No. A21-0626

STATE OF MINNESOTA
IN COURT OF APPEALS

Drake Snell, et al.,

Appellants,

vs.

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

Respondents.

RESPONDENTS' BRIEF

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(h)(3).

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LEGAL ISSUES

I. Did the rescission of the mask mandate and the end of the peacetime emergency render this appeal moot?

This issue was not raised in district court because these events occurred after the district court's decision. *Infra* at 9. But justiciability issues may be raised at any time. *In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989).

Apposite authority: *Dean v. City of Winona*, 868 N.W.2d 1 (Minn. 2015).

II. Is the Minnesota Emergency Management Act, Minn. Stat. ch. 12, a constitutional delegation of authority to the Governor?

The district court granted Respondents' motion to dismiss on this issue because the Act provided the Governor with clear standards that are consistent with other court-approved delegations to the Executive Branch. App. Add. at 17–19. Appellants timely appealed. Doc. 71.

Apposite authority: Minn. Const. art. III § 1; Minn. Stat. ch. 12; *Minn. Energy & Econ. Dev. Auth. v. Printy*, 351 N.W.2d 319 (Minn. 1984); *Lee v. Delmont*, 36 N.W.2d 530 (Minn. 1949).

III. Was the COVID-19 pandemic a valid basis for the Governor to declare a peacetime emergency under Minn. Stat. § 12.31?

The district court granted Respondents' motion to dismiss on this issue because the COVID-19 pandemic is an "act of nature" under the plain meaning of Minn. Stat. § 12.31, subd. 2(a). App. Add. at 21. Appellants timely appealed. Doc. 71.

Apposite authority: Minn. Stat. §§ 12.02, .31, .39, .61.

IV. Did the mask mandate conflict with Minnesota's anti-disguise statute?

The district court granted Respondents' motion to dismiss on this issue because the anti-disguise statute requires specific intent to conceal one's identity, so it does not criminalize wearing masks to prevent the spread of a deadly respiratory disease. App. Add. at 24–29. Appellants timely appealed. Doc. 71.

Apposite authority: Minn. Stat. § 609.735; Executive Order 20-81; *Minn. Voters Alliance v. Walz*, 492 F. Supp. 3d 822 (D. Minn. 2020).

V. Was the mask mandate unconstitutionally vague?

The district court granted Respondents' motion to dismiss on this issue because the mask mandate language was "simple and understandable," and Appellants failed to support their argument about arbitrary or discriminatory enforcement with facts. App. Add. at 31–32. Appellants timely appealed. Doc. 71.

Apposite authority: *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982); *State, City of Minneapolis v. Reha*, 483 N.W.2d 688 (Minn. 1992); *Hard Times Cafe, Inc. v. City of Minneapolis*, 625 N.W.2d 165 (Minn. Ct. App. 2001).

VI. Did the mask mandate violate Appellants' free-speech rights?

The district court granted Respondents' motion to dismiss on this issue because wearing or not wearing a mask is conduct, not speech. App. Add. at 34. Appellants timely appealed. Doc. 71.

Apposite authority: *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006); *United States v. O'Brien*, 391 U.S. 367 (1968); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Minn. Voters Alliance v. Walz*, 492 F. Supp. 3d 822 (D. Minn. 2020).

VII. Did the mask mandate violate Appellant Johnson's free-exercise rights?

The district court granted Respondents' motion to dismiss on this issue because Appellant Johnson failed to allege facts to support her claim and, in any event, the mask mandate was a neutral law of general applicability. App. Add. at 37-38. Appellants timely appealed. Doc. 71.

Apposite authority: *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

STATEMENT OF THE CASE

This appeal challenges two cornerstones of Minnesota's COVID-19 response: the Governor declaring a peacetime emergency in response to a global pandemic and mandating that Minnesotans wear masks in indoor public spaces. These cornerstones allowed Minnesota to outperform most other states in its management of the public health crisis. *See, e.g.*, Lauren Leamanczyk & Steve Eckert, *KARE 11 Investigates: New data shows Minnesota's COVID restrictions saved lives* (July 7, 2021), https://www.kare11.com/article/news/investigations/kare-11-investigates-new-data-shows-minnesotas-covid-restrictions-saved-lives/89-d802ebef-428a-4ea0-b78d-35a2f25a932f (last visited July 27, 2021).

COVID-19 was indeed a public health crisis. In just over a year, it spread to over 610,000 Minnesotans and killed over 7,500 of our neighbors. Situation Update for COVID-19, Minnesota Department of Health, https://www.health.state.mn.us/diseases/coronavirus/situation.html (last visited July 27, 2021.) Nationally, it spread to over 34.4 million Americans, killing over 608,000 people. COVID Data Tracker, U.S. Centers for Disease Control and Prevention, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7daysCOVID-19 (last visited July 27, 2021.) "[T]hat grim figure exceeds the number of U.S. soldiers killed in combat in the Vietnam War and both World Wars combined." *Cnty. of Los Angeles Dep't of Pub. Health v. Superior Court of Los Angeles Cnty.*, 61 Cal. App. 5th 478, 494 (2021), *reh'g denied* (Mar. 12, 2021), *review denied* (June 9, 2021).

To protect the lives and health of Minnesotans, Governor Walz declared a peacetime emergency and issued numerous executive orders in accordance with the Minnesota Emergency Management Act. One of these orders required Minnesotans to cover their face in certain situations to limit transmission of this deadly respiratory disease. Minnesota courts and thirty-seven other states had similar mask mandates.

Appellants did not want to wear a mask, so they filed a petition for a writ of quo warranto in Ramsey County challenging the Governor's authority to impose a mask mandate. Judge John H. Guthmann dismissed their lawsuit, holding that (1) the Emergency Management Act is a valid delegation of authority to the Governor; (2) the COVID-19 pandemic is a valid basis for a peacetime emergency; (3) the mask mandate does not conflict with Minnesota's anti-disguise statute; (4) the mask mandate is not unconstitutionally vague; (5) the mask mandate does not violate Appellants' free-speech rights; and (6) the mask mandate does not violate the Free Exercise Clause.

After the district court dismissed the case, the Governor rescinded the mask mandate and the peacetime emergency ended. This appeal is therefore moot. If this court chooses to address Appellants' substantive arguments, it will find they were properly dismissed.

STATEMENT OF FACTS

I. COVID-19 TRANSMISSION.

COVID-19 is an infectious disease caused by a coronavirus. Doc. 37 at 15.[1] COVID-19 primarily spreads by respiratory droplets released when people exhale, cough, or sneeze. *Id.* at 16, 40. The most common way COVID-19 spreads is through close contact with an infected individual. *Id.* But small droplets or particles can linger in the air and transmit the virus to people more than six feet away or even after the infected individual leaves the room. *Id.* Airborne transmission is more likely to occur indoors. *Id.* The virus can also spread through commonly touched surfaces. *Id.* at 16, 41. Limiting the spread of COVID-19 is especially difficult because infected individuals are often asymptomatic or presymptomatic and thus unaware that they are infected. *Id.* at 16; Doc. 41 at 255. Indeed, asymptomatic and presymptomatic cases are responsible for more than 50% of COVID-19 transmission. Doc. 41 at 255.

II. MINNESOTA RESPONDS TO THE COVID-19 EMERGENCY.

In response to the COVID-19 public health crisis, Governor Walz declared a peacetime emergency on March 13, 2020. *See* Executive Order 20-01.[2] That same day, President Trump declared a National Emergency, and—for the first time in history—a

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[1] Documents that are a matter of public record may be considered on a motion to dismiss. *Mutua v. Deutsche Bank Nat. Trust Co.*, No. A13-0498, 2013 WL 6839723, at *1 (Minn. Ct. App. Dec. 30, 2013) (citing *State v. Rewitzer*, 617 N.W.2d 407, 411 (Minn. 2000)), *review denied* (Mar. 18, 2014).

[2] The peacetime emergency was extended every thirty days until July 1, 2021. All of Minnesota's emergency executive orders regarding COVID-19 are available online at https://www.lrl.mn.gov/execorders/eoresults?gov=44 (last visited July 27, 2021).

President approved major disaster declarations in all 50 states. Doc. 40 at 151–56. Minnesota engaged in a comprehensive plan to combat COVID-19 that included slowing the spread of the disease, protecting the capacity of the state's medical system, and ensuring the continued operation of critical sectors to protect the public's access to necessary services and supplies.

As relevant here, Governor Walz issued Emergency Executive Order 20-81 on July 22, 2020. Resp. Add. at 1, 15-16. EO 20-81 required most Minnesotans to wear face coverings in certain situations like, for example, when they went inside a business or some other indoor public space. *Id.* at 4-7. The EO exempted individuals who could not wear a mask safely like young children, individuals with medical conditions, and workers where wearing a mask would create a job hazard. *Id.* at 4-5. The EO also allowed people to temporarily remove their mask during activities that involved the mouth, like eating, drinking, heavy breathing, and playing a musical instrument. *Id.* at 6-7.

EO 20-81 was consistent with the best advice from federal officials. In calling on all Americans to wear cloth face coverings, CDC Director Robert Redfield stated, "[c]loth face coverings are one of the most powerful weapons we have to slow and stop the spread of [COVID-19] – particularly when used universally within a community setting. All Americans have a responsibility to protect themselves, their families, and their communities." Doc. 37 at 101. The Federal Occupational Health and Safety Administration ("OSHA") also recommended that employers encourage workers to wear face coverings at work. Doc. 40 at 168. President Trump encouraged all Americans to wear face coverings and recommended that Minnesota "[c]ontinue to communicate the

public health and economic benefits of compliance with the state masking mandate" and "[e]nsure compliance with current Minnesota StaySafe Plan occupancy restrictions." *Id.* at 180, 187.

Ordering face coverings in public spaces is an effective way to combat the spread of COVID-19. As CDC doctors explained:

> Like herd immunity with vaccines, the more individuals wear cloth face coverings in public places where they may be close together, the more the entire community is protected. Community-level protection afforded by use of cloth face coverings can reduce the number of new infections and facilitate cautious easing of more societally disruptive community interventions such as stay-at-home orders and business closings.

Doc. 37 at 120. Studies show that mandating face coverings in public is associated with a significant decline in the daily COVID-19 growth rate. Doc. 40 at 208-09. South Carolina, for example, saw a 46.3 percent greater decrease in COVID-19 cases in counties with a face covering mandate. *Id.* at 226. Modeling estimates that face covering mandates have averted hundreds of thousands of COVID-19 cases in the U.S. *Id.* at 298-09. Another study found that use of face coverings reduced COVID-19 transmission by 70% aboard the *U.S.S. Theodore Roosevelt* during an outbreak. U.S. Centers for Disease Control and Prevention, Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2 (last updated May 7, 2021), *available at* https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html (last visited July 27, 2021).[3] An analysis published by Goldman Sachs Research found that a national face covering mandate could prevent the need to bring back

[3] A prior version of this report appears in Doc. 41 at 255–59.

stay-at-home orders that would otherwise cost an estimated 5% of U.S. gross domestic product. Doc. 40 at 249.

Recognizing the effectiveness and legality of mask mandates, other government institutions issued their own mask mandates. For example, two months before the Governor issued EO 20-81, the United States District Court for the District of Minnesota imposed a mask mandate for U.S. Courthouses. U.S. District Court for the District of Minnesota, COVID-19 Update – Face Mask Requirement (May 15, 2020), https://www.mnd.uscourts.gov/sites/mnd/files/2020-0515_News-Release-COVID19-Use-of-Mask.pdf (last visited July 27, 2021). This mandate is still in effect as of the date of this brief. U.S. District Court for the District of Minnesota, Protocol for In-Person Hearings in the District of Minnesota (July 23, 2021), https://www.mnd.uscourts.gov/sites/mnd/files/2020-0820_Protocol-for-In-Person-Hearings.pdf (last visited July 27, 2021).

The Minnesota Judicial Branch also imposed a mask mandate prior to EO 20-81. Order Requiring Face Coverings at Court Facilities, No. ADM20-8001 (Minn. July 7, 2020). The Judicial Branch's mask mandate was based on "[p]ublic health guidance from the CDC and the Minnesota Department of Health." *Id.* at 2. The Minnesota Supreme Court stated that a mask mandate "will contribute to the exposure precaution measures already in place for the safety of members of the public and for Judicial Branch staff and judges." *Id.* It also "will contribute to the administration of justice by allowing the Judicial Branch to continue to safely and methodically expand court services and in-person proceedings." *Id.* at 2–3. The Judicial Branch maintained its mask mandate until

July 6, 2021. Order Governing the Continuing Operations of the Minnesota Judicial Branch, No. ADM20-8001 (Minn. June 28, 2021).

Similarly, at least thirty-seven states, as well as the District of Columbia and Puerto Rico, imposed a mask mandate at some point during the pandemic. Doc. 40 at 131–45. And the CDC still recommends masks for unvaccinated individuals and requires masks on public transportation. https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html (last visited July 19, 2021).

III. APPELLANTS CHALLENGE EO 20-81.

Appellants did not want to wear a mask, so they filed this lawsuit seeking a writ of quo warranto. "Quo warranto is an available remedy to challenge official action not authorized by law." *Save Lake Calhoun v. Strommen*, 943 N.W.2d 171, 174 (Minn. 2020). Appellants challenged the Governor's authority to issue EO 20-81 on numerous statutory and constitutional grounds. Resp. Add. at 22–31.

The district court dismissed their petition, holding (1) the Emergency Management Act is not an unconstitutional delegation of power because it contains reasonably clear standards for the Governor's exercise of authority; (2) the plain language of the Emergency Management Act demonstrates that communicable diseases like COVID-19 are a valid basis to declare a peacetime emergency; (3) the mask mandate does not conflict with Minnesota's anti-disguise law because the anti-disguise law requires an intent to conceal one's identity; (4) the mask mandate is not unconstitutionally vague because it is "simple and understandable," and Appellants' conclusory allegations of arbitrary enforcement were not supported by facts; (5) the mask mandate does not infringe, much less violate,

Appellants' free speech rights because wearing or not wearing a mask is conduct, not speech; and (6) the mask mandate does not violate the Free Exercise Clause because the right to freely practice religion does not include liberty to expose the community to a communicable disease. App. Add. at 11–38. A similar challenge to Minnesota's mask mandate had already been rejected by a federal judge. *Minn. Voters Alliance v. Walz*, 492 F. Supp. 3d 822 (D. Minn. 2020).

Appellants timely appealed the dismissal. Although Respondents' raised mootness in their Statement of the Case, Appellants have persisted with this appeal.

IV. THE GOVERNOR RESCINDED THE MASK MANDATE, AND THE PEACETIME EMERGENCY ENDED.

On May 6, 2021, Governor Walz announced that the mask mandate would end on June 30 or when 70% of people over the age of 15 received one dose of vaccine, whichever came first. EO 21-21 at 8. Eight days later, after the CDC released new recommendations, the Governor rescinded the mask mandate. EO 21-23 at 1. As noted above, both the U.S. District Court for the District of Minnesota and the Minnesota Judicial Branch continued to impose a mask mandate after the Governor rescinded EO 20-81.

On June 29, 2021, the Governor announced that he would end the peacetime emergency on July 1. https://mn.gov/governor/news/#/detail/appId/1/id/487865. The Legislature then passed a bill terminating the peacetime emergency as of July 1 at 11:59 p.m. 2021 Minn. Laws 1st Spec. Sess. Ch. 12., Art. 2, § 23. The Governor signed the bill on June 30. 2021 Minn. Laws 1st Spec. Sess. Ch. 12.

STANDARD OF REVIEW

"A petition for a writ of quo warranto may be dismissed for failure to state a claim upon which relief can be granted." *Free Minn. Small Bus. Coalition v. Walz*, A20-1161, 2021 WL 1605123, at *2 (Minn. Ct. App. Apr. 26, 2021). On appeal from a dismissal for failure to state a claim upon which relief can be granted, this Court "review[s] de novo whether a complaint sets forth a legally sufficient claim for relief." *Walsh v. U.S. Bank, N.A*, 851 N.W.2d 598, 606 (Minn. 2014). This Court also reviews the interpretation of statutes de novo. *Swenson v. Nickaboine*, 793 N.W.2d 738, 741 (Minn. 2011).

ARGUMENT

I. APPELLANTS' CLAIMS ARE MOOT, AND THEIR APPEAL SHOULD BE DISMISSED.

All of Appellants' claims are moot. If the claims were not moot when Governor Walz rescinded the relevant provisions of EO 20-81 on May 14, 2021, they certainly were when the peacetime emergency ended on July 1, 2021. "An appeal should be dismissed as moot when a decision on the merits is no longer necessary or an award of effective relief is no longer possible." *Dean v. City of Winona*, 868 N.W.2d 1, 5 (Minn. 2015). In this case, all of Appellants' alleged injuries are from requirements that Minnesotans wear face coverings in certain situations and Appellants seek exclusively injunctive and declaratory relief. Resp. Add. 32–36, 40. No face covering requirement now exists. Thus, the requested injunctive and declaratory relief is "no longer necessary," and none of the injuries that Appellants alleged in their pleadings remain to be redressed by any ruling the Court might issue. All of Appellants' claims are therefore moot. *See Dean*, 868 N.W.2d at 5.

In accordance with basic constitutional principles, this Court should not address the merits of Appellants' constitutional claims. It is well-settled that courts "will not address a constitutional issue if there is another basis upon which the case can be decided." *Rickert v. State*, 795 N.W.2d 236, 240 (Minn. 2011); *see also State v. Bourke*, 718 N.W.2d 922, 926 (Minn. 2006) ("[O]ur general practice is to avoid a constitutional ruling if there is another basis on which a case can be decided." (quotation omitted)); *In re Senty–Haugen*, 583 N.W.2d 266, 269 n.3 (Minn. 1998) ("It is well-settled law that the courts should not reach constitutional issues if matters can be resolved otherwise.").

Regardless, no mootness exception applies to Appellants' claims. In attempting to save their claims from dismissal for mootness, Appellants offer a single citation to *Tandon v. Newsom*, App. Br. at 18, in which the U.S. Supreme Court noted without analysis that withdrawal or modification of a disputed executive order does not "necessarily" moot a case and that, in non-moot cases, preliminary injunctive relief may be appropriate if there is a "constant threat" that the disputed restriction will be reinstated. 141 S. Ct. 1294, 1297 (2021). Appellants do not even attempt to apply that case to these facts, or to offer a citation to a case in which the Governor's emergency authority has ended.

Based on their citation to *Tandon*, Appellants apparently rely on one of two mootness exception doctrines: "capable of repetition, yet evading review" or "voluntary cessation." Neither is applicable here.

A. The Challenged Executive Order Is Not Capable of Repetition Yet Evading Review.

Under the "capable of repetition, yet evading review" doctrine, a case challenging a law or policy may remain vital after the law or policy has been rescinded if (1) there is a "reasonable expectation" that the challenging party will again become subject to the restriction and (2) the challenged action is, "by its character," too short to be fully litigated before it ceases or expires. *Dean*, 868 N.W.2d at 5. This doctrine is well illustrated by *State ex rel. Doe v. Madonna*, in which the plaintiffs challenged a Minnesota statute that allowed courts to order a person to be involuntarily committed for up to 72 hours pending a mental health evaluation, in a process known as a "hold order." 295 N.W.2d 356, 359-60 (Minn. 1980). Although all three plaintiffs had been released from the challenged commitments prior to litigation, the court held that the case was not moot because it was capable of repetition yet would evade review. *Id.* at 361. The first prong was satisfied because one plaintiff suffered from serious mental illness and had been subject to several hold orders, making a future hold order likely. *Id.* The second prong was satisfied because it was impossible to get a ruling on the merits of a 72-hour hold order before it expired. *Id.* Thus, by their nature, the statutory hold orders would evade review. *Id.*

In this case, there are at least two reasons why the "capable of repetition, yet evading review" doctrine does not apply: (1) Appellants have not established a reasonable expectation that a face covering executive order will be re-enacted; and (2) even if such an executive order were issued, there is no indication that it would evade review.

1. Appellants cannot show a reasonable expectation that face coverings will be ordered again.

Appellants have not and cannot show reasonable expectation that an executive order requiring universal face coverings will be re-enacted. Not only has EO 20-81 been rescinded for more than two months, the emergency declaration that authorized it is no longer in effect. This contrasts starkly with *Madonna*, in which the challenged statute was still in force. *See id.* at 359. It also distinguishes this case from cases like *Roman Catholic Diocese of Brooklyn v. Cuomo*, in which the regulatory scheme was still in place. *See* 141 S. Ct. 63, 68 (2020). In *Roman Catholic Diocese*, at the time of the Supreme Court's decision, current case counts allowed for less intense regulation, but Governor Cuomo had changed the level of regulation eight times in the previous five weeks. *Id.* at 68 n.3. Thus, the threat of a return to the challenged restrictions loomed large. In this case, by contrast, the entire peacetime emergency has ended. *See Lewis v. Cuomo*, 20-CV-6316, 2021 WL 3163238, at *6, 8 (W.D.N.Y. July 27, 2021) (finding "that there is no reasonable expectation of a recurrence" of a challenged executive order where the combined actions of the governor and legislature had ended both the challenged order and the declared state of emergency).[4]

[4] Although the court in *Lewis* was analyzing the applicability of the "voluntary cessation" doctrine, which, as discussed below, is not used by Minnesota courts, the version of the test used by the court required the party opposing dismissal to show a "reasonable expectation" that the challenged conduct would recur. *Id.* at *7. This is the same standard used in the first prong of the test applied by Minnesota courts under the "capable of repetition, yet evading review" doctrine.

Moreover, the conditions that led to the enactment of EO 20-81 have changed. One of the driving forces behind the rescission of EO 20-81 was vaccine distribution. Millions of Minnesotans have now received a COVID-19 vaccine and that number can only grow going forward. *See Vaccine Data*, Minn. COVID-19 Response (updated July 25, 2021), *https://mn.gov/covid19/vaccine/data/index.jsp* (68.4% of Minnesotans 16 or older have received at least one vaccine dose; 65.1% are fully vaccinated). While viruses are unpredictable, the combination of the vaccination rate in Minnesota and the termination of the peacetime emergency make it unlikely that a statewide mandate like EO 20-81 will again be required.[5]

2. Nothing prevents full litigation of Executive Orders.

There is nothing to suggest that an executive order requiring face coverings is, by its character, unable to be fully litigated prior to expiration. EO 20-81 was in force for nearly ten months.[6] This was ample time for full litigation. Appellants served their original Petition nearly one month after EO 20-81 was issued and waited another month to file and serve their Amended Petition. They filed their motion for a temporary injunction nearly

[5] Although a variant of the COVID-19 virus known as the "Delta variant" has spread to the United States and has hindered efforts to eradicate COVID-19, research shows that COVID-19 vaccines are highly effective against the Delta variant. *See* Jared S. Hopkins, *Why Covid-19 Vaccines Work Well Against the Delta Variant*, Wall St. J., (Jul. 22, 2021), *https://www.wsj.com/articles/why-covid-19-vaccines-work-well-against-delta-variant-11626957000*. The vast majority of adult Minnesotans are vaccinated against COVID-19. Thus, it remains unlikely that the conditions that led to the enactment of EO 20-81 will recur.

[6] Other emergency executive orders were in force even longer. *See, e.g.*, EO 20-10 (prohibiting price gouging; issued March 20, 2020; rescinded at conclusion of the peacetime emergency on July 1, 2021).

two months later. Despite this leisurely pace of litigation, Appellants received a ruling on the merits nearly two months before EO 20-81 was rescinded. They then made no effort to expedite the filing or processing of this appeal. This undermines any contention that executive orders are, by their character, incapable of being fully litigated on the merits.

B. Voluntary Cessation Doctrine Is Not Recognized by Minnesota Courts.

"Voluntary cessation" is a federal court doctrine that prevents a party to a lawsuit in federal court from avoiding judicial review by ceasing the challenged conduct when that party remains free to resume the challenged conduct once the case has been dismissed. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). The "voluntary cessation" doctrine has never been adopted by Minnesota courts. *Matter of Merrill Lynch Investors Trust Mortgage Loan Asset-Backed Certificates, Series 2006-RM2* [hereinafter, "*Merrill Lynch Investors*"], No. A18-1554, 2019 WL 2079819, at *3 (Minn. Ct. App. May 13, 2019) ("[T]he Minnesota Supreme Court has not adopted this doctrine, and we decline to do so here.").

The court in *Merrill Lynch Investors* declined to apply voluntary cessation doctrine even though the circumstances in the case before it were in line with the doctrine's purpose. The petitioners in *Merrill Lynch Investors* intervened in a distribution of trust assets, challenging the respondents' attempt to purchase some of the assets, of which the petitioners were third-party beneficiaries. *Id.* at 1. After the respondents rescinded their offer to buy the trust assets, the district court dismissed the petition, reasoning that its claims were both moot and not yet ripe. *Id.* On appeal, the petitioners asked the court of appeals to apply the doctrine of voluntary cessation and find that their claims were not

mooted by the respondents' voluntary retraction of their purchase offer. *Id.* at 3. They argued that once the petition was dismissed, the respondents could reinstate their offer to buy the contested assets the very same day. The petitioners would be left with no recourse but to file a new petition, which could again be mooted by a temporary retraction of the offer. Nevertheless, this Court declined to adopt the doctrine for the first time in Minnesota. *Id.* The same result should apply here.

Even if the Court were inclined to consider adopting voluntary cessation doctrine for the first time in Minnesota courts, this case is a poor candidate. While it is true that Governor Walz voluntarily rescinded EO 20-81, the surrounding circumstances do not fit the policy underlying the federal doctrine.

The policy underlying voluntary cessation doctrine is a fear that a person will intentionally avoid judicial scrutiny by engaging in unlawful conduct, mooting cases by stopping when sued, and then resuming the challenged conduct, "repeating this cycle until he achieves all of his unlawful ends." *Already, LLC*, 568 U.S. at 91. Here, the timeline of litigation demonstrates that Governor Walz's rescission of EO 20-81 had nothing to do with this litigation. Governor Walz rescinded EO 20-81 the day after the CDC announced that universal masking was no longer needed.[7] The rescission occurred after COVID-19 vaccines became widely available in Minnesota and key COVID-19 metrics improved. *See* EO 21-23 at 1. Concerns of intentional dodging of judicial review are not present in this

[7] Appellants may point out that EO 20-81 was rescinded shortly after they filed their appeal. But Governor Walz announced that EO 20-81 would be rescinded a week earlier than the appeal. The CDC's announcement merely accelerated the timeline for rescission.

case. Accordingly, it is a poor candidate for the first application of voluntary cessation doctrine in Minnesota courts.

Neither of the mootness exception doctrines that Appellants may have been attempting to invoke with their citation to *Tandon v. Newsom* can be applied in this case. Appellants' claims are moot and this appeal should be dismissed, without substantive consideration of the arguments below.

II. ALTERNATIVELY, MEMA PROPERLY DELEGATES AUTHORITY TO THE EXECUTIVE BRANCH BECAUSE THE LEGISLATURE PROVIDED AMPLE GUIDANCE THROUGH POLICIES AND STANDARDS.

Appellants first argue that Governor Walz lacked authority to issue EO 20-81 based on their theory that the Legislature improperly delegated pure legislative power to the Governor by enacting the Minnesota Emergency Management Act ("MEMA"). App. Br. at 18–30.

Statutes do not violate the separation-of-powers principle unless the legislature "delegate[s] purely legislative power" to the executive branch. *Lee v. Delmont*, 228 Minn. 101, 112–13, 36 N.W.2d 530, 538 (Minn. 1949). However, the Legislature may delegate power when it provides "a reasonably clear policy or standard" for the executive branch to implement. *City of Richfield v. Local No. 1215, Int'l Ass'n of Fire Fighters*, 276 N.W.2d 42, 45 (Minn. 1979). The policy or standard can be expressed in "very broad and general terms." *Lee*, 228 Minn. at 114, 36 N.W.2d at 539.

Statutes delegating authority are viewed liberally "in order to facilitate the administration of laws which . . . are complex in their application." *State v. King*, 257 N.W.2d 693, 697 (Minn. 1977). Indeed, "it is impossible for the legislature to deal

directly with the many details in the varied and complex conditions on which it legislates." *Anderson v. Comm'r of Highways*, 126 N.W.2d 778, 781 (Minn. 1964). Thus, the Legislature can, without violating separation powers, enact statutes that give the executive branch flexibility on implementation, leaving the details to the "reasonable discretion" of executive branch officials. *Id.* A flexible standard is necessary to leave room for the executive branch to work out the "details" pursuant to a particular law, "particularly in a complex and fast-changing area[.]" *Minn. Energy & Econ. Dev. Auth. v. Printy*, 351 N.W.2d 319, 351 (Minn. 1984). When evaluating a challenge to a statute, Minnesota courts presume that the statute is constitutional, and recognize that the "power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary." *State v. Behl*, 488 N.W.2d 363, 364 (Minn. 1989).

When enacting MEMA, the Legislature provided sufficient standards and policies for executive branch officials to follow. The Legislature first provided a policy to guide executive officers under MEMA. It stated the purpose of the delegation of power under the peacetime emergency power is to address "the existing and increasing possibility . . . of natural and other disasters of major size and destructiveness" through adequate preparation, steps to "protect the public peace, health, and safety," and preserving "the lives and property of the people." Minn. Stat. § 12.02, subd. 1(2).

The Legislature then provided standards. It limited the Governor's power to declare a peacetime emergency to six enumerated triggering events. Minn. Stat. § 12.31, subd. 2. Additionally, if one of the six triggering events occurs, the Legislature deemed that a

peacetime emergency can be declared only if the condition "endangers life and property" and "local government resources are inadequate to handle the situation." *Id.*

The Legislature also included time limits, beyond which the Governor needs approval from other officials. Peacetime emergencies are limited to five days unless the Minnesota Executive Council, consisting of the Governor, Lieutenant Governor, Secretary of State, State Auditor, and Attorney General, approves an extension. *Id.* § 12.31, subd. 2(a). Moreover, any extension beyond 30 days is reviewable by the Legislature, even if the Legislature is out of session when the extension occurs. *Id.* at 12.31, subd. 2(b). The Legislature may act to end the peacetime emergency by a majority vote of each house, enact legislation adjusting the Governor's executive actions, or take no action.

MEMA provides clear guidance on the circumstances under which a peacetime emergency may be declared and on the procedures that must be followed to declare and extend the peacetime emergency. This is exactly the type of "reasonably clear policy or standard" that the Legislature must provide to the executive branch when delegating authority. *See Local No. 1215*, 276 N.W.2d at 45. That the policies are broad enough to encompass a variety of situations, allowing the executive branch to exercise discretion in issuing orders is not surprising given the nature of the statute. The very purpose of providing the executive branch with authority to address emergencies is to quickly respond to dangerous and unforeseen circumstances. An overly prescriptive statute would defeat this purpose. Moreover, it is acceptable under Minnesota law to express the guiding standard or policy in "broad or general terms." *See Lee*, 36 N.W.2d at 539. This is

especially true in a "complex and fast-changing area" such as management of an unforeseen emergency. *Printy*, 351 N.W.2d at 351.

Appellants' primary contention against MEMA is that it purportedly gives the Governor unrestrained authority, because he can misapply the statute and no one can take any action. Appellants' contention is false. First, MEMA provides ample checks from numerous government officials independent of the Governor. For a peacetime emergency to last even six days, it must be approved by the Executive Council, which consists of the Governor and four other elected constitutional executive officers. Additionally, after 30 days, the Legislature may act to end the emergency or reverse the Governor's actions in whole or in part. If a Governor's orders remain in force for a relatively long time during a peacetime emergency, it is because the rest of the constitutional political entities of Minnesota have agreed that he has acted legally and prudently.

Moreover, if any person alleges that they have been injured because the Governor exceeded the bounds of the standard or policy set by the Legislature, those actions are subject to judicial review. That is exactly what happened in this case (and in many other cases). *See AALFA Family Clinic v. Walz*, No. 20-cv-1037, Doc. No. 1 (D. Minn. Apr. 28, 2020); *Northland Baptist Church of St. Paul, Minn. v. Walz*, No. 20-cv-1100, Doc. No. 1 (D. Minn. May 6, 2020); *Lewis v. Walz*, 20-cv-1212, Doc. No. 1 (D. Minn. May 20, 2020); *Minn. Multi Housing Assoc. v. Walz*, No. 20-cv-1399, Doc. No. 1 (D. Minn. Jun. 14, 2020); *Cornerstone Church of Alexandria v. Walz*, 20-cv-1770, Doc. No. 1 (D. Minn. Aug. 13, 2020); *Heights Apts. LLC v. Walz*, No. 20-cv-2051, Doc. No. 1 (D. Minn. Sept. 24, 2020); *Young v. Ellison*, No. 20-cv-2144, Doc. No. 1 (D. Minn. Oct. 9, 2020); *Let Them Play MN*

v. Walz, No. 21-cv-79, Doc. No. 1 (D. Minn. Jan. 8, 2021); *Free Minn. Small Bus. Coal. v. Walz*, 62-CV-20-3507, Index. No. 1 (Ramsey Cnty. Dist. Ct. May 28, 2020); *The Edge Performance Hockey Training Ctrs., LLC v. Walz*, 62-CV-20-3583, Index Nos. 2, 3 (Ramsey Cnty. Dist. Ct. May 19, 2020); *Buzzell v. Walz*, 62-CV-20-3623, Index No. 1 (Ramsey Cnty. Dist. Ct. Jun. 1, 2020); *Willy McCoy's of Albertville, LLC v. Walz*, 62-CV-21-38, Index No. 1 (Ramsey Cnty. Dist. Ct. Jan. 4, 2021); *Minn. Ops. of Music & Amusements v. Walz*, 62-CV-21-49, Index. No. 2 (Ramsey Cnty. Dist. Ct. Jan. 4, 2021); *Doran 610 Apts., LLC v. State*, 27-CV-21-1034, Index No. 1 (Hennepin Cnty. Dist. Ct. Jan. 24, 2021); *JX Event Servs., LLC v. Walz*, 27-CV-21-1080, Index Nos. 1, 3 (Ramsey Cnty. Dist. Ct. March 10, 2021). Appellants alleged that the Governor declared a peacetime emergency when the requisite statutory circumstances were not present and that they were thereby injured. They sought and received judicial review.[8]

The propriety of having an emergency management act is demonstrated by the numerous other states that have upheld such laws. Appellate courts in at least five states have upheld emergency executive orders issued in response to COVID-19 against separation-of-powers challenges. *E.g.*, *Kravitz v. Murphy*, --- A.3d ----, 2021 WL 3043312 (N.J. Super. Ct. App. Div. July 20, 2021) (concluding Disaster Control Act did not violate separation-of-powers doctrine); *Casey v. Lamont*, --- A.3d ----, 2021 WL 1181937, at *10-11 (Conn. Mar. 29, 2021) (legislature provided sufficient guidance to governor for

[8] As discussed in the next section, Appellants were wrong. As the district court correctly held, all statutory prerequisites were met.

delegation of authority to comport with separation-of-powers)[9]; *Desrosiers v. Governor*, 158 N.E.3d 827, 839–41 (Mass. 2020) (same); *Beshear v. Acree*, 615 S.W.3d 780, 809-11 (Ky. 2020) (same); *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 892–93 (Pa. 2020) (Governor's exercise of the "broad powers authorized by the General Assembly" did not violate separation-of-powers). These courts recognized the same rule that Minnesota courts have enunciated: that delegation of authority is permissible as long as sufficient standard or policy is provided. *See, e.g.*, *Beshear*, 615 S.W.3d at 811 (applying an "intelligible principle" rule). Moreover, the courts recognized the need for the Governor to have discretion in response to an emergency. *See, e.g.*, *Casey*, 2021 WL 1181937, at *13 (recognizing "that there are myriad serious disasters that could arise and the actions the governor would be required to take could vary significantly from one serious disaster to another").

In support of their contention that MEMA violates separation-of-powers, Appellants rely primarily on a case from the Michigan Supreme Court. (*See* App. Br. at 23 (citing *In re Certified Questions from United States Dist. Court, W. Dist. of Mich., S. Div.* [hereinafter "*Certified Questions*"], 958 N.W.2d 1 (Mich. 2020)).) In a 4-3 decision, the court in *Certified Questions* held that Michigan's Emergency Powers of the Governor Act violated that state's constitutional separation-of-powers doctrine. *Id.* at 16-24. Notably, the court relied on Michigan precedents on nondelegation that are much stricter than those of

[9] In *Casey*, the court found that separation of powers was not upset even though the Connecticut statute allows the governor to suspend or modify statutes for up to six months when necessary. *Id.* at *11.

Minnesota. *Compare Osius v. City of St. Clair Shores*, 75 N.W.2d 25, 27 (Mich. 1956) (overturning city ordinance under which city council delegated evaluation of land use applications to a zoning board, even though the members of the board were the same as the members of the city council (cited at 958 N.W.2d at 18)), *with Lee*, 228 Minn. at 104-05, 113, 36 N.W.2d at 534, 538-39 (upholding statute under which Legislature delegated certification of barber instructors to a board of barber examiners). Additionally, the court focused heavily on the fact that the Michigan statute was "devoid of all temporal limitations." *Certified Questions*, 958 N.W.2d at 24. This contrasts with MEMA, under which the Governor, in order to extend a peacetime emergency beyond 30 days, must obtain approval from other constitutional officers and must call the Legislature into session for the purpose of overruling the Governor if it chooses. Minn. Stat. § 12.31, subd. 2.

One month after *Certified Questions* was decided, the Kentucky Supreme Court was asked to apply to invalidate that state's emergency management act. *See Beshear*, 615 S.W.3d at 812. In a unanimous opinion, the Kentucky Supreme Court, which had enunciated nondelegation standards similar to those in Minnesota, declined. *Id.* at 809-10, 813. The court first distinguished *Certified Questions* by noting that Kentucky's emergency management act does not grant powers of indefinite duration and that the Kentucky legislature is not continuously in session, both of which are also true of Minnesota. *Id.* at 812. The court also emphasized the need for a broad and general delegation of discretionary authority to deal with statewide emergencies, which are necessarily unexpected, urgent, and high-stakes. *Id.* at 812-13. This focus on the need for the legislature to sometimes provide broad, general guidance to the executive branch is

reminiscent of the well-settled law in Minnesota. *See, e.g.*, *Lee*, 228 Minn. at 112-13, 36 N.W.2d at 538–39. The Court should follow the lead of the five courts cited by Respondents, which applied separation-of-powers principles similar to those used in Minnesota, rather than the one court cited by Appellants, which applied principles foreign to Minnesota.

Minnesota courts have been clear that legislative delegation of authority to the executive branch is permitted, so long as the Legislature provides a guiding policy or standard. Here, MEMA contains an articulated policy to guide its implementation, as well as standards to limit its use, and guardrails against any executive overreach. The Court should reject Appellants' argument and hold that MEMA represents a proper delegation under Minnesota law.

III. THE PLAIN LANGUAGE OF MEMA PERMITS A PEACETIME EMERGENCY IN RESPONSE TO A GLOBAL PANDEMIC.

Appellants also argue that the Governor's peacetime emergency declaration was improper under MEMA because the COVID-19 pandemic is not an "act of nature"—the triggering event under which Governor Walz declared the peacetime emergency. As the district court correctly held, this argument lacks merit.

The term "act of nature" clearly and unambiguously includes a global pandemic. According to Black's Law Dictionary, "act of nature" is synonymous with "act of God," which is defined as "[a]n overwhelming, unpreventable event caused exclusively by forces

of nature . . . ." *Act of God*, Black's Law Dictionary (11th ed. 2019).[10] It is difficult to see how the COVID-19 pandemic could fall outside this definition. It was clearly overwhelming. There have been more than 190 million documented infections and more than 4 million documented deaths from the virus worldwide. The pandemic was unpreventable. It spread to those millions upon millions of people despite a concerted effort by authorities from around the globe to prevent the spread. It was caused by forces of nature. Viruses, including COVID-19, are a part of the natural world. They spread and cause diseases through natural processes. The COVID-19 virus most likely originated from a bat and definitely originated from an animal, a source that is clearly of "nature." *Animals and COVID-19*, Ctrs. for Disease Control & Prevention (updated June 4, 2021), https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/animals.html.

Courts examining the term "act of god" have routinely concluded it encompasses a pandemic. *See Rio Props. v. Armstrong Hirsch Jackoway Tyerman & Wertheimer*, 94 F. App'x 519, 521 (9th Cir. 2004) (act of god included illness outside of one's control); *Poston v. W. Union Tel. Co.*, 107 S.E. 516, 517 (S.C. 1920), *rev'd on other grounds*, *W. Union Tel. Co. v. Poston*, 256 U.S. 662 (1921) (influenza epidemic was an "act of god"); *Grover v. Zook*, 87 P. 638, 640 (Wash. 1906) (tuberculosis infection constituted an "act of god"). Additionally, several courts have found that the COVID-19 pandemic is a "natural disaster" under the term's plain, unambiguous meaning. *Easom v. U.S. Well Servs., Inc.*,

[10] As the district court explained, the definitions of "act" and "nature" further support Respondents' position that "act of nature" unambiguously includes a pandemic. App. Add. at 21.

--- F. Supp. 3d ----, 2021 WL 1092344, at *7–8 (S.D. Tex. Mar. 19, 2021) (holding that the COVID-19 pandemic is a "natural disaster"); *JN Contemporary Art LLC v. Phillips Auctioneers LLC*, 507 F. Supp. 3d 490, 501 (S.D.N.Y. 2020) ("By any measure, the COVID-19 pandemic fits" the dictionary definitions of "natural," "disaster," and "natural disaster."); *Friends of Danny DeVito*, 227 A.3d at 889 ("The COVID-19 pandemic is, by all definitions, a natural disaster" under the Pennsylvania emergency management statute); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 370 (Pa. 2020) ("We have no hesitation in concluding that the ongoing COVID-19 pandemic equates to a natural disaster.").

Appellants' only attempt to argue that "act of nature" does not unambiguously include a global viral pandemic is to cite an unpublished opinion of the Delaware Chancery Court. *See* App. Br. at 31-32. That opinion is inapposite here, because it analyzes the use of the word "calamity" in the context of a purchase agreement.[11] But, even in doing so, it acknowledges that the ordinary dictionary meaning of terms akin to "calamity" would include a pandemic. *See AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, No. CV 2020-0310, 2020 WL 7024929, *57, *64-65 (Del. Ch. Nov. 30, 2020). Appellants fail to provide any reason why the Court, in analyzing the Minnesota statute at issue in this case, should not apply the ordinary definition of "act of nature." Because the text of the statute is unambiguous there is no reason for the Court to go beyond the plain language of the

[11] The holding of the Delaware case, on the point for which Appellants cite it, is that the alleged business practice of expressly mentioning pandemics when they are meant to be covered in purchase agreements is not so strong that it automatically overcomes the ordinary definition of words like "calamity." *AB Stable VIII LLC*, 2020 WL 7024929, at *57, *65.

statute.[12] *See St. Paul Park Refining Co. v. Domeier*, 950 N.W.2d 547, 549 (Minn. 2020) (courts apply the language of unambiguous statutes, rather than probing deeper into the purpose). The plain, unambiguous language of MEMA shows that Governor Walz acted within his statutory authority when he declared a peacetime emergency.

This conclusion is reinforced by the language of the Minnesota Emergency Management Act as a whole. *Id.* at 36–38. The Legislature described the policy goals of MEMA as follows:

> 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:

[12] Even if the court were to examine the legislative history of the statute, as Appellants urge, it would find only further support for Respondents' position. Appellants are correct that the Legislature removed the term "public health emergency" from subdivision 2 of section 12.31, but Appellants present only a partial picture of that amendment. The legislative history surrounding that amendment demonstrates that the term "public health emergency" was removed because the bill's proponents believed it was redundant of the term "act of nature." (*See* Doc. 60 at 14–16 (citing H.F. 3031, 2002 Leg., 82nd Reg. Sess. (Minn. May 16, 2002) (statement of Rep. Mulder) (3:49–5:21), https://www.house.leg.state.mn.us/hjvid/82/2419; *id.* (statement of Rep. Huntley) (14:10–14:39; 16:14–16:39) ("[T]he bill we are talking about today adds no powers to the Governor."); H.F. 1507, 2005 Leg., 84th Reg. Sess. § 21 (Minn. 2005) (reducing the number of provisions of MEMA set to sunset in 2005); H.F. 1555, 2005 Leg., 84th Reg. Sess. (Minn. 2005) (statement of Rep. Powell) (35:00–35:25; 36:11–36:25), https://www.house.leg.state.mn.us/hjvid/84/1508 (stating that the removal of "public health emergency" from section 12.31 is "in recognition of the fact that many kinds of emergencies have public health components," that the "all hazards model" being adopted "provides a coordinated systemic approach," and that under the new model, "the Governor and emergency managers [can] address emergencies of all types with the same broad ray of authority.").)

> . . . to confer upon the governor and upon governing bodies of the political subdivisions of the state the emergency and disaster powers provided in this chapter; . . . .

Minn. Stat. § 12.02, subd. 1 (emphasis added). These stated goals confirm the legislative intent to authorize a governor's use of emergency declarations to protect public health and address "other disasters" that may not have been foreseen by the Legislature.

In addition, sections 12.39 and 12.61 specifically contemplate a peacetime emergency declaration based on a communicable disease like COVID-19. Section 12.39 acknowledges that a "communicable disease" may be "the basis for which the . . . peacetime emergency was declared." Minn. Stat. § 12.39, subd. 1. And section 12.61 provides that during a peacetime emergency, "the governor may issue an emergency executive order upon finding that the number of seriously ill or injured persons exceeds the emergency hospital or medical transport capacity of one or more regional hospital systems and that care for those persons has to be given in temporary care facilities." Minn. Stat. § 12.61, subd. 2(a). These statutory provisions read *in pari materia* with section 12.31 provide additional support for the conclusion that a public health emergency or pandemic is included within the phrase "act of nature." *See Free Minn. Small Bus. Coal. v. Walz*, 62-CV-20-3507, Index. No. 28 (Ramsey Cnty. Dist. Ct. Sept. 1, 2020) at 38 (same); *see also In re Walz (Walz II)*, No. A20-0984, Order at 7 (Minn. filed Aug. 13, 2020) (citing section 12.39 and stating that the context of the phrase "act of nature" in chapter 12 "suggests that a peacetime emergency may be declared because of a pandemic").

IV. THERE WAS NO CONFLICT BETWEEN MINNESOTA'S ANTI-DISGUISE STATUTE AND EO 20-81.

Appellants assert that EO 20-81 conflicted with, and was therefore preempted by, Minnesota Statutes section 609.735. Appellants are incorrect. The plain, unambiguous language of the statute demonstrates that it does not prohibit all mask wearing and, thus, that there was no conflict with EO 20-81. *See State v. Thonesavanh*, 904 N.W.2d 432, 435 (Minn. 2017); *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003). Moreover, the legislative history of section 609.735 further shows that it did not conflict with EO 20-81.

A. The Plain Text of the Anti-Disguise Statute Shows That It Only Prohibits Wearing Disguises with the Intent to Conceal One's Identity.

The plain meaning of the Anti-Disguise Statute is to prohibit individuals from concealing their identity.[13] The statute targets a "person whose identity is concealed." Minn. Stat. § 609.735. Concealment, rather than mere wearing of a robe or mask, is the guilty act described by the Legislature. Because "concealed" is not defined in the statute, the Court should rely on the term's plain and ordinary meaning of "conceal," which is "To hide or keep from observation, discovery, or understanding; keep secret." *Conceal*, American Heritage Dictionary, 304 (2d College ed.). Thus, the Anti-Disguise statute applies only when a person's identity is "hidden," "kept from observation, discovery, or understanding," or "kept secret."

The face covering required by EO 20-81 does not keep the wearer's identity "hidden", does not keep the identity "from observation, discovery, or understanding," and

[13] Indeed, Minnesota Statutes section 609.735 is entitled "Concealing Identity," rather than focusing on masks or even disguises.

does not keep the identity "secret." Instead, persons can be observed and identified while wearing a face covering in public. Accordingly, EO 20-81 did not conflict with the unambiguous meaning of section 609.735.

The plain language of the remainder of the statute further demonstrates that it unambiguously does not conflict with EO 20-81. The Anti-Disguise Statute states in full: "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 (emphasis added). The phrase "or other disguise" ends a list that includes "robe" and "mask." The use of the word "other" demonstrates that the Legislature only meant to prohibit robes and masks when they are used as disguises. *Minn. Voters Alliance v. Walz*, 492 F. Supp. 3d 822, 835 (D. Minn. 2020) ("[T]he statute does not make it unlawful to wear robes and masks; the statute makes it unlawful to wear *disguises*."). Disguises are worn with the purpose and intent to conceal one's identity. *Id.* Accordingly, the plain language of the Anti-Disguise Statute demonstrates that it prohibits wearing masks and robes only when those items are worn as a disguise—i.e., with the intent and effect of concealing one's identity. Because the face coverings required by EO 20-81 did not conceal one's identity and were worn with the intent of limiting the spread of COVID-19 or simply complying with the law, EO 20-81 did not conflict with the Anti-Disguise Statute.

B. The Legislative History of the Anti-Disguise Statute Further Demonstrates That It Prohibits Only Intentional Concealment of One's Identity.

The legislative history behind the Anti-Disguise Statute confirms that it criminalizes the wearing of disguises only when the individual intends to conceal their identity. *See Save Lake Calhoun v. Strommen*, 943 N.W.2d 171, 180–81 (Minn. 2020) (describing how the legislative history of a statute supported the holding the Court had already reached based on the statute's plain language).

In 1923, Minnesota first enacted the Anti-Disguise Statute, making it a misdemeanor to appear in public with one's face obscured by a "mask or other regalia or paraphernalia with the intent thereby to conceal the identity of such person." Minn. L. of 1923, ch. 160, §§ 1, 2, codified at Minn. Stat., ch. 100, § 10300 (1923).[14] The Anti-Disguise Statute further provided that appearing in public with one's face obscured was prima facie evidence of intent to conceal one's identity but allowed concealment of identity "in good faith for the purposes of amusement or entertainment." *Id.*

Minnesota is one of many states around the country with statutes criminalizing disguising one's identity in public. Doc. 41 at 351–53. As in most states, the statute was enacted in response to the Ku Klux Klan ('the Klan"), a domestic terrorist organization designed to instill fear while keeping the identity of its members a secret. *Id.*; *Virginia v. Black*, 538 U.S. 343, 353–54 (2003) (describing the history of the Klan); Doc. 41 at 354-403. Members have historically worn robes, masks, and hats while seeking to

[14] This provision was later moved, without amendment, to Minn. Stat. § 615.16.

accomplish these goals. *State v. Miller*, 398 S.E. 2d 547, 550 (Ga. 1990) (noting the "terrorization by masked vigilantes" and that "[b]ecause of the masks, victims of Klan violence were unable to assist law enforcement officers in identifying their oppressors"); Doc. 41 at 354–403.

Due to its purpose to combat violence perpetrated anonymously, the focus of the Anti-Disguise Statute is on the intent of an individual to conceal their identity. Minn. Stat. ch. 100 ¶ 10300 (1923) (original version of the statute that prohibited individuals from wearing a "mask or other regalia or paraphernalia, *with intent thereby to conceal the identity of such person*") (emphasis added); *c.f. Hernandez v. Superintendent, Fredericksburg-Rappahannock Joint Sec. Center*, 800 F. Supp. 1344, 1352 (E.D. Va. 1992) (noting that intent is an element of a similar Virginia statute); *see also* Doc. 41 at 410 (noting that following the passage of the law prohibiting using masks to conceal one's identity, thirty Klansmen marched in Owatonna with hoods but left their faces exposed). A key characteristic of these laws is that concealment of one's identity, rather merely wearing any particular type of clothing, is the *actus reus*. *See* Hate Crimes L. § 4:4 n.14 and accompanying text; *see also United States v. Pentaleri*, Crim. No. 07-298, 2007 WL 4350798, at *2, *5 (D. Minn. Dec. 11, 2007) (noting probable violation of Minnesota's anti-concealment statute where defendant wore a wig and false goatee, but no mask or robe, in an airport terminal).

The presumption of intent was removed from the Anti-Disguise Statute after the Minnesota Supreme Court held such a presumption is improper. In 1960, the Minnesota Supreme Court decided *State v. Higgin*, in which it held that specific intent could not be

presumed where it is an element of a criminal offense. 257 Minn. 46, 99 N.W.2d 902 (1960).[15] In 1963, when chapter 615 was moved to chapter 609, the substance of the identity concealment statute was moved to section 609.735, but the text was rewritten to eliminate the presumption of intent in accordance with *Higgin*. *See* Minn. Stat. § 609.735; *see also* 1963 Advisory Committee Comment to Minn. Stat. § 609.735 ("This contains the substance of Minn. Stat. § 615.16 which will be superseded. The presumption contained in the latter section has not been retained in view of *State v. Higgin*, 1960, 257 Minn. 46, 99 N.W.2d 902."). Accordingly, the legislature removed the *presumption* of intent from the Anti-Disguise Statute but retained the remaining substance, including the intent element.[16] *See Minn. Voters Alliance*, 492 F. Supp. 3d at 834–35.

In 1995, the Anti-Disguise Statute was amended to expressly allow concealment of identity for religious reasons, protection from weather, and medical treatment, while retaining the provision allowing concealment incidental to amusement or entertainment. Minn. L. of 1995, ch. 30, § 1. None of these amendments purports to remove the intent element.

The legislative history of the Anti-Disguise statute supports what the plain language says: that people are criminally liable if and only if they intentionally physically conceal

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[15] *Higgin* concerned Minnesota Statutes section 620.10, which had a presumption of intent to defraud, similar to the presumption of intent to conceal one's identity in section 615.16, that defendants were required to rebut if other elements were established by the prosecution.

[16] Appellants read the advisory committee comment to say that the Legislature removed the intent element along with the presumption. App. Br. at 42. There is nothing in the advisory committee note, however, that supports that reading.

their identities. From the early days of its enactment as a countermeasure to the Klan, the Anti-Disguise Statute has always been focused on the prevention of anonymous violence or mischief and not the wearing of any particular garment. Otherwise, many Minnesotans would have been in regular violation due to the face coverings required for their work – like surgeons, construction workers, and firefighters. There is no violation of the Anti-Disguise Statute when one wears a piece of cloth over their nose and mouth. Accordingly, there was no conflict between the Anti-Disguise Statute and EO 20-81.

C. As a Criminal Statute, the Anti-Disguise Statute Is Presumed to Include a *Mens Rea* Element, Still Further Demonstrating That It Prohibits Only Intentional Concealment of One's Identity.

Despite the plain language and legislative history of the statute, Appellants argue that the statute imposes strict liability on anyone who wears a mask (or robe), subject to the express statutory exceptions.[17] This argument is at odds with Minnesota's policy of construing criminal statutes to include a *mens rea* element unless the Legislature is clear that it is imposing strict liability.

Courts should construe a criminal statute "strictly so that all reasonable doubt concerning legislative intent is resolved in favor of the defendant." *Koenig*, 666 N.W.2d at 373. "Criminal intent is embedded" in the Minnesota penal system such that criminal

[17] Appellants use the term "general intent" to describe their theory, but they appear to describe strict liability. The only "intent" Appellants believe is required is the volitional act of donning a mask, robe, or other disguise. A mere volitional act aligns with *actus reus*, and even strict liability criminal offenses require an *actus reus*. *See State v. Kremer*, 262 Minn. 190, 191-92, 114 N.W.2d 88, 89 (1962) (holding that traffic ordinance was a strict liability offense, but defendant's conviction must be vacated where his brakes failed unexpectedly, negating any guilty act).

offenses normally "require both a volitional act and a criminal intent, referred to as *mens rea*." *State v. Moser*, 884 N.W.2d 890, 895–97 (Minn. 2016); *see also State v. Garcia-Gutierrez*, 844 N.W.2d 519, 524 (Minn. 2014) ("[W]e 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.") (internal quotation marks omitted) (alteration in original).

The Anti-Disguise Statute does not use any language that suggests the Legislature intended to impose strict liability. Thus, Minnesota courts should interpret the Anti-Disguise statute as having both an *actus reus* element—concealing one's identity—and a *mens rea* element—doing so intentionally.[18]

D. Interpreting the Anti-Disguise Statute to Criminalize Mask Wearing and to Lack a *Mens Rea* Element Would Lead to Absurd Results.

Construing section 609.735, as Appellants do, as a strict liability offense such that wearing any mask for any purpose but the narrow exceptions enumerated in the statute is a criminal violation would lead to absurd results. It would no doubt come as a surprise to Minnesota's landscapers, painters, and exterminators that they have been committing misdemeanors each time they don masks that prevent inhalation of harmful materials by

[18] Appellants' focus on the intent element—whether specific intent, general intent, or strict liability—is a bit of a red herring. The *actus reus* of the Anti-Disguise Statute is clear from its text: concealment of identity. Minn. Stat. § 609.735. Regardless of whether it is a specific intent statute, a general intent statute, or even a strict liability statute, there can be no conflict with EO 20-81 because the face coverings the EO ordered do not conceal the wearer's identity. The parade of horribles Appellants present if this statute were interpreted as requiring specific intent, even if credited, does nothing to respond to this basic textual problem with Appellants' theory.

wearing a N-95 mask during construction. Indeed, under Appellants' interpretation, wearing a robe in public for any purpose is a misdemeanor. Accordingly, a person who walks down his driveway in his robe, retrieves the morning newspaper, waves to his neighbor, and returns to his house, is guilty under the Anti-Disguise Statute—an absurd result under a statute entitled "concealing identity."[19] Clearly, this is not what the Legislature intended when it enacted a measure to prevent anonymous racial violence and intimidation.

***

For the reasons explained above, the Anti-Disguise Statute does not prohibit wearing masks of the type that EO 20-81 required. Thus, wearing a face covering over one's nose and mouth, as was required by EO 20-81, did not violate the Anti-Disguise Statute. EO 20-81 was in harmony with the Anti-Disguise Statute. There was no conflict between the two laws and preemption cannot serve as a basis for any of the relief Appellants seek.

V. THE MASK MANDATE WAS NOT UNCONSTITUTIONALLY VAGUE.

Appellants also assert that EO 20-81 was unconstitutionally vague, App. Br. at 43-47, but those arguments are either unsupported in the petition or forfeited.

"The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is

[19] For additional absurd results that would flow from Appellants' interpretation of section 609.735, *see Minn. Voters Alliance*, 492 F. Supp. 3d at 835–36 (listing absurd results of an identical interpretation of section 609.735).

prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *State v. Bussmann*, 741 N.W.2d 79, 83 (Minn. 2007) (quotation omitted). Courts should exercise "extreme caution" before declaring a law void for vagueness. *Hard Times Cafe, Inc. v. City of Minneapolis*, 625 N.W.2d 165, 171 (Minn. Ct. App. 2001). The use of general language does not make a law vague. *Id.* Nor should a law 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 v. Minn. Bd. of Med. Exam'rs*, 525 N.W.2d 559, 564 (Minn. Ct. App. 1994) (citing *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963)), *review denied* (Minn. Feb. 14, 1995).

Appellants appear to challenge the district court's order on three grounds, none of which have merit. First, Appellant Jesse Wiederholt attempts to argue in one conclusory sentence that the mask mandate was unconstitutionally vague because the term "job hazard" is undefined. App. Br. at 46; Resp. Add. at 23 ¶ 40 and 32 ¶ 96. This argument is forfeited and meritless.

The argument is forfeited because Appellant Wiederholt did not make this argument below, the district court did not consider it, and it is not adequately argued or explained in his appellate brief. Doc. 54 at 25–28; App. Add. at 29–32; *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *State v. Myhre*, 875 N.W.2d 799, 806 (Minn. 2016). Appellant Wiederholt's claim also fails on the merits. He cites no authority for the proposition that an undefined term is *per se* unconstitutional. To the contrary, courts frequently turn to dictionaries to discern the meaning of undefined terms. *Getz v. Peace*, 934 N.W.2d 347, 354 (Minn. 2019) ("[W]hen the Legislature has not provided definitions of the relevant

term . . . we may consider dictionary definitions to determine a word's common usage."). Merriam-Webster's online dictionary defines the word "hazard" as "a source of danger." https://www.merriam-webster.com/dictionary/hazard. This is the commonly understood meaning of the word, so people of ordinary intelligence understood that they did not have to wear a mask at work when it was a source of danger to themselves or others. Therefore, the exemption for a "job hazard" was not unconstitutionally vague.

Second, the business and church appellants assert that the mask mandate was unconstitutionally vague as to their enforcement responsibilities. App. Br. at 44; Resp. Add. at 31–35 ¶¶ 88–94, 101, 108. This argument fails because they did not identify a single provision in Executive Order 20-81 that they did not understand. Resp. Add. at 31-35 ¶¶ 88–94, 101, 108. To the contrary, as the district court recognized, EO 20-81 was "simple and understandable," it "clearly state[d] what businesses [were] expected to do and what they [did] not have to do," and it used "the same reasonableness standard that is ubiquitous in our criminal law." App. Add. at 31. Indeed, Appellants' Amended Petition makes it clear that they understood exactly what was required of them. Resp. Add. at 23-32 ¶¶ 41–45, 88–94.

Third, the business and church appellants assert that the mask mandate was vague because it encouraged arbitrary and discriminatory enforcement. App. Br. at 44-45. But their Amended Petition does not contain any facts that support such a claim. Resp. Add. at 31–35 ¶¶ 87–94, 101, 108.) Their Amended Petition does not identify a single instance of arbitrary or discriminatory enforcement by the State Respondents or anyone else. *Id*.; *cf. State, City of Minneapolis v. Reha*, 483 N.W.2d 688, 692 (Minn. 1992) (unsuccessful

challenger "never alleged that the ordinance was actually enforced in an arbitrary or discriminatory manner"). Appellants' brief cites some investigations of non-parties but none of those allegations were in their Amended Petition, and Appellants fail to explain how any of those investigations were arbitrary or discriminatory. App. Br. at 44-45.

What the business and church appellants really feared were the hypothetical actions of other people. *Id.* at 44–47. For example, they alleged that a hypothetical person might have complained to the Attorney General about people in their business or church not wearing masks. Resp. Add. at 31 ¶¶ 89-90. They feared that the Attorney General in this hypothetical would have ignored the exemptions and prosecuted them regardless of the circumstances. *Id.* ¶¶ 90, 94. Baseless speculation about the actions of other people is insufficient to state a void-for-vagueness claim. *See Hard Times Cafe*, 625 N.W.2d at 172 ("An entity challenging the constitutionality of a statute on vagueness grounds must show the ordinance lacks specificity as to its own behavior rather than some hypothetical situation."). Even now, Appellants do not claim that any of this actually happened to them.

Instead, Appellants rely solely on the speculative "danger of arbitrary enforcement." App Br. at 43. But "[t]he speculative danger of arbitrary enforcement does not render [a law] void for vagueness." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503 (1982). Indeed, "the *potential* for arbitrary and discriminatory enforcement is a legitimate concern with respect to any law." *Reha*, 483 N.W.2d at 692. A vagueness claim requires more than speculation about potential dangers, and certainly more than Appellants' paranoia about "people wishing to prove their loyalty to their tribe."

App. Br. at 45. The district court therefore properly dismissed Appellants' vagueness claim.[20]

Appellants' reliance on *281 Care Comm. v. Arneson*, 766 F.3d 774 (8th Cir. 2014) is misplaced. First, *281 Care Committee* is not a vagueness case. It is a First Amendment case about a law that regulated false speech in political campaigns. *281 Care Comm.*, 766 F.3d at 778. Second, the "complaints" at issue were not citizen complaints to a prosecuting authority, like the ones Appellants feared. They were legal complaints (*i.e.* pleadings) that initiated an administrative proceeding. *Id.* Third, those pleadings were problematic because, unlike the enforcement actions Appellants fear, the authority to file was not limited to "state officials who are constrained by explicit guidelines or ethical obligations." *Id.* at 790. They could be filed by anyone, including political opponents who strategically timed their filings to achieve maximum disruption. *Id.* Fourth, unlike citizen complaints to prosecuting authorities, the pleadings in *281 Care Committee* were damaging because the election was usually over before the case could be adjudicated. *Id.* at 790 n.12, 792. In short, *281 Care Committee* is not even remotely applicable to this case, and Appellants' vagueness challenge fails.

VI. THE DISTRICT COURT CORRECTLY DISMISSED APPELLANTS' FIRST AMENDMENT SPEECH CLAIM.

In Count II, Appellants claimed that the mask mandate violates their First Amendment speech rights in two ways: (1) by forcing them to wear a mask, the Governor

[20] If the mere possibility of citizen complaints and government investigations was sufficient to render a law unconstitutionally vague, then no criminal or regulatory law could ever exist. *See, e.g.*, App. Add. at 32.

allegedly compelled them to communicate to others that they agree with the mask mandate; and (2) the mask mandate "destroy[ed] [their] right to dissent." Resp. Add. at 30 ¶ 81 and 37 ¶¶ 122–24. The district court correctly rejected these arguments because wearing or not wearing a mask is not speech, and even if it was, the mask mandate passes constitutional muster no matter which standard the Court applies.

A. The Mask Mandate Did Not Infringe, Much Less Violate, Appellants' Free Speech Rights.

Appellants' speech claims are based entirely on their mistaken belief that they get to decide what is or is not speech. App. Br. 47-48. But declaring in a conclusory manner that something is speech does not make it so. And Appellants do not get to opt out of Minnesota's laws by labeling noncompliance as protest. If this Court were to accept Appellants' argument, it would mean that any time someone disagrees with a law, they have a First Amendment right not to comply. *Cf. Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006) ("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.") There is no support in the law for such a claim, *id.*, and it has already been rejected by multiple courts.

For example, in *Minnesota Voters Alliance*, the court held that the mask mandate "does not implicate the First Amendment at all" because the wearing or not wearing of a mask is not speech, but conduct. 492 F.Supp.3d at 837. And this conduct is not inherently expressive because it sends no message on its own. *Id.* Absent explanation, "an observer would have no idea why someone is not wearing a face covering." *Id.* (noting other

possible explanations like being exempt or simply forgetting). Rather, it was the accompanying speech—which Appellants remained free to present—that conveyed a particular message.

Other courts have similarly held that mask mandates do not regulate speech. *See, e.g.*, *Whitfield v. Cuyahoga County Pub. Library Found.*, No. 1:21-cv-0031, 2021 WL 1964360, at *3 (N.D. Ohio May 17, 2021) ("[W]earing a mask is not a symbolic or expressive gesture. It is a health and safety measure put into effect in many public establishments to prevent the spread of COVID-19 to employees and other patrons."); *Denis v. Ige*, No. 21-cv-00011, 2021 WL 1911884, at *10 (D. Haw. May 12, 2021) ("[T]he Mask Mandates regulate conduct, not speech, and do not implicate the Free Speech Clause at all."); *Nowlin v. Pritzker*, No. 1:20-cv-1229, 2021 WL 669333, at *5 (C.D. Ill. Feb. 17, 2021) (wearing a mask is not speech), *appeal filed* No. 21-1479 (7th Cir. Mar. 17, 2021); *Stewart v. Justice*, 502 F. Supp. 3d 1057, 1066 (S.D.W. Va. 2020) ("[F]ailing to wear a face covering would likely be viewed as inadvertent or unintentional, and not as an expression of disagreement with the Governor."); *Antietam Battlefield KOA v. Hogan*, 461 F. Supp. 3d 214, 237 (D. Md. 2020) ("[W]earing a face covering would be viewed as a means of preventing the spread of COVID-19, not as expressing any message.") Appellants do not cite any contrary cases, and Respondents have found none.

This Court should affirm for the same reasons.

B. Alternatively, the District Court Correctly Concluded That the Mask Mandate Satisfies the *Jacobson* Test.

Even if wearing or not wearing a mask was inherently expressive, the mask mandate would still "easily" pass constitutional muster. *Minn. Voters Alliance*, 492 F.Supp.3d at 837. When "reviewing constitutional challenges to state actions taken in response to a public health crisis," courts apply the framework from *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). *In re Rutledge*, 956 F.3d 1018, 1027 (8th Cir. 2020); *see also Stewart v. Justice*, No. 3:20-cv-0611, 2021 WL 472937, at *2–3 (S.D.W. Va. Feb. 9, 2021) (collecting cases). Indeed, the failure to apply *Jacobson* "constitutes a clear abuse of discretion." *In re Rutledge*, 956 F.3d at 1027.

The *Jacobson* framework provides that:

> [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.

Id. at 1028 (quotation omitted).

As the district court and the *Minnesota Voters Alliance* court recognized, the mask mandate was "clearly constitutional" under this framework because there was "no question" that it bore a real and substantial relation to the public-health crisis caused by COVID-19, and it "either d[id] not implicate the First Amendment at all or, at most, ha[d]

an incidental and trivial impact on First Amendment freedoms." *Minn. Voters Alliance*, 492 F.Supp.3d at 838; App. Add. at 36.

Appellants' assertion that the U.S. Supreme Court implicitly overruled *Jacobson* is simply not true. App. Br. at 48 (citing *Tandon* and *Roman Catholic Diocese*). The U.S. Supreme Court has made it clear that lower courts should not "conclude our most recent cases have, by implication, overruled an earlier precedent." *Agnostini v. Felton*, 521 U.S. 203, 237 (1997); *see also Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

Because *Jacobson* is still valid precedent, courts continue to properly apply it to pandemic-related regulations. *See, e.g.*, *Denis v. Ige*, No. 21-cv-00011, 2021 WL 1911884, at *6 (D. Haw. May 12, 2021) ("There is no dispute that *Jacobson* remains good law today. And its reasoning is also relevant."); *Stewart*, 2021 WL 472937, at *3 ("Although *Jacobson* is more than a century old, recent case law shows that it is still good law."); *Delaney v. Baker*, No. 20-cv-11154, —— F. Supp. 3d ——, 2021 WL 42340, at *11-12 (D. Mass. Jan. 6, 2021) ("[U]ntil the Supreme Court overrules *Jacobson*, this Court is bound by stare decisis to apply *Jacobson* harmoniously with the precedent developed under the tiers of scrutiny."); *Heights Apartments, LLC v. Walz*, No. 20-cv-2051, —— F. Supp. 3d ——, 2020 WL 7828818, at *10 (D. Minn. Dec. 31, 2020) (applying *Jacobson*); *M. Rae, Inc. v. Wolf*, No. 1:20-CV-2366, —— F. Supp. 3d ——, 2020 WL 7642596, at *6

(M.D. Pa. Dec. 23, 2020) ("The bottom line for our purposes is that *Jacobson* is controlling precedent until the Supreme Court or Third Circuit Court of Appeals tell us otherwise.").

C. In Any Event, the Mask Mandate Satisfies Traditional Constitutional Scrutiny.

The mask mandate is also "clearly constitutional" under the non-public-health-crises framework from *United States v. O'Brien*, 391 U.S. 367 (1968). Under *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. at 377.

As discussed above, the mask mandate was a proper use of the Governor's emergency powers under chapter 12. The mask mandate furthers the substantial government interest of controlling the spread of COVID-19, which the Judicial Branch recognized when it imposed its own mask mandate. *See also supra* at 5-6 (discussing effectiveness of masks). Controlling the spread of a dangerous respiratory virus is unrelated to the suppression of free expression. And any incidental effects on Appellants' speech was no greater than necessary because Appellants were "free to express their opinions about EO20-81 in every conceivable way except by violating its provision and putting at risk the lives and health of their fellow citizens." *Minn. Voters Alliance*, 492 F.Supp.3d at 838. The mask mandate was therefore constitutional under *O'Brien*.

VII. THE DISTRICT COURT PROPERLY DISMISSED APPELLANT MICHELLE JOHNSON'S FREE EXERCISE CLAIM.

Appellant Michelle Johnson claims in Count III that the mask mandate violates the Free Exercise Clause. Resp. Add. at 30 ¶ 82 and 39 135. She alleges that she is a Christian and sincerely believes that wearing a mask is a sin. *Id.* This claim fails because conclusory legal statements are not sufficient to survive a motion to dismiss. When a plaintiff simply states that wearing a mask is against their religion without explanation, the case should be dismissed. App. Add. at 7–8 (noting that legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss); *Whitfield*, 2021 WL 1964360, at *3 (dismissing Free Exercise challenge to mask mandate because plaintiff simply stated in a conclusory manner that wearing a mask was against her religion).

In any event, the mask mandate also satisfies the *Jacobson* framework. As the court in *Minnesota Voters Alliance* recognized, "there is no question" that Minnesota's mask mandate has a real and substantial relationship to the public health crisis caused by COVID-19. 492 F.Supp.3d at 838. The mask mandate also was not beyond all question, a plain, palpable invasion of religious liberties because it allowed religious worship to continue while limiting community transmission based on the best available information. *See, e.g.*, *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring) (citing *Jacobson* and concluding that California's restrictions on places of worship "appear consistent with the Free Exercise Clause"); *Roman Catholic Diocese*, 141 S. Ct. at 73–74 (2020) (Kavanaugh, J., concurring) (citing Chief Justice Roberts's *South Bay* concurrence approvingly).

Even if *Jacobson* did not apply, this claim would still fail. "One cannot avoid the application of any law or policy by simply claiming it violates his or her religion." *Whitfield*, 2021 WL 1964360, at *3. "To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good." *United States v. Lee*, 455 U.S. 252, 259 (1982). Neutral laws of general applicability do not violate the First Amendment, even if they incidentally burden an individual's religious conduct. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990).

"Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1877 (2021). Appellants have not and cannot cite any evidence that the Governor intended to regulate religious worship through the mask mandate. Indeed, the mask mandate applies to Minnesotans regardless of their religious beliefs and in nearly every setting outside the home.

Not only was EO 20-81 neutral, it was also generally applicable. It did not treat comparable secular activity more favorably than religious exercise. *Tandon*, 141 S. Ct. at 1296; *Roman Catholic Diocese*, 141 S. Ct. at 67–68. The mask mandate applied evenly to everyone within the Governor's power who could safely and effectively wear a mask. It did not correlate to religion at all, let alone single out religion for especially harsh treatment.

The exceptions cited by Appellant Johnson are not even remotely comparable to what she wants to do. The Governor allowed for *temporary* removal when exercising at a

gym only when the level of exertion made it difficult to wear a mask and, even then, only if social distancing was always maintained. In contrast, Appellant Johnson wanted a *permanent* exception so she did not have to wear a mask under any circumstances, including when social distancing cannot be maintained. *Cf. Roman Catholic Diocese*, 141 S. Ct. at 66 (finding it significant that the houses of worship "have complied with all public health guidance" and "have implemented additional precautionary measures").

Appellant Johnson also argues for the first time on appeal that the Governor improperly treated Minnesota Tribes more favorably than her. *Compare* App. Br. at 53 *with* Doc. 54 at 30. This argument is forfeited. *Thiele*, 425 N.W.2d at 582. Regardless, the activities are not comparable. Tribal members on tribal reservations were exempted because the Governor did not have authority to impose a mask mandate in that unique situation. *Cf. State ex rel. Malcolm v. Sw. Sch. of Dance, LLC*, No. A20-1612, 2021 WL 2794654, at *3 (Minn. Ct. App. July 6, 2021) ("Tribes not only enjoy the authority to exercise control within the boundaries of their lands, but they also possess the inherent power of regulating their internal and social relations." (quotation omitted)). The Governor similarly exempted the federal government, the Minnesota Legislature, and the Minnesota Judicial Branch. In contrast, Appellant Johnson's activities were within the scope of the Governor's emergency powers. *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) ("The right to practice religion freely does not include liberty to expose the community . . . to communicable disease.").

Because the mask mandate is neutral and generally applicable, the district court properly dismissed Count III even under traditional Free Exercise standards.

CONCLUSION

For these reasons, Respondents respectfully request that this Court affirm in a non-precedential opinion based on mootness. If the Court addresses the merits, it should affirm in a precedential opinion because the decision would resolve significant and novel issues involving constitutional provisions and statutes.

Dated: July 28, 2021

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