

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Free Minnesota Small Business Coalition,
Representative Steve Drazkowski,
Representative Jeremy Munson,
Representative Cal Bahr, Representative
Tim Miller, et al.,

Petitioners,

vs.

Tim Walz, Governor of Minnesota,

Respondent.

Court File No.: 62-CV-20-3507

Case Type: Civil – Other/Misc.

ORDER & MEMORANDUM

This matter came before the undersigned on July 16, 2020, following the court’s Order to Show Cause (ECF No. 13) and Respondent Tim Walz, Governor of Minnesota’s (the “Governor”) motion to dismiss. (ECF No. 16) Petitioners were represented by Attorney Erick G. Kaardal. The Governor was represented by Solicitor General Liz Kramer.

Having considered the facts, the arguments of counsel, and all of the files, records, and proceedings herein, **IT IS HEREBY ORDERED:**

1. The Governor’s motion to dismiss is **GRANTED**.
2. Petitioners’ application for a writ of quo warranto is therefore **DENIED**.
3. The attached Memorandum shall be incorporated into this Order.

LET JUDGMENT BE ENTERED ACCORDINGLY

BY THE COURT:

Dated: September 1, 2020

THOMAS A. GILLIGAN, JR.
JUDGE OF DISTRICT COURT

MEMORANDUM

Petitioners Free Minnesota Small Business Coalition, Representative Cal Bahr, Representative Steve Drazkowski, Representative Jeremy Munson, Representative Tim Miller, Duff's LLC, Flaherty's Arden Bowl, Prestige Gymnastics, Southwest School of Dance, LLC, Three Rivers Fitness, Title Boxing Club Arden Hills, Title Boxing Club Coon Rapids, Title Boxing Club Rogers, Trev's Kitchen, Yoga by Blisstopia, LLC, (collectively "Petitioners") filed a Petition for Quo Warranto ("Petition") to challenge the constitutionality of the Governor's issuance of emergency executive orders during the COVID-19 pandemic. (ECF No. 1) Specifically, Petitioners claim that the executive orders issued by the Governor: (1) violate the non-delegation doctrine under the Minnesota Constitution because the executive orders are "an exercise of pure legislative power without judicial oversight;" (2) Minn. Stat. § 12.31, subd. 2, which concerns peacetime emergencies, is unconstitutional because it provides for a legislative veto which is not authorized by the Minnesota Constitution; and (3) the Governor exceeded his authority under Minn. Stat. § 12.31, subd. 2 by invoking emergency power for a public health emergency. The Petition seeks to enjoin the Governor from enforcing executive orders issued in response to the COVID-19 pandemic, and for a declaration that the Governor is without power to issue emergency executive orders for public health purposes.

After the Petition was filed, this court held a status conference on June 5, 2020, and issued an Order to Show Cause on June 8, 2020. (ECF No. 13) In its Order, this court directed the Governor to explain:

- a. That when the Respondent issued his COVID-19 executive orders, he did not exceed his authority under the Minnesota Constitution's separation of powers principle regarding the non-delegation doctrine;
- b. Whether the Governor's COVID-19 executive orders exceeded his authority because the statutory authority relied upon, Minnesota Statutes §

12.31, is unconstitutional because the provision authorizes a legislative veto on the extension of peacetime emergencies beyond 30 days;

- c. Whether the Governor's COVID-19 executive orders exceeded his authority because Minnesota Statutes § 12.31, subdivision 2 does not authorize the Governor to invoke emergency powers for a public health emergency; and;
- d. To provide any other rationale under which an argument can be made that would show why this court should not grant the Petition.

In response to the Petition and Order to Show Cause, the Governor moved to dismiss the Petition on June 18, 2020. (ECF No. 16) Upon the parties' stipulation, this court ordered the joinder of Representative Jeff Backer, Representative Mary Franson, Representative Glenn Gruenhagen, Representative Erick Lucero, Representative Shane Mekeland, Senator Mike Goggin, Senator Scott Jensen, and Senator Andrew Mathews to the Petition. (ECF No. 21)

The court heard oral arguments on July 16, 2020, and took this matter under advisement. (ECF No. 26)

FACTUAL BACKGROUND

Minnesota Governors—regardless of their party affiliation—have used their authority to issue emergency executive orders to combat a myriad of emergencies that affected Minnesotans in times of peril.¹ Governor Harold LeVander issued executive orders to assist localities following tornado and flooding damage. Governor Wendell Anderson issued executive orders to aid in the search for missing persons, assist localities after flooding and tornado damage, and to alleviate emergency conditions following a blizzard. Governor Rudy Perpich followed suit, using his emergency orders to assist localities affected by natural disasters and assist in the search for Jacob Wetterling. Governor Arne Carlson invoked his

¹ A complete list of executive orders since 1967 can be found at: <https://www.leg.state.mn.us/lrl/execorders/eoresults?gov=all>

emergency executive authority to assist communities in the Red River Valley after heavy flooding. Governor Jesse Ventura issued emergency orders to assist in the search for a missing 74-year old man who suffered from Alzheimer’s disease and to prepare a nuclear power plant for testing. Governor Tim Pawlenty issued emergency orders to assist communities affected by wildfires and to begin emergency repairs and rebuilding in the aftermath of the Interstate 35W bridge collapse. Governor Dayton declared a peacetime state of emergency in response to the avian flu. When faced with a pandemic which had the potential to kill an untold number of Minnesotans and overwhelm our state hospital and emergency systems, Governor Walz also declared a peacetime state of emergency.

The 2019 novel coronavirus (“COVID-19”) is a disease caused by a coronavirus.² As of August 31, 2020, 25.4 million cases have been reported in 188 countries, along with 849,303 deaths worldwide.³ In the United States, as of August 31, 2020, 6 million cases have been reported, along with 182,622 deaths.⁴ In Minnesota, as of August 31, 2020, there have been 75,864 cases reported, along with 1,817 deaths.⁵

The virus which causes COVID-19 is thought to spread from person to person, mainly through respiratory droplets produced when an infected person coughs, sneezes, or talks.⁶ Transmission is therefore more likely when people are in close contact with one another (within about 6 feet).⁷ For this reason, the CDC recommends that people practice “social

² Frequently Asked Questions, Centers for Disease Control (“CDC”)(August 26, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (last accessed August 27, 2020)

³ COVID-19 Dashboard, Johns Hopkins University, available at <https://coronavirus.jhu.edu/map.html> (last accessed August 31, 2020)

⁴ Cases in the U.S., CDC (August 31, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last accessed August 31, 2020)

⁵ Situation Update for COVID-19, Minnesota Department of Health (“MDH”)(August 31, 2020), available at <https://www.health.state.mn.us/diseases/coronavirus/situation.html#dailyd1> (last accessed August 31, 2020)

⁶ Frequently Asked Questions, CDC (August 27, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Spread> (last accessed August 27, 2020)

⁷ *Id.*

distancing” by staying at least 6 feet away from another person outside of the home and that they wear cloth face coverings when in public.⁸

On January 31, 2020, the United States Department of Health and Human Services declared a public health emergency for the entire United States because of the spread of COVID-19.⁹ On March 6, 2020, the Minnesota Department of Health confirmed Minnesota’s first known case of COVID-19.¹⁰ By that time, COVID-19 had spread to nearly every corner of the globe creating a full blown pandemic. On March 11, 2020, the World Health Organization formally declared COVID-19 a pandemic.

On March 13, 2020, the Governor issued EMERGENCY EXECUTIVE ORDER 20-01: Declaring a Peacetime Emergency and Coordinating Minnesota’s Strategy to Protect Minnesotans from COVID-19. In declaring a peacetime state of emergency, the Governor found COVID-19 to be an act of nature, which at the time had been reported in 42 states and 118 countries. *Id.* The Governor exercised this power under Minnesota Statutes sections 4.035 and 12.31. *Id.*

In the months which followed, the Governor implemented Minnesota’s Stay Safe Plan, which he characterizes as a “phased approach” to combatting the COVID-19 pandemic.¹¹ The Governor has issued over sixty emergency executive orders related to the COVID-19 pandemic. The Governor authorized school closures and limitations to visiting hours at veteran’s homes. EMERGENCY EXECUTIVE ORDER 20-02; 20-03. The Governor also ordered

⁸ How to Protect Yourself & Others, CDC (July 31, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last accessed August 27, 2020)

⁹ Secretary Azar Declares Public Health Emergency for United States for 2019 Novel Coronavirus (January 31, 2020), available at <https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html> (last accessed August 28, 2020)

¹⁰ Health officials confirm first case of novel coronavirus in Minnesota (March 6, 2020), available at <https://www.health.state.mn.us/news/pressrel/2020/covid19030620.html> (last accessed August 28, 2020)

¹¹ Minnesota COVID-19 Response, *Minnesota’s Stay Safe Plan*, <https://mn.gov/covid19/for-minnesotans/stay-safe-mn/stay-safe-plan.jsp>

the temporary and partial closure of places of public accommodation, such as bars, restaurants, hair salons, and theaters. EMERGENCY EXECUTIVE ORDER 20-04. On March 25, 2020 the Governor issued Minnesota’s Stay Home Order, which prohibited Minnesotans from leaving their homes unless engaging in permitted work or leisure activities. EMERGENCY EXECUTIVE ORDER 20-20. The Governor rescinded Minnesota’s Stay Home Order on May 17, 2020, and urged Minnesotans to wear face masks. EMERGENCY EXECUTIVE ORDER 20-56. To date, the Governor has extended the peacetime state of emergency five times. EMERGENCY EXECUTIVE ORDERS 20-35, 20-53, 20-75, 20-78, 20-83.

The declaration of a peacetime state of emergency must be ratified by Minnesota’s Executive Council within five days. Minn. Stat. § 12.31, subd. 2(a). Minnesota’s Executive Council—composed of the governor, lieutenant governor, secretary of state, state auditor, and attorney general—ratified the original declaration of a peacetime state of emergency and has ratified each extension. *See* EMERGENCY EXECUTIVE ORDERS 20-01, 20-35, 20-53, 20-75, 20-78, 20-83. After thirty days, the Minnesota Legislature—by majority vote in both the Senate and House of Representatives—may terminate the Governor’s declaration of a peacetime state of emergency. Minn. Stat. § 12.31, subd. 2(b). The Minnesota Legislature has declined to terminate the Governor’s peacetime emergency declaration, despite having multiple opportunities to do so in both regular and special sessions. Each time the Minnesota Legislature has considered the declaration of a peacetime state of emergency¹², Minnesota’s Senate voted to terminate the Governor’s declaration, while the Minnesota House of

¹² S.C. 0008, 2020 Leg., 91st Reg. Sess., (Minn. May, 16, 2020)(A Senate concurrent resolution proposed by Sen. Jensen to terminate the peacetime state of emergency); S.C. 0001, 2020 Leg., 2020 1st Spec. Sess. (Minn. Jun. 12, 2020)(A Senate concurrent resolution proposed by Sen. Gazelka to terminate the peacetime state of emergency); S.C. 0001, 2020 Leg., 2020 2nd Spec. Sess. (Minn. Jul. 13, 2020)(A Senate concurrent resolution proposed by Sen. Gazelka to terminate the peacetime state of emergency); S.C. 0001, 2020 Leg., 2020 3rd Spec. Sess. (Minn. Aug. 12, 2020)(A Senate concurrent resolution proposed by Sen. Gazelka to terminate the peacetime state of emergency)

Representatives has voted against termination.¹³ The peacetime state of emergency is currently extended through September 11, 2020, or until it is “rescinded by proper authority, or until it is terminated by a “majority vote of each house of the Legislature pursuant to Minnesota Statutes 2019, section 12.31, subdivision 2(b), whichever occurs earlier.” EMERGENCY EXECUTIVE ORDER 20-83.

Petitioners are Free Minnesota Small Business, several members of the Minnesota Senate and Minnesota House of Representatives, and individual business entities from around the State of Minnesota. Free Minnesota Small Business alleges that it is an association of businesses that have been damaged by being shut down by the Governor’s executive orders. It claims associational and taxpayer standing. The members of the Minnesota Legislature allege that their powers as duly elected members of the Minnesota Senate and Minnesota House of Representatives have been usurped because of the Governor’s executive orders. They claim to have individual legislator and taxpayer standing. The individual business entities such as bowling alleys, boxing clubs, and restaurants allege that they have been shut down due to the Governor’s executive orders. They claim to have suffered “damages” and also claim taxpayer standing. Finally, the Petition asserts that it is being brought on behalf of 5,600,000

¹³ H.C. 0009, 2020 Leg., 91st Reg. Sess. (Minn. Apr. 14, 2020)(A house concurrent resolution proposed by Rep. Daudt to terminate the peacetime state of emergency); H.C. 0008, 2020 Leg., 91st Reg. Sess. (Minn. Apr. 14, 2020)(A house concurrent resolution proposed by Rep. Drazkowski to terminate the peacetime state of emergency); H.C. 0010, 2020 Leg., 91st Reg. Sess. (Minn. Apr. 28, 2020)(A house concurrent resolution proposed by Rep. Lucero to terminate the peacetime state of emergency); H.C. 0002, 2020 Leg., 2020 1st Spec. Sess. (Minn. Jun. 12, 2020)(A house concurrent resolution proposed by Rep. Daudt to terminate the peacetime state of emergency); H.C. 0001, 2020 Leg., 2020 1st Spec. Sess. (Minn. Jun. 12, 2020)(A house concurrent resolution proposed by Rep. Drazkowski to terminate the peacetime state of emergency); H.C. 0001, 2020 Leg., 2020 2nd Spec. Sess. (Minn. Jul. 14, 2020)(A house concurrent resolution proposed by Rep. Daudt to terminate the peacetime state of emergency); H.C. 0002, , 2020 Leg., 2020 2nd Spec. Sess. (Minn. Jul. 14, 2020)(A house concurrent resolution proposed by Rep. Drazkowski to terminate the peacetime state of emergency); H.C. 0001, 2020 Leg., 2020 3rd Spec. Sess. (Minn. Aug. 12, 2020)(A house concurrent resolution proposed by Rep. Neu to terminate the peacetime state of emergency).

Minnesotans whose civil liberties are purportedly being restricted by the Governor’s executive orders.

All of the business entities named in the Petition are considered non-critical businesses under the Stay Safe Minnesota Plan.¹⁴ EMERGENCY EXECUTIVE ORDER 20-74. Under the current phase of the Stay Safe Minnesota Plan, the business entities that are bars and restaurants must limit their indoor occupant capacity to no more than 50%, up to 250 persons, and comply with a number of other regulations.¹⁵ The business entities that fall within the gym and fitness center category are required to limit their occupancy to no more than 25% of capacity, up to 250 persons, and must also comply with numerous additional safety regulations.¹⁶ The Governor deems these restrictions necessary because “certain establishments—including those in which people gather and linger, those with communal facilities, and those in which close physical contact is expected—continue to pose a public health risk.” *Id.*

On August 27, 2020, there were 1,158 newly reported COVID-19 cases in Minnesota and 13 newly reported deaths due to COVID-19.¹⁷

¹⁴ Stay Safe Guidance For Businesses & Organizations, <https://staysafe.mn.gov/industry-guidance/index.jsp>

¹⁵ Industry Guidance for Safely Reopening: Restaurants and Bars, <https://www.health.state.mn.us/diseases/coronavirus/safedining.pdf>

¹⁶ Industry Guidance for Safely Reopening: Gyms and Fitness Centers, <https://www.health.state.mn.us/diseases/coronavirus/safegym.pdf>

¹⁷ Situation Update for COVID-19, MDH (August 27, 2020), available at <https://www.health.state.mn.us/diseases/coronavirus/situation.html#dailyd1> (last accessed August 28, 2020)

STANDARD OF REVIEW

The Governor has moved to dismiss the Petition, in part, because he contends that Petitioners lack standing. Lack of standing deprives the court of subject matter jurisdiction. Minn. R. Civ. P. 12.02(a); *In re Custody of D.T.R.*, 796 N.W.2d 509, 512 (Minn. 2011)(“Standing is a jurisdictional doctrine, and the lack of standing bars consideration of the claim by the court.”); *See also* Minn. R. Civ. P. 12.08(c)(“Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”). “For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.” *Forslund v. State*, 924 N.W.2d 25, 32 (Minn. Ct. App. 2019)(quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

The Governor also contends that Petitioners’ claims must be dismissed for failing to state a claim upon which relief may be granted. A motion to dismiss a complaint under Minn. R. Civ. P. 12.02(e) “raises the single question of whether the complaint states a claim upon which relief can be granted.” *Martens v. Minnesota Min. & Mfg. Co.*, 616 N.W.2d 732, 739 (Minn. 2000)(citations omitted). “Like a battlefield surgeon sorting the hopeful from the hopeless, a motion to dismiss invokes a form of legal triage, a paring of viable claims from those doomed by law.” *Iacampo v. Hasbro, Inc.*, 929 F. Supp. 562, 567 (D. R.I. 1996). “[I]t is immaterial whether or not the plaintiff can prove the facts alleged,” and a court should not grant a dismissal under Rule 12.02(e) “if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded...” *Martens* at 739-40 (internal quotes and citations omitted). In determining whether a claim survives a motion to dismiss, courts are “not bound by legal conclusions stated in a complaint.” *Walsh v. U.S. Bank*,

N.A., 851 N.W.2d 598, 603 (Minn. 2014). The district court must consider and accept as true only the facts alleged in the complaint and construe all reasonable inferences in favor of the nonmoving party. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008).

A writ of quo warranto “is an available remedy to challenge whether an official’s action exceeded the official’s statutory authority.” *Save Lake Calhoun v. Strommen*, 943 N.W.2d 171, 176 (Minn. 2020). An official is compelled in a quo warranto action to “show before a court of competent jurisdiction by what authority the official exercised the challenged right or privilege of office.” *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 318 (Minn. Ct. App. 2007)(citations omitted). Quo warranto is “an extraordinary legal remedy[;] it is not granted where another remedy is available.” *State ex rel. Burnquist v. Village of N. Pole*, 6 N.W.2d 458, 461 (1942).

**FREE MINNESOTA SMALL BUSINESS & THE BUSINESS ENTITIES HAVE STANDING;
HOWEVER, THE LEGISLATORS DO NOT**

The Governor contends that all of the Petitioners lack standing to seek the relief they are applying for in their Petition. This court will address the standing arguments in three groups: (1) members of the Minnesota Legislature, (2) the individual businesses and (3) the Free Minnesota Small Business coalition.¹⁸ “Standing is the requirement that a party has a sufficient stake in a justiciable controversy to seek relief from a court.” *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996)(citing *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972)). Standing is essential to a Minnesota court’s exercise of jurisdiction. *Annandale Advocate v. City of Annandale*, 435 N.W.2d 24, 27 (Minn. 1989). If a plaintiff lacks standing to

¹⁸ The Petition is also purportedly being brought on behalf of an unnamed class of 5.6 million people. To the extent that such a claim could be deemed an attempt to certify a class of persons under Minn. R. Civ. P. 23, analysis of such a class is not necessary in light of the fact that the Petition fails to state a claim upon which relief can be granted. In addition, it is questionable whether a petition for a writ of quo warranto is the appropriate vehicle to advance a class action.

bring a suit, the attempt to seek court relief fails. *Id.* “The goal of the standing requirement is to ensure that the issues before the courts will be ‘vigorously and adequately presented.’” *Id.* (cleaned up). See also *Webb Golden Valley, LLC v. State*, 865 N.W.2d 689, 693 (Minn. 2015). “A party has standing when (1) the party has suffered an injury-in-fact, or (2) the party is the beneficiary of a legislative enactment granting standing.” *Id.* (citation omitted).

Petitioners must establish an injury-in-fact to have standing because the challenged laws do not include an explicit or implicit legislative grant of standing and they do not argue otherwise. See *Lickteig v. Kolar*, 782 N.W.2d 810, 814 (Minn. 2010) (“Generally, a statute does not give rise to a civil cause of action unless the language of the statute is explicit or it can be determined by clear implication.”). “An injury-in-fact is a concrete and particularized invasion of a legally protected interest.” *Webb*, 865 N.W.2d at 693 (cleaned up). An injury-in-fact must not only be concrete, but must also be “actual or imminent, not conjectural or hypothetical.” *Hanson v. Woolston*, 701 N.W.2d 257, 262 (Minn. Ct. App. 2005) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). “The injury must be more than mere dissatisfaction with [the State’s] interpretation of a statute.” *Webb*, 865 N.W.2d at 693 (citing *In re Complaint Against Sandy Pappas Senate Comm.*, 488 N.W.2d 795, 797 (Minn. 1992)). “A party questioning a statute must show that it is at some disadvantage, has an injury, or an imminent problem.” *All. for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 913 (Minn. Ct. App. 2003) (cleaned up).

A party claiming to have standing “must have a direct interest in the statute that is different from the interest of citizens in general.” *Id.* (citation omitted). Put another way, when citizens bring lawsuits in the public interest challenging governmental conduct, they must show harm distinct from harm to the public. See *Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143, 146 (Minn. Ct. App. 1999).

Organizations can establish standing on two grounds: (1) associational standing or (2) direct organizational standing. Associational standing derives from the standing of an organization's members; it requires that: (1) the organization's members have standing as individuals, (2) the interests that the organization seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members. *Philip Morris*, 551 N.W.2d at 497-98 (stating that Minnesota's "approach [to associational standing] is derived from the seminal case" of *Hunt v. Wash. State Apple Advertis. Comm'n*, 432 U.S. 333 (1977)).

Direct organizational standing focuses on the entity rather than its members or constituents; it requires that the organization satisfy the injury-in-fact standing test applicable to individuals. See *Rukavina v. Pawlenty*, 684 N.W.2d 525, 533 (Minn. Ct. App. 2004) ("Minnesota courts recognize impediments to an organization's activities and mission as an injury sufficient for standing"). At the pleading stage, a plaintiff need only allege an injury resulting from the defendant's challenged conduct. *Forslund*, 924 N.W.2d at 33 ("Whether appellants can prove that the challenged statutes impinge their children's right to an adequate education (and whether such impingement states a viable claim) is more appropriately addressed in connection with the merits."). The Minnesota Supreme Court has adopted a liberal standard for organizational standing. *All. for Metro. Stability*, 671 N.W.2d at 913 (citing *Snyder Drug Stores, Inc. v. Minn. State Bd. of Pharmacy*, 221 N.W.2d 162, 166 (Minn. 1974)).

Under certain circumstances, taxpayers may have standing to bring lawsuits in the public interest. *Olson v. State*, 742 N.W.2d 681, 684 (Minn. Ct. App. 2007). "Absent express statutory authority, taxpayer suits in the public interest are generally dismissed unless taxpayers can show some damage or injury to the individual bringing the action which is special or

peculiar and different from damage or injury sustained by the general public.” *Id.* (citing *Conant*, 603 N.W.2d at 150). To meet the taxpayer exception to maintain an action without suffering an injury, a taxpayer must allege an illegal expenditure or unlawful use of public funds. *McKee v. Likins*, 261 N.W.2d 566, 571 (Minn. 1977)(quoting *Arens v. Village of Rogers*, 61 N.W.2d 508, 513 (Minn. 1953)(“it has been generally recognized that a taxpayer has sufficient interest to enjoin illegal expenditures of both municipal and state funds.”). “[W]hile the activities of governmental agencies engaged in public service ought not to be hindered merely because a citizen does not agree with the policy or discretion of those charged with the responsibility of executing the law, the right of a taxpayer to maintain an action in the courts to restrain the unlawful use of public funds cannot be denied.” *McKee*, 261 N.W.2d at 571.

For individual legislators to have standing, they must show that their claimed injury is “personal, particularized, concrete, and otherwise judicially cognizable.” *Conant*, 603 N.W.2d at 150 (citations omitted). Minnesota recognizes a limited avenue for individual legislators to suffer an injury-in-fact sufficient to confer standing: vote nullification. Vote nullification has been construed to stand “at most, for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect) on the ground that their votes have been completely nullified.” *Rukavina*, 684 N.W.2d at 532 (citations omitted). A legislator lacks standing where the injury is institutional, rather than personal. *Conant*, 603 N.W.2d at 150.

I. THE MINNESOTA STATE LEGISLATORS LACK STANDING

Ten members of the Minnesota House of Representatives and three members of the Minnesota Senate (collectively, the “Legislators”) assert that they have “individual legislator

standing as the Governor’s executive orders usurp legislative power” as well as taxpayer standing.

The Legislators argue that Minnesota courts have conferred standing to state legislators in instances of vote nullification and usurpation of legislative powers. They contend that their “injury” here is that the Governor’s executive orders purportedly violate the non-delegation doctrine, the prohibition on legislative vetoes, that COVID-19 is not an “act of nature,” and that the executive orders are usurping the legislature’s powers.

The Governor argues that the Legislators lack standing because individual legislator standing can be established only in rare circumstances in Minnesota. The Governor contends that the Legislators have failed to show an injury that is personal, particularized, concrete, and otherwise judicially cognizable. The Governor also argues that to the extent that the Legislators allege that the Governor’s executive orders usurp legislative powers, those purported injuries are institutional instead of personal and are therefore insufficient to establish standing. This court agrees with the Governor’s standing analysis and finds that the Legislators lack standing.

For a legislator to have standing, “they must show that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable.” *Rukavina*, 684 N.W.2d at 532 (cleaned up). While a legislator may have standing based upon vote nullification in certain circumstances, the Legislators here have not alleged a sufficiently concrete and personal injury to create standing. *Id.* As the court of appeals observed in *Conant*, vote nullification has been construed to stand “at most, for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect) on the ground that their votes have been

completely nullified.” 603 N.W.2d at 150 (citing *Raines v. Byrd*, 521 U.S. 811, 823 (1997)). There is no allegation in the Petition that the Legislators’ votes would have been sufficient to terminate the peacetime emergency. It appears that there was simply not a majority of votes of each house of the Legislature to terminate the peacetime emergency. The Legislators’ votes were not completely nullified. Any alleged injury to the Legislators in failing to terminate the peacetime emergency would be institutional and not personal.

The court draws the same conclusion with regard to the Legislators’ contention that the Governor has usurped their legislative power, an injury that—if true—is clearly institutional rather than individual. *Conant*, 603 N.W.2d at 150 (holding that the diminution of legislative power is an institutional, rather than personalized, injury)(citing *Raines*, 521 U.S. at 823.

Next, the Legislators argue that they each have standing as taxpayers to maintain this action. The crux of the Legislators’ argument in favor of a grant of taxpayer standing is that they are seeking to restrain illegal action on the part of the Governor. The Governor argues that the Legislators have failed to establish a particularized injury distinct from the public at-large, and have not demonstrated that the Governor has illegally expended public funds. The Governor points to the fact that many Minnesotans have suffered from the COVID-19 pandemic and resulting public health safety measures, and that any injury to the Legislators as “taxpayers” is not distinct from the injuries that any other Minnesotan has suffered during the course of the peacetime state of emergency.

To meet the taxpayer exception to maintain an action without suffering an injury, the Legislators must allege an illegal expenditure or unlawful use of public funds. *McKee*, 261 N.W.2d at 571 (quoting *Arens*, 61 N.W.2d at 513 (“it has been generally recognized that a

taxpayer has sufficient interest to enjoin illegal expenditures of both municipal and state funds.”). In the Petition, the Legislators make no mention at all of any funds being unlawfully disbursed on the part of the Governor or any other public official. For that reason alone, the Legislators lack taxpayer standing. In addition, the Legislators have not alleged any damage or injury which is special, or peculiar and different from any damage or injury to the general public. As a result the Legislators lack taxpayer standing.

II. THE INDIVIDUAL BUSINESSES HAVE STANDING

The Governor contends that the remaining Petitioners lack standing to allege any claims because they have failed to allege facts that support an injury-in-fact. The individual businesses respond that they have been damaged by being forced to shutter their businesses, and that, when their businesses have been allowed to reopen, their capacity has been severely limited by the Governor’s executive orders.

The Governor contends that because the Petitioners have not identified with specificity what kind of damages they have sustained, they should be dismissed. The Governor argues that the Petition does not address what “legally protected interest” the Governor’s orders invade or violate. The Governor also argues that even if this court were to find that the Petitioners had been damaged by the closure of their businesses; that issue should now be moot because the Governor has allowed businesses to reopen. In the Governor’s opinion, it is impossible on the face of the Petition to discern that Petitioners have suffered any cognizable injury-in-fact. This court disagrees.

Standing is a threshold issue. “A party questioning a statute must show that it is at some disadvantage, has an injury, or an imminent problem.” *All. for Metro. Stability*, 671 N.W.2d at 913. Here, when construing all of the material allegations in the Petition as true,

the individual businesses have demonstrated that they have experienced or are experiencing an injury: the loss of revenue from the closing or a reduction in revenue due to limitations on the occupancies of their businesses. It is clear that non-critical businesses across Minnesota have been profoundly affected by the Governor's emergency executive orders. For a time, they were closed completely. Currently, the bar and restaurant businesses can only reopen to 50% of their normal capacity. The physical fitness businesses can only reopen to 25% of their normal capacity. In addition, these injuries are unique to non-critical businesses. Undoubtedly, such injuries are fairly traceable to the Governor's executive orders. The individual business entities have therefore sufficiently alleged an injury-in-fact to confer standing to bring the Petition.¹⁹

III. FREE MINNESOTA SMALL BUSINESS HAS ASSOCIATIONAL STANDING

The Governor contends that Free Minnesota Small Business lacks standing to allege any claims. The Governor compares Free Minnesota Small Business to the unsuccessful standing assertion made by the St. Paul Area Chamber of Commerce in its opposition to the construction of Interstate Highway 35E in *St. Paul Area Chamber of Commerce v. Marzitetelli*, 258 N.W.2d 585 (Minn. 1977). The Governor essentially argues that Free Minnesota Small Business is attempting to manufacture standing by creating an entity solely for the purpose of challenging the Governor's executive orders.

Free Minnesota Small Business contends that it has associational standing and points this court to the three-part *Hunt* test, which was cited with approval in *Phillip Morris*. *Phillip Morris*, 551 N.W.2d at 497-98 (“Our conclusion is based upon the well-established notion of

¹⁹ Since this court has determined that the individual businesses have alleged an injury-in-fact, it does not need to address their purported standing as taxpayers.

‘associational standing,’ which recognizes that an organization may use to redress injuries to itself or injuries to its members. * * * Our approach is derived from the seminal case of *Hunt*...where the U.S. Supreme Court found standing for a state agency which, in its capacity as representative of the state apple industry, challenged another state’s agricultural regulation.’)(cleaned up). Free Minnesota Small Business argues that the Petition shows how the association and its individual members were damaged by the Governor’s executive orders. It points primarily to the loss of revenue its members experienced when the Governor ordered their businesses closed.

As a threshold matter, the “Minnesota Supreme Court has adopted a liberal standard for organizational standing.” *All. for Metro. Stability*, 671 N.W.2d at 913 (citing *Snyder Drug Stores, Inc.*, 221 N.W.2d at 166). So the court will view Free Minnesota Small Business’s claimed associational standing through that lens.

The members comprising Free Minnesota Small Business would have standing on their own because they have suffered an injury-in-fact as a result of the Governor’s executive orders. As indicated above, Free Minnesota Small Business members were forced to close and have been unable to open at full capacity. Free Minnesota Small Business has therefore satisfied the first prong of *Hunt*. *Hunt*, 432 U.S. at 343.

As to the second prong of *Hunt*, the interests that Free Minnesota Small Business seeks to protect in bringing the Petition are germane to its purpose. Free Minnesota Small Business contends that its members are affected by the Governor’s executive orders, and has brought the Petition to protect those interests. This *Hunt* prong is satisfied as well.

As to the third prong of *Hunt*, the relief requested does not require participation of individual members in this action. The Petition seeks to enjoin the Governor from enforcing

his current executive orders and bar him from issuing any new executive orders related to the COVID-19 pandemic. The Petition itself is straightforward; it alleges that members of Free Minnesota Small Business have been affected by the challenged executive orders. This is sufficient, at this stage, to satisfy the third prong of *Hunt* and establish standing.

In addition, the Governor contends that Free Minnesota Small Business cannot bootstrap its way into the creation of a justiciable controversy and gain standing by forming for the sole purpose of disputing the executive orders and cites *Marzitelli* as support. *Marzitelli*, 258 N.W.2d at 589-90 (“A special interest group cannot by this rationale acquire standing to complain that its special interest has been eliminated by a legislative act.”). The record, however, is silent about when Free Minnesota Small Business was formed and silent about its “sole mission.” The description of Free Minnesota Small Business in the Petition is simply that it “is an association of businesses in Minnesota shut down by the Governor’s executive orders.” There are not enough facts in the record for this court to conclude that Free Minnesota Small Business was formed for the opportunistic reason to create standing.

Free Minnesota Small Business has, therefore, pled sufficient facts to create associational standing.

THE GOVERNOR’S MOTION TO DISMISS IS GRANTED

The Petition alleges that the Governor has acted outside his statutory authority, and that a writ of quo warranto is the proper method for challenging the declaration of a peacetime state of emergency.

The Petition alleges that the Minnesota Emergency Management Act (“MEMA”) violates separation of powers principles in the Minnesota Constitution. MEMA provides the Governor with the authority to declare a peacetime state of emergency. Minn. Stat. § 12.31,

subd. 2. Subdivision 2 outlines the following procedure for the Governor, the Executive Council, and the Minnesota Legislature to follow in an emergency:

(a) The governor may declare a peacetime emergency. A peacetime declaration of emergency may be declared only when an act of nature, a technological failure or malfunction, a terrorist incident, an industrial accident, a hazardous materials accident, or a civil disturbance endangers life and property and local government resources are inadequate to handle the situation. If the peacetime emergency occurs on Indian lands, the governor or state director of emergency management shall consult with tribal authorities before the governor makes such a declaration. Nothing in this section shall be construed to limit the governor's authority to act without such consultation when the situation calls for prompt and timely action. When the governor declares a peacetime emergency, the governor must immediately notify the majority and minority leaders of the senate and the speaker and majority and minority leaders of the house of representatives. A peacetime emergency must not be continued for more than five days unless extended by resolution of the Executive Council up to 30 days. An order, or proclamation declaring, continuing, or terminating an emergency must be given prompt and general publicity and filed with the secretary of state.

(b) By majority vote of each house of the legislature, the legislature may terminate a peacetime emergency extending beyond 30 days. If the governor determines a need to extend the peacetime emergency declaration beyond 30 days and the legislature is not sitting in session, the governor must issue a call immediately convening both houses of the legislature. Nothing in this section limits the governor's authority over or command of the National Guard as described in the Military Code, chapters 190 to 192A, and required by the Minnesota Constitution, article V, section 3.

Minn. Stat. § 12.31, subd. 2. The Petition alleges that MEMA is an impermissible delegation of “pure legislative power” to the Governor.

The Petition also alleges that the Governor’s orders are unconstitutional because they fail to follow statutory guidelines found in the Minnesota Administrative Procedure Act (“MAPA”). The Petitioners argue that this court should apply a strict scrutiny standard when analyzing the constitutionality of MEMA, and contend that MAPA provides the court with an example of an alternative process that has additional and acceptable procedural safeguards.

Third, the Petition alleges that MEMA creates an impermissible “legislative veto provision” because MEMA provides the legislature with the opportunity to terminate a peacetime state of emergency beyond thirty days.

Finally, the Petition also alleges that the COVID-19 pandemic is not “an act of nature” that would allow the Governor to declare a peacetime state of emergency under Minn. Stat. § 12.31, subd. 2. According to Petitioners, if the COVID-19 pandemic is not an act of nature, then the Governor is without authority to declare a peacetime state of emergency.

The Governor argues that a writ of quo warranto is an inappropriate method to assert the allegations raised in the Petition. He contends that a writ of quo warranto is not available to the Petitioners because a declaratory judgment action is available to adjudicate their claims under Minnesota Statutes chapter 555.

Even if quo warranto is the appropriate vehicle to adjudicate the Petition, the Governor maintains that none of the allegations in the Petition state a claim upon which relief can be granted.

First, the Governor contends that MEMA is not violative of separation of powers principles, and is a permissible delegation of authority. The Governor argues that MEMA is not a delegation of “pure legislative power” because Minn. Stat. § 12.31 provides “a reasonably clear policy or standard” for the executive branch to implement and because that provision provides legislative oversight. The Governor also contends that MAPA is inapplicable here because MAPA expressly exempts MEMA from going through administrative procedure and judicial review, and because judicial review is otherwise available.

The Governor disagrees with Petitioners' argument that MEMA creates an impermissible legislative veto structure because MEMA lays out a bicameral process for the legislature to terminate his declaration of a peacetime state of emergency.

The Governor also argues that the COVID-19 pandemic is an act of nature, and therefore, he has authority to declare a peacetime state of emergency in Minnesota to protect Minnesotans from a pandemic. He contends that this is clear from the plain language of the statute, when read in conjunction with MEMA as a whole, and when viewing the legislative history behind MEMA's enactment.

Finally, the Governor contends that the Petitioner did not plead any claims concerning whether the executive orders unconstitutionally infringe upon the fundamental rights of Minnesotans. The Governor observes that the Petitioners' opposition memorandum "attempt(s) to shift this case from the one Petitioners pled—one about whether Minnesota's Emergency Management Act violates the balance of power between the executive and legislative branches—to one that Petitioners did not plead, about whether the executive orders unconstitutionally infringe on the fundamental rights of Minnesotans." Accordingly, the Governor argues that the court should reject any attempt by Petitioners to amend their Petition through argument. Even if the court does address the ostensible fundamental rights claims, the Governor contends that Petitioners have not identified any fundamental right impacted by the executive orders. He contends that the executive orders pass constitutional scrutiny.

The court will address each of the contentions of the Governor in turn.

I. A WRIT OF QUO WARRANTO IS THE APPROPRIATE VEHICLE TO CHALLENGE WHETHER AN OFFICIAL EXCEEDED THEIR STATUTORY AUTHORITY

The Governor contends that a writ of quo warranto is not the appropriate vehicle for the Petitioners' to seek relief from his executive orders. Instead, the Governor argues that the Petitioners should seek relief under Minnesota's Declaratory Judgment Act. *See* Minn. Stat. § 555.01, *et seq.*

Petitioners contend that a petition for a writ of quo warranto is the appropriate vehicle to seek relief from the Governor's orders in light of the Minnesota Supreme Court's ruling in *Save Lake Calhoun*. 943 N.W.2d 171. This court must therefore determine the threshold issue of whether a writ of quo warranto is the appropriate method of challenging the Governor's issuance of emergency executive orders.

In *Save Lake Calhoun*, the petitioners sought a writ of quo warranto to challenge the Department of Natural Resources change of a Minneapolis lake's name to Bde Maka Ska. The Minnesota Supreme Court held that a petition for a writ of quo warranto, while a limited remedy, is the appropriate vehicle to challenge whether "an official's action exceeded the official's statutory authority." *Save Lake Calhoun*, 943 N.W.2d at 176 (citations omitted). In holding that a writ of quo warranto was available in *Save Lake Calhoun*, the Minnesota Supreme Court said a writ of quo warranto is "designed to test whether a person exercising power is legally entitled to do so." *Id.* (citing *State ex rel. Graham v. Klumpp*, 536 N.W.2d 613, 614 n.1 (Minn. 1995)).

The Petition squarely challenges the Governor's authority to issue executive orders to combat the spread of the COVID-19 pandemic. Quo warranto is an available remedy to challenge the type of conduct at issue in this case. *See Save Lake Calhoun*, 943 N.W.2d at 175;

State ex rel. Palmer v. Perpich, 182 N.W.2d 182, 183 (Minn. 1971); *State ex rel. Danielson v. Vill. of Mound*, 48 N.W.2d 855, 865 (Minn. 1951). The Petition is therefore the appropriate method to challenge whether the Governor’s actions have exceeded his authority under MEMA.

II. MEMA DOES NOT VIOLATE SEPARATION OF POWERS PRINCIPLES UNDER THE MINNESOTA CONSTITUTION

In times of emergency, the Legislative Branch has vested the Executive Branch with the power to declare a national security or peacetime state of emergency in the state. Minn. Stat. § 12.31. A peacetime state of emergency may not last longer than five days unless extended by resolution of Minnesota’s Executive Council for a period up to thirty days.²⁰ Minn. Stat. § 12.31, subd. 2(a). The Legislature, by a majority vote in both houses, may terminate a peacetime emergency extending beyond thirty days. Minn. Stat. § 12.31, subd. 2(b). If the Legislature is not in session, and the Governor determines that another peacetime emergency declaration is necessary, the Governor must call the Legislature back into session to give it the opportunity to terminate the peacetime emergency. For the reasons set forth below, MEMA is a permissible delegation of power to the Governor

Petitioners’ principal challenge here is that MEMA violates the Minnesota Constitution under separation of powers principles as an inappropriate delegation of legislative authority. “Minnesota statutes are presumed constitutional, and [the court’s] power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary.” *State v. Bebl*, 564 N.W.2d 560, 566 (Minn. 1997)(quoting *In Re Haggerty*, 488 N.W.2d 363, 364 (Minn. 1989)). “Every presumption is invoked in favor of the constitutionality of a statute.” *Miller Brewing Co. v. State*, 284 N.W.2d 353, 356 (Minn. 1979)(construing *Reed v.*

²⁰ Minnesota’s Executive Council is composed of the Governor, Lieutenant Governor, Secretary of State, State Auditor, and Attorney General. Minn. Stat. § 9.011, subd. 1.

Bjornson, 253 N.W. 102 (Minn. 1934)). “A statute will not be declared unconstitutional unless the party challenging it demonstrates beyond a reasonable doubt that the statute violates some constitutional provision.” *Id.* at 356. “If possible, [the court] must interpret a statute to uphold its constitutionality.” *Fedziuk v. Comm’r of Pub. Safety*, 696 N.W.2d 340, 344 (Minn. 2005)(construing *St. Paul Cos., Inc. v. Hatch*, 449 N.W.2d 130, 137 (Minn. 1989)).

The separation-of-powers principle is embodied in Article III of the Minnesota Constitution:

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

MINN. CONST. art. III § 1. In 1949, the Minnesota Supreme Court held in *Lee v. Demont* that, unless expressly authorized by the constitution, “the legislature...cannot delegate purely legislative power to any other body, person, board, or commission.” 36 N.W.2d 530, 538 (Minn. 1949). Pure legislative power, as defined in *Lee*, is “the authority to make a complete law,” including the time the law takes effect and to whom it applies. *Id.* at 113, 36 N.W.2d at 538-39. The legislature may, however, delegate power when it provides a “reasonably clear policy or standard of action.” *Id.* And just because a power may be wielded by the legislature directly or because it entails an exercise of discretion and judgment, does not make the power exclusively legislative in nature. *Rukavina*, 684 N.W.2d at 535. Legislative delegation may grant discretion to the executive “in order to facilitate the administration of laws as the complexity of economic and governmental conditions increase.” *Anderson v. Comm’r of Highways*, 126 N.W.2d 778, 780-81 (Minn. 1964).

Two important principles guide judicial review of legislative delegation, “[f]irst, if the legislature may properly perform certain acts, but it is not convenient or advantageous for it to do so, it may authorize others to perform those acts. Second, the distinction between properly conferring authority or direction and improperly delegating legislative powers depends on whether a statute gives a private party ‘the arbitrary right to exercise an option to make a law operative on its own terms.’” *Matter of Griepentrog*, 888 N.W.2d 478, 487-88 (Minn. Ct. App. 2016)(cleaned up). While pure legislative power cannot be delegated, delegation is constitutional where “a law embodies a reasonably clear policy or standard to guide and control administrative officers, so that the law takes effect by its own terms when the facts are ascertained by the officers and not according to their whim, then the delegation of power will be constitutional.” *City of Richfield v. Local No. 1215, Intern. Ass’n of Fire Fighters*, 276 N.W.2d 42, 45 (Minn. 1979).

The Governor argues that the legislature has wide latitude in articulating a standard when it delegates authority because the Governor must be able to meet the challenges of a complex conditions that the Legislature cannot deal with directly in fast-changing areas. The Governor points to several Minnesota Supreme Court decisions that have upheld legislative delegation of authority that allowed the officer flexibility to meet changing situations. *See, e.g., Reyburn v. Minn. State Bd. Of Optometry*, 78 N.W.2d 351, 354-55 (Minn. 1956)(proper delegation to Board of Optometry to determine what constitutes unprofessional conduct); *Anderson*, 126 N.W.2d at 781 (proper delegation to Commissioner of Highways to suspend a habitual violator of traffic laws); *City of Minneapolis v. Krebs*, 226 N.W.2d 617, 619-21 (Minn. 1975)(proper delegation to municipal fire department to determine hazardous condition); *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 242 (Minn. 1984)(proper delegation to Commissioner of

Health to determine whether significant health problem presented by formaldehyde-containing building materials).

According to the Governor, Minn. Stat. § 12.31 sets forth a reasonably clear policy or standard of action because subdivision two prescribes six conditions for when the statute may be invoked, it establishes a time period of limited duration after which the state Executive Council reviews and approves or rejects the declaration, and gives the Legislature the opportunity to reject the declaration regardless of whether it is in or out of session. The Governor contends that, for subdivision two of Minn. Stat. § 12.31 to be properly invoked, one or more of six conditions must be present *and* two additional conditions must be met: (1) life and property must be endangered and (2) local government resources must be inadequate to handle the situation. Only then is the Governor permitted to declare and respond to a peacetime state of emergency.

Petitioners argue that the Governor bears the burden of proof in a quo warranto proceeding to show that his exercise of authority is constitutional. Petitioners argue that the MEMA does not carry a statutory presumption of validity, but instead should be reviewed under strict scrutiny standards. Petitioners argue that the Governor's orders restrict fundamental rights, and therefore, the Governor must advance a compelling state interest and must be narrowly tailored to further that interest. Petitioners further aver that MEMA creates an impermissible "legislative veto" provision. Petitioners contend that the only avenue for the Governor to act in a time of emergency, as he is currently acting under MEMA, would be to amend the Minnesota Constitution. Petitioners also argue that the Governor's peacetime emergency powers should be subject to MAPA. They urge review under MAPA because they believe administrative procedure provides greater procedural safeguards and a basis for

demonstrating that there are alternative lesser restrictive means for implementing the type of orders the Governor has issued during a peacetime state of emergency.

A. MEMA Provides a Reasonably Clear Standard to Guide the Governor

MEMA is a permissible delegation of authority from the Legislative Branch to the Executive Branch. MEMA provides a reasonably clear standard to guide the Governor during times of emergency and peril. MEMA lays out strict conditions for invocation, notice provisions to the legislature, and strict temporal limitations which provide safeguards within both the Executive Branch and the Legislative Branch. The Governor has exercised that authority under those procedural safeguards.

When an emergency arises in Minnesota, whether that be flooding in the Red River Valley or when a deadly disease breaks out across Minnesota, the Governor may only declare a peacetime state of emergency in very limited circumstances. Under MEMA, the Governor may only declare a peacetime state of emergency due to: (1) an act of nature, (2) a technological failure or malfunction, (3) a terrorist incident, (4) an industrial accident, (5) a hazardous materials accident, or (6) a civil disturbance. Minn. Stat. § 12.31, subd. 2(a). After determining one or more of those six limited circumstances exist, the Governor must also determine both that: (1) the emergency endangers life and property; and (2) local government resources are inadequate to handle the situation. *Id.* This statutory scheme therefore furnishes a reasonably clear standard by which the Governor may declare a peacetime state of emergency under Minn. Stat. § 12.31, subd. 2.

The COVID-19 pandemic has presented unprecedented challenges to Minnesota. In six months, it has infected over 75,000 Minnesotans and has killed over 1,800 of its citizens. It has presented the fastest moving and deadly pandemic since the 1918 influenza pandemic

ravaged Minnesota. The Legislature clearly recognized that it could not act alone to combat this type of peacetime emergency. The Executive Branch must, as the Legislature determined, have flexibility when the legislature delegates power in a complex and fast-changing area, such as a public health crisis. *Minn. Energy & Econ. Dev. Auth. v. Printy*, 351 N.W.2d 319, 351 (Minn. 1984); *State ex rel. Brown v. Johnson*, 96 N.W.2d 9, 14 (Minn. 1959).

Moreover, the Legislature has placed strict temporal limitations on the duration of a peacetime emergency declaration, which further supports this conclusion. The peacetime emergency cannot extend past the first five days without the approval of the Executive Council. Minn. Stat. § 12.31, subd. 2(a). Thereafter, the peacetime emergency can only extend for 30 days and then is subject to review by the Legislature, which has an opportunity to exercise its authority to end the peacetime emergency or to enact legislation that could otherwise restrict the Governor's actions during a peacetime emergency. *Id.* If the Legislature is not in session at the expiration of the 30 day period, MEMA requires the Governor to call the Legislature back into session to give it an opportunity to terminate the peacetime emergency. *Id.* at subd. 2(b). Every thirty days since the Governor declared the peacetime emergency, the Legislature has had the opportunity to monitor and terminate it. *See Minn. Energy & Econ. Dev. Auth.*, 351 N.W.2d at 351.

In drafting and enacting MEMA, the Legislature made specific choices about what creates an emergency which would necessitate swift action on the part of the Governor to protect the lives of Minnesotans. The Legislature made specific choices about triggering events, temporal limitations, and additional review and oversight from the Executive Council and Legislature which provide a check on the Governor's power in times of emergency. The Governor has chosen to take measures that he deems appropriate to protect Minnesotans

from the COVID-19 pandemic in accordance with the authority granted to him under MEMA. MEMA provides clear standards for the Governor’s exercise of this authority. MEMA does not, therefore, delegate pure legislative authority, and does not violate the Minnesota Constitution.

B. MEMA Does Not Create an Unconstitutional Legislative Veto

MEMA does not create an impermissible legislative veto structure. Petitioners argue that by allowing the Legislature to terminate the peacetime state of emergency, MEMA creates an impermissible statutory scheme where the Governor makes or implements the law and the Legislature overrides it with a majority in both chambers. Petitioners argue that this structure violates the U.S. Supreme Court’s decision in *I.N.S. v. Chadha*, 462 U.S. 919 (1983). The Governor argues that MEMA’s structure does not violate *Chadha* because MEMA requires a bicameral process and that no Minnesota appellate court has concluded that a legislative veto violates the separation of power requirements in the Minnesota Constitution.

Chadha involved the delegation of Congress to the federal Executive Branch under the Immigration and Naturalization Act (“INA”) to determine whether an individual subject to deportation should nonetheless be relieved from deportation and allowed to stay in the United States. *Id.* at 923-24, 952-54. The INA contained a “one-House veto” provision, which provided that *either* chamber of Congress had the power to invalidate or suspend deportation rulings of the United States Attorney General. *Id.* at 925-928. The Supreme Court held that the section of the INA which authorized one House of Congress, by resolution, to invalidate an executive branch decision was unconstitutional because action by the House pursuant to that section was essentially legislative and subject to the requirement under the United States

Constitution to be passed by a majority of both houses and presented to the President of the United States. *Chadha*, 462 U.S. at 954-55.

Petitioners cite to Frickey, *The Constitutionality of Legislative Committee Suspension of Administrative Rules: The Case of Minnesota*, 70 MINN. L. REV. 1237, 1248 (1986) as further support for their contention that legislative termination of a peacetime state of emergency under *Chadha* violates the separation of powers. However, as the Governor notes, Professor Frickey's perspective on the legislative veto, has never been adopted by any Minnesota appellate court. As Professor Frickey even observes himself:

Because *Chadha* represents only an interpretation of the separation of powers contained in the federal Constitution, a state supreme court, of course, is not required to use the same analysis in determining whether a state legislative committee's authority to suspend administrative rules violates the separation of powers contained in the state constitution. In Minnesota, predicting whether the state supreme court would hold that an LCRAR suspension of a rule is unconstitutional is rendered even more difficult by the fact that no decision of that court has involved an analogous issue.

Id. Even so, Petitioners have not persuaded this court that this law review article or the several extra-jurisdictional cases which they advance to support the notion of legislative veto apply to an emergency executive order.

Moreover, as this court expressed at oral argument, it is concerned about refereeing a political dispute between co-equal branches of government over the continuance or termination of peacetime emergency powers, when those branches have both an obligation and an opportunity to resolve those disputes between themselves. *Ninetieth Minnesota State Senate vs. Dayton*, 903 N.W.2d 609, 624 (Minn. 2017). This court declines the opportunity to find that the termination provision of MEMA constitutes a legislative veto which violates the separation of powers.

In the end, unlike the INA provision in *Chadha*, MEMA requires a majority vote in both chambers of the Minnesota Legislature to terminate the Governor's declaration of a peacetime state of emergency under Minn. Stat. 12.31, subd 2(b). MEMA therefore does not violate *Chadha* by allowing a single chamber to terminate the peacetime state of emergency. The majority of both Houses of the Legislature voted to pass MEMA, in compliance with MINN. CONST. Art. IV, § 22 and carved out its oversight responsibilities and the opportunity to terminate peacetime emergencies through a bicameral vote. For this reason, MEMA does not violate the separation of powers.

C. MAPA Does Not Apply to MEMA and Would Defeat MEMA's Purpose

Petitioners contend that emergency executive orders issued under MEMA should be subject to the administrative process of MAPA. They argue that the absence of an administrative process is further evidence of a lack of legal standard or safeguard for the issuance of executive orders during a peacetime emergency. Accordingly, they contend that there should be an administrative procedure that the Governor should be required to follow when issuing an executive order to address a peacetime emergency, with notice and comment periods, hearings, review by an administrative law judge, and so on. Petitioners also claim that since judicial review is not available under Chapter 14, that judicial review of executive orders issued under MEMA is not available at all.

The plain language of Minn. Stat. § 14.03, subd. 1, exempts declarations of peacetime emergencies under MEMA from the administrative process of MAPA. While Petitioners concede that the Legislature has expressly exempted emergency executive orders issued under MEMA from the administrative process of Chapter 14, they nevertheless argue that the Legislature made a mistake in not subjecting MEMA to the MAPA process.

The MAPA administrative process is wholly unsuited for emergency situations which endanger the lives of Minnesotans. The notion that, when faced with an emergency, the Governor should craft a plan that goes through a notice and comment period, public hearings, and review by an administrative law judge, is cumbersome and unreasonable.

The whole point of the Legislature's creation of a process like MEMA was to afford the Governor an ability to take quick and nimble action to save life and property in designated emergencies. If the Legislature intended to provide the Governor with emergency powers that went through an administrative review process rather than the procedural safeguards outlined in Minn. Stat. § 12.31, it could have done so. This court has already determined that MEMA provides a reasonably clear policy or standard for the Executive Branch to declare a peacetime emergency. This court has also determined that the Legislature created a review process for oversight and termination of peacetime emergencies under Minn. Stat. § 12.31, subd. 2(b). Finally, Petitioners' assertion that there is no opportunity for judicial review is belied by their commencement of this quo warranto action and that they also could seek a declaratory judgment under Chapter 555. The exemption of MEMA from MAPA does not violate separation of powers.

III. THE COVID-19 PANDEMIC IS AN ACT OF NATURE

Petitioners contend that the COVID-19 pandemic is not an "act of nature." They argue that an act of nature is limited to a catastrophic one-time event, such as a flood or a tornado, which "don't go on forever" like a pandemic. They further argue that if COVID-19 cannot be defined as an act of nature, then the Governor is without the statutory authority to declare a peacetime state of emergency under Minn. Stat. § 12.31, subd. 2. The Governor

disagrees. Both parties agree that this is an issue of statutory interpretation. The core issue presented here is whether a pandemic can be considered an act of nature.

When interpreting a statute, the court's objective “is to give effect to the legislature's intent as expressed in the language of the statute.” *Goodyear Tire & Rubber Co. v. Dynamic Air, Inc.*, 702 N.W.2d 237, 242 (Minn. 2005) (quoting *Pususta v. State Farm Insurance Companies*, 632 N.W.2d 549, 552 (Minn. 2001)); Minn. Stat. § 645.16 (“The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature.”). The text of an unambiguous statute must be interpreted “according to its plain language.” *Brua v. Minnesota Joint Underwriting Ass'n*, 778 N.W.2d 294, 300 (Minn. 2010) (citing *Molloy v. Meier*, 679 N.W.2d 711, 723 (Minn. 2004)). “[T]he court is prohibited from adding words to a statute and cannot supply what the legislature either purposely omitted or inadvertently overlooked.” *Tracy State Bank v. Tracy-Garvin Coop.*, 573 N.W.2d 393, 395 (Minn. Ct. App. 1998) (citation omitted); *see* Minn. Stat. § 645.16 (“When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.”). To determine the plain meaning of a statute, the words and phrases in the statute are “construed according to the rules of grammar and according to their common and approved usage.” *State v. Riggs*, 865 N.W.2d 679, 682 (quoting Minn. Stat. § 645.08(1)). “The statutory language in dispute is not examined in isolation; rather, all provisions in the statute must be read and interpreted as a whole.” *State v. Pakhnyuk*, 926 N.W.2d 914, 919 (Minn. 2019)(citations omitted). The Legislature is presumed to intend that “the entire statute ... be effective and certain.” Minn. Stat. § 645.17(2).

If, after considering these principles, a court concludes that the statute is “subject to more than one reasonable interpretation,” then it is ambiguous, and the court “may apply

canons of construction to resolve the ambiguity.” *State v. Thonesavanb*, 904 N.W.2d 432, 435 (Minn. 2017)(quoting *500, LLC v. City of Minneapolis*, 837 N.W.2d 287, 290 (Minn. 2013)); *see also* Minn. Stat. § 645.16 (2018). “A statute is ambiguous only if it is subject to more than one reasonable interpretation.” *Thonesavanb*, 904 N.W.2d at 435.

As indicated above, Petitioners urge this court to limit the definition of an act of nature to one-time catastrophic occurrences like an earthquake, flood, or tornado. They argue that because a pandemic can last for a longer duration than the ripple effects of a flood or tornado, the Legislature did not intend to confer emergency powers to the Governor in a situation such as COVID-19. In Petitioners’ view, when faced with a deadly disease that could overwhelm Minnesota’s hospitals and medical personnel, the Governor should seek legislation or engage in the administrative rule-making process to address it.

The Governor argues that this proposition is absurd. He argues that a pandemic is unambiguously falls under an act of nature. In support of his argument, the Governor points to his predecessor Governor Mark Dayton declaring a peacetime emergency based on a worldwide virus in May 2015. EMERGENCY EXEC. ORDER 15-09, 39 S.R. 1542-44. The Governor also points the court to the fact that the federal government considers pandemics and epidemics to be acts of nature. *See, e.g.*, Office of Emergency Operations, U.S. Dep’t of Energy, 151.1D, Comprehensive Emergency Mgmt. Sys. (2016)(emergency management system order defining “acts of nature: as “hurricanes, earthquakes, tornadoes, animal disease outbreak, pandemics, or epidemics”). The Governor also contends that the case law that Petitioners cite, such as *Bailey v. Strippers, Inc.*, 2020 WL 2616255, at *2 (M.D. Ga. May 22, 2020) and *Lantino v. Clay, LLC*, 2020 WL 2239957, at 3 (S.D.N.Y. May 8, 2020), are inapposite here because they did not determine that a pandemic is not an “act of god,” and that they dealt

with financial transactions between private parties, and not the constitutional authority of the Governor to declare a peacetime state of emergency to combat an act of nature. *But see Rio Props. v. Armstrong Hirsch Jackoway Tyerman & Wertheimer*, 94 Fed.Appx. 519, 521 (9th Cir. 2004) (act of god included illness outside of one’s control); *Poston v. W. Union Tel. Co.*, 107 S.E. 516, 517 (S.C. 1920), *rev’d on other grounds*, *W. Union Tel. Co. v. Poston*, 256 U.S. 662 (1921)(influenza epidemic was an “act of god”); *Grover v. Zook*, 87 P. 638, 640 (Wash. 1906)(tuberculosis infection constituted an “act of god”).

A. The Plain Language of the Phrase “Act of Nature” Includes Pandemics and Other Natural Disasters

Both parties agree that the phrase “act of nature” is synonymous with the phrase “act of god.” This court may consider dictionary definitions in determining the plain and ordinary meaning of words. *State v. Haywood*, 886 N.W2d 485, 488 (Minn. 2016). Black’s Law Dictionary defines an act of nature as an act of god which is “[a]n overwhelming, unpreventable event caused exclusively by forces of nature...” ACT OF GOD, *Black’s Law Dictionary* (11th ed. 2019). The Merriam Webster Dictionary defines “act” as “something done voluntarily” and “the process of doing something.” ACT, *Merriam-Webster Dictionary* (2020). The Merriam-Webster Dictionary defines “nature” as “the external world in its entirety” and as a “creative and controlling force in the universe.” NATURE, *Merriam-Webster Dictionary* (2020).

The COVID-19 pandemic has been an overwhelming and unpreventable event in Minnesota that has caused over 1,800 deaths and continues to pose a serious health risk to all Minnesotans. COVID-19 is a disease caused by a virus – a natural event. It is spread from person to person – again, a natural event. The force and effect of this disease spread quickly throughout every part of Minnesota and has persisted. At this point, there is no vaccine and

there is no cure for this disease. It difficult to understand how a pandemic caused by a deadly virus could be characterized, other than as an “act of nature.”

Petitioners’ attempt to limit an “act of nature” to address only weather or environmental events of short duration, with long-lasting effects, is unavailing. While certainly, tornadoes and floods are “acts of nature,” it does not follow that only such short-lived events are within the scope of Minn. Stat. § 12.31, subd. 2(a). As the Governor observes: “To accept Petitioners’ interpretation of ‘act of nature’ would mean that the Governor can act swiftly to protect the health and safety of Minnesotans during severe weather events, terrorist attacks, periods of civil unrest, and other dangerous events, but must leave Minnesotans unprotected and to their own devices during worldwide pandemics.” This court agrees that would be an absurd and unreasonable result. *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003).

The COVID-19 pandemic is an act of nature which may authorize the Governor to declare a peacetime state of emergency.

B. MEMA as a Whole Contemplates Diseases and Medical Emergencies as a Basis for Exercising Emergency Powers

Even if the plain language of MEMA was unclear as to whether the COVID-19 pandemic constitutes an act of nature, when read as a whole, MEMA contemplated diseases and medical emergencies as a basis for the Governor to exercise his emergency executive power. The application of canons of construction help guide this court to its conclusion that the phrase “act of nature” includes the COVID-19 pandemic.

The *in pari materia* or “related-statutes canon,” allows the court to read MEMA and other related statutes as one systematic body of law. *Thonesavanh*, 904 N.W.2d at 437-38 (internal citations omitted). Statutes which relate “to the same person or thing or having a

common purpose should be construed together.” *Eischen Cabinet Co. v. Hildebrandt*, 683 N.W.2d 813, 816 (Minn. 2004).

The Governor contends that, when read *in pari materia*, the phrase “act of nature” in MEMA clearly includes a public health emergency like the COVID-19 pandemic. The Governor points to the Legislature’s stated policy goals in enacting MEMA to “generally protect the public peace, health, and safety” and to “preserve the lives and property of the people of the state...” Minn. Stat. § 12.02, subd. 1. The Legislature also intended for MEMA to cover “the existing and increasing possibility of natural and other disasters of major size and destructiveness...” *Id.* The Governor argues that these statute policy goals make clear that the Legislature intended to authorize a governor to use emergency declarations to protect public health and to address unforeseen “other disasters.”

The Governor contends that Minn. Stat. § 12.39, subd. 1 also contemplates that a peacetime emergency may be declared due to a communicable disease like COVID-19. Under that provision, the Commissioner of Health may isolate or quarantine individuals who may be infected with a communicable disease when the “communicable disease is the basis for which the national security emergency or peacetime emergency was declared...” Minn. Stat. § 12.39, subd. 1.

Finally, the Governor offers Minn. Stat. § 12.61, subd. 2(a), as support for its construction of MEMA, which states 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.”

Petitioners do not address whether the phrase “act of nature” encompasses pandemics when MEMA is read as a whole. Instead, as previously discussed, Petitioners allege that the plain meaning of the phrase does not include a pandemic like COVID-19.

When MEMA’s provisions are construed as a whole, it is clear that “act of nature” in Minn. Stat. § 12.31, subd. 2(a) includes pandemics such as COVID-19. MEMA was created to protect the public health of Minnesotans for natural disasters and other disasters. It specifically contemplated that a communicable disease, of which COVID-19 is clearly one, could be the basis of a peacetime emergency declaration. The “related-statutes canon” of statutory construction supports a pandemic as an “act of nature.”

Since this court has determined that the phrase “act of nature” is clear and unambiguous, and that this conclusion is supported by other related provisions within MEMA, there is no need for it to look to MEMA’s legislative history for interpretation.

IV. NEITHER MEMA NOR THE GOVERNOR’S EMERGENCY RESPONSE TO THE COVID-19 PANDEMIC HAVE IMPERMISSIBLY INFRINGED ON PETITIONERS’ FUNDAMENTAL RIGHTS

The Petition alleges that the Governor exceeded his authority in three ways:

First, the Governor’s COVID-19 executive orders violate Minnesota’s non-delegation doctrine because the executive orders are exercises of pure legislative power without legislative enactment or judicial oversight. Second, Minnesota Statutes § 12.31, subdivision 2, applying to the Governor’s peacetime emergency powers, has a provision unconstitutionally authorizing a legislative veto on extension of peacetime emergencies beyond thirty days. There is not Minnesota Constitution provision authorizing such legislative vetoes and such provision is not judicially severable due to the legislative intent. Third, Minnesota Statutes § 12.31, subdivision 2, does not authorize the Governor to invoke emergency powers for public health purposes; the phrase “public health” is not mentioned in the enumerated situations where the Governor can invoke such emergency peacetime powers.

(ECF No. 1) While the Petition makes incidental mention of the impact of the executive orders on “civil liberties,” the Petition makes no claim that Petitioners’ fundamental rights

have been unconstitutionally infringed. The proposed Order to Show Cause, which was filed by Petitioners, demanded that the Governor explain:

- That when the Governor issued his COVID-19 executive orders, he did not exceed his authority under the Minnesota Constitution's separation of powers principle regarding the non-delegation doctrine;
- Whether the Governor's COVID-19 executive orders exceeded his authority because the statutory authority relied upon, Minnesota Statutes § 12.31, is unconstitutional because the provision authorizes a legislative veto on the extension of peacetime emergencies beyond 30 days;
- Whether the Governor's COVID-19 executive orders exceeded his authority because Minnesota Statutes § 12.31, subdivision 2 does not authorize the Governor to invoke emergency powers for a public health emergency; and;
- To provide any other rationale under which an argument can be made that would show why this Court should not grant the Petition.

(ECF No. 3) Notably, the proposed Order to Show Cause did not contain any reference to a claim for the unconstitutional infringement on Petitioners' fundamental rights. On June 8, 2020, this court issued an Order to Show Cause, after a Zoom hearing, which adopted the proposed language of Petitioners. (ECF No. 13) Accordingly, this court assumed that the field of contested issues advanced in the Petition was complete. In Petitioners' brief, however, they claimed for the first time that the Governor's actions in restricting their fundamental rights was "appropriately challenged in the underlying Petition," and that "[t]he applicable remedy here is a writ holding that the Governor's executive orders and future executive orders, if any, restricting civil liberties under § 12.31, subdivision 2, are unconstitutional." Accordingly, they claimed that Minn. Stat. § 12.31, subd. 2 is subject to strict scrutiny and was unconstitutional because its delegation of power to restrict civil liberties is not narrowly tailored to meet a compelling state interest. Petitioners appear to claim that the operation of

their businesses, their movement and association with others are the fundamental rights impacted by Minnesota Statutes § 12.31, subd. 2 and the executive orders.

The Governor argues that strict scrutiny should not apply here because the Petition does not claim that his executive orders violate substantive due process rights under the Fourteenth Amendment to the U.S. Constitution or the Minnesota Constitution, nor does the Petition identify any particular fundamental right. The Governor argues that Petitioners should not be permitted to amend their claims through responsive briefing. The Governor further contends that all of the “fundamental rights” that Petitioners identify are not fundamental and do not warrant strict scrutiny review. Finally, the Governor argues that even if the court were to allow Petitioners to bring forward these claims in responsive briefing, and even if the court were to view them as fundamental, his response is a constitutional exercise of power under a *Jacobson* analysis. *See Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

As a threshold matter, Petitioners are now seeking to raise in their responsive brief a constitutional claim that they did not include in their Petition. Even construing the Petition in the most favorable possible light to Petitioners, it does not state a legally sufficient claim to have this court issue a writ of quo warranto because their fundamental rights were unconstitutionally infringed by either Minnesota Statutes § 12.31, subd. 2, or by the Governor’s executive orders. On that basis alone, any ostensible fundamental rights claim in the Petition does not survive a motion to dismiss.

Even if Petitioners had included a claim for an unconstitutional violation of their fundamental rights in the Petition, that claim would still fail, for reasons that this court will address.

The Fourteenth Amendment to the Constitution of the United States guarantees that “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1. The Minnesota Constitution similarly states “[n]o person shall...be deprived of life, liberty, or property without due process of law.” MINN. CONST. Art. 1, § 7. The substantive due process requirements of the Minnesota and United States Constitutions are the same. *See, e.g., Saratori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn. 1988). “[S]ubstantive due process protects individuals from certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them.” *In re Linehan*, 593 N.W.2d 867, 872 (Minn. 1999)(internal quotations and citations omitted). The due process clause provides “heightened protection against government interference with certain fundamental rights and liberty interests.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Fundamental rights are those that are, “objectively, ‘deeply rooted in this Nation’s history and tradition.’” *Id.* at 720-21 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)). Government action infringing a fundamental liberty interest must be narrowly tailored to serve a compelling state interest. *Reno v. Flores*, 507 U.S. 292, 301-02 (1993). If the right is not fundamental, the government action need only be “rationally related to legitimate government interests.” *Glucksberg*, 521 U.S. at 728.

Courts engage in a two-step analysis to determine whether substantive due process rights have been violated. *Ganley v. Minneapolis Park & Rec. Board*, 491 F.3d 743, 749 (8th Cir. 2007). First, the court must determine whether petitioners possessed a fundamental right protected by the Fourteenth Amendment. *Id.* Second, if the court is able to identify the nature

of the liberty interest at stake, it must determine whether the government's conduct was proper using the applicable standard. *Id.*

The Petition claims that Petitioners have suffered "damages" because their businesses were shut down by the executive orders. As previously discussed, this allegation was sufficient to confer standing on the individual businesses and on Free Minnesota Small Business. Petitioners have not, however, cited any authority to suggest that engaging in commercial activity is a fundamental right. In fact, case authority from the Minnesota and United States Supreme Courts suggest that the operation of a business is not a fundamental right. *See, e.g., Essling v. Markman*, 335 N.W.2d 237, 239 (Minn. 1983)("freedom of choice or contract" are not "fundamental rights sufficient to invoke strict judicial scrutiny"); *Usery v. Turner Elkborn Mining Co.*, 428 U.S. 1, 15 (1976)(statutes adjusting the burdens and benefits of economic life are presumed constitutional and the burden is on the challenger to establish that the legislature acted arbitrarily or irrationally); *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 491 (1955)(upholding law prohibiting unlicensed persons from fitting lenses for eyeglasses). While undoubtedly significant, Petitioners have not demonstrated that the closing of their businesses impacted a fundamental right.

Petitioners also claim that they have been "damaged" by the Governor's executive orders because they "cannot exercise movement...as they desire." While it is not entirely clear how an individual business or association would "exercise movement," the only travel right that is fundamental is the right to interstate travel. *See Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 654-55 (Minn. 2012)(discussing the three components of the right to interstate travel). Petitioners have not alleged that they have been prohibited from traveling from Minnesota to another state. Significantly, the Governor's executive orders have not prohibited or placed

obstacles on travel from state to state. Petitioners have not demonstrated that their movement is a fundamental right.

Last, Petitioners claim that they have been “damaged” because they “cannot...associate with others as they desire.” Again, it is somewhat difficult to understand the associational right being claimed here by individual businesses or by Free Minnesota Small Business. This allegation appears to address “social association,” which is not a fundamental right. *See City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989)(providing “meeting one’s friends at a shopping mall” as an example of activity insufficient to invoke First Amendment protection). Nor do purely commercial groups, like the businesses here, have a fundamental right of “freedom of association.” *Metro. Rehab. Serv., Inc. v. Westberg*, 386 N.W.2d 698, 700 (Minn. 1986). Petitioners have not demonstrated that their social or commercial associations are a fundamental right.

Although there are passing mentions by Petitioners in their responsive brief to other fundamental rights affected by the executive orders – prohibition on leaving home, prohibition on certain elective surgeries and the restriction of religious liberties – there is no articulated connection between those rights and the individual businesses or Free Minnesota Small Business. It is difficult to imagine how such rights could be articulated in a commercial context, and Petitioners have not even attempted to do so here. Accordingly, since Petitioners have not alleged that these rights have been impacted for them, there is no reason for this court to consider whether these rights are fundamental.

A petition for a writ of quo warranto, as outlined above, is a limited remedy. *Save Lake Calhoun*, 943 N.W.2d at 176. Because Petitioners have failed to identify a fundamental right that they hold, which has been affected by MEMA or the Governor’s executive orders, this court will apply a rational basis review. *Glucksberg*, 521 U.S. at 728. Petitioners here are limited

to challenging whether the Governor exceeded his statutory authority for the reasons which they articulated in their Petition and as mandated in the Order to Show Cause. They have failed to plead or demonstrate that any of their fundamental rights have been unconstitutionally infringed by Minn. Stat. § 12.31, subd. 2 or the executive orders.

Even if Petitioners had adequately plead a fundamental rights violation, such a claim would not survive a *Jacobson* analysis.

The “Constitution principally entrusts ‘[t]he safety and the health of the people’ to the politically accountable officials of the States ‘to guard and protect.’” *S. Bay United Pentecostal Church v. Newsom* (*S. Bay II*), 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (quoting *Jacobson*, 197 U.S. at 38). When state officials “undertake[] to act in areas fraught with medical and scientific uncertainties,” their latitude “must be especially broad.” *Id.* (alteration in original) (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)). “The Constitution does not compel courts to turn a blind eye to the realities of the COVID-19 crisis.” *Cassell v. Snyders*, 2020 WL 2112374 at *6 (N.D. Ill. May 3, 2020).

More than one hundred years ago, in *Jacobson* the United States Supreme Court developed a framework by which to evaluate a State’s exercise of its emergency authority during a public health crisis. There, the Court rejected a constitutional challenge to a State’s compulsory vaccination law during the smallpox epidemic. *See Jacobson*, 197 U.S. at 367. The *Jacobson* court explained that “[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” *Id.* at 27. It reasoned further that the Constitution does not provide an absolute right to be “wholly freed from restraint” at all times, as “[t]here are manifold restraints to which every person is necessarily subject for the common good.” *Id.* at 26. While

“individual rights secured by the Constitution do not disappear during a public health crisis,” the government may “reasonably restrict[.]” rights during such times. *See In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020). Judicial review of such claims is only available in limited circumstances. *See S. Bay II*, 140 S. Ct. at 1613–14 (Roberts, C.J., concurring)(where state officials do not exceed their broad latitude during a pandemic “they should not be subject to second-guessing by an ‘unelected federal judiciary,’ which lacks the background, competence, and expertise to assess public health and is not accountable to the people” (citation omitted)); *Jacobson*, 197 U.S. at 31. If a State implements emergency measures during an epidemic that curtail individual rights, courts uphold such measures unless they have “no real or substantial relation” to public health or are, “beyond all question, a plain, palpable invasion of rights secured by the fundamental law.” *Id.*; *see also In re Abbott*, 954 F.3d at 784.

Here, there can be no doubt that Minnesota is in the midst of a public health crisis. There is equally no doubt that this public health crisis and the government’s response to it has had a profound effect on the independent, small businesses that Minnesotans rely on every single day and which provide the lifeblood to communities throughout the State. Like the court in *Cassell*, this court “finds that the COVID-19 pandemic constitutes the very sort of extraordinary threat to public health and safety contemplated by the Supreme Court in *Jacobson*.” *Cassel*, 2020 WL 2112374 at *7. This court concludes that the executive orders have a “real and substantial relation” to the preservation of public health and the spread of COVID-19.

On the opposite side of the balance sheet, as discussed above, Petitioners have provided no evidence that the executive orders are, “beyond all question, a plain, palpable

invasion of rights secured by the fundamental law.” See *Elim Romanian Penecostal Church v. Pritzker*, 962 F.3d 341, 347 (7th Cir. 2020).

In summary, in light of the ongoing and catastrophic public health threat posed by COVID-19, this court concludes that any infringement of Petitioner’s federal constitutional rights (or of those under the Minnesota Constitution), even if they were actually pled by Petitioners, would be permissible under *Jacobson*. Petitioners’ purported fundamental rights claim does not survive a *Jacobson* analysis, and as such, fails to state a claim upon which relief may be granted.

Conclusion

In sum, the Petition is dismissed because it fails to state a claim upon which relief may be granted. While a writ of quo warranto is the appropriate vehicle to challenge the Governor’s declaration of a peacetime state of emergency and subsequent emergency executive orders, the Governor has acted pursuant to the authority delegated to him by the Legislature. The COVID-19 pandemic constitutes an act of nature that provides the Governor with the basis to declare a peacetime state of emergency in Minnesota under MEMA. MEMA provides the Governor with a reasonably clear standard when faced with a pandemic that endangers the lives and property of Minnesotans that are not violative of separation of powers principles or the articulated fundamental rights of Petitioners.

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