-22. This case also satisfies this test.

Functional justiciability deals with whether the case has a well-developed record. *Dean*, 868 N.W.2d at 6. Here, the Court faces an appeal from a grant of a motion to dismiss, which only addresses whether the Petition states a claim for relief. However, the issues presented here are overwhelmingly legal issues, not fact-driven determinations. The Court

[1] As of August 9, 2021, Florida's rate of vaccination is virtually identical to Minnesota's. https://www.mayoclinic.org/coronavirus-covid-19/vaccine-tracker (MN: 54.2% fully vaccinated; FL: 49.5% fully vaccinated).

has the information it needs to determine the merits of the legal arguments presented here, which makes the case "functionally justiciable."

Of note in *Kahn*, the "statewide significance" prong focused on the impact the decision would have beyond Minneapolis, in cities across the state. 701 N.W.2d at 823. Such is the case here—the mask mandate is, by its nature, statewide (unless one is on tribal lands). In addition, the issues presented here are of substantial importance because this case invokes the question of whether the Minnesota Emergency Management Act (MEMA) unconstitutionally delegates power to Minnesota's Governor. If Chapter 12 is an unconstitutional delegation, then the Legislature has work to do before another emergency arises in Minnesota. If the Court here declines to review the constitutionality of Chapter 12, Minnesotans will be left guessing as to the validity of a governor's emergency orders when the next emergency is declared. The Court should not allow that to happen.

C. This Case Is Not Moot Under the Voluntary Cessation Doctrine.

Respondents are correct that this Court held, in the *Matter of Merrill Lynch* case in 2019, that the Minnesota Supreme Court has not yet adopted the voluntary cessation doctrine. 2019 WL 2079819, at *3 (Minn. Ct. App. May 13, 2019). However, the Supreme Court did grant review on that case on August 6, 2019, and a decision should be forthcoming on that issue. In the meantime, Appellants simply note that the doctrine should apply here, and Governor Walz' voluntary cessation of the mask mandate is part and parcel of the "evading review" nature of this matter.

Moreover, Respondents' claim that Governor Walz simply terminated the mask mandate because of CDC recommendations appears hollow and would actually militate in

favor of review. Resp. Br. 17. As Appellants noted before, this appeal pre-dated the termination of the mask mandate. In addition, the CDC has just announced a return to masking recommendations, even for the fully vaccinated. "Guidance for Wearing Masks," Center for Diseases Control, *available at* https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html (last visited August 9, 2021). If Governor Walz is truly tying himself to the CDC, the Court's review is clearly needed because masks are "back in."

Simply put, Respondents' conduct is capable of repetition, yet evading review, and their voluntary cessation of their illegal conduct should not allow them to escape this Court's review of this important case of statewide significance. Governor Walz continues to claim that Chapter 12 allows him to declare a peacetime emergency for practically any reason. This Court should deliver a decision on the merits of this case.

II. There Is No Meaningful Subject-Matter Limitation on the Minnesota Governor's Powers Under the MEMA.

Respondents followed the District Court's lead and emphasized the procedural "limitations" on the implementation of the Governor's power under the MEMA. Resp. Br. 19-22. These procedural "limitations" are illusory—the Governor claims the power to entirely regulate Minnesota's economy and social fabric without even talking to the Legislature, and for months on end. Respondents then essentially admit the lack of any "policy" or "standard" limiting the Governor's power grab, as they fail to enunciate *any* limitation on the subject matter of the Governor's power under the MEMA, instead referring this Court to statutory language about "health, safety, and welfare"—virtually the

entire field of state law. Resp. Br. 18. The question the Court should ask is not what the MEMA allows Governor Walz to do—rather, what *can't* he do under Chapter 12?[2]

A. MEMA Does Not Reasonably Limit Governor Walz' Discretion.

Respondents first emphasize that the executive branch must be able to use delegated authority to act in circumstances where the executive can exercise "reasonable discretion" to work out "details" of particular laws. Resp. Br. 19. Appellants agree with that principle, but Chapter 12 has none of the hallmarks of a law passed by the Legislature which delegates "reasonable discretion" to work out "particular details" based on the law's subject matter. Administrative rules, in contrast, go through a detailed and thorough process under Chapter 14, including an agency's explanation of the need and reasonableness of proposed rules, and a justification of those rules as within the agency's statutory delegation of authority. *See* Minn. Stat. §14.05, subd. 1. Governor Walz' orders have gone through none of that scrutiny. There is no limitation on Governor Walz' discretion under Chapter 12. As the Michigan Supreme Court pointed out, that limitless discretion is unconstitutional, even if in effect for only a day or two. *In re Certified Questions*, No. 161492, 2020 WL 5877599, at *14 (Mich. Oct. 2, 2020).

B. MEMA's Weak Procedural Limitations Provide No Real Check on Governor Walz' Power, As Demonstrated by His 16-Month Rule.

Respondents then move to the procedural limitations on the exercise of emergency powers under Chapter 12. Resp. Br. 21. As Appellants already discussed in their principal

[2] Appellants demonstrated to this Court in their principal brief the incredible swath of Governor Walz' regulation of Minnesota's economy and social life. App. Br. 11-12.

brief, these procedural limitations are insufficient because mere procedural limitations without subject-matter limitations still violate the nondelegation doctrine. App. Br. 21. In addition, as Appellants already argued, these procedural limitations have no practical significance—Minnesota was under "emergency" rule for 16 months even while the Legislature was in session for a number of those months. App. Br. 28-29. Even though one house of the Legislature attempted to terminate the peacetime emergency ***ten times*** and asked the Governor to work with the opposing political party, those efforts were ignored by the Executive. *See* "Senate Republicans End Emergency Powers," https://www.mnsenaterepublicans.com/senate-republicans-end-emergency-powers/ (June 30, 2021) (last visited August 11, 2021). Reality sharply contrasts with Respondents' theoretical view of the MEMA.

Respondents also claim that the availability of judicial review limits the MEMA's delegation. Resp. Br. 21-22. But as Appellants pointed out before, judicial review does not save a statute from violating the nondelegation doctrine. App. Br. 21; *Holmberg v. Holmberg*, 588 N.W.2d 720, 725 (Minn. 1999) ("Finally, although appellants encourage us to rely on the availability of appellate review to conclude that there is adequate judicial supervision of the administrative process, the right to appellate review does not provide sufficient judicial oversight of this mandatory, albeit piecemeal, process."). Having to bring a lawsuit to attack every infirmity in the Governor's emergency orders is time-consuming and expensive, and this Court should stop the infirmities from arising in the first place.

C. The Michigan Case Is a Far Better Comparison for Minnesota Than the Other Cases Respondents Cite.

Respondents try to analogize this case to cases from other states in which the courts have upheld COVID restrictions in the face of separation of powers arguments. These attempted analogies fall short.

In Kentucky, the court held that the powers exercised by Governor Beshear were "executive" powers in part because the Kentucky Assembly is limited to 60 or 30 days total per year, even if special sessions are called. *Beshear v. Acree*, 615 S.W.3d 780, 806-07 (Ky. 2020). Unlike in Kentucky, in Minnesota, the Legislature does not have a cap on special session days in office per year. Minn. Const. Art. IV §12 (regular session limited to 120 days per biennium, and no limitation on special sessions). After holding that the powers exercised were executive, the court then, in *dictum*, incorrectly held that the procedural limitations on Governor Beshear's power were sufficient to make the delegation constitutional, following the dissent in the Michigan case. *Id.* at 810-11.

The New Jersey court essentially failed to analyze the separation of powers issues presented, as it held that there was no nondelegation issue because COVID-19 created an economic crisis. *Kravitz v. Murphy*, 2021 WL 3043312, at *13 (N.J. Super. Ct. App. Div. July 20, 2021).

The Connecticut court likewise found no unconstitutional delegation, but by example demonstrated the weakness of Governor Walz' position here. *Casey v. Lamont*, 2021 WL 1181937 (Conn. Mar. 29, 2021). That court incorrectly stated the "reasonably necessary" language of the Connecticut statute was enough to rein in the powers of the

governor, and then gave hypothetical examples of what would not be "reasonably necessary"—limiting types of food one can eat during COVID-19 or requiring masks during a hurricane. *Id.* at *12. Given that, in this case, the District Court held that Governor Walz' *ipse dixit* alone was enough to justify the declaration of an emergency, Add. 21-22, it follows that these types of silly regulations are not off the table—or if they are, then only truly insane policies could trigger judicial review. This demonstrates just how broad MEMA's grant of authority is.

The Massachusetts Supreme Court distinguished the case before it from the Michigan case, noting most importantly that the broad and vague "reasonable and necessary" standard in the Michigan Emergency Powers of the Governor Act did not provide the "substantial[] more detail and guidance to the Governor" that the Massachusetts statute does. *Desrosiers v. Governor*, 158 N.E.3d 827, 841 n.24 (Mass. 2020). As discussed below, Minnesota has more in common with Michigan than Massachusetts in this regard.

In Pennsylvania, the court analyzed whether Governor Wolf's shutdown orders, as opposed to mask orders, violated the separation of powers, and focused specifically on the language of the Emergency Code which allowed for a restriction on ingress and egress. *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 892-93 (Pa. 2020). Thus, the shutdown policy was at least related to a more specific grant of authority given to the Governor under the Pennsylvania Code, as opposed to allowing the Governor to do whatever is "reasonable and necessary," as is the case here and in Michigan.

Respondents also try to distinguish the MEMA from Michigan's law that was struck down by the Michigan Supreme Court, but there is no valid distinction between the two. Appellants have amply shown that the Michigan case is on all fours with this case. *Compare* Resp. Br. 23-24 *with* App. Br. 22-25.

History also shows that Michigan is the best lead for Minnesota to follow. Minnesota is a state made up of land from both the Northwest Ordinance (east of the Mississippi) and the Louisiana Cession (to the west); Michigan is entirely of the Northwest Ordinance. Minnesota's 1857 Constitution copied, in part, from Michigan's 1850 Constitution. Anderson, William. *Minnesota Frames a Constitution*, p. 10 (March 1958), available at http://collections.mnhs.org/MNHistoryMagazine/articles/36/v36i01p001-012.pdf (last visited August 10, 2021). The same cannot be said of Kentucky, Pennsylvania, Connecticut, New Jersey, or Massachusetts, which were original colonies or not part of the Northwest Ordinance. Not surprisingly, Michigan's 1850 Constitution contained a separation of powers constraint in its Article III (substantively the same as its current Article III) which is virtually identical to Minnesota's 1858 Article III. *Compare* Minn. Const. Art. III §1 (original available at https://www.lrl.mn.gov/docs/2005/other/050565.pdf) *with* Constitution of Michigan of 1850, Art. III (available at https://www.legislature.mi.gov/documents/historical/miconstitution1850.htm). Michigan is the best lead for this Court to follow.

Simply put, the Court should follow Michigan's lead and restore the balance of power to Minnesota's government.

III. Governor Walz Did Not Have the Authority to Declare a Peacetime Emergency Based on COVID-19.

The Minnesota Legislature voted to remove the Governor's power to declare a peacetime emergency based on a "public health emergency" in 2005, and the Governor signed that law. App. Br. 29, 32-33. Despite Respondents' presentation of the testimony of a couple legislators related to this change, Resp. Br. 28 n.12, the only act of the *Legislature* before the Court is that of removing the quoted language. That act should be interpreted, under usual canons of construction, to be an indication that the Governor's powers were thus limited.

A. COVID-19 Is Not Unambiguously an "Act of Nature" Under the MEMA.

It is true that some courts have held that COVID-19 qualifies as a "natural disaster," as Respondents say. Resp. Br. 26-27. It is also true, however, that other courts have held it not to be an "act of nature" or "act of God." App. Br. 31; *Dominion Energy Cove Point LNG, L.P. v. Mattawoman Energy, LLC*, No. 1:20-CV-611, 2020 WL 9260246, at *8 (E.D. Va. Oct. 20, 2020) (collecting cases); *AB STABLE VIII LLC v. MAPS HOTELS AND RESORTS ONE LLC*, No. CV 2020-0310-JTL, 2020 WL 7024929, at *64 (Del. Ch. Nov. 30, 2020). If courts have interpreted a pandemic to not to be an act of nature for purposes of commercial transactions, there is no valid reason to claim that it *unambiguously is* an act of nature when the Governor decides to rule the state without legislative input. Thus, the Court should look to the history and structure of the statute to determine whether the Governor has the power to declare a public health emergency.

B. Respondents' Examples Do Not Negate the Legislature's Express Intent in Removing the Language "Public Health Emergency" From Section 12.31.

The most likely reason to remove a provision allowing the declaration of a "public health emergency" while also adding specific statutes governing health-related due process for isolation and quarantine procedures is that the Legislature meant to reduce the scope of the Governor's emergency powers under the MEMA. App. Br. 32; Minn. Stat. §§144.419-144.4199. Given that the phrase "act of nature" was previously alongside "public health emergency," the two are clearly distinct concepts and one should not be interpreted as being part of the other. *State v. Thonesavanh*, 904 N.W.2d 432, 437 (Minn. 2017) (the canon against surplusage "favors giving each word or phrase in a statute a distinct, not an identical, meaning").

The statutory history of Minn. Stat. §§12.39 and 12.61 also support this finding. Section 12.39 states that an "agent or communicable disease" may be "the basis for which the national security emergency or peacetime emergency" may be declared, but "public health emergency" was also removed from that statute in 2005. 2005 Minn. Sess. Law Serv. Ch. 150 (H.F. 1555) (WEST). Section 12.39 is not exempt from the requirement that the basis for a peacetime emergency must affect both life *and* property, Minn. Stat. §12.31, and removing "public health emergency" from that statute keeps that consistent requirement in place. Furthermore, Minn. Stat. §12.61 is better read to apply to emergencies which relate to "acts of nature" or terrorist attacks, *et cetera*, which *also* threaten public health *in addition to* property. *See* 2005 Minn. Sess. Law Serv. Ch. 150 (H.F. 1555) (WEST) (adding section 12.61 in its entirety). This view, again, better fits *in*

pari materia with the requirement under Minn. Stat. §12.31, that any "emergency" must threaten *both* life *and* property, which pandemics alone do not fit. App. Br. 26; Minn. Stat. §12.31.

Finally, it bears noting that some legislators in the Minnesota House tried to add "public health emergency" back into the law in 2020, obviously realizing that Governor Walz would not have the authority to declare an emergency without that addition. That bill failed. H.F. 4326 (2020) (available at https://www.revisor.mn.gov/bills/text.php?number=HF4326&version=0&session=ls91&session_year=2020&session_number=0).

The Court should resolve the ambiguity in section 12.31 by finding that pandemics like COVID-19 are not a predicate circumstance for the Governor to declare a peacetime emergency in Minnesota.

IV. Section 609.735 of the Minnesota Statutes Conflicts With EO 20-81.

Respondents incorrectly argue that to be convicted of violating Minn. Stat. §609.735, a prosecutor would have to prove that the accused specifically intended to conceal him or herself. Resp. Br. 30-37. Requiring prosecutors to prove specific intent with no specific intent presumption under statutes like section 609.735 would turn Minnesota criminal law on its head and would have eviscerated the KKK Act when it was adopted. It is no surprise that the Attorney General has, in the past, argued directly contrary to the current argument.

A. The Intent to Put on the Mask Is the Intent Required by Section 609.735.

Respondents simply read too much into the phrase, "is concealed." Resp. Br. 30-31. It is passive for a reason—it is the *result* of the act of putting on the mask. Intending to put

on the mask is the *mens rea* required for conviction. The *State v. Higgin* case and the resultant revamp of Minnesota's criminal code explain why.

It is true that the 1923 version of the statute contained specific intent language—but that language was accompanied by a presumption of specific intent just for wearing the mask. App. Br. 40; *Minn. Voters Alliance v. Walz*, 492 F. Supp. 3d 822, 834 (D. Minn. 2020). In other words, the original statute's specific intent presumption burdened KKK members to prove that they weren't intending to hide their identity by donning KKK garb.

Higgin took issue with such presumptions and held them unconstitutional because the state must prove every element of a crime beyond a reasonable doubt. 99 N.W.2d 902, 906 (Minn. 1959). As a result, the Legislature entirely rewrote the law. Laws 1963, ch. 753, p. 1231, *available at* https://www.revisor.mn.gov/laws/1963/0/Session+Law/Chapter/753/pdf/, p. 47 of 62. Since *Higgin* would have made it much harder to convict Klansmen, the Legislature removed the presumption of specific intent and replaced it with general intent.[3] *See* Minn. Stat. §609.735, 1963 Advisory Comm. Cmt. The Legislature also created

[3] Respondents appear to claim that the intent to commit an action and the physical act itself are the same thing. The Court should decline this invitation to conflate *actus reus* with the general intent *mens rea*. *In re Welfare of C.R.M.*, 611 N.W.2d 802, 804 (Minn. 2000) directly forecloses Respondents' argument by making clear that there is a difference between specific and general intent: "General intent requires only that the defendant engaged intentionally in specific, prohibited *conduct* * * * In contrast, specific intent requires that the defendant acted with the intention to produce a specific *result,* such as is the case in premeditated murder." *Orsello,* 554 N.W.2d at 72 (citation omitted)."

specific affirmative defenses which would not violate *Higgin*.[4] Resp. Br. 34.

Thus, the prosecutor's job remains the same as it was in 1923: prove that the accused intended to put on the mask, and it's up to the accused to prove they didn't mean to conceal themselves via their affirmative defense. Respondents' formulation simply misunderstands *Higgin* and the subsequent changes to the criminal code.

B. Respondents' Interpretation of the Law Conflicts With the Attorney General's Traditional Position and Would Undermine the Criminal Justice System in Minnesota.

Respondents have, in prior cases, argued that a statute is one of general intent instead of specific intent to ensure that the accused do not escape conviction because of subjective claims related to their intent.

In *State v. Orsello*, the Minnesota Attorney General, Hubert Humphrey III, argued that the stalking statute, which did not include the specific intent language defined by Minn. Stat. §609.02, was "clearly a general intent crime." 554 N.W.2d 70, 73 (Minn. 1996). Even though the statute included the language "intentional conduct" and "in a manner that," which both approach the section 609.02 standards, the Attorney General argued that only general intent was required to prove the crime of stalking had been committed. *Id.* The Minnesota Supreme Court disagreed and held that specific intent was required. *Id.* at 74-76. The Legislature promptly rejected the Supreme Court's reading and made it clear that

[4] The existence of affirmative defenses in a statute strongly supports that a lesser level of intent is the applicable *mens rea*. *State v. Schwartz*, 957 N.W.2d 414, 420 (Minn. 2021) (interpreting Minn. Stat. §609.02).

the stalking statute did not require specific intent. *King v. State*, 649 N.W.2d 149, 159 (Minn. 2002).

Criminal defendants have made the same arguments that the Attorney General makes here (in an interesting twist) related to crimes like felony murder, which does not require proof of the specific intent to kill to result in a murder conviction. *Id.*; *see also* Minn Stat. §609.185(a)(2) ("Whoever . . . causes the death of a human being while committing or attempting to commit criminal sexual conduct in the first or second degree with force or violence" is guilty of first degree murder.").

Implying specific intent where the Legislature has not used the standard Model Penal Code language from §609.02, and the language related to intent is passive (e.g., "identity is concealed" instead of "conceals his identity"), opens a Pandora's Box of problems absent clear language indicating a specific intent requirement. Implying specific intent on such a slender reed will cause significant damage to the Minnesota criminal justice system.

Finally, Respondents' claims of "absurd" results based on a finding that the statute only requires general intent for conviction is a classic straw-man argument. The concept that simply wearing a robe in public is a violation of this law is absurd in and of itself. The original meaning of the 1923 law would easily be understood to refer to a KKK robe, which included the hood after 1915. Anti-Defamation League, "Ku Klux Klan Robes," https://www.adl.org/education/references/hate-symbols/kkk-robes. Such costumes certainly create the result of concealment.

C. Because the Mask Mandate Requires What Section 609.735 Prohibits, the Mask Mandate Is Preempted.

As Appellants argued before, this is a classic case of conflict preemption. App. Br. 40-41. The Court should find that Minn. Stat. §609.735 preempts EO 20-81 and reverse the District Court.[5]

V. The Mask Mandate Is Confusing and Opens Appellants to the Threat of Enforcement Even If They Comply With It.

The mask mandate is vague because it fails to define key terms and sets up businesses for investigations and enforcement even if they try to comply with its terms. App. Br. 42-46.

Respondents claim that Appellant Wiederholt waived the argument that the phrase "job hazard" makes EO 20-81 vague. Appellants raised the lack of definition of the term below in both their memorandum of law supporting their motion for a temporary injunction, Doc. 39 at 3, and in their opposition to Respondents' motion to dismiss. Doc. 54 at 3. If "job hazard" means what Respondents claim—simply any "source of danger," then Appellant Wiederholt's concerns are entirely vindicated. Who defines danger? Would danger include, for example, increased risk of harm caused by wearing masks during youth sports? Respondents have refused to make any exceptions for those playing youth sports, and instead fought to keep children masked during athletic competition. *Let Them Play MN*

[5] Minn. Stat. §12.32 does not allow the setting aside of a contrary statute pursuant to an emergency order. If the Court were to find that Minn. Stat. §12.32 allows the Governor to set aside contrary statutes through executive orders, however, then section 12.32 would clearly violate the non-delegation doctrine itself. And if so, the Court should then declare that section 12.32 violates Article III, set it aside, and hold that the statute preempts the order anyway.

v. Walz, 2021 WL 423923 (D. Minn. Feb. 8, 2021). Appellants do not know where Respondents draw the line.

Respondents then seek to use their pre-discovery Rule 12 motion as proof that Appellants have alleged no facts which would indicate arbitrary enforcement. Resp. Br. 39-40. Appellants did allege facts which, if supported by discovery, would demonstrate arbitrary enforcement. Doc. 21 (Am. Pet. ¶¶84-94). They cited these allegations in their papers below and supported them with examples of the Attorney General's ongoing harassment of people the AG suspected *might* violate the mask order, with no evidence to support their harassment. App. Br. 43; Doc. 54 at 27 (Mem. of Law. in Opp. to MTD); *Voter Fraud: The Issue They'd Rather You Didn't Talk About*, available at https://www.powerlineblog.com/archives/2020/10/voter-fraud-the-issue-theyd-rather-you-didnt-talk-about.php).

As Appellants have already argued, the danger of discriminatory enforcement of the mask mandate is unreasonable given the exceptions to the mandate and the requirement that a business owner or church leader accept as fact a customer or parishioner's claim of an exemption to EO 20-81. EO 20-81 had a series of exemptions that businesses and churches had to evaluate and follow. EO 20-81 forced businesses and churches to "require" masking by customers, but customers could simply state that they had medical conditions exempting them from mask-wearing, and businesses could not inquire further, under either EO 20-81 or, arguably, the Americans with Disabilities Act. Yet any person could complain to Attorney General Ellison about the business or church based on the same person with an exemption not wearing a mask, which Ellison affirmatively encouraged. In

addition, EO 20-81 purports to give Ellison substantial discretion as to when and to what degree to impose penalties on businesses—up to $25,000, at his discretion. Because this system (i) criminalizes not knowing whether a third-party customer is lying about mask exemptions and (ii) gives too much leeway to Attorney General Ellison and thus creates a danger of arbitrary enforcement, it is vague and unconstitutional.

VI. Mask-Wearing and Refusal to Wear One Are Political Speech.

Appellants already argued that mask-wearing is political speech, and pointed out numerous examples showing that people do, in fact, objectively consider it as such. App. Br. Whether something is speech is not a subjective determination that Respondents get to make.

A. *Jacobson* Does Not Apply in the Wake of *Roman Catholic Diocese* and *Tandon*.

As Appellants argued in their principal brief, the United States Supreme Court has emphatically rejected the misapplication of *Jacobson*, utilized by the District Court in this case, in First Amendment challenges to COVID-19-related emergency orders. App. Br. 47; *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). The Supreme Court corrected lower courts' misapplication of *Jacobson* in the Free Exercise Clause context by not applying *Jacobson* at all, and instead applying normal constitutional scrutiny. *See id.* at 70-71 (Gorsuch, J., concurring). There is no reason to believe that the Court would apply Respondents' misunderstanding of *Jacobson* in other contexts. The District of Minnesota has already recognized this. *Northland Baptist Church v. Walz*, 2021 WL 1195821, at *10-11 (D. Minn. Mar. 30, 2021) (citing *Roman Catholic Diocese*)). It was error for the District

Court in this case to apply a precedent where the Supreme Court does not consider it applicable.

In reality, *Jacobson* is not a special precedent to be applied to a pandemic—there was no pandemic in 1905 which led to the Massachusetts law,[6] so the decision did not create some sort of emergency exception to the Constitution. This should not be surprising, as the Civil War itself did not, in the Supreme Court's mind, constitute an emergency justifying a departure from regular constitutional scrutiny. *Ex parte Milligan*, 71 U.S. 2, 120–21 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.").

Jacobson was merely Justice Harlan's formulation of the constitutional analysis for the Fourteenth Amendment's liberty interest, which has been refined substantially in the ensuing century-plus of Supreme Court jurisprudence. *E.g., Lawrence v. Texas*, 539 U.S. 558, 564-67 (2003) (discussing the evolution of liberty-interest jurisprudence). Additionally, Justice Harlan applied the same language to constitutional challenges across multiple contexts throughout his tenure at the Supreme Court.[7] Justice Harlan's 1905

[6] Further undermining *Jacobson*'s application is that it addressed a Massachusetts law duly passed by the legislature, not an executive order.

[7] *Lochner v. New York*, 198 U.S. 45, 68 (1905) (Harlan, J., dissenting) (wage and hour laws); *California Reduction Co. v. Sanitary Reduction Works of San Francisco*, 199 U.S. 306, 318-19 (1905) (municipal garbage ordinances); *Booth v. People of State of Illinois*, 184 U.S. 425, 429 (1902) (Harlan, J.) (prohibition on the sale of grain options); *Atkin v.*

wording has been refined in hundreds of cases since then. There is no valid reason to turn back the clock a century and neglect the Supreme Court's refinements of First Amendment jurisprudence.

B. Applying Proper First Amendment Scrutiny, Mask-Wearing or Refusal to Wear a Mask Are Political Speech, and the Mask Order Violates Appellants' First Amendment Rights.

Appellants' initial arguments that the mask order violates the First Amendment are equally applicable here. App. Br. 48-50. Respondents notably fail to rebut Appellants' application of proper First Amendment scrutiny to the mask mandate, which appears to be a concession that if normal political speech scrutiny applies, the mask mandate must be enjoined. Resp. Br. 46. Respondents instead only offer a scant reference to the *O'Brien* case. *Id.*

Respondents miss the mark when they fail to actually apply the *O'Brien* test. First, as argued above, the mask mandate is not within the "constitutional power of the government" in this circumstance because it is an executive order which violates the separation of powers. *See supra* sections II-IV. Second, it is not enough for Respondents to simply claim that they are regulating conduct, and that is that. *See* Resp. Br. 42. It is a low bar for Appellants to identify a message associated with mask-wearing, which they have done. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) ("a narrow, succinctly articulable message is not a condition of constitutional

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State of Kansas, 191 U.S. 207, 223 (1903) (Harlan, J.) (wage and hour laws); *State of Minnesota v. Barber*, 136 U.S. 313, 320 (1890) (Harlan, J.) (sales of meat); *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (Harlan, J.) (liquor laws).

protection"); App. Br. 46-47. If homeless people convey a message that there is "an affordable housing crisis in Cincinnati," then non-mask-wearers convey a message that they disagree with mask-wearing, or by wearing masks, that they agree with it. *See Phillips v. City of Cincinnati*, 479 F. Supp. 3d 611, 635 (S.D. Ohio 2020).

Third, and perhaps most important, *O'Brien* still requires a tailoring analysis which Respondents neglect. Under *O'Brien*, an order fails constitutional scrutiny if "the incidental restriction on first amendment freedom is…greater than that which is essential to further the governmental interest." *United States v. Lee*, 935 F.2d 952 (8th Cir. 1991). In this case, as Appellants already noted, the mask mandate failed to further the government's claimed interest in slowing the spread of COVID-19, as the number of cases increased after it was imposed, and the case positivity rate stayed the same. App. Br. 48-49. In addition, the mask mandate is woefully underinclusive, exempting all tribal lands in Minnesota and anyone from a neighboring state. App. Br. 49. The mask mandate fails *O'Brien* just as much as it fails strict scrutiny.

VII. Appellant Johnson's Allegations That Mask-Wearing Violates Her Religious Beliefs Are Not "Conclusory" or "Legal Conclusions."

Respondents' reduction of Appellant Johnson's stated beliefs about mask-wearing to "legal conclusions" is offensive and improper. Resp. Br. 47. Appellant Johnson alleges that mask-wearing is sinful. Am. Pet. ¶¶ 82-83, 98, 134. This is her belief and must be accepted as true, especially at the Rule 12 stage. Courts take extreme caution not to cavalierly discard litigants' religious beliefs in the manner that Respondents do here. *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to

question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.").

Contrary to Respondents' assertion that this Court should determine what is religion and what isn't, the Court's challenge is to determine whether Appellant Johnson's beliefs entitle her to an injunction against being forced to wear a mask. Because the mask mandate is not narrowly tailored to a compelling government interest, she is entitled to exactly that. Appellants believe their prior tailoring analysis meets Respondents' arguments well. App. Br. 49-52. In addition, Respondents err by claiming that Appellants did not argue that the mask order was underinclusive because it exempted tribal lands. Resp. Br. 49. They did make that argument below. Doc. 63 at 11-12 (Pet'rs' Reply Mem. of Law in Supp. of Their Mot. for a Temporary Injunction, Dec. 18, 2020). Appellants have also explained that Public Law 280 subjects tribal lands other than Red Lake Nation to Governor Walz' authority, especially if an emergency truly exists. App. Br. 49-52.

The Court should reverse the District Court and issue an injunction against EO 20-81 based on Appellant Johnson's Free Exercise Clause challenge.

CONCLUSION

For the reasons set forth here and in Appellants' Principal Brief, Appellants ask the Court to reverse the District Court and instruct it to issue the Writ of Quo Warranto.

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Dated: August 11, 2021

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