

**State of Minnesota
In Supreme Court
Case No. _____**

Free Minnesota Small Business Coalition, Minnesota State House of Representatives Representative Steve Drazkowski, Representative Jeremy Munson, Representative Cal Bahr, Representative Tim Miller, Representative Jeff Backer, Representative Mary Franson, Representative Glenn Gruenhagen, Representative Erick Lucero, Representative Joe McDonald, Representative Shane Mekeland, Senator Mike Goggin, Senator Scott Jensen, Senator Andrew Mathews, Southwest School of Dance L.L.C., Trev's Kitchen, Prestige Gymnastics, Yoga by Blisstopia LLC, Title Boxing Club Coon Rapids, Title Boxing Club Arden Hills, Title Boxing Club Rogers, Duff's LLC d/b/a Duffy's Bar and Grill, Flaherty's Arden Bowl, Inc., Three Rivers Fitness,

Appellants/Petitioners,

vs.

Tim Walz, Governor of Minnesota,

Respondent.

Petition for Accelerated Review and Addendum

TO: The Supreme Court of the State of Minnesota.

The petitioners believe that this case is the right vehicle for the Supreme Court to determine the following two very important legal issues. First, the Supreme Court should determine whether the Governor's COVID Orders restricting civil rights under Minnesota Statutes § 12.31 are a violation of Minnesota Constitution Article III's non-delegation doctrine because Minnesota Statutes § 12.31 lacks "less restrictive means" or similar limitations. Second, the Supreme Court should determine whether

Minnesota Statutes § 12.31, subdivision 2, section (b) is a non-severable legislative veto violating Minnesota Constitution Article III's ban on legislative vetoes.

Statement of Legal Issues

1. Whether the Governor's COVID Orders restricting civil rights under Minnesota Statutes § 12.31 are a violation of Minnesota Constitution Article III's non-delegation doctrine because Minnesota Statutes § 12.31 lacks "less restrictive means" or similar limitations.
2. Whether Minnesota Statutes § 12.31, subdivision 2, section (b) is a non-severable legislative veto violating Minnesota Constitution Article III's ban on legislative vetoes.

I. Statement of the Case

A. Summary of case

Minnesota Statutes § 12.31 authorizes the Governor's COVID executive orders to restrict civil rights without any legal limitation. But, Article III of the Minnesota Constitution has express separation-of-powers provisions:

ARTICLE III DISTRIBUTION OF THE POWERS OF GOVERNMENT

Section 1. Division of powers.

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.

This petition for writ of quo warranto challenged the Governor's legal authority to restrict civil rights without legal limitation under Minnesota Statutes §

12.31 because Minnesota Statutes § 12.31 violates Article III’s express separation of power provisions in the Minnesota Constitution. Minnesota courts under Article III enforce a robust non-delegation doctrine so that when the legislature delegates to the Governor the power to restrict civil rights “less restrictive means” language is required in the delegating law as found in Minnesota’s guardianship statute, Minnesota Statutes § 524.5-409, subd 1 (3). Additionally, although an issue of first impression for the Minnesota appellate courts, Minnesota courts under Article III should enforce a robust ban on legislative vetoes. Here, Minnesota Statutes § 12.31, subdivision 2, section (b) is a no-severable legislative veto making the Governor’s COVID executive orders unconstitutional.

B. Summary of the facts

1. The Governor under Minnesota § 12.31, subdivision 2 has issued executive orders restricting civil rights of over 5.6 million Minnesotans.

On March 13, 2020, Minnesota Governor Tim Waltz issued Emergency Executive Order 20-01 declaring a peacetime emergency under Minnesota § 12.31, subdivision 2. Pet. ¶ 10, Ex. 1. Since then, the Governor has issued over 80 peacetime emergency executive orders, Nos. 20-01 through 20-88. Pet. ¶ 11, Ex. 1. Ex. 1-63; Kaardal Dec. ¶ 3, Ex. 68–81 (Exec. Ord. 64-77).¹

¹ All the Governor’s executive orders, 20-01 through 20-88, can be found at: <https://mn.gov/governor/news/executiveorders.jsp>.

On May 29, this petition for a writ of quo warranto was filed challenging the Governor's continuing use of a claimed authority to issue the executive orders for the COVID-19 health crisis. On June 8, 2020, this Court issued an Order to Show Cause. Since the court-issued order, the Governor has issued Executive Order 20-75 extending for an additional 30 days the peacetime emergency relating to COVID-19 to July 12. Kaardal Dec. ¶ 3, Ex. 79 (Exec. Ord. 20-75) (issued June 12, 2020). The last Governor's Executive Order 20-77 was issued on June 30. *Id.*, Ex 81 (Exec. Ord. 77).

The Governor issued the executive orders based upon a claimed legal authority under Minnesota Statutes § 12.31, subdivision 2 (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.

Pet. ¶ 13, Ex. 20-1; Kaardal Dec. Ex. 68 (Exec. Ord. 20-64). The Governor's first order, Executive Order 20-01, declared a peacetime emergency under Minnesota Statutes § 12.31, subdivision 2, based on COVID-19 as an "act of nature":

The infectious disease known as COVID-19, an act of nature, has now been detected in 118 countries and territories, including the United States.

Pet. ¶ 14, Ex. 1 at 1.

In Executive Order 20-64, the Governor declared a peacetime emergency under Minnesota Statutes § 12.31, subdivision 2, in response to the aftermath of

George Floyd's death while in police custody. Kaardal Dec. ¶ 3, Ex. 68 (Exec. Ord. 20-64)²

The Governor, so far, has issued over 80 executive orders. The consequences of the executive orders since March 13, 2020, has been a severe restriction of basic civil rights. For example, at the time, executive orders 20-04, 20-09 and 20-20 required: closure of businesses; prohibition on leaving home; prohibition on gatherings; prohibition on travelling; and prohibition on elective surgeries (except abortions). *See, e.g.*, Pet. Ex. 4, 9, 20.

In Executive Order 20-74, effective today, the Governor has continued to restrict civil rights including gatherings of more than 25 people at social, civic, community, faith-based, or leisure events, sporting or athletic events, performances, concerts, conventions, fundraisers, parades, fairs, and festivals:

Social gatherings. All indoor social gatherings of more than 10 people and all outdoor social gatherings of more than 25 people are prohibited, except as set forth below.

Kaardal Dec., Ex. 78 (Exec. Ord. 20-74 at 4). Violation of the prohibition on social gatherings included a misdemeanor charge, which includes imprisonment of up to 90 days and fines up to \$1,000. *Id.*, Ex. 78 (Exec. Ord. 20-74 at 17). The same executive order continued restrictions on non-critical businesses including bars, restaurants,

² Notably, Executive Orders 20-64., 20-65, 20-67, 20-68, 20-69, 20-71 and 20-72 are based on the Governor's response to the aftermath of George Floyd's death. The other executive orders relate to the peacetime emergency relating to the COVID-19 pandemic.

gyms and other places of accommodation. *Id.*, 78 (Exec. Ord. 20-74 at 9–11).

Violation of the restrictions on non-critical businesses included a criminal misdemeanor charge, which includes imprisonment up to 90 days and fines up to \$1,000. *Id.*, 78 (Exec. Ord. 20-74 at 17).

On April 13, the Governor in Executive Order 20-35 extended the peacetime emergency for an additional 30 days noting that his asserted authority could only be rescinded by legislative veto, “a majority vote of each house of the legislature pursuant to Minnesota Statutes 2019, section 12.31, subdivision 2(b).” Pet. Pet. ¶ 17, Ex. 35 at 2. The state legislature failed to exercise the legislative veto to end the extension of the Governor’s peacetime emergency powers. Kaardal Dec. ¶ 3. And for the next two similar executive orders, issued on May 13th (Exec. Ord. 20-53) and June 12th (Exec. Ord. 20-75), the Governor extended his authority an additional 30 days and asserted his claim that his asserted authority could only be rescinded by legislative veto, which the legislature failed to exercise. Pet. ¶ 18, Ex. 53 at 2; Kaardal Dec. ¶ 4 and Kaardal Dec. ¶ 3, Ex. 79 (Exec. Ord. 20-75 at 2-3). The Governor made similar 30-day extensions in July and August. (Exec. Ord. 20-78 and 20-83.)

The current 30-day period for the Governor’s executive order ends on September 11, 2020. *Id.* It is anticipated that the Governor will call a special session of the state legislature on or before September 11, 2020 for the legislature to consider rescinding the Governor’s peacetime emergency by a majority vote of each house pursuant to Minnesota Statutes 2019, section 12.31, subdivision 2(b). *See, e.g., id.* at 3.

All Petitioners are damaged by the Governor’s executive orders restricting civil rights because they cannot exercise movement and associate with others as they desire without recourse. Pet. ¶ 21. The Free Minnesota Small Business Coalition members and the individual business petitioners are damaged by the Governor’s executive orders because their businesses have been closed down, shuttered without recourse and restricted. Pet. ¶ 22. All Petitioners are also taxpayers and claim taxpayer standing. Pet. ¶¶ 1-3.

2. The Ramsey County District Court denied the petition for writ of quo warranto.

On September 9, the Ramsey County District Court entered judgment on its dismissal of the petition. Ex. 1. In its September 1 order and memorandum opinion, the lower court rejected petitioners’ constitutional arguments. Ex. 2. On September 10, the petitioners appealed to the Court of Appeals.

ARGUMENT

The petition for accelerated review should be granted for the following reasons.

- I. The criteria of Rule 117 is satisfied for discretionary review because the appeal is an important one, presenting the new principle of Minnesota Constitution Article III banning legislative vetoes, upon which the Supreme Court should rule.**

The criteria of Rule 117 is satisfied. Rule 117, subdivision 2, section (a) and (d) apply here:

Subd. 2. Discretionary Review.

Review of any decision of the Court of Appeals is discretionary with the Supreme Court. The following criteria may be considered:

- (a) the question presented is an important one upon which the Supreme Court should rule; or
- (d) a decision by the Supreme Court will help develop, clarify, or harmonize the law; and
- (1) the case calls for the application of a new principle or policy; or
- (2) the resolution of the question presented has possible statewide impact; or
- (3) the question is likely to recur unless resolved by the Supreme Court.

First, under section (a) “the question presented [here] is an important one upon which the Supreme Court should rule.” Second, under section (d), the petitioners are petitioning the Supreme Court to apply a new principle of Article III’s ban on legislative vetoes, which would have a statewide impact and will be a question unresolved if the Supreme Court does not address it.

Article III of the Minnesota Constitution sets out the separation of powers among the branches of our state government:

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

Minn. Const. art. III, § 1. The Supreme Court in *State ex rel. Patterson v. Bates* stated that this provision includes three elements: a distributive clause that identifies the three branches; a prohibitive clause that prevents one branch from exercising the powers of another branch; and an exceptions clause, which allows one branch to

exercise another type of power when the constitution expressly provides for it. 96 Minn. 110, 104 N.W. 709, 712 (1905). “Together, these clauses create not merely a separation of functions, but also, importantly, a balance of powers among the branches of our government.” *Ninetieth Minnesota State Senate*, 903 N.W.2d at 629.

The petitioners believe that this case is the right vehicle for the Supreme Court to determine the two legal issues presented. First, the Supreme Court should determine whether the Governor’s COVID Orders restricting civil rights under Minnesota Statutes § 12.31 are a violation of Minnesota Constitution Article III’s non-delegation doctrine because Minnesota Statutes § 12.31 lacks “less restrictive means” or similar limitations. Second, the Supreme Court should determine whether Minnesota Statutes § 12.31, subdivision 2, section (b) is a non-severable legislative veto violating Minnesota Constitution Article III’s ban on legislative vetoes.

II. The district court acknowledged that the writ of quo warranto petition was the proper way to challenge the legal authority of the Governor under Minnesota Statutes § 12.31.

There was a dispute between the petitioners and the Governor whether the quo warranto proceeding was the proper way to challenge the Governor’s peacetime emergency powers used to restrict civil rights. The district court agreed with petitioners that it was the correct procedure. Ord. at 22-23.

III. Section 12.31 delegates legislative powers to the Governor without a legislative standard on restricting civil rights, without procedural safeguards, and without judicial review, but with a legislative veto without a severance clause.

The issuance of the Governors executive orders is based upon his claimed legal authority under Minnesota Statutes § 12.31, subdivision 2, governing the declaration of peacetime emergencies for specific categories of emergencies which cannot be challenged but for the legislature if the emergency extends beyond 30 days:

Subd. 2. Declaration of peacetime 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.... A peacetime emergency must not be continued for more than five days unless extended by resolution of the Executive Council up to 30 days. (b) By majority vote of each house of the legislature, the legislature may terminate a peacetime emergency extending beyond 30 days. If the governor determines a need to extend the peacetime emergency declaration beyond 30 days and the legislature is not sitting in session, the governor must issue a call immediately convening both houses of the legislature...

Pet. ¶ 13, Ex. 20-1; Kaardal Dec. Ex. 68 (Exec. Ord. 20-64). After the legislature's regular session ended in May, the Governor did call the legislature into special session after the 30-day executive order extensions.

IV. The statutes and executive orders show the Governor is exercising legislative power to restrict civil rights.

The Governor's executive orders exercise legislative power to restrict basic civil rights. Section 12.32 describes that the executive orders promulgated by the Governor have the "full force and effect of law":

12.32 GOVERNOR'S ORDERS AND RULES, EFFECT. Orders and rules promulgated by the governor under authority of section 12.21, subdivision 3, clause (1), when approved by the Executive Council and filed in the Office of the Secretary of State, have, during a national security emergency, peacetime emergency, or energy supply emergency, the full force and effect of law.

Thus, the issued executive orders, with the full force and effect of law, reflect an exercised power that restricted and continues to restrict civil rights. For example, the executive orders prohibited: certain sized gatherings; fully operating non-critical businesses; and the orders imposed criminal sanctions for violations of the executive orders, including incarceration or fines, or both. Executive orders still in effect continue to curtail civil rights despite some lessening of restrictions; however, citizens are still subject to criminal sanctions for exercising basic civil rights. *E.g.*, Kaardal Dec., Ex. 78 (Exec. Ord. 74 at 4, 9-11 and at 17).

V. Chapter 12 provides the Governor with no legislative standard for restricting civil rights.

Minnesota Statutes Chapter 12 is devoid of any legal standard or legislative guidance for restricting civil rights during a peacetime emergency. The powers granted in § 12.21, subdivision 3, fail to even mention restricting civil rights wherein the

Governor, through his executive orders, suspends civil rights without any legal standard or legislative guidance. In other statutes, for example, § 524.5-310 for court appointment of guardians, the legislature provides the courts guidance not to restrict civil rights if there are “less restrictive means”:

The court may appoint a limited or unlimited guardian for a respondent only if it finds by clear and convincing evidence that...the respondent's identified needs cannot be met by less restrictive means...

Minn. Stat. § 524.5-310. In contrast, subdivision 3 of § 12.21 does not contain a legislative standard for restricting civil rights to the Governor such as “don’t issue an executive order restricting civil rights if there is a ‘less restrictive means.’” Minn. Stat. § 524.5-310. The state legislature omitted any legal standard for the Governor to follow when restricting civil rights during a peacetime emergency.

VI. The Governor’s executive orders restricting civil rights are not subject to the procedural safeguards of the Administrative Procedures Act Chapter 14 rule making process.

Minnesota Administrative Procedures Act expressly excepts from its application “emergency powers in sections 12.31 to 12.37.” Minn. Stat. § 14.03, subd. 1. For example, the following procedural safeguards which apply to state agency rulemaking do not apply to the Governor’s executive orders:

- Agency statement of need and reasonableness under Minn. Stat. § 14.131;
- Public notice under Minn. Stat. § 14.14, subd. 1a;
- Public hearing before administrative law judge under Minn. Stat. § 14.14, subd. 2a; and,

- Administrative Law Judge reports under Minn. Stat. § 14.15.

Importantly, the administrative law judge’s report requires “stating findings of fact and conclusions and recommendations, taking notice of the degree to which the agency has (i) documented its statutory authority to take the proposed action, (ii) fulfilled all relevant procedural requirements of law or rule, and (iii) in rulemaking proceedings, demonstrated the need for and reasonableness of its proposed action with an affirmative presentation of facts.”

All of these procedural safeguards are missing from the Governor’s executive orders because Minnesota Statutes § 14.03, subd. 1 expressly exempts “emergency powers in sections 12.31 to 12.37” from these procedural safeguards.

VII. The Governor’s executive orders restricting civil rights are not subject to judicial review.

Similarly, the state legislature did not provide for judicial review of the Governor’s executive orders. Minnesota Statutes § 14.44 which provides judicial review of state agency rules does not provide for judicial review of the Governor’s executive orders. As the Minnesota Court of Appeals ruled on May 26, 2020, in the prior companion case, the Governor’s executive orders are not subject to Chapter 14 judicial review:

The [Emergency Executive Orders] were issued pursuant to the Governor’s authority under the Minnesota Emergency Management Act of 1995, Minn. Stat. §§ 12.01-.61(2018). Petitioners assert that the EEOs are statements of general applicability and future effect and are therefore subject to review

under Minn. Stat. § 14.44. However, [Minnesota Administrative Procedures Act] expressly excepts from its application “emergency powers in sections 12.31 to 12.37.” Minn. Stat. § 14.03, subd. 1. And, consistent with the exception in MAPA, Minn. Stat. § 12.21, subd. 3(a) authorizes the governor to “make, amend, and rescind the necessary orders and rules to carry out the provisions of this chapter...without complying with sections 14.001 to 14.69.” Thus, the EEOs were neither required to be formally promulgated under MAPA nor were they so promulgated. Accordingly, the EEOs are not subject to review by this court under Minn. Stat. § 14.44.

Free Minnesota Small Business Coalition, et al. v. Tim Walz, Governor of Minnesota, Case No. A20-0641. Pet. Ex. 64 at 2-3. Thus, the Governor’s executive orders 20-01 through 20-76, which have the “full force and effect of law” under § 12.32, are not subject to judicial review. Pet. ¶ 11, Ex. 1. Ex. 1-63; Kaardal Dec. ¶ 2, Ex. 68–81 (Exec. Ord. 64-77).

VIII. The Governor’s executive orders are subject to legislative veto; the state legislature has not exercised its legislative veto despite multiple opportunities to do so.

Minnesota Statutes § 12.31, applying to peacetime emergencies, has a provision authorizing a legislative veto on extension of peacetime emergencies beyond 30 days:

(a)...A peacetime emergency must not be continued for more than five days unless extended by resolution of the Executive Council up to 30 days... (b) By majority vote of each house of the legislature, the legislature may terminate a peacetime emergency extending beyond 30 days. If the governor determines a need to extend the peacetime emergency declaration beyond 30 days and the legislature is not sitting in session, the governor must issue a call immediately convening both houses of the legislature.

Minn. Stat. § 12.31, subd. 2. On April 13, the Governor in Executive Order 20-35 extended the peacetime emergency for an additional 30 days noting that his asserted

authority could only be rescinded by legislative veto, “a majority vote of each house of the legislature pursuant to Minnesota Statutes 2019, section 12.31, subdivision 2(b).” Pet. Pet. ¶ 17, Ex. 35 at 2. The Governor made similar extensions on May 13, June 12, July 13 and August 12.

In sum, the Governor has issued five executive orders extending the suspension or curtailment of civil rights. And, each time, the legislature has failed to act under the legislative veto provision. *See, e.g.*, Pet. Pet. ¶ 17, Ex. 35 at 2 (Apr. 13, 2020); Pet. ¶ 18, Ex. 53 at 2 (May 13, 2020); Kaardal Dec. ¶ 3, Ex. 79 (Exec. Ord. 20-75 at 2-3 (June 12, 2020)); Kaardal Dec. ¶¶ 4.

IX. Minnesota Statutes, Chapter 12, does not have a severance clause.

Minnesota Statutes, chapter 12, does not have a provision requiring severability if a provision in chapter 12 is found to be unconstitutional.

CONCLUSION

The Supreme Court should accept this case for accelerated review to determine the two legal issues presented. First, the Supreme Court should determine whether the Governor’s COVID Orders restricting civil rights under Minnesota Statutes § 12.31 are a violation of Minnesota Constitution Article III’s non-delegation doctrine because Minnesota Statutes § 12.31 lacks “less restrictive means” or similar limitations. Second, the Supreme Court should determine whether Minnesota Statutes

§ 12.31, subdivision 2, section (b) is a non-severable legislative veto violating Minnesota Constitution Article III's ban on legislative vetoes.

Dated: September 10, 2020

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